Worldwide Litigation over Foreign Sovereign Assets

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Recent litigation about Argentina’s sovereign debt workout and the enforcement of arbitral awards against foreign sovereigns has cast a spotlight on foreign sovereign immunity rules. It tells of diverse national rules of such complexity that they demand concise explanation. This brief article attempts to provide such explanation, following a panel discussion at the 2015 IBA Annual Conference in Vienna where panellists discussed the prospects of boilerplate, catch-all contractual waiver clauses and global rule convergence. What emerged was a sense that we need to find a way out of the thicket of rules, and the unpredictability, of foreign sovereign immunity litigation. This article expands on remarks originally made in Vienna, contends that neither boilerplate contractual text nor global convergence is likely to offer wholly satisfactory solutions, illustrates this by example and explains some of the hidden strengths of our current practices.

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2 The panel was chaired by Chris Tahbaz and the other members were Carmine D Boccuzzi, Kelly-Ann Dubos, Robert S Pé and Marc Russenberger.
Introduction

The complexity of foreign sovereign immunity rules was foretold by Hersch Lauterpacht. It was Lauterpacht who, in the 1950s, broached the idea that foreign sovereigns should no longer be held legally immune for their merchant conduct.\(^3\) This novel view eventually came to pass in the form of a European treaty, worldwide legislation and much by way of judicial development.

Codification has reflected two of Lauterpacht’s key ideas: (1) immunity from suit should be restricted only to closely circumscribed public activities and should not extend to commercial activities,\(^4\) hence the term ‘restrictive immunity’; and (2) when it comes to the attachment of sovereign property, only certain narrow classes of public property should be shielded by immunity.\(^5\) The laws of several industrialised Western nations and some from the Commonwealth reflect this view. They all tend to begin with a general immunity rule before listing the exceptions to that general rule.

That there is diversity among these national laws raises difficulties. The proliferation of rules requires legal advisers and counsel to navigate a vast, complex and commonly unfriendly terrain of comparative legislation. Typically, one begins by asking an abstract question – such as whether a restrictive immunity regime is available in a particular jurisdiction – in the hope then that immunity is lifted by the automatic operation of law where a claim is based upon commercial activity, but a parallel enquiry involves asking also whether the foreign sovereign has waived its immunity. Oftentimes it is hoped, although there is no assurance, that an affirmative answer to either question will suffice.\(^6\) Even if immunity is not automatically lifted by law, a waiver should ordinarily accomplish the same end.\(^7\) Both a

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4 For the latest developments in the United States, see OBB Personenverkehr AG v Sachs 577 US (2015); ‘Supreme Court Clarifies the Scope of Application of Commercial Activity Exception to Foreign Sovereign Immunity’, King & Spalding, Client Alert, 7 December 2015.
5 See n3 above, 1.
6 This is not always so since the existence of a restrictive immunity regime need not lift immunity from the attachment of a certain class of assets which would still require a waiver. Also, where a waiver exists it may not be sufficiently broadly worded, or even where it is it may be ineffective in respect of a class of assets deemed to be so special that immunity cannot be waived under forum law such as in the case of foreign military assets under US immunity rules. See US Foreign Sovereign Immunities Act 1976, s 1611(b)(2).
7 There is the further point by Delaume that waivers are often intended and ought to be intended to produce an effect in multiple forums, notwithstanding a forum selection clause choosing a forum in which the restrictive immunity doctrine is applied or, as I shall go on to mention, where different national rules treat waivers differently. See Georges R Delaume, ‘The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later’ (1994) 88 AJIL 257, 267.
waiver and the restrictive immunity doctrine are, after all, versions of the same crucial idea; namely, that the foreign state has in some way consented – expressly or implicitly – to the exercise of forum state jurisdiction.\(^8\)

Both inquiries, however, operate under forum state rules and therein lies the rub. The existence of a waiver, as with the exact operation of the restrictive doctrine in that forum, can be highly circumscribed under such rules. It all depends on the rules of the forum. Like twin-accordions played discordantly, the accordions of waiver and restrictive immunity are being stretched and squeezed in different places in different fora. Sometimes, as has happened of late in France in respect of waiver law there, the accordion gets stretched and squeezed differently at different times.\(^9\) Time, place and circumstance, as well as questions of fact and degree, all seem to play a role.

The following illustrations arise from recent litigation in two Far Eastern financial centres, Singapore and Hong Kong. The first illustration, from Singapore, shows the potentially broad reach and effectiveness of a properly worded waiver clause. However, a second Hong Kong example shows that even the most perfectly worded waiver clause may fail altogether to lift immunity. The question one is then prompted to ask is whether a uniform set of global laws, in the form of the United Nations Convention on the Jurisdictional Immunities of States and their Property (‘UN Convention’), now offers the best solution.

That Convention began its early life in the late 1970s when cases in which exceptions to immunity were pleaded occurred mainly before the courts of the United States (US) while the developing world demonstrated, in the words of one commentator, a ‘perceptible reticence’ in allowing similar claims. A comprehensive global code and a uniform international practice were therefore considered desirable in these circumstances. The International Law Commission commenced work and although by 1991 it had adopted its final draft and sent it to the United Nations (UN) General Assembly, at the end of that decade there was still uncertainty within the open-ended Working Group established by the UN’s Sixth Committee (Legal) about whether a binding convention or a model law instead


would present the better approach towards achieving global uniformity.\textsuperscript{10} Eventually an Ad Hoc Committee was established by the General Assembly which worked from 2002 to 2004 when the finalised text of the Draft Convention emerged. It was presented to the UN General Assembly which adopted it without a vote on 2 December 2004.\textsuperscript{11} The Convention currently has 28 signatories but only 21 parties,\textsuperscript{12} and it will only come into force on the 30th day of the deposit of the 30th instrument of ratification, acceptance, approval or accession.\textsuperscript{13} As such, the UN Convention is not yet in force. By employing a final, third illustration involving the recent \textit{NML} litigation over the Argentine debt workout, I suggest in this article that even if a uniform global law may be desirable in the abstract, there are compelling advantages to the present regime of disparate national laws which we cannot ignore.

\textbf{Interim relief in Singapore against a sovereign, and the ‘separate waiver’ requirement}

Singapore, like Hong Kong prior to the Chinese handover, had adopted legislation almost identical to United Kingdom (UK) legislation. In this regard, Singapore’s judiciary have been just as robust as their UK counterparts, if not more so in some cases,\textsuperscript{14} in denying immunity to foreign sovereigns.

Under UK-style legislation and the US Foreign Sovereign Immunities Act (FSIA), immunity from jurisdiction is treated separately from immunity from execution and attachment.\textsuperscript{15} In the context of waivers, the point is usually expressed by saying that a ‘separate waiver’ is required for waiving immunity from post-judgment execution and attachment (the separate waiver doctrine). However, if this is taken literally to suggest that a single piece of drafting language which successfully waives immunity from adjudicative jurisdiction cannot also serve to waive immunity from

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\textsuperscript{11} Hafner, \textit{ibid}, 8–11.
\textsuperscript{12} As at 29 May 2016.
\textsuperscript{13} Article 30, UN Convention.
\textsuperscript{14} One example is the Singapore courts’ departure from the English position where there are contested claims over intangible property; see \textit{Republic of the Philippines v Maler Foundation} [2008] 2 SLR(R) 857 at [40]–[41]; \textit{contra} Juan Ysmael & Company Inc v Government of the Republic of Indonesia [1955] AC 72 at 89–90.
\textsuperscript{15} UK State Immunity Act 1978 (UK SIA), ss 2 (2) and 13 (3); compare US FSIA, ss 1605(a) (1) and 1610(a) (1) and (b) (1), and also ss 1604 with ss 1609. See further, Dhisadee Chamlongrasdr, \textit{Foreign State Immunity and Arbitration} (London: Cameron May, 2007) 208.
\end{flushleft}
execution of judgment and the attachment of foreign state assets, that would be incorrect. In practice it is often the case with Anglo-American courts that the same piece of contractual language suffices to effect both waivers notwithstanding lip service being paid to the separate waiver doctrine. It is, likewise, with a requirement of a further separate waiver of immunity from pre-judgment attachment or other preliminary relief.  

A form of language which contains all three waivers was found in Singapore’s recent Maldives Airports case. The contractual clause in that case, contained in a concession, stated that:

‘To the extent that any of the Parties may in any jurisdiction claim for itself… immunity from service of process, suit, jurisdiction, arbitration… or other legal or judicial process or other remedy… such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction.’

Singapore’s Court of Appeal held that the Maldives had in effect also waived immunity from the grant of an interim injunction, which under the separate waiver doctrine would require a ‘separate’ waiver under Singapore’s UK-style legislation. In short, it is not unusual to find separate waivers contained in a single piece of contractual language, and this was precisely what the Singapore court found.

Much depends on the precise wording of the clause. Another well-known example is the English decision in A Company Ltd v Republic X, in which the relevant clause had stated that ‘[t]he Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)’. Mr Justice Saville, as he then was, applied the ordinary principles of the construction of commercial contracts as opposed to the separate waiver doctrine strictly construed, and held that language to have been sufficient to waive immunity from a pre-judgment freezing order. In another English decision, the contract stated that the guarantor ‘waives any rights of immunity which it or any of its assets (other than the Protected Assets) now has or may in the future have in any jurisdiction’. Similarly, under the US FSIA, a clause waiving immunity

16 See s 13(3) of the UK SIA 1978 of which more will be said below.
18 Ibid, 457, emphasis contained in the judgment suppressed, my emphasis added.
19 A Company Ltd. v Republic X [1990] 2 Lloyd’s Rep 520 (QBD), emphasis added.
20 Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan [2003] 2 Lloyd’s Rep 571 (CA), 577–578, emphasis added. For the suggestion that a narrower approach would have been more appropriate in light of the British Act, see Chamlongrasdr, n15 above, 197–199.
from ‘taxation, suit, execution of judgment, or other liability’ was held to have been effective in such circumstances.\(^{21}\)

Even so, these examples only serve to remind us of the advice that, as a matter of prudence, there ought to have been a more specific, expressly worded stipulation in respect of non-immunity from pre-judgment attachment. Notwithstanding the fact that post-judgment attachment may already be provided for expressly, one should go on to state that the sovereign waives its immunity ‘from attachment prior to entry of judgment’ and insert those words before the words ‘and from attachment in aid of execution against… property and assets irrespective of their use or intended use’.\(^{22}\) Also, it ought not to be presumed that where an express waiver is required, a court will not set a high bar before finding an express waiver where attachment of property is at issue.\(^{23}\)

Insofar as all these examples might suggest that properly worded, boilerplate contractual waiver clauses offer a practical answer, two immediate difficulties come to mind: first, boilerplate clauses tend to suffer from vagueness and lack of specificity;\(^{24}\) and secondly, as I shall go on to show with the next example, even the most carefully worded waiver clauses may still find themselves entirely devoid of any legal effect at all in some places.

### An Anglo-Hong Kong oddity

Two ICC arbitral awards had been rendered against the Democratic Republic of Congo and the claimant, FG Hemisphere, which had acquired the awards as distressed debts, applied for a freezing order in Hong Kong,
the place of intended enforcement, execution and attachment.\textsuperscript{25} The case is well known for the Hong Kong courts’ application of China’s absolute rule on foreign sovereign immunity, in preference to Hong Kong’s previous regime of restrictive immunity. It shows that we cannot simply rely on the existence and operation of the restrictive doctrine. But are robustly worded waiver clauses any more reliable?

The origin of the problem lay in the fact that, following the United Kingdom, Hong Kong’s pre-handover regime of foreign state immunity had been placed upon a statutory footing in 1979. However, that legislation, the State Immunity (Overseas Territories) Order of 1979, then lapsed at midnight on 1 July 1997. There were those in the legal community who had assumed or at least hoped that the common law doctrine of restrictive immunity continued to apply even after the handover of Hong Kong. After all, English case law which applied in Hong Kong had embraced the restrictive immunity doctrine even before that doctrine had been put on a statutory footing.\textsuperscript{26}

\textit{A rapid tour of Hong Kong’s Congolese litigation}

In \textit{FG Hemisphere Associates LLC v Democratic Republic of Congo}, this question came squarely before the learned judge,\textsuperscript{27} Mr Justice Reyes, who, although expressing a preference for the restrictive doctrine,\textsuperscript{28} held that the monies deposited in a Hong Kong bank account were payable under certain mining agreements between the Congolese government and the China Railway Group. But because these agreements were ‘driven’ by the Chinese and Congolese governments, the learned judge reasoned that they were the result of foreign sovereign acts.\textsuperscript{29}


\textsuperscript{27} [2009] 1 HKLRD 410.

\textsuperscript{28} \textit{Ibid}, para 71.

\textsuperscript{29} \textit{Ibid}, paras 83–96.
With respect, his Lordship was too quick to judge, as the majority of Hong Kong’s Court of Appeal went on subsequently to explain. According to the Court of Appeal, insofar as there was a critical transaction to be considered, that had nothing to do with the mining agreements which had led to the monies in the Hong Kong account. Rather, the transaction which mattered was the Congolese government’s financing transaction. It was the financing dispute which had led to the ICC awards whose enforcement was now sought in Hong Kong, together with interim injunctions restraining the China Railway Group from paying the Congo the entry fees and restraining the Congo from receiving the fees. Under the restrictive doctrine’s ‘commercial exception’ rule, one would have to determine the nature of the critical act, in this case the financing transaction, in order to decide the question of the Congo’s immunity from the jurisdiction of the Hong Kong courts. This is what is known as the ‘nature’ test for lifting immunity from adjudicative jurisdiction under the restrictive doctrine’s exception for commercial acts. Applying this test, the financing transaction is commercial in nature, as the Court of Appeal also explained. At common law, however, where the issue concerns not immunity from the jurisdiction of the courts but rather immunity from execution and from the attachment of assets, it is the purpose of the funds which counts, not the nature of any underlying transaction. This second test for the attachment of assets is known as the ‘purpose’ test under which one simply asks if the funds are being used, or if they are intended for use, for a commercial purpose. If they are for the payment of commercial fees pursuant to certain mining agreements, then they are intended for a commercial purpose and that is the end of the matter under the restrictive doctrine.

The Court of Appeal is correct insofar as the common law restrictive doctrine is concerned, and it is noteworthy that the UK Supreme Court
in *Servaas Inc v Rafidian Bank* has since urged the view that the Hong Kong Court of Appeal’s majority decision is persuasive authority even in England notwithstanding its subsequent overruling by Hong Kong’s Court of Final Appeal (the ‘HKCFA’).\(^{35}\)

I should just mention that there was also a well-known constitutional issue in that case, having to do with whether questions of state immunity fell properly within the province of mainland Chinese (ie, national) as opposed to Hong Kong law.\(^{36}\) The significance of the subsequent appeal to Hong Kong’s highest court, the HKCFA,\(^{37}\) was that by a majority of three to two, the HKCFA considered the matter to be one governed by the absolute immunity rule applying in the People’s Republic of China following China’s resumption of sovereignty over Hong Kong. In principle, however, that should still allow immunity to be waived. Irrespective of the proper regime, be it the mainland Chinese regime of absolute immunity or Hong Kong’s previous restrictive immunity regime, one would ask if the Democratic Republic of Congo which had already submitted to arbitration had not waived its immunity as a result.

**Killing contractual waivers**

In what Lord Collins sitting in the UK Supreme Court in *NML Capital v Republic of Argentina* considered to be a misreading of English common law,\(^{38}\) the HKCFA however went on to set a near-insurmountable hurdle for the sovereign to be shown to have provided its consent to the legal process. It did so by requiring a waiver *in facie curiae*, a juridical anachronism from a time when it might have been thought important to preserve Britain’s colonial and Commonwealth relations.\(^{39}\) That line of authority had long been criticised by commentators, not least by the late F A Mann.\(^{40}\) Still, it lurked in a judicial aside by Mr Justice Saville as late as 1990,\(^{41}\) and in

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\(^{37}\) *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 (CFA).


\(^{39}\) See *Kahan v Pakistan Federation* [1951] 2 KB 1003, at 1012 *per* Jenkins L J. See further, *Duff Development v Kelantan* [1924] AC 797, at 829 *per* Lord Sumner; and *Mighell v Sultan of Johore* [1894] 1 QB 149, at 159 *per* Lord Esher M R.


\(^{41}\) *A Co Ltd v Republic of X* [1990] 2 Lloyd’s Rep 520.
the *Congo* case the HKCFA held it to be the applicable English doctrine. The effect of the Hong Kong holding is the obliteration in a single blow of all – and if I could emphasise this, ALL – prior contractual waivers of foreign sovereign immunity. Such that where contractual parties might have chosen Hong Kong as a dispute forum, and had even gone so far as to insert a waiver of immunity in their contracts, such contracts have now become wholly unenforceable. More is the pity had they sought English justice in their choice of Hong Kong courts or even just Hong Kong law.

In short, not only did Hong Kong abandon restrictive immunity, any waiver clause will also fail entirely in Hong Kong. Only the consent of the foreign sovereign to submit itself to legal process after a dispute has arisen, as an act of grace, would suffice. Still, that is not the end of it.

Preclusion of curial assistance by the Hong Kong courts to sovereign counterparty arbitration

Foreign sovereign immunity legislation around the world commonly and quite sensibly admits an ‘arbitration exception’. Many jurisdictions would therefore treat an arbitration agreement as being sufficient to waive immunity in respect of the jurisdiction of the forum courts. This may even be a requirement under a plain reading of institutional rules such as the ICC rules, or under the New York Convention, and some jurisdictions have extended the arbitration exception to execution against foreign state assets. In short, foreign sovereign immunity claims have a special resonance for the enforcement of international arbitral awards.

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42 *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (2011) 14 HKCFAR 95 (CFA), para 229. Quite aside from Lord Collins’ pronouncement, this archaic view had been superseded by statute in the United Kingdom in the form of the UK SIA, s 9.


44 Examples include the UK SIA, s 9; US FSIA, s 1605(a)(6); Singapore’s State Immunity Act 1979, s 11; Australia’s Foreign States Immunities Act 1985, s 17; South Africa’s Foreign States Immunities Act 1981, s 10; Pakistan’s State Immunity Ordinance, s 10. See further, for the English position, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No 2) [2007] QB 886.

45 See the decision of the French Court of Cassation, First Civil Chamber, *Creighton v Qatar*, Cass Civ 1, 28 September 2011, although see the subsequent developments discussed in Meyer, n9 above; the decision of the US Court of Appeals, Fifth Circuit, in *Walker International Holdings Ltd v Republic of Congo*, 395 F 3d 229 (2004) (construction of the waiver rule in s 1610(1) of the US FSIA in connection with submission to ICC arbitration under the ICC’s rules), 234; and the Canadian decision in *Collavino Inc v Tihama Development Authority* [2007] 9 W W R 290 (Alta QB) (construing s 12(1)(a) of the 1980 Canadian State Immunity Act). These cases are discussed in the Hong Kong Court of Appeal’s judgment, later overturned, in *FG Hemisphere LLC v Democratic Republic of Congo* [2010] 2 HKLRD 66, [155]–[163] (per Stock V-P), see Lim, ‘Foreign Sovereign Counterparties’, n25 above, 165–166.

Not so now in Hong Kong, and what this means is that Hong Kong, having rejected the arbitration exception, has also abandoned all curial support for arbitration, including all judicial assistance for interim relief, where the respondent is a foreign sovereign. Attempts to play this matter down, of which unfortunately there have been a few, by simply asserting that immunity from national courts does not feature in arbitration or that there is no effect of the Court of Final Appeal’s holding on Hong Kong’s efforts to burnish its reputation as a centre for international arbitration, surely cannot be taken seriously in this regard. What emerges is a stark difference between Singapore and Hong Kong today, which is especially striking when both are well-known common law jurisdictions and prominent Far Eastern financial centres. It is also because there are such outlying jurisdictions whose rules might sit ill with their function as financial centres that one is tempted to think that the only real solution would be to have a uniform global regime, which in time China and in turn Hong Kong will embrace.

Is the United Nations Convention the answer?

In Lauterpacht’s original framework, we begin by asking whether a restrictive immunity doctrine applies. If it does, and jurisdiction is established, we should then go on to treat the question of post-judgment attachment. As for pre-judgment measures, including attachment, places like the UK require another separate waiver. Finally, certain classes of property are typically excluded from the scope of the restrictive immunity doctrine and although one might seek an explicit waiver for these the possibility of a waiver may not always be admitted, such as is the case of military assets under the US Foreign Sovereign Immunities Act. Aside from this very special case involving the immunity of military assets under the US regime, other asset classes exist which allow waivers even where a restrictive immunity doctrine would not automatically operate to lift immunity. These include central

47 With respect, it is therefore incorrect and misleading to suggest as some have that the whole Hong Kong affair has no bearing on arbitration practice in Hong Kong. It does for the reasons given here.

48 Originally, the UK Bill precluded any injunction, order for specific performance, or any order for the recovery of property against a foreign sovereign and this is now contained in s 13(2). Section 13(3) was added later, allowing ‘any relief or… process’ (ie, injunctions) to be awarded where a foreign sovereign had consented in writing’; Fox and Webb, n8 above, 295; Lim, ‘Injuncting Foreign Sovereigns’, n17 above, 194.

49 US FSIA, s 1611(b)(2). Section 16(2) of the UK SIA is narrower. It confines such immunity only to anything done in connection the armed forces of the foreign state while present in the United Kingdom and thus excludes arms purchases from the cloak of immunity; see Fox and Webb, n8 above, 521.
bank accounts,\textsuperscript{50} and diplomatic assets and embassy bank accounts where the issues can still be immensely complex where they cross into or overlap with the realm of diplomatic immunities.\textsuperscript{51}

Might we not hope then for the convergence of national rules under the UN Convention? It is true that the Convention would, if and when it comes into force, set a minimum standard of common commercial justice. In the extreme Hong Kong example, the Convention’s waiver rules would solve the problem of prior contractual waivers, cure the unavailability of curial supervision of HK arbitrations involving foreign sovereigns, and ameliorate the harshness of a general, absolute immunity rule against the attachment of foreign state commercial assets. However, we would still need to ask if the UN Convention compares favourably with other rules we have worldwide which are more attuned to the needs of commercial justice than the rules currently in force in places like Hong Kong.

First, the Convention requires waivers to be express (Article 7). Being a creature of compromise, however, and bearing in mind the stricter approach adopted in places such as the UK,\textsuperscript{52} a proper interpretation of the Convention might yield a more stringent position about what this means than the case under the US FSIA, for example,\textsuperscript{53} where choice of the law of a restrictive immunity regime to govern a contract could still be held to be sufficient. If this is true, convergence will be a retrograde step.

Secondly, regarding the ‘arbitration exception’, the Convention’s intention in Article 17 is to lift immunity from the supervisory jurisdiction

\textsuperscript{50} These may be subject to post-judgment attachment if an explicit waiver exists, see US FSIA, s 1611(b)(1). Central bank funds are otherwise immune provided the funds are used to perform the ordinary functions of a central bank. This last limitation does not apply in the United Kingdom which therefore provides wider protection for central bank funds. For a waiver of immunity against pre- and post-judgment attachment in the United Kingdom, see the UK SIA s 14(4) read together with s 13(3).

\textsuperscript{51} Generally, in the absence of a waiver, even mixed accounts have traditionally been held to be immune; see Chamlongradr, n15 above, 270 et seq. The most well-known case internationally remains the \textit{Philippine Embassy Bank Account case}, German Federal Constitutional Court (13 December 1977) 65 ILR 146.

\textsuperscript{52} UK SIA, s 2(2), which expressly precludes treatment of a choice of English law as a waiver.

\textsuperscript{53} US FSIA, s 1605(a)(1) whose legislative history at least suggests the possibility of waivers through choice of law. See Dickinson, Lindsay and Loonam, \textit{State Immunity: Selected Materials and Commentary} (Oxford: OUP, 2004), 246, 249, 250. In practice, much has depended upon whether a choice of the law of a restrictive immunity regime has in fact been made, or if it has whether that actually evinces an intention to waive immunity. See Fox and Webb, n8 above, 256. The position under the US FSIA is therefore harder to generalise than that under s 2(2) of the UK SIA, and it may be that under that statute a choice of law or similar clause will be more likely to be construed as an implied waiver of immunity if it is a choice of state law in the United States, see Dickinson, Lindsay and Loonam, 500 F 3d 77, 80(4th Cir 1994).
of the courts but not for enforcement. The way the Convention rule is framed requires the court to be ‘competent’ according to its own conflict of laws rules to determine the validity, interpretation or application of the arbitration agreement, the arbitration procedure, questions of confirmation, and of the setting aside of the award. The better view must be, in case of any doubt, that the Convention lifts immunity for all curial support of arbitration. But could it not also be read to limit curial assistance to the court of the seat? As I have said, the better view is that the Convention would also lift immunity in proceedings for, say, a stay of litigation in favour of foreign arbitration. The reason would be that, in this example, the conflict of laws rules in the place of the court would grant such jurisdictional competence. The problem is that the entire issue would depend on the conflict of laws rules in the place of the court and this is at worst a backward step when compared to the application of the arbitration exception in some jurisdictions, and at best an empty rule. As we have seen

54 See Claudia Annecker and Robert T Greig, ‘State Immunity and Arbitration’ (2004) 15 ICC Bulletin 70, 71; UN Doc A/41/10, YBILC, 1986, II, Pt 2, 63. The Convention states in Art 17 that it does not extend to recognition and enforcement of the award because its framers took ‘recognition and enforcement’ to include execution; see Seventh Report on the Jurisdictional Immunities of States and their Property by Mr Sompong Sucharitkul, YBILC 1985, II, Pt 1, 26; Annecker and Greig, 71. Thus ‘recognition’ was excluded from Art 17’s implied consent to supervisory jurisdiction because that was seen to be a step, albeit only a first step, towards execution under the procedure of some civil law jurisdictions; see Second Report on the Jurisdictional Immunities of States and their Property by Mr Motoo Ogooso, UN Doc A/CN.4/422 and Add.1, YBILC 1989, II, Pt 1, 71; Annecker and Greig, 71–72. Under English Law, however, recognition and enforcement of the award has nothing to do with the execution but rather the adjudicative jurisdiction of the courts. This was also the position adopted by the Bundesgerichtshof in 2013 in the Walter Bau Case Case No III ZB 40/12; discussed in Kr Il, n1 above. This makes the Convention different from the position under Anglo-American law where submission to arbitration implies waiver with respect to the enforcement of the award. See UK SIA, s 9; Svenska v Lithuania [2007] 2 WLR 876, CA, [117]–[122], per Moore-Bick LJ (extending s 9 to enforcement whereby execution will then be available under s 13(4) against property in or intended for commercial use). For the US position, see US FSIA, s 1605(a)(1); Ipitrade International SA v Nigeria 465 F Supp 824 (DDC 1978), extending the implied waiver clause in that provision to arbitrations to which the New York Convention applies and now US FSIA, s 1605(a)(6) ‘the arbitration exception’.

55 A similar but not identical link is required under Anglo-American law. See UK SIA, s 9(1), whose limiting words, however, are ‘which relate to the arbitration’. This is not to say that the UK clause cannot also have unintended effects. Take the example of a freezing injunction pending execution. Does it ‘relate to the arbitration’ as such? See ETI Eurotelecom v Bolivia [2008] EWCA Civ 880, [113], per Collins LJ). In the US, this question was finally resolved by US FSIA, s 1605(a)(6), obviating the need to rely on the implied waiver exception under s 1605(a)(1). For Australia, see the Australian FSIA, s 17(2). All that is required by these provisions is jurisdiction, thus if you have no jurisdiction at all because the foreign state is immune from it, waiving immunity from execution does no good. A waiver cannot create a jurisdiction which did not exist in the first place.
from the Hong Kong example, Hong Kong’s ‘conflicts rules’ – if by that we mean to include its current rules on foreign sovereign immunity – will not allow for the confirmation of an award which is adverse to a non-compliant and recalcitrant foreign sovereign; be it a local or foreign award.

Thirdly, the Convention imposes the usual ‘separate waiver’ requirement for post-judgment asset attachment in the case of non-commercial assets (Article 19) where, as we have also seen, comparative case law has demonstrated a most flexible judicial attitude in some places towards the ‘separate waiver’ requirement.\footnote{See n17 to n21, above.} At the very least, this is more than we can currently presume under the Convention.

Finally, a separate waiver is also sometimes required, for pre-judgment measures, as in the United Kingdom where even an \textit{in personam} injunction requires a ‘third waiver’. This is unlike the Second Circuit’s narrow interpretation in \textit{NML}, discussed further below,\footnote{\textit{NML Capital, Ltd v Republic of Argentina}, 699 F 3d 246, 261–63 (2nd Cir 2012).} of the USFSIA’s requirement of an explicit waiver for pre-judgment attachment.\footnote{US FSIA, s 1610(d), and thus waiver of suit and/or waiver of execution alone would be insufficient. What is required is an explicit third waiver. See \textit{S&S Machinery Co v Masinesexportimport} 706 F 2d 411, 417–418 (2nd Cir 1983); see further, Fox and Webb, n8 above, 279.} The Convention, which shows strong signs of British influence, upholds the UK approach in Article 18. Article 18 requires an express waiver for ‘pre-judgment measures of constraint… against property of a state’.\footnote{Fox and Webb, n8 above, 491.} Will ‘measures of constraint’ be defined as narrowly as in the Second Circuit’s holding in \textit{NML} that an ‘\textit{in personam} injunction’ would fall outside that expression? This is unlikely.\footnote{The framers of Art 18 did not seem to have observed any distinction between \textit{in personam} injunctions and asset attachment and the conservative view taken in the literature does not contribute to commercial confidence on this point; see further, O’Keefe and Tams, n10 above, 300–301.}

The \textit{NML} litigation in the United States: an illustration of rule arbitrage

I come now to a final example: the \textit{NML} litigation in the United States. This saga involved the post-judgment attachment of assets in which case immunity is typically more readily available than in cases where only the jurisdiction of the court is contested.\footnote{‘Typically’ because under the US FSIA, for example, immunity from post-judgment (although not pre-judgment) attachment may still be waived implicitly; see US FSIA s 1610(a)(1) and s 1610(d).} The separate treatment of execution and attachment becomes an especially critical issue where claims have been
brought precisely, and only, because there are assets in the jurisdiction. *NML*, however, involved assets outside the United States which the claimants nonetheless sought to attach with the assistance of the United States’ courts. On the face of it, this ran against the design of the US FSIA which concentrates on assets located within the United States.

For convenience, we can split *NML* into the ‘foreign sovereign assets’ dispute and the dispute over bond contract *pari passu* clauses (the ‘*pari passu* dispute’). 62 The ‘*pari passu* dispute’ concerned injunction orders which threatened to derail Argentina’s sovereign debt restructuring by seeking the enforcement of the *pari passu* covenant’s requirement that holders of Argentine bonds should be paid out equally. It would require payment to the plaintiff, *NML* and other hold-out creditors, whenever payment is made to bondholders who had consented to the debt workout. However, as the US Justice, Treasury and State Departments also pointed out, because Argentina’s assets abroad cannot be attached they therefore cannot be injunction. The Second Circuit held that, elegant as this argument might seem, there was simply no attachment – of any assets – in the case of what is only an *in personam* injunction (readers are asked to forgive the tautology). 63 This is the potential difference between the regime under the US FSIA today and Article 18 of the UN Convention which I have already referred to. An injunction may be a measure of constraint, but it is not an attachment of assets for which US law would require a further waiver of immunity. The US Supreme Court refused to hear the case and denied certiorari.

Turning to the sovereign foreign assets dispute, the question was whether the FSIA would allow discovery orders in respect of non-US commercial assets, 64 and assets in connection with which immunity had been waived. 65 The US FSIA is silent on discovery orders for assets abroad, but the United States had argued that because the FSIA contains a general immunity rule subject only to express exceptions, and the FSIA does not state an exception for discovery orders, Argentina is immune from the reach of such orders. 66 Argentina in turn argued that since its assets outside the United States are immune, this ‘necessarily entailed immunity from discovery in aid of execution.’ However, the Supreme Court ruled that discovery of foreign assets is allowed

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64 US FSIA, s 1610 (a). Section 1610(a)(2) requires these to be assets on which the claim is also based.
under the FSIA since there is no limitation in the statute on the scope of a discovery order.\footnote{Republic of Argentina v NML Capital, Ltd, 134 S Ct 2250, 2256–2258 (2014).}

The effect of the Supreme Court’s ruling paves the way for rule arbitrage and allows plaintiffs to mix and match US discovery rules and foreign attachment rules. Immunity from jurisdiction may be lifted in one jurisdiction, judgment is then ordered but because of the comparative restrictiveness of the FSIA’s attachment rules which require property to be located in the United States and used for a commercial activity, and because sovereign assets are typically located worldwide, the latitude afforded by NML allows information on foreign sovereign assets outside the United States to be obtained through United States courts for attachment proceedings abroad under a foreign nation’s (foreign sovereign immunity) rules.\footnote{The principal difference insofar as attachment is concerned between, for example, the US FSIA and UK and UK-style legislation is that, under the FSIA’s restrictive immunity provisions, there is a specialty requirement that the property is or was used for the commercial activity upon which the claim is based. It serves, in effect, as an anti-vulture fund clause. See US FSIA, s 1610(a)(2).}

As some readers are aware, the NML litigation has spawned enforcement and attachment proceedings worldwide, not least in the UK,\footnote{NML Capital Ltd v Republic of Argentina [2011] UKSC 31. See Hazel Fox, ‘Rain on the Just and Unjust’ (2012) 128 LQR 10, 13.} and in the famous arrest of the Argentinian warship, the ARA Libertad, in the Ghanaian port of Tema.\footnote{Agustino Fontevecchia, ‘The Real Story of How A Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina’s “Air Force One”’ (5 October 2012) Forbes.}

**Conclusion**

I have not explored every nook and cranny of the Convention. There is no need to delve deeper in order to ask more generally perhaps if there should not be greater acknowledgment of the utility of our current forum rules and international legal practices. Frustration – such as in Hong Kong, or with the complexity of comparative foreign sovereign immunity law, or indeed with sudden unpredictability under French forum law – should not cause us to lurch unreflectively towards the UN Convention’s broad promise of a universal cure.

There are jurisdictions in which the need to dispense commercial justice is felt more keenly than in a compromise treaty text. The whole problem cannot be reduced to the UN Convention’s general aim of spreading the doctrine of restrictive immunity. Commercial claimants will wish for greater rights and assurances than that, and experience suggests that they may be relieved to have the option in future of falling back on current, more liberal, national forum rules and practices rather than what the Convention may offer.\footnote{The use or prospect of treaty reservations and interpretative declarations in connection with national ratifications of the UN Convention should therefore hold special interest.}