Arbitration between a private party and a State is always contentious for one main reason: whether the State in arbitration will raise the defence of sovereign immunity. A private party wants the State to behave like any other commercial partner when entering into a commercial deal. On the other hand, a State keeps its ultimate defence of sovereignty as and when its sovereignty is at stake. During the evolution of arbitration as a method of dispute resolution, a trend was seen that States imposed self restraint in invoking sovereign immunity in arbitration. The equilibrium has been maintained for all these years in international commercial arbitration, and the issue has become almost settled. However, it has recently been resurrected in the Court of Appeal case FG Hemisphere Associates LLC and Democratic Republic of Congo and ors. In this case, the defence of sovereign immunity was raised by the Democratic Republic of Congo (DRC) at the enforcement stage when an arbitral award was brought for enforcement in Hong Kong. Although the case is pending before the Court of Final Appeal for final disposal on the issue, this paper examines the issue of sovereign immunity in the context of enforcement of arbitral awards in general and particularly with reference to Hong Kong, which is a special administrative region of China, which is the sovereign authority for Hong Kong. This paper will first examine the enforcement mechanism for arbitral awards and then examine the position of sovereign immunity in enforcement in arbitration as well as enforcement proceedings. A State and a private party which have agreed to arbitration have the intention to arbitrate, but the same intention is interpreted differently when the award emanating from that arbitration comes up for enforcement. In order to highlight this issue, the paper will show how professional players in the same field – i.e., law – such as scholars and lawyers of public international law, ardent supporters of international commercial arbitration and judges of national courts involved in the enforcement of awards view the issue of sovereign immunity so differently, and invariably through their litigative lens, thus compromising the integrity of the arbitration process as an alternative to litigation. The paper will then argue for the use of the sovereignty defence, particularly the timing or stage of using such a defence, in a consistent manner during the whole arbitration process, including the enforcement of awards.

1. Introduction

Arbitration between a private party and a State is always contentious for one main reason: whether the State in arbitration will raise the defence of sovereign immunity. A private party wants the State to behave like any other commercial partner when entering into a commercial deal. On the other hand a State keeps its ultimate defence of sovereignty as and when its sovereignty is at stake. During the evolution of arbitration as a method of dispute resolution, a trend was seen that States imposed self restraint in invoking sovereign immunity in arbitration. The same position was fortified through the International Convention of Settlement of Investment Dispute (ICSID) Convention dealing with investment arbitration between a State and a private party.\(^2\) The Convention explicitly states that a disputing State will not raise the defence of sovereign immunity.\(^3\) The equilibrium has been maintained for all these years in international commercial arbitration, and the issue has become almost

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\(^2\) The ICSID Convention was formulated by the Executive Directors of the World Bank. It came into force on 14 October 1966. See ICSID Convention, Article 1(2).

\(^3\) ICSID Convention, Articles 25-27.
settled. However, the issue has recently been resurrected in the Court of Appeal case *FG Hemisphere Associates LLC and Democratic Republic of Congo and others* (hereinafter “the FGH case”). In this case, the defence of sovereign immunity was raised by the Democratic Republic of Congo (DRC) at the enforcement stage when an arbitral award was brought for enforcement in Hong Kong. The same defence was not raised at the arbitration stage, which was conducted according to the Rules of the International Chamber of Commerce (ICC) in Switzerland and France. Although the case is pending before the Court of Final Appeal for final disposal on the issue, this paper examines the issue of sovereign immunity in the context of enforcement of arbitral awards in general and particularly with reference to Hong Kong, which is a special administrative region of China, which is the sovereign authority for Hong Kong. This paper will first examine the enforcement mechanism for arbitral awards and then examine the position of sovereign immunity in enforcement in arbitration as well as enforcement proceedings. A State and a private party which have agreed on arbitration have the intention to arbitrate, but the same intention is interpreted differently when the award emanating from that arbitration comes up for enforcement. In order to highlight this issue, the paper will show how the professional players of the same field – i.e., law – such as scholars and lawyers of public international law, ardent supporters of international commercial arbitration and judges of national courts involved in the enforcement of awards view the issue of sovereign immunity so differently, and invariably through their litigative lens, thus compromising the integrity of the arbitration process as an alternative to litigation. The paper will then argue for the use of the sovereignty defence, particularly the timing or stage of using such a defence, in a consistent manner during the whole arbitration process, including the enforcement of awards.

2. Arbitral Award: The Cart before the Horse

It is the general duty of an arbitral tribunal to give an award which is enforceable; otherwise the whole purpose of arbitration will be frustrated. Parties to arbitration are also mindful of this fact; therefore, they select a place of arbitration which is a party to the New York Convention on Recognition and Enforcement of Arbitral Awards (hereinafter “the NYC”). The NYC makes enforcement of arbitral awards much easier, faster and more effective than court judgments.

An arbitral award, under the NYC process, is easy to enforce. The party has to submit the arbitration agreement and a certified copy of the award to the enforcement court. The court

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4 The USA adopted the Foreign Sovereign Immunity Act (1974), and the UK legislated the State Immunity Act (1978), which set the trend that a State cannot claim immunity for its commercial activities. This may be said to be the established approach, at least in the Common Law. In Civil Law countries, though absolute immunity was practiced, an exception was created for commercial activities.


6 The parties to the arbitration — i.e., the DRC — agreed to use the ICC Rules for the arbitration.

7 An arbitral tribunal is only required to do everything according to arbitral procedure to ensure that an award rendered by it is not refused from enforcement. However, the tribunal is not obliged to make sure that the parties fulfill their obligations under an award. It is up to the parties to discharge their obligations under an award.

8 The NYC came into force in 1958 and so far has played a significant role in the development of arbitration as a method of dispute resolution. So far 144 countries have signed the Convention.

9 NYC, Article III.
recognizes the award and then issues the order to the other party to satisfy the claim awarded in the arbitral award. If the opposing party has any objection, it can argue its case using the grounds listed in Article V of the NYC. If the party succeeds in its argument, the court may refuse to enforce the award. The enforcing court can still enforce the award even if the opposing party has successfully argued its case; this is because Article V of the NYC contains the word “may”, which gives discretion to the courts; this discretion can be exercised in favour of the enforcement of awards. The pro-enforcement policy of the NYC has been used even in situations where an award was set aside in the court where the award was made. However, it is interesting to note that the NYC does not list sovereign immunity as a ground for refusing to enforce an award rendered where one of the parties is a State.

Some arbitration institutions have incorporated a special rule which, in effect, prevents a State from raising sovereign immunity during enforcement once it agrees to arbitrate under their rules. The ICC is one of the leading arbitration institutions which have incorporated such a rule. The relevant rule states: “Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made”. The contentious question in this regard is that by submitting to arbitration, does a State also waive its sovereign immunity defence at the enforcement stage? Scholars have analyzed this issue by proposing two-stage approaches. This may suggest that consent to arbitration by a State is different from consent or waiver of sovereign immunity at the enforcement stage by the State. However, some scholars argue that once a State consents to arbitration, the waiver of sovereign immunity at the enforcement stage is deemed to have been given, so that the arbitration can lead to its logical and practical conclusion through enforcement. In general, at the execution stage (i.e., after recognizing the award) if the Court attaches the bank account or diplomatic property of a State, then the State is entitled to raise sovereign immunity. However, if the bank account or property of the commercial arm of the State is attached for the execution, then the State is not allowed to raise the defence of sovereign immunity. Therefore, a State which has consented to international commercial arbitration is deemed to have consented to enforcement (or to not raising the defence of sovereign immunity at the enforcement stage) as long as sovereign funds or property are not affected. In other words, State property used for purely State functions cannot be subject to the enforcement of an award to satisfy claims.

10 Article V (1)(e) of the NYC says that a court may refuse the enforcement of an award if the award has been set aside in the court of the country where it was made. However, in few cases the court allowed enforcement of an award where the original award had been set aside. See Hilmarton Ltd. v Omnium de traitement et de valorization (OTV) Revue de l’arbitrage Vol. XX (1995) Yearbook of Commercial Arbitration 663 and Chromalloy Aeroservices Inc. v Arab Republic of Egypt, 939 F. Supp 907 (D.D.C 1996).
11 ICC Rules, Article 28(6).
14 Diplomatic, military, and cultural heritage or its archives and property forming part of an exhibition of objects of scientific, cultural, or historical interest of a State are accorded special immunity status. See the UN Convention on the Jurisdictional Immunities of States and Their Property 2004 (hereinafter 2004 Convention), Articles 21(1)(d) and (e). The first two have long been given special immunity status, but the last two kinds of property were given such status in the 2004 Convention.
15 The 2004 Convention is largely based on the principle of restrictive immunity.
The only question remaining is whether a State which adheres to the principle of absolute sovereignty can raise the defence of sovereign immunity at the enforcement stage. A State which follows absolute immunity may claim immunity for pure state functions or commercial functions. This paper argues that in order to give effect to arbitration, a State, once it has agreed to arbitration, should not be allowed to raise the defence of sovereign immunity either during the arbitration process or during enforcement, except in a situation where diplomatic property or funds are involved.

3. The Hong Kong “hungama”

The *FGH case* has created a “hungama” in Hong Kong with regard to enforcement of an arbitral award against a sovereign state, i.e., the DRC. Hong Kong was targeted by FGH because a few Chinese entities that have a commercial presence in Hong Kong were required to transfer certain funds (called “entry fees”) to the DRC, and FGH wanted to obtain injunctions to prevent those entities from making any payment to the DRC.¹⁶

FGH, a New York-based company, was the beneficiary of two arbitral awards because the original party to the arbitration, Energoinvest, a Yugoslav company, assigned FGH the entire benefit of principal and interest payable by the DRC under the award rendered in Switzerland and Paris. The arbitration was conducted as per the ICC rules. FGH, before coming to Hong Kong, had initiated several enforcement proceedings in different jurisdictions.¹⁷ It should be noted that the DRC is not a signatory to the NYC; therefore, FGH did not try to go to the DRC for enforcement; rather it approached courts in countries which are parties to the NYC and collected part of the award.¹⁸ Knowing the good political and economic relationship between China and the DRC and the Chinese government’s plan to make massive investments in the DRC mainly for mineral exploitation rights in the DRC for which Chinese companies are supposed to pay a fee, FGH took out an originating summons seeking leave to enter judgment to enforce the awards against the consortium of the Chinese enterprises and seeking an injunction to prevent them from making those payments to the DRC. Those consortiums are established in Hong Kong as a limited liability company (but are wholly-owned subsidiaries of Chinese Railway Group Limited, a company incorporated in China with limited liability) and their stocks are listed in the Hong Kong Stock Exchange.¹⁹

In the Court of First Instance, among many other issues, one issue raised was whether the DRC had waived immunity by submitting to arbitration. Other related issues were whether after 1997 Hong Kong common law recognized the doctrine of restrictive sovereign immunity or whether immunity from suit was absolute. Although the Court of First Instance did not dwell upon the applicable principle of immunity, it did rule against FGH (and in favour of the DRC) on the issue of waiver of immunity.²⁰ The question before the Court of Appeal was:

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¹⁶ Those entities are also parties in the *FGH case*; they are: China Railway Group (Hong Kong Ltd.), China Railway Resources Development Limited, China-Railway Sino-Congo Mining Limited, and China Railway Group Limited.
¹⁷ See FGH Case, paras. 3-7.
¹⁸ FGH has so far recovered US$2.78 million through enforcement proceedings in other jurisdictions. See FGH Case, para. 7.
¹⁹ See FGH Case, paras. 8-9.
²⁰ See FGH Case, paras. 21-22.
Whether an application for leave to enforce an arbitral award made under the New York Convention against a State impleads that foreign state; whether the law of Hong Kong requires application of the doctrine of absolute state immunity from jurisdiction and execution, as opposed to the restrictive doctrine; and whether by agreeing to refer a dispute to arbitration in a New York Convention country, to be conducted according to the Rules of the International Chamber of Commerce (ICC), a foreign State which is not a party to the Convention waives such state immunity from jurisdiction and execution to which it is otherwise entitled.

In simple words, the court was asked to decide on two issues: (1) What is the current practice of Hong Kong in relation to sovereign immunity: i.e., does it practice absolute immunity or restrictive immunity? and (2) By agreeing to refer a dispute to arbitration in an NYC country and as per the ICC rules, does a State also waive immunity to jurisdiction and execution?

The Court of Appeal is of the opinion that the doctrine of restrictive immunity currently continues to apply in Hong Kong. The Court of Appeal has explicitly said:

In my judgment, the application for leave to enforce the foreign arbitral award is an application that seeks to invoke the jurisdiction of the court and which, when directed at an award made against a foreign State, is an application that seeks to implead that State, so that the question of immunity from that jurisdiction is one which at that stage has to be raised and addressed […] Absent legislation to a broader effect, the submission of a foreign State to arbitration “operates solely to remove state immunity from the first stage of arbitration in which the national courts exercise supervisory powers”, so that in this case, the submission of the DRC to the ICC arbitration did not constitute waiver to the jurisdiction of the Hong Kong courts to consider an application for leave to enforce those awards, or waiver against execution.

The opinion of Justice Stock VP was supported by Justice Yuen JA, who, in a separate opinion, reached the same conclusion, albeit via a different route. Justice Yuen concluded that restrictive immunity is a customary international law and part of the common law tradition which is now applicable in Hong Kong since 1997. Therefore, the DRC is subject to restrictive and not absolute immunity.

However, Justice Yeung JA respectfully disagreed with Justices Stock and Yuen and opined that from a “global perspective, and bearing in mind the constitutional provisions of the Hong Kong SAR as well as the unequivocal foreign policy of the PRC, DRC, in my view, enjoys absolute immunity.” Justice Yeung also said clearly that: “The absolute immunity doctrine, adopted by the PRC as part of its international legal obligation, applies to the Hong Kong SAR.” Justice Yeung went on to provide a third reason for his decision: “the restrictive immunity doctrine is not part of the customary international law and therefore the DRC is entitled to absolute immunity […] the DRC, despite its submission to arbitration, had not waived its right to state immunity.”

21 The FGH case was decided by a 2-1 majority. Justice Stock VP and Justice Yuen formed the majority, but Justice Yeung gave a dissenting opinion. The Court of Final Appeal has yet to give a final ruling on this issue.
22 Justice Stock VP; see FGH Case, para. 177.
23 See FGH Case, Justice Yuen, para. 246.
24 See FGH Case, Justice Yeung, para. 182.
25 See FGH Case, Justice Yeung, para. 224.
26 See FGH Case, Justice Yeung, para. 231.
The Hong Kong “hungama” thus largely centered on one crucial issue on which the Court of Final Appeal (hereinafter CFA) has to rule: whether Hong Kong follows an absolute or restrictive doctrine of sovereign immunity. While this issue is still pending before the highest court of Hong Kong, this paper will discuss this issue from an academic and arbitration practice point of view.

4. Sovereign Immunity and the New York Convention

The disciples of arbitration support the view that once a State agrees to commercial arbitration with a private party, it waives its immunity from the jurisdiction as well as from the execution of the award. In their view, if a State is allowed to raise the defence of immunity at the execution stage, it will make the agreement to arbitrate otiose and of no value. Therefore, the agreement to arbitrate should also include the enforcement and execution of the award stage, and “unless commitment to arbitration is firm and enforceable, arbitration agreements with States are rendered pointless” and in violation of equal justice.

In countries like the Netherlands, the U.S.A and France it is generally understood that “when a State has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for confirmation or recognition and enforcement of resulting award”. When we discuss the enforcement of arbitral awards, the New York Convention comes first to mind. This is the convention signed by 145 countries which have pledged to enforce arbitral awards made in any Convention country with utmost ease, and the enforcing court will proactively make sure that awards are recognized and enforced. Only in very limited circumstances should enforcement of an award be refused. In the list of those limited grounds sovereign immunity does not appear. During the drafting and adoption of the NYC, the issue of sovereign immunity was scantily raised and it was left to the national courts and states to decide. As signatories to the NYC, States are only obliged (through their courts), as Hazel Fox says, “to recognize the agreement in writing and arbitral clause and when seized of a matter relating to such an agreement to refer the parties to arbitration unless the national court finds that agreement ‘to be null and void’, inoperative, or incapable of being performed and to recognize arbitral awards as binding”.

Therefore, at the recognition stage if a State raises the defence of sovereign immunity, the national courts are allowed to deal with the matter according to their national law. This also means that the national courts can entertain the possibility of a foreign government or State raising the defence of sovereign immunity at the execution stage, as well.

The UNCITRAL Model Law on International Commercial Arbitration was the next stage after the NYC where the issue of sovereign immunity could be raised and discussed in the context of enforcement of arbitral awards, but even at that time this matter was swept under the carpet. There was an initial movement in the area when a regional consultative committee

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27 Toope, supra note 12.
29 See Toope, supra note 12, as cited by Justice Stock in FGH Case, para. 140.
on international commercial arbitration made the proposal that “where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of arbitration pursuant to that agreement.”\textsuperscript{31} The proposal did not make very clear whether “sovereign immunity in respect of arbitration” includes the enforcement stage of the award, too. It is interesting to note that the UNCITRAL secretariat did make it clear that the “intention of that proposal is to prevent a government agency which has entered into a valid arbitration agreement in a commercial transaction from invoking sovereign immunity at all stages of arbitration, including the stage of recognition and enforcement of the arbitral award.”\textsuperscript{32} Nevertheless, the Model Law on International Commercial Arbitration does not state this issue anywhere. The issue was nipped by the UNCITRAL Commission as having an “obviously political and public international law character.” Some delegates even considered “that was a delicate matter which could not be settled by means of a protocol to the NYC.”\textsuperscript{33} However, later it was noted that the issue of immunity requires “more long term consideration and possible resolution in either an additional protocol or annex to the UNCITRAL Model Law.”\textsuperscript{34}

In the \textit{FGH case}, the point was raised that the DRC is not a signatory to the NYC; therefore, it cannot be assumed that the DRC, like signatories of the NYC, has implicitly consented not to raise sovereign immunity at the time of enforcement: i.e., signatory States will follow restrictive immunity when it comes to enforcement of an award.\textsuperscript{35} However, it should be noted that for the purposes of enforcing an award even a non-signatory may benefit by agreeing to select the seat of arbitration in a signatory State, so that the resulting award will be considered as a convention award that can be enforced in any convention State. That was perhaps one of the reasons for the commercial partner of the DRC (i.e., Energoinvest) and the DRC agreeing on the place of arbitration in Switzerland and France so that the award could be enforced in any convention country by using the easy process of the NYC with regard to the recognition and enforcement of arbitral awards. Therefore, in a case where a non-signatory to the NYC selects the seat of arbitration in a country which is a signatory State, it should be interpreted that the non-signatory knows and accepts the consequence that the resulting award will be enforced like a convention award in any other convention country.

5. Do the ICC Rules of Arbitration provide any Road Map for Sovereign Immunity?

Rules of arbitration, in general, govern proceedings of arbitration. However, the ICC rules are indicative of the practice of a State as a party to arbitration. According to the ICC Rules, “Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed

\begin{thebibliography}{9}
\bibitem{note1} This proposal was made by the Asian African Legal Consultative Committee on International Commercial Arbitration in 1976 during its meeting in Kuala Lumpur.
\bibitem{note2} As cited by Fox, supra note 29, p. 830.
\bibitem{note4} Fox, supra note 29.
\bibitem{note5} As per Justice Stock in FGH Case, para. 171.
\end{thebibliography}
to have waived their right to any form of recourse insofar as such waiver can validly be made.”

Article 24 of the old ICC Rules, which was equivalent to Article 28(6), contained the words “final” and “appeal”, which have now been changed, respectively, to “binding” and “recourse”. It is not clear whether the ICC considered the inclusion of sovereign immunity within the ambit of Article 28(6) or not. However, a French court in *Creighton Ltd v Government of the State of Qatar* ruled that by agreeing to submit disputes to ICC arbitration, the State of Qatar had, by reason of Article 24 (the predecessor of Article 28(6)) of the ICC Rules, undertaken to carry out an award without delay and had thereby waived immunity from execution. Article 28(6) of ICC Rules was also invoked in *Walker International Holdings Ltd v the Republic of Congo*, in which the US Appellate Court ruled that “in addition, the ROC agreed to abide by the rules of the ICC (Article 28(6)) which precludes the ROC from asserting a sovereign immunity defence.” After citing Article 28(6) of the ICC Rules, the court concluded, “Therefore, we hold that the ROC explicitly waived its sovereign immunity. Accordingly, we need not address a potential implicit waiver”.

The Hong Kong court indicated that this very agreement constituted an explicit waiver of sovereign immunity as opposed to the implied waiver (by agreeing to the ICC Rules) as suggested by the French court in *Creighton*. Under US law, a waiver of sovereign immunity may be made “explicitly” or “by implication”. Therefore, the ROC in the *Walker case* could not have claimed sovereign immunity because it stated that it “irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court”. The Hong Kong court indicated that this agreement constituted an explicit waiver of sovereign immunity as opposed to the implied waiver (by agreeing to the ICC Rules) as suggested by the French court in *Creighton*. Under US law, a waiver of sovereign immunity may be made “explicitly” or “by implication”. Therefore, the ROC in the *Walker case* could not have claimed sovereign immunity because it stated that it “irrevocably renounces to claim any immunity”, which is considered to be an “explicit” waiver under Section 1610 of the FSIA. The US court also said that agreeing to the ICC Rules on arbitration, including Article 28(6), also constitutes an “explicit” waiver of immunity. In other words, courts in the USA have considered submission to the ICC Rules as an “explicit” waiver.

The court in the *FGH case* did not agree with the decisions of *Creighton* and *Walker*. However, it agreed that the facts of the *FGH case* are similar to those of *Creighton*. The Court said:

> It cannot in my judgment be said that by entering upon an ICC arbitration agreement with a private party, a foreign State that is not a party to the NYC is going beyond the making of a representation to each Convention State that it consents to the enforcement against it in the Convention State of such arbitral awards as may be made. It seems to me that jurisdiction in the forum State can, in such circumstances, only be conferred by legislation or by express representation by the foreign State to the forum State.

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36 ICC Rules, Article 28(6).
38 French Court of Cassation, ch.civ,1; 6 July 2006.
39 395 F.3d 229 (5th Cir.) (2004).
40 Walker case *supra* note 38, p. 234.
41 *FGH Case*, para. 158.
42 Foreign Sovereign Immunity Act, Section 1610.
43 As per Justice Stock in *FGH Case*, para. 171.
In this statement it is clear that the court mixed two different issues: the ICC Rules and the NYC. The ICC Rules serve as the procedural rule of arbitration: by agreeing to the ICC Rules, parties undertake to carry out any award without delay and are deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. This waiver has nothing to do with the parties’ (or their States’) obligations towards NYC signatories. A party which is not a signatory to the NYC may agree to arbitrate at a place which is a signatory of the NYC so that it can avail itself of the benefits of the NYC regarding easy enforcement of award in other signatory States. This does not, by any means, oblige a non-signatory to be bound by the obligations of the NYC; and at the same time, due to the special application rule, the NYC can be utilized by a non-signatory by choosing a signatory State as the place of arbitration. This is a very common practice in the field of arbitration, and the FGH case is just one example. Many times, a private party enters into a commercial deal with a State, selects arbitration as a means of resolving disputes and selects a seat of arbitration in a Convention state, and chooses the rules of an international arbitration institution. Had FGH opted for HKIA or LCIA rules, the situation would have been different, and as far as waiver of immunity is concerned, it would not have been argued that the DRC also impliedly waived the right to invoke sovereign immunity. The very facts that the DRC agreed to arbitration and used the ICC rules for it (knowing that it requires parties to waive their right of sovereign immunity), and agreed to a Convention country as the seat of arbitration, together show that the DRC had impliedly waived its defence of sovereign immunity. Therefore, the court in the FGH case has wrongly combined the two issues—the agreement to use the ICC Rules and the implications thereof and the obligations on Signatory States of the NYC—and reached an incorrect conclusion.

Public international lawyers argue that at the time of enforcement, by recognizing arbitral awards, foreign courts exercise jurisdiction; therefore, at that time a State may raise the sovereign immunity defence in refusing to submit to jurisdiction: “In common law, sovereign immunity could be waived by or on behalf of the foreign State, but waiver had to have taken place at the time the court was asked to exercise jurisdiction and could not be constituted by, or inferred from, a prior contract to submit to the jurisdiction of the court or to arbitration.” And since a prior contract to submit to the jurisdiction of the court or arbitration is not sufficient to waive sovereign immunity, therefore the arbitration agreement or agreement to use the ICC Rules (containing an implied waiver) cannot be construed as an implied waiver by the DRC.

Arbitration lawyers find it difficult to accept this view of public international lawyers because the arbitration process, including the rendering of an award and its execution, is inherently different from a court proceeding, including the enforcement of a judgment. In the field of arbitration an agreement to arbitrate sets the arbitration into motion, and the parties, from the moment they agree to arbitrate, know and can imagine the consequences. That is, if a dispute arises, it will be resolved through arbitration at an agreed place, as per the agreed rules of arbitration, and the resulting award will be enforced by using the NYC, and at the enforcement stage the party will have only limited grounds to challenge the award. If arbitration lawyers and private parties have to deal with the issue of sovereignty at every stage of arbitration, they will be reluctant to enter into any commercial deals with a State. Moreover, even if arbitration lawyers take steps to deal with the sovereignty issue at the enforcement stage – for example, by including a clause in the contract preventing a State from exercising its right of sovereign immunity – it is not clear whether a foreign court will

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give weight to such an agreement, because prior “agreements” may not be construed as a
waiver of sovereignty. Therefore, the use of public international law principles in a private
international law situation will not help the commercial world and arbitration particularly in
dealing with a State and the defence of sovereign immunity.

6. Is the Nature of the Asset Important?

Even proponents of the waiver of immunity through the signing of arbitration agreements are
aware of the sensitivity of sovereign immunity and agree that at the execution stage of an
arbitral award if the assets to be executed fall into the category of properties for pure State or
public purposes or diplomatic or non-commercial use, those properties should be immune
from the execution of the arbitral award. If a private party encounters a situation where only
State property for pure State purposes is available for execution, it has to accept the situation,
and it will not amount to an assault on the principle of equal justice, which requires a State to
agree to arbitration and submit to the jurisdiction of an arbitral tribunal. All States which have
accepted the theory of restrictive immunity invariably adhere to the absolute immunity
principle when it comes to State properties for military, diplomatic and non-commercial
use. At the time of executing an award, the court needs to ascertain whether a property or an
account which is attached falls into the category of pure State use or commercial use. The test
for the determination of the nature of the property or account is the functionality test: what
the use or function of that property is, rather than how that property or account was
acquired. The problem comes when a State property or account is used for pure State
purposes as well as for commercial purposes. In such a situation whether that State property
should enjoy immunity or be subject to execution is unclear.

In the FGH case, FGH requested an injunction against the payment of an “entry fee” to the
DRC by the Chinese railway consortium. FGH will have no case for enforcement if no
payment is due to the DRC by the Chinese railway consortium, which has offices in Hong
Kong and stocks listed in the Hong Kong stock market. The “entry fee” amounts to US$350
million, which is payable to the DRC and Gecamines (a DRC state mining company). There
were few changes made in the composition of the investment vehicle, which ultimately
resulted in the possibility that the entry fee of US$144 million becomes payable to
Gencamime and Congo Simco, rather than to the DRC and Gecamines as before. On the face
of it, it may be possible to see the DRC as no longer being the recipient of that entry fee;
however, FGH argues that Gecamines and Congo Simco are merely agents or fronts acting
for the DRC. Even if that is true, if the entry fee, once collected, is put to use for the public
good, it becomes a non-commercial governmental fund which will enjoy sovereign
immunity. However, if the entry fee is used for commercial purposes, it will not be immune
from execution as per the decision of the Hong Kong Court. Justice Yeung in the FGH case
said, “It must be recognized that the seizure and sale of a state’s assets in order to satisfy a
judgment against it constitutes a particularly dramatic interference with its interests and could

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45 See the provisions of the 2004 Convention, which reflect the compromise between different State
practices.
46 Diplomatic immunity has a different regime due to the 1861 Vienna Convention on Diplomatic
Relations, which accords special immunity.
47 FGH Case, para. 179.
48 Redfren, Alan, Hunter, Martin et al. (2004) Law and Practice of International Commercial
49 FGH Case, para. 10.
damage its ability to function properly.50 From the materials available before the Court, it was concluded that US$200-$250 million would go to the budget of the DRC which would be used for public purposes. Therefore, that part of the entry fee will be immune from execution. The remaining US$100-$150 million which the DRC government would have passed on to Gecamine may become subject to execution, and no immunity will be given to that money.51 Whether the money given to Gecamine would qualify as money for public use or not is a different question. However, the court has concluded that money given to Gecamine, which is a government arm with its own commercial interests, may not use money that is intended for public use; therefore that money will be subject to execution of the award. Ultimately, if the entire entry fee is used for public purposes, even if Hong Kong follows restrictive immunity, the FGH cannot get the money to satisfy the award. This is a situation where enforcement of an award may come to a halt, which may cause hardship to the private party, but it will be in line with the practice accepted by the arbitration community, and such rare circumstances will not pose a threat to arbitration as a process of dispute resolution.

The 2004 Convention makes it clear that State properties are not subject to post judgment constraints such as attachment, arrest or execution unless a State has expressly consented to it through arbitration agreement.52 It does not say that merely signing an arbitration agreement in itself makes that State’s property subject to post-judgment constraints. That means a separate specific waiver of immunity is required. Therefore, if an arbitration agreement also includes an express waiver of immunity (as in the Walker case) on State property, that arbitration agreement may constitute a waiver of immunity from jurisdiction as well as from execution. If a State has earmarked a property for the satisfaction of a claim, during the execution of such claim that earmarked property will not enjoy sovereign immunity. Furthermore, in so far as a State property which is not intended to be used for non-commercial governmental purposes (i.e., it is intended for commercial purposes) is within the territory of the State of the forum and the said property is connected to the entity against which the execution is sought, that property is beyond the scope of immunity. The express waiver of immunity against State property may also be inferred from international agreements to which the State is a party: e.g., the New York Convention.

7. Conclusion

Sovereign immunity creates an insurmountable hurdle in arbitration mainly at the enforcement stage of the arbitral process. This is mainly because public international lawyers often apply the same yardstick when dealing with the issue of sovereign immunity in arbitration, including the enforcement of arbitral awards, as in court proceedings and the enforcement of a court’s judgments. The public international lawyers’ view, which does not differentiate between arbitration and court practice, argues that at the enforcement stage there is a need for another waiver, which goes totally against the understanding of the arbitration and business communities. It is important that court judgments and arbitral awards are treated differently. Therefore, once a State has agreed to arbitration, it should be assumed that the State has waived its immunity from jurisdiction and execution. If that State is a signatory to the NYC or has agreed to arbitrate in a State which is a signatory of the NYC, it should be treated as strong evidence of a waiver of immunity. If some arbitration rules, such as the ICC

50 FGH Case, para. 234.
51 FGH Case, paras. 277-278.
52 2004 Convention, Article 19.
rules, include an indication of a waiver of immunity that should also be taken into account in concluding that the State has given up the waiver of immunity.

The situation becomes even more difficult “because national courts (dealing with enforcement of awards) refuse to develop special rules for the enforcement of arbitral awards” and they are guided by the principles applicable in judicial proceedings.\textsuperscript{53} Arbitration has not been allowed to develop its own substantive law as a freestanding system of dispute resolution, which, in itself, makes arbitration not an alternative but a dependent system of dispute resolution.\textsuperscript{54} The court in the \textit{FGH} case relied heavily on Hazel Fox’s book on sovereign immunity; however, Lady Fox herself, in her article “State Immunity and the New York Convention”, says: “I would challenge this subordination of enforcement of arbitral awards to the same regime as applies to foreign judgments of national courts, at least in respect of awards that are confined to commercial relationships and do not award compensation for regulatory failings of the State.” \textsuperscript{55} As long as arbitration is treated like a court process, the problems of sovereign immunity and many other problems will create hurdles in the path of the smooth operation of arbitration. Unless arbitration exists as a standalone system of dispute resolution, the traditional legal processes as used in courts will keep on colliding with the commercial interest and parties’ autonomy in arbitration, thus undermining the integrity of international commercial arbitration as a true alternative to litigation.

References


\textsuperscript{55} Fox, Hazel, \textit{supra}, p. 861.
Enforcement of Arbitral Awards and Defence of Sovereignty

