STATE INCAPACITY AND SOVEREIGN IMMUNITY IN INTERNATIONAL ARBITRATION

This article examines state incapacity and sovereign immunity in international arbitration. When a State is involved in international arbitration, it may raise the defence of state incapacity or sovereign immunity against petitions to compel arbitration, interim judicial orders in support of arbitration, and the enforcement of final arbitral awards. This article surveys the law on these issues in several key jurisdictions, including Singapore, the US and the UK, as well as before international tribunals.

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I. Introduction

1 Global trade and commerce does not occur solely among private individuals and corporations. Nation-states, state-owned enterprises and sovereign wealth funds also directly participate in the international marketplace and enter into international commercial transactions. Whether today's cross-border transactions are strictly between private commercial actors or also involve sovereign states or entities acting on their behalf, their transaction agreements routinely contain arbitration clauses. If private entities who have signed contracts containing arbitration clauses refuse to arbitrate when a dispute later arises, most nations' courts will generally compel arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and domestic legislation implementing its provisions.[1] Likewise, when private entities refuse to honour final awards resulting from international arbitration

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1 Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958, 330 UNTS 38) ("New York Convention"); see generally United Nations Commission on International Trade Law, 1958 New York Convention Guide <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> (accessed 1 August 2014).

proceedings, national courts may typically be relied upon to recognise and enforce the award under the New York Convention and its domestic analogues.[2] Unlike purely private commercial actors, however, sovereign entities may not find themselves fully subject to arbitration-related orders of national courts, either because they may be found to have lacked the legal capacity under their own domestic laws to consent to arbitration in the first place, or because they may succeed in raising sovereign immunity as an affirmative defence to the enforcement of arbitration agreements and awards.

2 This article examines how national courts and legislatures have attempted to balance the tension between, on the one hand, respecting the sovereignty of States and their proxies, such as state-owned enterprises and sovereign wealth funds, and, on the other hand, vindicating the legitimate expectations of their commercial partners by enforcing sovereign entities' agreements to arbitrate international business disputes, supporting arbitration proceedings through interim judicial measures, and recognising and enforcing final international arbitration awards. In what follows, we consider the initial, middle and terminal stages of international arbitration against sovereign entities and requests by the parties to national courts either to support or to interfere with the arbitration, all of which require courts to take into account special considerations and limitations relating to state sovereignty.

3 At the initial stage, if a sovereign government named as the respondent in a demand for arbitration refuses to submit to the jurisdiction of a duly-constituted arbitral tribunal, and the opposing party then seeks an order from a national court compelling the Government to arbitrate the dispute, the court must initially determine whether the State is validly bound by an arbitration clause. The State may raise the defence that the entity that signed the arbitration agreement lacked the legal capacity to bind the State, especially where the State has previously signalled through legislation that it disclaims any intention to be bound by arbitration agreements. Alternatively, a State may argue that it is entirely immune from the jurisdiction of the court where enforcement of the arbitration agreement is sought, and thus the court has no power to compel it to arbitrate, regardless of any arbitration agreement. Similar arguments may arise during or after international arbitration proceedings, when private claimants may seek provisional enforcement measures or enforcement of a final award against the State's assets in another nation's courts. Courts may thus have to decide whether foreign states are immune from both supervisory and enforcement jurisdiction in a variety of arbitration-related actions.

2 New York Convention Art V.

4 Although these strategic issues are not unfamiliar to practitioners and jurists, the lack of a uniform approach to them among both arbitral tribunals and national courts can leave parties without clear guidance about how to conduct their business dealings. The authors hope that this article will help to clarify the issues of state incapacity and sovereign immunity as they bear upon international arbitration agreements. Part I of the article discusses the basis for a State's legal capacity or incapacity to enter into an arbitration agreement. Part II discusses a State's sovereign immunity (or lack thereof) from foreign national courts' jurisdiction to bind it to an arbitration agreement at the initial stage of an arbitration, to resist interim judicial measures in support of ongoing arbitration proceedings, and to enforce resultant arbitral awards against it once arbitration proceedings have ended.

II. The capacity of sovereign entities to consent to arbitration

5 Private parties are generally free to submit their disputes to either national courts or arbitral tribunals. States and sovereign entities by contrast may be constrained from making this election by national constitutional or legislative provisions that restrict or remove their authority to enter into binding arbitration agreements.[3] Such self-imposed restrictions on the ability of a State or sovereign entity to enter into arbitration agreements are commonly characterised as relating to "the State's capacity to enter into arbitration agreements".[4] A traditional view that a sovereign state should not be subject to any dispute resolution system that is not controlled by the State itself may be offered in support of a sovereign entity's defence of incapacity to avoid its own prior commitment to submit disputes to international arbitration.[5] According to some commentators, States' efforts to pre-emptively

3 See generally *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at pp 241–380; Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at pp 733–759; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 625–639; Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at pp 31–52; Jan Paulsson, "May A State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration? Reflections on the *Benteler v Belgium* Preliminary Award" (1986) 2 Arb Int'l 90; Note, "Authority of Government Corporations to Submit Disputes to Arbitration" (1949) 49 Colum L Rev 97; Karl-Heinz Böckstiegel, "States in the International Arbitral Process" (1986) 2 Arb Int'l 22; and Jean Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at paras 229–332.

4 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 629.

5 Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.17; see also Ousmane Diallo, *Le Consentement des Parties a l'Arbitrage International* (Presses Universitaires de France, 2010) at p 17.

restrict the authority of their own governmental entities to enter into arbitration agreements are frequently motivated by a lingering distrust of commercial arbitration generally, or a perception of international commercial arbitration as favouring private parties from industrialised countries.[6] This Part of the article examines the question of so-called "state incapacity to enter into arbitration agreements" by laying out the legal concept of capacity and examining its ambiguity as applied to sovereign entities. It then surveys the range of restrictive and permissive doctrinal approaches to state incapacity, providing a brief assessment of the current state of the law on state incapacity in various jurisdictions.

A. The concept of legal capacity and its ambiguity as applied to sovereign entities

6 Legal capacity, a familiar concept found in the private law of contract, refers to the ability of a natural or legal person to conclude and be party to an agreement, and it encompasses both the capacity to have rights and the capacity to exercise rights. If the parties to a purported contract lacked the legal capacity to enter into it from the outset, the contract may be deemed invalid. As the majority of national arbitration laws are silent on the notion of "capacity to arbitrate", legal capacity in the arbitration arena appears to fall on the same footing as the general capacity to contract.[7] Where private parties are concerned, the general rule is that any natural or legal person with the capacity to enter into a valid and binding contract also has the capacity to conclude a valid arbitration agreement.[8]

7 Sovereign entities sometimes attempt to establish their own legal incapacity by reference to national constitutional or legislative provisions that restrict their power to conclude binding arbitration agreements in efforts to avoid submitting disputes to arbitration pursuant to an otherwise-valid arbitration agreement. Such domestic legal restrictions were, until recently, understood as falling "clearly within the classic definitions of legal capacity", a view that finds strong support in the language of the applicable legal instruments.[9] For

6 See Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.22.

7 Jean Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at para 270.

8 Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.06 (citing Art 1676(2)(1) of the Belgian Judicial Code).

9 Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 630–631 (citing Restatement (Second) Contracts §12 (1981): "No one can be bound by contract who does not have legal capacity to incur at least voidable contractual duties and the capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.").

example, the official French version of Art II of the European Convention on International Commercial Arbitration ("European Convention") speaks of the "capacity of legal persons of public law to submit to arbitration" ("*capacité des personnes morales de droit public de se soumettre à l'arbitrage*").[10] In cases where the referral of disputes to arbitration is permitted but is made conditional upon certain legislative or regulatory authorisations, the issue can also be seen as implicating agency principles relating to the party's power or authority to enter into an arbitration agreement.[11]

8 However, domestic legal restrictions on the ability of state entities to enter into arbitration agreements are not invariably characterised as problems of incapacity. A growing number of courts and commentators have framed domestic restrictions on arbitration as relating to the question not of which parties have the power to elect an arbitral forum for dispute resolution, but of which *disputes* are capable of being resolved through that process – the arbitration-specific concept of "arbitrability".[12] Some commentators have propounded that arbitrability has an objective and a subjective aspect.[13] In order for a dispute to be arbitrable, the agreement to arbitrate must, first, relate to a subject matter which is suitable for resolution by arbitration (*objective arbitrability*) and, second, involve parties who are entitled to submit their disputes to arbitration (*subjective arbitrability*). Because domestic legal provisions purporting to restrict capacity to arbitrate concern the kinds of parties – namely state-owned and other public entities – that are entitled to submit their disputes to arbitration, rather than the kinds

10 Article II(1) of the European Convention on International Commercial Arbitration (21 April 1961, 484 UNTS 349) (the English translation employs the word "right" (*droit*) to translate the French *capacité*).

11 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 538 (citing, *inter alia*, Matthieu de Boisseson, *Le Droit Francais de L'Arbitrage Interne et International* (Joly, 2nd Ed, 1990) at p 583 and *Myrtoon Steamship v France French* Tribunal des Conflits, 19 May 1958, D Jur 699.

12 See, *eg*, Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at pp 319 *ff*; *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at pp 534 *ff*; Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-6. See generally Karl-Heinz Böckstiegel, "Public Policy and Arbitrability" in *Comparative Arbitration Practice and Public Policy in Arbitration* (P Sanders ed) (Kluwer Law International, 1987) at pp 177 and 181.

13 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at pp 311 *ff*.

of disputes that may be submitted, they relate to subjective arbitrability.[14]

9 In support of this characterisation, commentators have noted that while legislative restrictions on the capacity of ordinary commercial actors to enter into arbitration agreements often aim to protect vulnerable private parties, self-imposed restrictions on a State or sovereign entity's entitlement to enter into arbitration agreements directly or through its commercial proxies are based on independent policy considerations concerning the sovereign state's acceptance or rejection of arbitration as an institution.[15] This view has also been adopted by the French *Cour de Cassation*, which has held that France's legislative prohibition "is not a matter of capacity",[16] but rather is based on public interest considerations that are entirely unrelated to the rationale for limiting private contractual capacity.[17] Supporters of this "subjective arbitrability" theory add that self-imposed restrictions, which can be waived at any time by the State on behalf of itself or other/subsidiary sovereign entities, are decidedly unlike defects in legal capacity, which tend to be beyond the incapacitated party's control by definition.[18]

10 The choice between these two alternative characterisations of domestic restrictions on the ability of sovereign entities to enter into arbitration agreements may determine the choice of law that will apply to resolving the question, which in turn can have consequences for the effectiveness of the restrictions. Characterising the issue as one of capacity could lead courts and tribunals in civil law jurisdictions to apply the national law of the state party in question, whereas those in common law jurisdictions might apply the law of the domicile of the party whose capacity is in question.[19] In general, this choice-of-law approach might thus give effect to a domestic legal prohibition on States and sovereign entities consenting to refer disputes to arbitration unless a court avoids this result through the application of corrective factors,

14 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at pp 311 *ff*.

15 See Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.21.

16 *ONIC v Capitaine du SS San Carlo*, Cass.1e civ, 14 April 1964, JCP, Ed G, Pt II, No 14,406 (1965), and P Level's (accompanying) note, discussing C civ art 2060 (France) (formerly imposed by Arts 83 and 1004 of the Code of Civil Procedure).

17 See Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.21.

18 See Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.21.

19 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 538.

such as the doctrines of apparent authority or estoppel.[20] When the issue is characterised as relating not to capacity *per se*, but rather to the signatory's power or authority to enter into an arbitration agreement, the law under which the sovereign entity is organised might apply in both civil and common law jurisdictions, subject to the same corrective factors.[21]

11 If, on the other hand, a court or tribunal characterises the issue as one of objective arbitrability – the substantive public policy concerning which disputes are arbitrable, by virtue of their subject matter – it could then treat a request to compel a sovereign entity to arbitrate like any other question of international public policy. Courts reviewing an arbitral award could apply the principles of international public policy recognised in their own legal system.[22] In holding that the French legislative prohibition on the arbitration of "controversies concerning public bodies and public institutions" did not apply to international business relationships, French courts have relied on a rule of domestic substantive law that international public policy prohibits public entities from invoking provisions of their own national law in order to escape from an otherwise-valid agreement to submit their business disputes to international arbitration.[23] In the 1966 case of *Trésor Public v Galakis*[24] ("*Galakis*"), the *Cour de Cassation* explicitly refused to characterise the issue as one of capacity, reasoning solely in terms of substantive rules in order to affirm the Court of Appeals' decision that the prohibition did not apply "to an international contract entered into for the purposes and in accordance with the usages of maritime commerce".[25] Yet neither *Galakis* nor the subsequent *Société Gatoil v National Iranian Oil Co*[26] ("*Gatoil*") and *Ministère tunisien de l'équipement v Bec Frères*[27] ("*Bec Frères*") cases specified whether the

20 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 538.

21 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 538.

22 See *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 539.

23 *Cour de Cassation*, 2 May 1966, *Trésor Public v Galakis*, 93 Clunet 648 (1966); *Cour d'Appel Paris*, 10 April 1957, *Myrtoon Steam Ship v Agent Judiciaire du Trésor*, 85 Clunet 1002 (1958).

24 *Cour de Cassation*, 2 May 1966, 93 Clunet 648 (1966); *Cour d'Appel* Paris, 10 April 1957, *Myrtoon Steam Ship v Agent Judiciaire du Trésor*, 85 Clunet 1002 (1958).

25 *Cour de Cassation*, 2 May 1966, *Trésor Public v Galakis*, 93 Clunet 648 (1966).

26 *Société Gatoil v National Iranian Oil Co*, Court of Appeal Paris, 17 December 1991 (1993) Rev Arb 281, and H Synvet's note. For an English translation, see 7 Int'l Arb Rep B1 at B3 (July 1992).

27 *Ministère tunisien de l'équipement v Bec Frères*, Court of Appeal Paris, 24 February 1994 (1995) Rev Arb 275, and Y Gaudemet's note. For an English translation,

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Cour de Cassation understood itself to be adopting a substantive rule of French municipal law, or merely recognising the incorporation into French law of a general principle of international public policy.

B. Restrictive approaches to state sovereignty

12 Jurisdictions taking the restrictive approach to state capacity to enter arbitration, which is less prevalent today than in years past, are historically divided between those that absolutely prohibit state entities from agreeing to arbitrate their disputes and those that require a state entity to obtain some sort of authorisation before entering into an arbitration agreement. Some countries absolutely prohibit public entities from submitting their disputes (or at least their domestic disputes) to arbitration. For instance, although it is now limited to domestic law, a form of the complete prohibition persists in the French Civil Code, which provides that "controversies concerning public bodies and public institutions" cannot be referred to arbitration.[28] The Belgian Judicial Code once formerly contained a similar rule providing that "anyone, except public law entities, with the power to enter into a settlement, may enter into an arbitration agreement".[29]

13 It is now more common than before for domestic legislative restrictions to require that state-owned entities obtain authorisation from the relevant authorities before they can enter into arbitration agreements. This is the case, for example, in Saudi Arabia, Iran, Syria

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see *Yearbook Commercial Arbitration 1997* vol XXII (A J van den berg ed) (Kluwer Law International, 1997) at p 682.

28 French Civil Code Art 2060 :

> On ne peut compromettre sur les questions d'état et de capacité des personnes, sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public.
>
> Toutefois, des catégories d'établissements publics à caractère industriel et commercial peuvent être autorisées par décret à compromettre.

29 Belgian Judicial Code Art 1676. This provision was subsequently amended and now reads in relevant part:

> Without prejudice to specific laws, public legal entities may only enter into an arbitration agreement if the object thereof is to resolve disputes relating to an agreement. The conditions that apply to the entering into of the agreement, which constitutes the object of the arbitration, also apply to the entering into of the arbitration agreement. Moreover, public legal entities may enter into arbitration agreements on all matters defined by law or by royal decree decided by the Council of Ministers. The decree may also set forth the conditions and rules to be respected for the entering into of such an agreement.

and Venezuela.[30] Article 139 of the Constitution of the Islamic Republic of Iran provides that:

> The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here.

14 In state-controlled economies, the requisite authorisation for an international arbitration agreement might be considered to be lacking when a state-owned entity fails to obtain a necessary foreign trade licence, for example.[31]

15 Courts vary in their receptiveness to such conditional restrictions. For example, US courts have previously held that the US could not enter into an enforceable arbitration agreement with a private party absent the clearest legislative authorisation. In *BV Bureau Wijsmuller v United States*,[32] the US District Court for the Southern District of New York, relying on US legislative restrictions, ruled that neither the commanding officer of a US naval vessel nor, indeed, the Chief of Naval Operations himself could successfully bind the US to arbitrate a dispute relating to the salvage of a US warship off the coast of the Netherlands, which was carried out by a private party, holding that "only the Congress can remove or tailor the armor of the sovereign's immunity from suit; no officer or representative, regardless of rank, good intentions, or innocent misapprehension of his powers, has the requisite authority".[33] This decision is consistent with the teachings of the US Supreme Court that "[w]ithout specific statutory consent, no suit may be brought against the United States. No officer by his action

30 See Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at para 3.18 and provision cited therein.

31 See, *eg*, Decision of the German Bundesgerichtshof, 23 April 1998, *Yearbook Commercial Arbitration 1999* vol XXIV (A J van den berg ed) (Kluwer Law International, 1999) at p 928 (holding an arbitration clause to be invalid because a Yugoslav party did not have the required foreign trade licence and therefore lacked the capacity to enter into an arbitration agreement).

32 487 F Supp 156 (1979).

33 Born considers this case to represent the exception rather than the rule under US law. See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 632. Its rarity may be due to the non-commercial context of warships, acknowledged by the court: "Whatever uncertainties may arise when agencies of government engage in commercial transactions, relations arising out of the activities of warships have never been regarded as 'commercial' within the context of sovereign immunity."

can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts".[34]

C. Permissive approaches to state capacity to arbitrate

16 Permissive approaches to state capacity to enter into arbitration agreements aim to remove, overcome or obviate domestic barriers impairing States from entering arbitration agreements. In recent years, some countries have adopted laws expressly eliminating limitations on the capacity of the State and state-owned entities to consent to arbitration. This is the case, for example, in England, Switzerland and Greece, as well as under the European Convention. The English Arbitration Act 1996[35] abolished restrictions on legal capacity under the rubric of "Crown application",[36] while Swiss law, which cannot directly regulate the rights of foreign public entities to enter into arbitration agreements, indirectly excludes the possibility of relying on restrictions contained in the national law of the state party:[37]

> If a party to the arbitration agreement is a State or an enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement.

17 Similar rules are found in the Spanish Arbitration Act and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 ("UNCITRAL Model Law"). Several countries adopting the UNCITRAL Model Law, including Egypt, Bulgaria and Tunisia, have adopted provisions explicitly permitting state-owned enterprises to enter into arbitration agreements.

18 The European Convention is particularly forceful in this regard, expressly providing that sovereign entities are empowered to conclude international arbitration agreements. Article II(1) provides that:

> … legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right (*capacité*) to conclude valid arbitration agreements.

19 Article II of the European Convention supersedes any national restrictions on the capacity of States or sovereign entities to enter into arbitration agreements, but its signatory states are also permitted to

34 *United States v Shaw* 309 US 495 at 500 (1940).
35 c 23.
36 See R Merkin, *Arbitration Act 1996: An Annotated Guide* (Routledge, 2nd Ed, 2000) at p 141.
37 Swiss Federal Code on Private International Law Art 177(2).

make reservations from this provision.[38] One such reservation by Belgium lead to the landmark analysis of its effect in the 1983 arbitral award in *Benteler v State of Belgium*[39] ("*Benteler*").

20 The permissive approach is also supported by the language of Art II(3) of the New York Convention, which requires the national courts to compel arbitration unless the arbitration agreement is "null, void, inoperative, or incapable of being performed".[40] The interpretation of the word "inoperative" is controlled by the Vienna Convention on the Law of Treaties ("VCLT"), which looks to the plain meaning of the word in the light of the object and purpose of the New York Convention.[41] Although Art II(3) does not directly explain what renders an agreement "inoperative", a primary purpose of the Convention is to "require courts … to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal".[42] This conclusion is reinforced by Art 32 of the VCLT, which provides that where there is ambiguity in a treaty, its negotiating documents or *travaux préparatoires* are a further aid.[43] According to the New York Convention's *travaux*, the purpose of Art II(3) was to "plainly say that courts should not adjudicate where there had been an agreement to arbitrate but should facilitate the arbitration originally agreed upon".[44] Under the permissive approach, the word "inoperative" in Art II(3) could be construed narrowly, so as to overcome purported domestic legal barriers to the making of valid arbitration agreements.

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38 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-10; Dominique T Hascher, *European Convention on International Commercial Arbitration of 1961 – Commentary, Yearbook Commercial Arbitration 1995* vol XX (A J van den berg ed) (Kluwer Law International, 1995) at p 1006.

39 See *Benteler v State of Belgium*, ad hoc award (18 November 1983) (1989) Rev Arb 339.

40 New York Convention Art II(3).

41 Article 31 of the Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) ("VCLT"); *Chubb & Son, Inc v Asiana Airlines* 214 F 3d 301 at 309, n 5 (2d Cir, 2000) (recognising the VCLT as an "authoritative guide" to treaty interpretation); *Baah v Virgin Atlantic Airways Ltd* 473 F Supp 2d 591 at 595 (SDNY, 2007).

42 United Nations Commission on International Trade Law 1958 New York Convention Guide <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> (accessed 1 August 2014).

43 Art 32 of the Vienna Convention on the Law of Treaties (23 May 1969, 1155 UNTS 331) ("VCLT"); see *El Al Israel Airlines, Ltd v Tsui Yuan Tseng* 525 US 155 at 167 (1999) (using *travaux préparatoires* in treaty interpretation) and *Mora v New York* 524 F 3d 183 at 207 (2d Cir, 2008) (adopting and applying Art 32 of the VCLT).

44 United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-First Meeting, 5 June 1958, at p 22, UN Doc. E/Conf.26/SR.21 (12 September 1958).

21 National courts, as well as arbitral tribunals, have often had occasion to address restrictions on a State's capacity to conclude an arbitration agreement. The permissive trend in the outcomes of these decisions is that, in an international context, States and subsidiary sovereign entities cannot rely on provisions of their own domestic law to invalidate their freely-concluded arbitration agreements.[45] The French approach, illustrated by *Galakis*, *Gatoil* and *Bec Frères*, has been followed in other jurisdictions: US, English, French, Italian, Greek, Egyptian, Moroccan and Tunisian courts have each refused to countenance attempts by foreign states and sovereign entities to rely on their own national legislation in order to deny that they had the legal capacity to enter into otherwise-valid arbitration agreements.[46]

22 International tribunals may also reach similar results disallowing sovereign states to rely on their own laws to repudiate their sovereign entities' international arbitration agreements. A 1971 International Chamber of Commerce ("ICC") award in which the arbitrator was required to rule on the validity of an arbitration agreement entered into by an unnamed State provides an instructive example. The State had argued that the arbitration agreement was invalid on the ground that its own Code of Civil Procedure stipulated that disputes arising out of state contracts could not be referred to arbitration. The arbitrator rejected this argument, holding instead that:[47]

> [I]nternational public policy would be strongly opposed to the idea that a public entity, when dealing with a foreign party, could openly, knowingly and willingly enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void.

23 Another international arbitral award addressed an effort by an Iranian state entity to invalidate its agreement to arbitrate on the ground that the agreement had not received governmental approvals required by Art 139 of the Iranian Constitution. The tribunal in this instance employed an estoppel and reliance rationale, reasoning that

45 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-12. See, *eg*, Award of April 1982 in *ad hoc* arbitration, *Company Z v State Organization ABC, Yearbook Commercial Arbitration 1983* vol VIII (P Sanders ed) (Kluwer Law International, 1983) at pp 94 and 109; for a summary of relevant case law, see *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at pp 542 *ff*.

46 See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at paras 3.26 *ff*.

47 *Italian company v African state-owned entity*, cited by Yves Derains, "Le statut des usages du commerce international devant les juridictions arbitrales" (1973) Rev Arb 122 at 145, and 109 JDI 971 at 977 (1982).

"one must take into account the fact that the defect which affected the arbitration agreement had not been brought to the knowledge of the claimant at the time the agreement was entered into".[48] The Iranian company's failure to mention the requirements of Iranian law concerning the making of arbitration agreements by state entities had "created confidence in the other contracting party", and the state company was accordingly barred from "avail[ing] itself from the nullity of its own commitment".[49] Other international awards converge on similar results.[50]

24 Although the trend in these decisions favours removing, overcoming or obviating restrictions on the capacity of state entities to submit to arbitration, courts and tribunals have used differing approaches to reach this desired result. Three main types of reasoning to this end are summarised in the *Benteler* award of 1983.[51] The first acknowledges the relevance of the national law of the state party by characterising the problem as one of legal capacity, but then neutralises restrictive effects of domestic law by applying various so-called "corrective" factors. These include (a) limiting the scope of the prohibition on sovereign entities' submission of disputes to arbitration to domestic cases only; (b) holding that any State having entered into an arbitration agreement would violate international public policy by later invoking its internal law to avoid its arbitration agreement; and (c) allowing an arbitrator to disregard restrictions where the States recognising them would endorse acting against their earlier behaviour (*contra factum proprium*). The second approach also treats the problem as one of capacity, but then employs a choice-of-law analysis to treat the law of the state party as irrelevant to the issue, applying the law of the contract rather than law of the state party. The third approach treats the issue as one of subjective arbitrability that is governed by a substantive rule of the law of international arbitration that requires state parties to honour their arbitration agreements, precluding them from relying on restrictions in national law to avoid their effects. This last approach, which is probably the current prevailing view, was reflected in the influential *Benteler* tribunal's conclusion that Belgium could not rely on restrictions in its national law to prevent a valid submission to arbitration under Art II(2) of the European Convention.

48 Award in ICC Case No 4381, 113 JDI (Clunet) 1102 at 1106 (1986).

49 Award in ICC Case No 4381, 113 JDI (Clunet) 1102 at 1106 (1986).

50 See examples listed in Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 633, n 382.

51 *Benteler v State of Belgium*, ad hoc award (18 November 1983) (1989) Rev Arb 339. See also the summary in Andrea M Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) at paras 3.31–3.35 and Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at paras 27-13 *ff*.

D. Assessment

25 Permissive legal approaches that assist in removing or overcoming restrictions on the ability of state entities to enter into arbitration agreements have generally found favour with commentators, legislators, judges and arbitrators. While they may not always agree on the correct juridical characterisation of the issue, there is a view that it is contrary to a State's undertaking to arbitrate for the State to later invoke its own legislative, constitutional or administrative acts as qualifying or limiting the validity of its international arbitration agreements. Such efforts are seen not only as irreconcilable with the State's contractual obligations and general principles of good faith and estoppel, but also as contrary to international policy that arbitration agreements must be honoured.[52]

26 Characterising putative restrictions on sovereign entities' duties under their arbitration agreements as relating to subjective arbitrability rather than legal capacity appears to be a method to avoid finding state incapacity. This approach is grounded in international arbitration practice as well as the provisions of the various national laws and international conventions on arbitration. The European Convention, for example, expressly confirms subjective arbitrability by default in the case of state parties,[53] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") is based on the premise that a state party that has agreed to arbitrate is bound by its promise, which is linked closely to the international law principle of *pacta sunt servanda*. However, even when courts and commentators characterise the problem as one of capacity, they tend to apply "corrective" factors, such as limiting the scope of restrictions to domestic cases only or invoking the doctrines of estoppel or *contra factum proprium*, in order to overcome or avoid them.

52 See, *eg*, Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at p 634; *Fouchard Gaillard Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at p 558; Henri Battifol, "Arbitration Clauses Concluded Between French Government-Owned Enterprises and Foreign Private Parties" (1968) 7 Colum J Transnational L 32; and W Craig *et al*, International Chamber of Commerce Arbitration (Oceana Publications, 3rd Ed, 2000) at para 5.02.

53 See Art II(1) of the European Convention on International Commercial Arbitration (21 April 1961, 484 UNTS 349): "[L]egal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements."

III. Sovereign immunity from judicial orders compelling arbitration, interim measures in support of arbitration and enforcement of final arbitral awards

27 The doctrine of sovereign immunity is well established both in public international law and many domestic legal systems. It is understood to be based on principles of comity and the fundamental equality of sovereign states and serves to protect the autonomous functioning of all governments against the burden of defending litigation abroad.[54] This Part of the article addresses the scope of sovereign immunity when a party to an arbitration agreement with a sovereign entity requests judicial action by another nation's courts in order to compel arbitration, grant interim measures in aid of arbitration or enforce a final award. The recent decision of the Singapore Court of Appeal in *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd*[55] ("*Maldives Airports*"), which provides a case-study of these principles in the context of injunctive relief, will be discussed.

28 Historically, foreign states were considered to enjoy full and complete immunity from the jurisdiction of domestic courts, including from the enforcement of judgments and awards. Actions against States and other sovereign entities, including post-adjudication efforts to execute against their assets, could only proceed with their express consent. This position is known as the doctrine of absolute sovereign immunity.[56]

29 Although some domestic legal systems still accord absolute immunity to sovereign defendants in their courts, the increasing involvement of sovereign entities in transnational commercial activities in the 20th century has brought with it the gradual erosion of absolute immunity. In certain jurisdictions, the doctrine of restrictive sovereign immunity is now more favoured.[57] Its rationale is that once a sovereign entity enters the market place and conducts itself like a private party in its commercial dealings, it should not be permitted to avoid the economic and legal consequences of its actions simply by virtue of its

54 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at paras 27-35–27-83 for an excellent and relatively concise overview, on which the following section on immunity from jurisdiction and enforcement heavily depends.

55 [2013] 2 SLR 449.

56 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 37-36.

57 The doctrine of restrictive immunity is reflected in international conventions such as the European Convention on State Immunity and the Draft Articles on Jurisdictional Immunity, prepared by the International law Commission, as well as in national codifications such as the US Foreign Sovereign Immunity Act 1976 (28 USC) or the English State Immunity Act 1978 (c 33).

sovereign affiliation.[58] In the arbitration setting this position translates into greater deference to the institution of arbitration, particularly where the underlying context and object of the arbitration is predominantly commercial in nature.

A. Immunity from the jurisdiction of domestic courts to compel arbitration

30 States and other sovereign entities routinely raise the defence of sovereign immunity from *jurisdiction*, both in arbitration proceedings and before national courts that have been requested to act in their support. Once it has entered into a valid arbitration agreement, however, a sovereign entity cannot invoke its immunity from jurisdiction to avoid being named as a respondent in arbitration proceedings. This obligation flows from the international law principle of *pacta sunt servanda*: having promised to submit disputes to arbitration, a signatory to an arbitration clause must honour its agreement. An arbitration agreement can thus be understood to entail a waiver of sovereign immunity; the question then arises as to the extent of that waiver, and courts may answer it differently at each of the three stages of arbitration.

31 On a theory of "double waiver", a sovereign signatory to an arbitration agreement is understood to consent not only to an arbitral tribunal's adjudicative jurisdiction over the dispute, but also to the supervisory jurisdiction in any ancillary judicial proceedings necessary for the proper and efficient conduct of the arbitration. If sovereign immunity prevented any judicial involvement notwithstanding a valid arbitration agreement, state respondents could circumvent their agreements to arbitrate by, for example, refusing to participate in the appointment of arbitrators to the tribunal. On this line of reasoning, only in very rare cases will it make sense to treat the waiver of immunity represented by a sovereign entity's agreement to arbitrate as limited to proceedings before the arbitration tribunal itself.

32 Recognising that the principle of *pacta sunt servanda* limits sovereign immunity in the arbitration context, some domestic legal systems provide that specific performance is the remedy for breach of an arbitration agreement by sovereign and private parties alike. National courts employ various mechanisms to address situations in which a State that has entered into an arbitration agreement no longer wishes to participate once a dispute has arisen or seeks to stall the arbitration proceedings in some way. Although it is generally recognised that

58 This view was vividly expressed by Lord Mustill of the House of Lords in *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147 at 1171 (HL).

national courts must have some power to ensure that arbitrable disputes are in fact submitted to arbitration, the existence and scope of judicial oversight at the initial stage of compelling arbitration can differ across jurisdictions and between specific cases.

33 The European Convention on State Immunity sets out a relatively narrow view of judicial supervisory jurisdiction to enforce arbitration agreements:[59]

> Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in proceedings relating to:
>
> (a) the validity or interpretation of the arbitration agreement;
>
> (b) the arbitration procedure;
>
> (c) the setting aside of the award,
>
> unless the arbitration agreement otherwise provides.

34 This provision contains two salient limitations. First, it applies only to "civil and commercial" matters. Second, the waiver of immunity does not extend to all court proceedings associated with an arbitration, but only to judicial actions concerning the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award. Under the European Convention on State Immunity, then, the waiver of sovereign immunity to the jurisdiction of national courts that an arbitration agreement entails is not also presumed to extend to actions for the recognition and enforcement of awards.

35 By contrast, the English State Immunity Act 1978[60] ("UK SIA") contains a wider waiver of jurisdictional immunity to court proceedings in support of arbitration by sovereign signatories to arbitration agreements. Section 9 provides:

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

36 The wording of this provision suggests that, by submitting to arbitration anywhere in the world, a State waives its sovereign immunity

59 Article 12(1) of the European Convention on State Immunity (16 May 1972, 1495 UNTS 181).

60 c 33.

in the English courts in any matter relating to that arbitration, irrespective of whether the underlying dispute has any territorial connection to England. However, it is questionable whether this broad effect of including an arbitration clause in a commercial contract might always be foreseeable to sovereign entities; some commentators accordingly favour a narrower interpretation of s 9, requiring at least some sort of connection between England and the arbitration, such as the designated seat of arbitration, a choice of English law to govern the contract or some other factor.[61]

37 In the US, the Foreign Sovereign Immunities Act ("US FSIA") expressly requires that either the arbitration agreement or the underlying dispute have some connection to the US before deeming the state party to have waived its immunity in US courts:[62]

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case …
>
> …
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration under the law of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place in the United States (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable [waiver of immunity] ….

38 In applying this provision, US courts have declined to find a waiver of sovereign immunity when a State consents only to arbitration in some other country and there is no other substantial connection to the US.[63]

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61 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-45 (citing Richard J Oparil, "Waiver of Sovereign Immunity in the United States and Great Britain by an Arbitration Agreement" (1986) 3 J Int'l Arb 61 at 72).

62 28 USC §1605 (1976).

63 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-48 (citing *Verlinden BV v Central Bank of* (*cont'd on the next page*)

39 Despite these variations in domestic laws on sovereign immunity, it seems to be generally the case that a State cannot conclude an arbitration agreement while preserving complete and absolute immunity from any national court that might later be requested to enforce it. In countries that have not codified their domestic law of sovereign immunity in respect of arbitration agreements, including France, Switzerland and Sweden, courts and commentators have nevertheless considered arbitration agreements to waive immunity not only for the arbitration proceedings but also for court proceedings in support of arbitration.[64] If there were a general rule at the stage of initiating arbitration proceedings, it could be that an arbitration agreement effects a "double waiver" of immunity from both arbitral and judicial jurisdiction to ensure that disputes within the scope of the agreement are duly referred to arbitration.

40 Despite support for the implied waiver of jurisdictional immunity in actions to compel arbitration, States and sovereign entities might still attempt to avoid submitting their disputes to arbitration by relying on the act of state doctrine, claiming that the character of the underlying dispute prevents a court from compelling them to arbitrate. When the act complained of in the dispute underlying the arbitration proceedings was not of a commercial nature but instead was an "act of state", foreign courts should abstain from sitting in judgment on that conduct. In the seminal decision of the US Supreme Court in *Underhill v Hernandez*,[65] Chief Justice Fuller wrote that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory". Instead, "[r]edress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves".[66] However, only in relation to its sovereign activities may the State reasonably expect to be immune from legal proceedings in a foreign court, for no immunity attaches for activities of a purely commercial and private nature. Moreover, it does not necessarily follow that because a national court might ordinarily abstain from adjudicating disputes involving sovereign conduct, a State should also be entitled to repudiate its agreement to submit such disputes to arbitration. A rebuttal to an act of state defence at the initial stage of arbitration is that merely enforcing an agreement to arbitrate does not amount to sitting in judgment on the underlying dispute.

Nigeria 488 F Supp 1284 (SDNY, 1980) and *Ohntrub v Firearms Center, Inc* 516 F Supp 1281 (ED PA, 1981)).

64 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-49.

65 168 US 250 at 252 (1897).

66 *Underhill v Hernandez* 168 US 250 at 252 (1897).

41 The approach for a court deciding whether to assume or decline jurisdiction in proceedings involving an alleged act of state was summarised by Lord Pearson in *Attorney-General v Nissan*:[67]

> An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it.

42 Under this approach, a crucial question is what sort of conduct amounts to an "act of state". A given act may amount to an act of state if it was done in the exercise of the State's supreme sovereign power.[68] This analysis poses some difficulties because every action by a State is, in a sense, inherently an "act of state" simply by virtue of the State's sovereign status. Furthermore, a State's conduct may appear to be of a sovereign character when styled as a legislative or executive act even when the same action could equally assume the shape of a private commercial transaction if made by non-state or private actors. It may thus be argued that because the form adopted by the State is largely discretionary and may result from fortuitous circumstances, it should be immaterial to determining the sovereign essence of the action.[69] It is perhaps for these reasons that some courts have recognised that an act of state "is a very unusual situation and strong evidence is required to prove that it exists in a particular case".[70]

B. Interim measures in aid of arbitration

43 State respondents in arbitration proceedings will also sometimes assert the defence of sovereign immunity when a party has petitioned a court acting in support of arbitration for interim or provisional enforcement measures, such as pre-judgment attachment, interlocutory injunctions and temporary restraining orders.[71] Because interim measures of enforcement are exceptional in their ability to constrain and interfere with property rights before a final award is rendered, some jurisdictions do not view the "double waiver" of sovereign immunity to jurisdiction to enforce arbitration agreements as

67 *Attorney-General v Nissan* [1970] AV 179 at 237.

68 See *Salaman v Secretary of State in Council of India* [1906] 1 KB 613.

69 See J Gillis Wetter, "Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals" (1985) 2 J Int'l Arb 7 at 18.

70 See *Attorney-General v Nissan* [1970] AV 179 at 237.

71 See generally D Chamlongrasdr, Foreign State Immunity and Arbitration (Cameron May, 2007) at pp 194–202 ("The Extent of an Express Waiver and a Pre-Judgment Attachment").

extending beyond the initial stage to this context. Both national legislatures and courts may insist on a more express waiver of sovereign immunity when provisional relief or interim measures beyond referring the parties to arbitration are requested from a national court.

44 A waiver may be sufficiently express when the manifestation of a State's intent is "clear, complete, unambiguous and unmistakable".[72] A valid waiver may be made with regard to measures of constraint or attachment of property generally, or only with respect to particular measures or specific property. The question of whether an express waiver was sufficiently broad to cover enforcement measures was considered by the English High Court in *Arab Banking Corp v International Tin Council*.[73] The court in that case had to decide whether language in a facility letter providing that "[t]his credit facility shall be governed by and construed in accordance with the laws of England and shall be subject to the non-inclusive jurisdiction of the English courts" constituted an express waiver of immunity from enforcement. The plaintiff contended that the clause should be construed as an express waiver of general immunity. The court disagreed. Despite the fact that "jurisdiction" could cover both the adjudicative and enforcement powers of the courts, the court construed the waiver narrowly, taking into account several factors, including the well-recognised separate regime of the two immunities, the potential political conflicts which might arise from enforcing measures of execution and the use of the word "jurisdiction" in practice.

45 Courts may reach a different result if slightly different words are used in the clause waiving immunity from pre-judgment enforcement measures. In *A Company Ltd v Republic X*,[74] for example, a question arose about whether the following clause amounted to a waiver of immunity from pre-judgment attachment (in that case, a *Mareva* injunction):

> The Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired) ….

46 The foreign state defendant claimed that the phrase "whatever defence … for itself or its property" did not amount to the written consent to waive immunity according to s 13(3) of the UK SIA. The court held that having considered the context of the case, which concerned a commercial transaction, the clause should be construed like

72 *Aguinda v Texaco* 175 FRD 50 at 52 (SDNY, 1977); *Libra Bank Ltd v Banco Nacional de Costa Rica, SA* 676 F 2d 47 at 49 (2d Cir, 1982); *Jota v Texaco Inc* 157 F 3d 153 (2d Cir, 1998).

73 *Arab Banking Corp v ITC* (HC) (QB) (15 January 1986) 77 ILR 1.

74 [1990] 2 Lloyd's Rep 520 (QB Comm).

a commercial contract in accordance with the principles of construction of commercial contracts. The court explained that "the intent and purpose of the clause is quite clear, namely, to put the State on the same footing as a private individual so that neither in respect of the State nor its property would any question of sovereign immunity arise in connection with the State's obligations to the plaintiffs under the agreement".[75]

47 In *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*,[76] a different case dealing with whether a clause waiving immunity from legal proceedings would constitute a waiver of immunity from an interim injunction, the court did not apply the principles of construction of commercial contracts, though they were cited in support of the holding. Instead, the court considered the entire context of the clause before affirming the plaintiff's submission that by waiving "any right of immunity … in connection with any proceedings" in the waiver clause, the foreign state had consented to the granting of any relief against it in connection with such proceedings, including an interim injunction for *Mareva* relief or for an anti-suit injunction.[77]

48 The issue of sovereign immunity may also arise when interim measures are sought in investor-state arbitration. Consent to submit a dispute to the International Centre for Settlement of Investment Disputes ("ICSID") arbitration does not necessarily waive immunity from interim measures issued by national courts. In *ETI Euro Telecom Intl NV v Republic of Bolivia*,[78] the English Court of Appeal rejected the investor's argument that, pursuant to the UK SIA, the State waived immunity from an asset-freezing order issued by the lower English court by entering into a bilateral investment treaty containing an ICSID arbitration clause. The lower court initially issued an *ex parte* freezing order, but upon a hearing by both parties, it subsequently set aside the order.[79] It concluded that because the ICSID Convention required that ICSID arbitration should be the exclusive forum to seek remedy of the dispute, and because the ICSID Convention and Rules provided the tribunal the authority to issue provisional measures, the arbitration clause in the bilateral investment treaty constituted a "contrary provision in the arbitration agreement" under s 9 of the UK SIA sufficient to avoid waiver of immunity.[80] The Court of Appeal agreed with the lower court's decision, but rather than relying on s 9 to protect

75 *A Company Ltd v Republic X* [1990] 2 Lloyd's Rep 520 at 523 (QB Comm).
76 [2003] 2 Lloyd's Rep 571 (CA).
77 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at 577.
78 [2008] 2 Lloyd's Rep 421 (CA).
79 *ETI Euro Telecom Intl NV v Republic of Bolivia* [2008] 2 Lloyd's Rep 421 at [39]–[42].
80 *ETI Euro Telecom Intl NV v Republic of Bolivia* [2008] 2 Lloyd's Rep 421 at [60].

the State's immunity, as the lower court did, it relied on s 13(3) of the UK SIA, which requires "written consent of the State" in order for the court to issue an injunction against the State.[81] It concluded that "[p]roceedings for a freezing order to preserve the position pending execution of an award are within section 13 and are not 'proceedings which relate to the arbitration' for the purposes of section 9".[82] Therefore, it appears that the court refused to extend the broader waiver of jurisdictional immunity afforded by s 9 to requests for interim relief. It remains to be seen whether English courts will issue orders in support of interim measures ordered by investor-state tribunals against respondent States under the ICSID Convention, or whether the English courts will hold that even those tribunal-ordered interim measures are unenforceable in English courts due to sovereign immunity, and that consent to bilateral investment treaties and the ICSID Convention itself are insufficient to constitute "written consent of the State" to court jurisdiction over preliminary injunctive relief in aid of arbitration.

49 In the US, the US FSIA requires an express waiver of immunity from measures of pre-judgment attachment.[83] Although this provision has been subject to varying interpretations, US District Courts in *Reading & Bates Corp v NIOC*[84] and *E-System Inc v Islamic Republic of Iran*[85] have stressed that the standards for pre-judgment and post-judgment waiver must be distinguished, with the former requiring greater scrutiny.[86] Under these decisions, while immunity from attachment of assets for the purpose of enforcing a final award can technically be waived implicitly as well as explicitly in the US, measures of pre-judgment attachment require a more explicit standard because they are potentially more intrusive to the sovereign.

C. Enforcement of the award

50 Measures to *enforce* a final award against state assets not necessarily connected with the transaction or subject matter of the dispute could be considered to be a more intensive interference with its sovereign dignity than submission to domestic courts' jurisdiction at the initial stage. Moreover, there is an additional policy concern in this context that more liberal enforcement measures might prevent foreign states from contracting as more of their property would be at risk to

81 *ETI Euro Telecom Intl NV v Republic of Bolivia* [2008] 2 Lloyd's Rep 421 at [112].
82 *ETI Euro Telecom Intl NV v Republic of Bolivia* [2008] 2 Lloyd's Rep 421 at [113].
83 28 USC §1610(d)(1).
84 478 F Supp 724 (SDNY, 1979).
85 491 F Supp 1294 (ND Tex, 1980).
86 See D Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, 2007) at para 6.32.

measures of execution.[87] Accordingly, under some laws, the exceptions to immunity from enforcement of the award are narrower than those to immunity from jurisdiction.[88]

51 Nevertheless, some decisions appear to have taken a permissive approach, treating an arbitration agreement as a "double waiver" not only of immunity from jurisdiction, but also for purposes of enforcement of a final award against state assets. The Swiss Federal Court, for example, has previously held in *United Arab Republic v Mrs X* that since powers of execution derive from powers of jurisdiction, there is little reason for Swiss courts to treat immunity from execution differently than immunity from enforcement.[89] However, the reasoning in that case is thought to be limited by the fact that the property concerned was commercial in nature.[90] Likewise, the French *Cour de Cassation* in *Creighton v Qatar* appeared to apply the "double waiver" theory by deeming Qatar's submission to ICC arbitration to have waived its immunity from execution, basing its reasoning on the obligation in Art 24 of the 1988 ICC Rules (current Art 28) to carry out the resulting award and to waive any right to appeal.[91]

52 The double-waiver theory is still not widely accepted in the context of recognition and enforcement of final arbitral awards, where a restrictive view is more common than at the initial stage. In many cases,

87 See Giorgio Bernini & Albert Jan van den Berg, "The Enforcement of Arbitral Awards against a State: The Problem of Immunity from Execution" in *Contemporary Problems in International Arbitration* (Julian Lew ed) (Martinus Nijhoff, 1987) at p 359.

88 See Karl-Heinz Böckstiegel, Arbitration and State Enterprises (Kluwer Law International, 1984) at p 50; see also Germany, Bundesverfassungsgericht, 13 December 1977, BVerfGE 46, 342, 367; 65 ILR 146 (1984).

89 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-59 (citing Tribunal Fédéral, 10 February 1960, *United Arab Republic v Mrs X*, 88 Clunet 458 (1961)); Jean-Flavien Lalive, "Swiss Law and Practice in Relation to Measures of Execution against Property of a Foreign State" (1979) 10 Netherlands YB Int'l L 153.

90 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-59 (citing *Arab Republic of Egypt v Cinetelevision International*, Swiss Tribunal Fédéral, 20 July 1979, 65 ILR 425 at 430 (1984)); see also Landgericht Frankfurt, 2 December 1975, 65 ILR 131 at 135 (1984).

91 See *Creighton Ltd v Ministry of Finance and Ministry of Municipal Affairs and Agriculture of the State of Qatar*, Cour de Cassation, 6 July 2000, 15(9) Mealey's IAR A-1 (2000). But see *Maritime International Nominees Establishment (MINE) v The Republic of Guinea*, Tribunal de Première Instance of the Canton Geneva, 13 March 1986 (no immunity from execution so long as "the foreign State is acting [not] in exercise of its sovereignty (*jure imperii*) [but] in exercise of private rights (*jure gestionis*) like a private party" and "the legal relationship which has given rise to the dispute has a nexus with the territory of this country, that is to say that it arises here, or is to be implemented here, or at least that the debtor has performed certain acts of such a nature as to create a venue for execution here").

even though parties are presumed to have undertaken an obligation to honour an ensuing award, the theory that a "double waiver" to both jurisdiction and enforcement is contained in an ordinary arbitration clause has not found strong support in most national legislation or case law concerning the recognition and enforcement of arbitral awards.[92] The ICSID Convention, despite setting out a treaty obligation that state respondents honour awards against them, nevertheless arguably permits them to claim immunity from execution under domestic legal systems.[93]

53 Countries whose laws take the more restrictive view by requiring a separate express waiver from enforcement also differ with respect to the precision of language required in order to find a waiver and the type of assets that such a waiver might enable award creditors to reach. The UK SIA, for example, makes clear that the submission to jurisdiction does not automatically include a submission for enforcement purposes but is relatively permissive in respect of the language that it deems sufficient for a waiver.[94] Waivers of "whatever defences it may have of sovereign immunity for itself or its property" have been considered sufficient to allow measures of execution.[95] Likewise, some other countries' courts recognise that an express waiver of immunity may render any property held and used for *acta iure imperii* susceptible to execution.[96] In contrast, such a generalised express waiver could be found insufficient at the post-award stage in the US, where the US FSIA states that a waiver of immunity from enforcement applies only to "the property in the United States of a foreign state … used for a commercial activity in the United States".[97]

54 Even in jurisdictions where past national court decisions have implied a double waiver of immunity, to avoid the uncertainty of whether double waiver will apply, a party entering into an arbitration agreement with a State may be well-advised to bargain for an

92 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-54. Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") provides that by entering into an arbitration agreement the State also undertakes to honour the award.

93 See Art 54 of the ICSID Convention.

94 See s 13(3) of the State Immunity Act 1978 (c 33) (UK). Although the provision refers only to submission to the jurisdiction of the courts, the principle has been applied to arbitration agreements which are not considered to be sufficient to constitute a submission for the purpose of enforcement. See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-58.

95 See *A Co Ltd v Republic of X* [1990] 2 Lloyd's Rep 520.

96 See, *eg*, s 11(a) of the Canada State Immunity Act; for an analysis, see Christoph Schreuer, "Commentary on the ICSID Convention" (1999) 14 ICSID Rev-FILJ 117 at 145.

97 28 USC §1610.

appropriately specific and express waiver of immunity from enforcement. The model clause suggested by ICSID reads:[98]

> The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.

55 Finally, there is also considerable variation among national laws with respect to the scope of the so-called "commercial activity or purposes" exception to sovereign immunity from enforcement. A relatively narrow view is expressed in the International Law Institute's Draft Articles on Jurisdictional Immunities of State and Their Property 1991, which limit measures of execution to property "allocated or earmarked for the satisfaction of the claim which is the object of that proceeding" or "specifically in use or intended for use by the State for other than government non-commercial purposes that is in the territory of the State of the forum and has a connection to the claim [or to the relevant state entity]".[99] The limitation to commercial property that has some connection to the underlying claim can significantly curtail the ability to enforce an arbitral award against a State's assets located in jurisdictions following this rule. No special nexus between the property in question and the underlying claim is required in the US or other common law countries.[100] However, in most cases, some connection between the claim or subject matter of the arbitration and the US is required by the general rules on personal jurisdiction.[101]

D. The Singapore Court of Appeal recently considered sovereign immunity from interim enforcement measures

56 In *Maldives Airports*, the Singapore Court of Appeal recently dealt at considerable length with the issue of sovereign immunity from provisional measures of enforcement under Singapore law in a dispute arising out of a concession agreement for the expansion and modernisation of the Male International Airport between the Maldives government, a state-owned enterprise overseeing the Airport ("MACL") and a business consortium that soon transferred its rights to GMR Male International Airport Pte Ltd ("GMR"). GMR intended to finance the project by imposing a fee on departing passengers, a measure that the

98 Doc ICSID/5/Rev 2 cl 15. For further examples, see Christoph Schreuer, "Commentary on the ICSID Convention" (1999) 14 ICSID Rev-FILJ 117 at 150.

99 International Law Institute, Draft Articles on Jurisdictional Immunities of State and their Property (1991) Art 18.

100 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-71.

101 See Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 27-72.

Male Civil Court declared to be contrary to a piece of Maldivian legislation.[102] Following the judgment, negotiations took place between the parties and MACL, and the Maldives government agreed with GMR to a variation of the fees payable to MACL under the concession agreement to account for GMR's expected loss of revenue arising from the judgment. But after a change of government in the Maldives in 2012, MACL informed GMR that the earlier agreement modifying the fees payable to MACL was issued without authority by its former chairman. Eventually, the Maldives government and MACL informed GMR that they considered the concession agreement void *ab initio* or, in the alternative, that it had been frustrated by that ruling ("November Notices"). The November Notices gave GMR seven days to vacate the Airport to allow MACL and the Government to take over the premises. The Maldives government then commenced a second set of arbitration proceedings under the concession agreement seeking, *inter alia*, a declaration that the concession agreement was void and of no effect.

57 GMR responded by seeking an injunction from the Singapore High Court to restrain the Maldives government and MACL and their directors, officers, servants or agents from taking any step (a) to interfere with its performance of its obligations under the concession agreement; or (b) to take possession and/or control of the Airport or its facilities pending further order by the Singapore court or an arbitral tribunal constituted to resolve the dispute.[103] The Singapore High Court judge granted the injunction in respect of (a) but made no order as to (b). When the Maldives government appealed that decision to the Singapore Court of Appeal, the issue in relation to the injunction granted by the High Court was twofold: (1) does a Singapore court have the power to grant the injunction, particularly against the Government of a foreign state; and (2) if the court has such a power, should the injunction be granted or upheld in all the circumstances of the present case?

(1) Singapore courts have the power to grant provisional injunctive relief in aid of arbitration with respect to an interest in land situated in a foreign state

58 The Court of Appeal held that neither the State Immunity Act[104] nor the act of state doctrine deprived Singapore courts of the power to grant provisional injunctive relief in aid of arbitration over GMR's interest in the land on which the Airport was situated. First, the Court of Appeal rejected the Maldives government's jurisdictional objection that

102 Act No 71/78.

103 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [8].

104 Cap 313, 1985 Rev Ed.

a Singapore court could not grant an injunction against a State by reason of the prohibition contained in s 15 of the State Immunity Act. Section 15 of the State Immunity Act provides in relevant part:[105]

> (2) Subject to subsections (3) and (4) –
>
> (*a*) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (*b*) 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.
>
> (3) Subsection (2) does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

59 The court dismissed the Maldives government's argument that it was immune from enforcement on the grounds that cl 23 of the concession agreement was sufficient to constitute written consent pursuant s 15(3) of the State Immunity Act.[106] Clause 23 of the concession agreement provided:

> 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.* [emphasis added by the court]

60 The Court of Appeal was not persuaded by the Maldives government's related argument that, because the concession agreement was allegedly void *ab initio*, the waiver of immunity by the Maldives government was also void.[107] The court found in response that the entire dispute-resolution mechanism, including the waiver of immunity, would in any case survive under the doctrine of separability. The court explained that "[t]he rationale for upholding the choice of law clause in such circumstances is simply that the framework which the parties have agreed should govern the resolution of differences that might arise

105 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [17]–[22].

106 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [18].

107 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [19]–[22].

between them should be upheld and applied".[108] The court noted that the position might very well be different if the basis for alleging that the concession agreement is void *ab initio* is that the contract itself never came into existence because no offer was made, or, if an offer had been made, it was never accepted.[109]

61 Second, the Court of Appeal concluded that the November Notices asking GMR to vacate the Airport amounted to an act of state over which the Singapore court could not sit in judgment.[110] Extensively citing English case law establishing a very high standard to demonstrate an act of state, the Singapore Court of Appeal concluded that this burden had not been discharged by the Maldivian government.[111] According to the court, the contractual dealings between the parties had been essentially of a private nature, even though one of the disputing parties happened to be a State. Furthermore, the appellants' asserted basis for taking over the Airport stemmed from their claim that the concession agreement was void *ab initio* and/or had been frustrated, which are matters of contract law, rather than the concerns of international comity that might warrant application of the act of state doctrine. The court concluded that it was "evident … that there is no act of the Maldives Government pursuant to an exercise of sovereign power which is impinged by the Injunction".[112]

62 Third, after requesting submissions on the scope of the "evidence or assets" over which a court could grant remedial relief under s 12A(4) of the IAA,[113] the court observed that Singapore courts have the power to grant interim measures in support of arbitration proceedings where such measures are "necessary for the purpose of preserving evidence or assets".[114] The court accepted that preserving "assets" could include protecting contractual rights, such as *choses in action*. However, it cautioned against reading this power too broadly as "not all contractual rights may be the subject matter of a preservation

108 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [20].
109 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [21].
110 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [23]–[31].
111 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [29]–[30].
112 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [30].
113 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [32].
114 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [34].

order".[115] Rather, the class of assets was properly limited to "those which, if lost, would not adequately be remediable by an award in damages".[116] The court then found that while it could grant an injunction with respect to the preservation of GRM's interest in the land on which the Airport site was situated, an injunction was improper with respect to the two contractual rights for which GRM had sought protection – namely, the right to be served appropriate notice for termination of the agreement and the right to have the dispute over entitlements under the agreement resolved by the tribunal before those entitlements were destroyed.[117]

(2) The injunction was, however, reversed

63 Following an extensive review of the facts, the court concluded that the injunction should not be preserved in the present circumstances.[118] While the court was satisfied that the injunction would have been necessary to preserve GMR's interest in the site, it was also of the view that the balance of convenience did not lie in favour of granting or upholding the injunction. In particular, GMR failed to convince the court that there would not be an adequate remedy in damages if the Maldives government were not entitled to take over the Airport. Though not devoid of difficulties, these losses were calculable. In contrast, the difficulties in assessing the damages to the Maldives government if the injunction turned out to be unjustified were significant.

64 The court further noted that the reach and extent of the injunction was uncertain and presented considerable practical difficulties to the Maldives government in complying with the injunction.[119] Finally, the court explained that while GMR had expressed a willingness to provide a cross-undertaking for damages which might be awarded to the Maldives government if it were later found the injunction should not have been granted, it had failed to provide security to back up its' cross-undertaking.[120]

115 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [40].
116 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [43].
117 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [45]–[49].
118 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [53]–[80].
119 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [66].
120 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [79]–[80].

(3) Comment

65 As a restatement of the breadth of the sovereign immunity defence in Singapore courts and of the scope of s 12A(4) of the International Arbitration Act[121] ("IAA"), *Maldives Airports* is a noteworthy judgment. Several aspects of the decision deserve special attention and comment.

66 First, although the judgment appears to be a vindication of the jurisdiction of Singapore courts to supervise arbitration and their power to grant injunctions against sovereign states, the Singapore court did not, in fact, find that an interim injunction restraining the Maldives government was warranted in the circumstances. It may be asked, therefore, whether concerns of state sovereignty played a role in the court's reasoning nonetheless, albeit in the guise of other legal considerations that must be weighed in deciding whether to grant injunctive relief. The court may have implicitly acknowledged the importance of sovereignty when it expressed concerns that the injunction granted by the High Court "reached beyond the scope of the contractual dispute between the parties into the realm of restricting the operations and duties of domestic regulators whose regulatory functions encompass aspects related to the operation of the Airport".[122] More specifically, the court said that "governmental bodies involved in the regulation of transportation, tourism and even defence might [be] affected",[123] and cautioned that "interim injunctive relief should not be granted if it requires an unacceptable degree of supervision in a foreign land".[124]

67 Second, *Maldives Airports* is significant because the Court of Appeal narrowed the potential scope of s 12A(4) of the IAA. Although it found that Singapore courts had the power to grant an interim injunction with respect to GMR's interest in the Airport site, which was covered under the term "assets" in s 12A(4) of the IAA, it found that the right to be served appropriate notice for termination of the agreement and the right to have the dispute over entitlements resolved by the tribunal under the agreement were not covered. The narrowing of the scope of "assets" can be seen as a further attempt by the court to strike the proper balance between fulfilling its supervisory function without interfering in the exclusive domain of a foreign sovereign state, particularly where damages would be sufficient.

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121 Cap 143, 2002 Rev Ed.

122 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [69].

123 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [70].

124 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [71].

68 Third, notwithstanding the above focus on the limits of the decision, it is important to emphasise that the court did not capitulate to the principle of state sovereignty. Most notably, the court upheld a robust doctrine of waiver and stood by a narrow application of the act of state doctrine. With respect to waiver, the court easily found that such a waiver existed under s 15(3) of the State Immunity Act (though s 11 of the IAA also appears to provide grounds for waiver).[125] Moreover, the court held firm by dismissing the Maldives government's attempt to circumvent the waiver clause on the basis that it was contending in the arbitration that the concession agreement was void *ab initio*. Interestingly, although it held that the waiver clause was severable in the circumstances, the court opened the door to a different result if the Maldives government had argued that "the contract itself never came into existence".[126]

69 In relation to the application of the act of state doctrine, the court cautioned that a high degree of proof is required to establish an act of state, particularly where the parties are seeking private law remedies. On this point, the court provided an interesting *obiter dictum* regarding whether a possible *future* act of state might be the subject of an injunction, observing that "where a possible future act of State might be the subject of an injunction, the wider principle of judicial abstention or restraint should apply and the court should refrain from adjudicating on the matter".[127]

IV. Conclusion

70 In this article we have examined the initial, middle and terminal stages of international arbitration against a State that may require national courts to account for state sovereignty and its limits. In particular, we considered how national courts and legislatures have attempted to balance the policy tension between respecting the sovereignty of States while enforcing their agreements to arbitrate international disputes, supporting arbitrations through interim judicial measures and enforcing international arbitration awards. The policy tension in this area is complex, and the variety of responses from different courts on these issues demonstrates that judges and legislators

125 Section 11(1) of the International Arbitration Act (Cap 143, 2002 Rev Ed) reads: "Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so."

126 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [21]. The court noted: "However, that is not the case here, and as this point was never canvassed before us, we express no view on this."

127 *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 at [31].

are sensitive to these competing policies. However, how the balance will be struck in each case ultimately may depend on the facts of the case, the attitude of the adjudicators and the law of the jurisdiction.