CHAPTER 13

Sovereign Immunity from Execution of Foreign Arbitral Awards: Sweden's Liberal and Pragmatic Contribution

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§13.01 INTRODUCTION

The plea of sovereign immunity can be invoked by a State in order to prevent a foreign court from either exercising its jurisdiction to hear a case against the state or to attach and execute against its property. In other words, it functions as a procedural shield available only to States, whereby the substantive issues at hand cannot be addressed by the foreign court if the plea is successfully invoked.

Courts have struggled with the plea of sovereign immunity for many years, but yet several issues remain unresolved.[1] One largely unresolved issue is that of immunity from execution, and hence it has been described as "the last fortress, the last bastion of [sovereign] immunity."[2] This chapter will discuss the defense of sovereign immunity from execution of foreign arbitral awards in the Swedish context. This will include some discussion on attachment, which can also be a post-judgment measure of constraint. This seemingly technical and narrowly defined question will, however, underscore a much greater debate on the theory of sovereign immunity and the scope, extent, and degree of qualifying the general rule of immunity.[3]

1. Kaj Hobér, *Selected Writings on Investment Treaty Arbitration,* 497 (Lund: Studentlitteratur AB, 2013).
2. *Yearbook of International Law Commission Commentary*, Art. 18, paras. 1, 208 (United Nations, 1986).
3. The law of sovereign immunity—regardless of adhering to the absolute or restrictive theory of immunity—provides that absolute immunity is the rule. The restrictive theory then enumerates exceptions to the rule, e.g., based on commercial activity. *See*, e.g., James Crawford, *Brownlie's Principles of Public International Law,* 489 (8th ed., Oxford: Oxford University Press, 2012);

While the issue of immunity from execution remains largely unresolved, the Swedish experience has neither been a regressive nor a silent one. Quite the opposite, Swedish courts have contributed to the development of the law of sovereign immunity in a liberal and progressive manner. That said, a recent decision from the Svea Court of Appeal has presented some deviation from the Swedish contribution thus far, and it is hoped that the regressive decision will soon be reversed in the Supreme Court.[4] The author is convinced that global commerce, trade, and investment will be richer if foreign and international courts accommodate the Swedish experience as a best practice of public international law and transnational adjudication. This chapter seeks to disseminate this contribution to the international legal community, while simultaneously making the point that Swedish courts should keep faithful to its liberal and pragmatic ethos.

In a Swedish case from 2011 regarding execution of State property, the Swedish Supreme Court *inter alia* (a) accepted parts of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) as a codification of customary international law, and (b) treated the purpose test liberally by reasoning pragmatically on the property of "mixed-use" (i.e., commercial and governmental).[5] In this case, the State was not able to shield its property. As a result, the State was held accountable in accordance with the decision in the arbitral award, which was both enforced and executed. The Court endorsed the ends as well as the means of international arbitration between investors and host States. The Court exercised its coercive powers in a situation where the State for no legitimate reasons had both decided to default on its voluntarily and freely entertained agreement to protect foreign investments and to arbitrate any grievance stemming from such protection.[6] This case represents neither an embarrassment nor an infringement on that sovereign's dignity, independence or equality. On the contrary, it manifests that a State is sovereign enough to engage in international affairs as a private actor.

Foreign Sovereign Immunities Act 1976; State Immunity Act 1978; the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property; and *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012.

4. *See The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (June 17, 2020).
5. *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475). *See also* a recent District Court judgment with a similar reasoning, i.e., *Stockholm District Court,* T 10498-17, 21 (Kazakhstan making the point that "the Supreme Court has declared in NJA 2011 p. 475 that the [UNCSI] to large extent is a codification of international customary law.").
6. For a recent and good reasoning making a pro-arbitration point *vis-á-vis* enforcement and immunity, *see Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157, para. 179 ("It was thus apparently the intention of the parties to the ECT to create rights in favour of private investors capable of enforcement in consensual arbitration against one or other state parties to the ECT […] and that, therefore, [i]n that regard, it has agreed to the terms of the Investment Convention which provide, amongst other things, that a Centre award is binding on the parties and is not subject to any appeal or any other remedy except those provided for in the [ICSID Convention Art 53], that Contacting States (including Australia) are obliged to 'recognise and enforce the pecuniary obligations imposed' by the award 'as if it were a final judgment of a court in that state'.").

This chapter makes the point that Sweden—together with other arbitration friendly jurisdictions—should remain a driving force in shaping the law on sovereign immunity from execution of foreign arbitral awards. These arbitration friendly jurisdictions should not give in to regressive sentiments stemming from investor-state arbitration backlash or political pressure. Thus far, Swedish courts have exercised an overall pro-arbitration approach. This has been manifested in the courts' pragmatic decision-making, e.g., with respect to back-end supervision of award enforcement.

However, the International Court of Justice (ICJ) remains best placed to interpret and consolidate the overall framework on immunity from execution when the opportunity arises.[7] In the author's view, the ICJ should exercise its jurisdiction to strengthen the currency of liberal and pragmatic municipal decisional law by forming certain principles of state practice as customary international law. The ICJ did some good work in this respect in its famous 2012 *Jurisdictional Immunities* case.[8] That said, the debate on the evolution of the law is on-going and the Swedish contribution as a politically neutral country with an independent judiciary will remain important.

§13.02 SOVEREIGN IMMUNITY: SOURCES AND THEORY

The law on immunity is one of the classic branches of public international law.[9] The law on sovereign immunity has evolved separately from other areas of immunity, e.g., diplomatic immunity or immunity for international organizations. In addition, the law on sovereign immunity has evolved differently depending on the context, e.g., arbitration, human rights violations, torts. Sovereign immunity operates on twin bases as: (1) immunity *ratione materiae* (i.e., a direct inference from the equality and independence of states), and (2) immunity *ratione personae* (i.e., foreign state officials should not be subject to host state jurisdiction—the personal or functional level).[10] Here, we are concerned only with the former. Moreover, it should be said that the law on immunity is a procedural plea and does in no way exonerate legal liability per se.

Sovereign immunity has been described as "a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts."[11] Put differently, "[i]ts rationale is to promote the functioning of all governments by protecting states

7. Depending on your preference of judicial methodology and attitude, i.e., whether ICJ judges should be pro-active or restrained, one could also make the case for further elaboration in *obiter dicta*. *See* Pieter Kooijmans, *The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy*, 27 International and Comparative Law Quarterly 741–753 (2007), Vera Gowland-Debbas, "*The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties*" in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (1st ed., Oxford: Oxford University Press 2013).
8. *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012.
9. Jan Klabbers, *An Introduction to International Institutional Law*, 139 (2nd ed., Cambridge: Cambridge University Press 2009).
10. *See* Crawford, *supra* n. 3, at 487.
11. *Ibid.*

from the burden of defending litigation abroad."[12] Therefore, it has been described as a protection that enables states "to carry out their functions effectively."[13] In practice, absolute immunity seems to be a default international rule of law that has been subjected to municipal procedural exceptions due to contextual realities.[14]

The law on sovereign immunity is a branch of public international law. Therefore, the sources are, generally speaking, to be found in Article 38(1) of the Statute of the ICJ.[15] Because a multilateral framework is lacking, the law has primarily developed through domestic decisional law (and in parts of the world through legislation). It has been noted that "[i]mmunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum."[16] As a result of the lack of a harmonized legal framework, many States engaged in discussions in order to reach consensus on the application and interpretation of the law. This eventually culminated in a multilateral treaty, namely, with the adoption of the 2004 UNCSI.[17] The UNCSI has not yet entered into force. However, given the fact that the convention has been adopted by several influential States (including Sweden) and was essentially produced as a verbatim result of the International Law Commission (ILC), it has largely been treated as a codification of customary international law. Thus, "the starting point for any discussion of the international law relating to [sovereign] immunity is now the

12. Julian D.M. Lew, Loukas A. Mistelis & Stefan Kröll, *International Comparative Commercial Arbitration,* 744 (Kluwer Law International, 2003).
13. Hazel Fox & Philippa Webb, *The Law of State Immunity* (3rd ed., Oxford: Oxford University Press, 2013).
14. *See*, e.g., Crawford, *supra* n. 3, at 489; Foreign Sovereign Immunities Act 1976; State Immunity Act 1978; the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property; and *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012.
15. Article 38 of the Statute of the International Court of Justice (adopted on April 18, 1946) ("1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."), www.icj-cij.org/en/statute.
16. Crawford, *supra* n. 3.
17. The convention will take effect and enter into binding force when ratified by thirty countries. This is not likely to happen anytime soon. To this day (May 22, 2019) fourteen have signed but not ratified the Convention; including Belgium, China, India, Russia, and the U.K. twenty-two States have ratified the Convention, including Austria, France, Iran, Italy, Japan, Saudi Arabia, Sweden, and Switzerland. The United States have neither signed nor ratified the Convention, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en. Some of these states have traditionally been opposed to restrictive immunity, e.g., China, India, and Russia. Furthermore, two earlier treaties deal with sovereign immunity (one in a narrow context and the other limited to members of the Council of Europe); that is, the Brussels Convention for the Unification of Certain rules Relating to the Immunity of State-Owned Vessels (adopted on April 10, 1926, additional protocol added on May 24, 1934) and the European Convention on State Immunity (adopted on May 1972) (ECSI).

text of that convention."[18] Other sources of significance include decisions of international tribunals and municipal courts[19] and scholarly work.

Absolute immunity has been replaced in most parts of the world, especially with respect to immunity from jurisdiction (alternatively "adjudication" or "suit"). The theory on restrictive immunity is based on a distinction of State acts as either (1) an exercise of sovereign authority (*acta iuree imperii*) or (2) an act that a private person may perform (*acta iuree gestionis*). Conclusively, States should not be treated differently when acting as private parties. This distinction rests and is firmly entrenched on the concept of "commerciality."[20] Nowadays, further exceptions are increasingly being carved-out from the general rule of immunity from jurisdiction as well as execution.

At the inception of the restrictive phase on immunity, a debate emerged, namely, whether commerciality should be determined on the basis of the "nature of the act" (the nature approach) or on the basis of the "purpose of the act" (the purpose approach).[21] The nature approach has gained most traction and is the dominant position. In other words, if the act is commercial in nature (or an act under the private law sphere), the state's immunity should be limited even if there is an alleged public purpose. However, despite being rejected in the context of immunity from jurisdiction, the purpose test unfortunately surfaces as the main test for elaborating a limitation on sovereign immunity from execution.[22] Finally, some States add a nexus requirement, i.e., a minimum connection between the territory and the commercial act or between the territory and the host-State where the property is located.[23]

This chapter focuses on immunity from execution. An illustration of the general rule on immunity from execution and exceptions that have received a general

18. Fox & Webb, *supra* n. 13. *See*, e.g., *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012 (the Court held *inter alia* that parts of the Convention were a codification of customary international law). *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475) (where the court relied on the 2004 Convention as constituting in part customary international law).
19. Primarily from the International Court of Justice; *see*, e.g., *Democratic Republic of the Congo v. Belgium*, Arrest Warrant, Judgment of February 14, ICJ Reports 2002; *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012; and *Islamic Republic of Iran v. United States,* Certain Iranian Assets, Judgment of February 13, 2019 (preliminary objections), ICJ Reports 2019.
20. There is no red-line between what is a commercial activity and what is not. The court must draw a distinction on a case-by-case basis unless the activity or transaction falls in a "straight-jacket," such as a sale of goods. *See* Xiaodong Yang, *State Immunity in International Law*, 77 (Cambridge: Cambridge University Press 2012), where the author stated that: "all that the current instrument on State immunity say is, in essence, that 'a commercial activity is a commercial activity'. This is pure tautology. In most cases, therefore, the courts are left to their own devices; and an examination of the relevant case law reveals a picture of great variety and complexity." It is equally difficult to understand what is a governmental, non-commercial activity.
21. One could add a "context approach." *See Ibid.*, at 85. Some judges have found difficulty in favoring a distinction and have instead searched for an answer in the totality of the circumstances.
22. Ylli Dautaj, *Enforcing Arbitral Awards Against States and the Defence of Sovereign Immunity from Execution*, 16(3) Manchester Journal of International Economic Law (2019).
23. *See*, e.g., U.S. section 1605(a)(2) of The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

consensus worldwide can be found in the UNCSI.[24] More specifically, in Articles 19 (post-judgment), 20 (effect of consent to jurisdiction to measures of constraint), and 21 (specific categories of property (considered immune)). The articles read as follows:

> **Article 19**
> **State immunity from post-judgment measures of constraint**
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> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
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> (a) the State has expressly consented to the taking of such measures as indicated:
> (i) by international agreement;
> (ii) by an arbitration agreement or in a written contract; or
> (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
> (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
> (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.
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> **Article 20**
> **Effect of consent to jurisdiction to measures of constraint**
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> Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.
> **Article 21**
> **Specific categories of property**
>
> 1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):
> (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
> (b) property of a military character or used or intended for use in the performance of military functions;
> (c) property of the central bank or other monetary authority of the State;
> (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
> (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.
> 2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

24. For a proper understanding of its content it is necessary to read the legislative history; that is, the International Law Commission and the Working Group of the United Nations General assembly, Sixth Committee. The ILC submitted its "draft" to the UN in 1991.

Article 19 presents three exceptions to immunity from execution, and Article 21 lists five categories of property as immune from execution *ipso facto*. As mentioned, the UNCSI has not yet entered into force, but it is said to, at least partially, represent customary international law. Moreover, the UNCSI indeed represents a measure of common ground among widely diverse jurisdictions.[25] It would be an outright denial to not accept the fact that the UNCSI has entrenched the move toward a restrictive theory on immunity also for execution purposes.

One must also proceed with a caution and cynicism. It is evidently the case that the evolution of restrictive immunity has not been as prevalent with respect to measures of constraint.[26] The doctrine on immunity from execution allows for certain qualification to the general rule of immunity. However, the doctrinal development has grown apart from the evolution seen with respect to immunity from jurisdiction. An expert on sovereign immunity wrote that:

> An examination of relevant State practice shows that, even though, as a general rule, preventive measures and measures of forced execution against foreign States and their property are permitted, such measures are subject to a number of conditions and limitations. First, a clear distinction has been drawn between immunity from the adjudicative process and immunity from measures of constraint […]. […] Secondly, the "purpose" test, much discredited in the context of adjudicative jurisdiction, resurfaces as a determinative factor in the context of measures of constraint. Generally speaking, the property of a foreign State enjoys immunity from attachment, arrest and execution when it is used for sovereign or public purposes, but not when it is used for commercial purposes. Thirdly, the territorial nexus requirement is adhered to even more strictly in the process of enforcement and execution of judgments against foreign State property. Finally, certain categories of property still enjoy absolute immunity, even where the foreign State has expressly waived its immunity from execution.[27]

It is partly for these reasons that the law on sovereign immunity remains largely unresolved. This chapter will not solve the issues, but it will illustrate how the Swedish courts have generated decisional law that could be consolidated as state practice representing customary international law in the context of immunity from execution from foreign arbitral awards.

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25. *See*, e.g., *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012 (the Court held *inter alia* that parts of the Convention were a codification of customary international law). *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475) (where the court relied on the 2004 Convention as constituting in part customary international law).
26. Measures of constraint "encompass the full variety of pre- and post-judgment measures available in national legal systems"; among other things, injunctions, attachment, and execution. *See* Crawford, *supra* n. 3, at 1,962. *See also* Yang, *supra* n. 20, at 343 (Cambridge University Press 2012) ("'Measures of constraint' is a generic term covering both interlocutory, interim or pre-trial measures prior to final judgments and the execution or enforcement of judgments. In the context of State immunity, these are coercive or enforcement measures taken by the court either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State.").
27. *Ibid.*

§13.03 THE INTERNATIONAL COURT OF JUSTICE

As mentioned already, the law on sovereign immunity has developed almost predominantly through municipal decisional law. At the same time, these courts know that they are constrained by other developments in public international law. Nowadays, the general rule of sovereign immunity is cemented as one of the customary international laws. Whether, when, and how to qualify the general rule of sovereign immunity is, therefore, also a matter of customary international law. Incidentally, the exceptions to the general rule will play out in municipal decisional law and legislative amendments first, and only thereafter be interpreted, consolidated, and crystallized by the ICJ.

In the well-known 2012 decision *Germany v. Italy (Greece Intervening)*, the ICJ interpreted and partly consolidated customary international law with respect to immunity from jurisdiction and indirectly the law on immunity from execution.[28] This case is better known as the "Jurisdictional Immunities Case." Unsurprisingly, much of the ICJ's decision was based on a reflection of liberal and pragmatic municipal decisional law, legislative action, scholarly work, and the UNCSI. The ICJ observed, *inter alia*, that: (1) immunity from jurisdiction had been "adopted as a general rule of customary international law solidly rooted in the current practice of States";[29] (2) there is a distinction between proceedings for the recognition and enforcement, on the one hand, and the execution of a foreign judgment on the other;[30] and (3) parts of Article 19 of the UNCSI (on immunity from execution) represent customary international law.[31] However, the vagueness in the majority opinion did not prove all that helpful with respect to the debate on immunity from execution. It was vague in the way that it did not really address the issue of immunity from execution head-on. The law on immunity from execution remains an unchartered territory and one in a state of flux, let alone in the context of enforcing foreign arbitral awards.

The ICJ only briefly discussed immunity from execution and mentioned that, even though not yet in force, the UNCSI "provides a comprehensive regime of rules covering immunity from adjudication and [execution] of a state."[32] As such, the court felt free to refer to Article 19 of the UNCSI, in general, and Article 19(c), in particular. Although the ICJ was careful to not endorse the article as a mandatory manifestation of customary international law, it "shaped, by reference to that article's exception (c), the standards to be applied by a third state's court in proceedings for recognition of a

28. *See* Roger O'Keefe, "*Jurisdictional Immunities*" in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* 111–115 (Oxford: Oxford University Press 2013).
29. Jurisdictional Immunities of the State *(Germany v. Italy: Greece Intervening)*, Judgment of February 3, 2012, para. 26, where the Court observed this by citing International Law Commission Yearbook of 1980.
30. *Ibid.*, at 128 and 130.
31. The Court did not find it necessary to determine whether the entirety of Article 19 reflects current customary international law. *Ibid.*, at 117–118. But the ICJ seems to have made a serious mistake in closing off additional discussion on implied waiver from execution. The court seems to have created a caveat by stating that this reflected only "current" customary international law, and therefore the discussion may remain open.
32. Fox & Webb, *supra* n. 13, at 47.

judgment given against a foreign state in the national court of another state."[33] Thus, in a kind of back-handed endorsement of the treaty, the court crystallized and consolidated the law as written in the convention, holding that:

> When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.
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> […]
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> Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim.[34]

The court then held that the property in dispute was clearly in use for sovereign functions, namely, for cultural exchanges between Germany and Italy.[35] Put slightly differently, the property enjoyed immunity because it was used for governmental non-commercial *purposes* "regardless of the validity of the judgment on which it was based."[36] In so holding, the ICJ appears to have solidly acknowledged the "commercial purposes exception" as forming part of customary international law. Naturally, because it was not required to discuss the entirety of the UNCSI, the court remained silent on whether *all* aspects of Article 19 reflect current customary international law. One could have wished for more in obiter dictum but, on the other hand, as the saying goes: "if you stand for everything, you stand for nothing." At the same time, it was perhaps slow in endorsing the entirety of Article 19 as that may have given some States the indication that other articles would be treated as customary international law, too. That is hardly the case.

In a dispute between *Iran v. United States* from 2019 (on-going), the ICJ was again presented with a singular opportunity to clarify a great deal of the law of sovereign immunity and perhaps to further crystallize or consolidate customary international law with respect to immunity from execution.[37] Two scholars rightly

33. *Ibid.*
34. *Jurisdictional Immunities*, at paras. 117 and 118 (citations omitted).
35. *Ibid.*, at para. 119. Going even further, the ICJ may have indirectly recognized Article 21 (1)(d) of the UNCSI in that the property forms "part of the cultural heritage of the State" and is "not placed or intended to be placed on sale."
36. *See* Fox & Webb, *supra* n. 13, at 51.
37. The case stems from the United States having taken several direct and indirect measures against Iran for its alleged support of groups labelled as "terrorist organizations" and for other, related violations of human rights. To effectuate this position, the United States has created an exception to the jurisdictional immunity for States that allegedly are "sponsors of terrorism." The USA has blocked certain Iranian assets and property and made these assets available for attachment and execution. By way of both legislative and executive action the USA has provided victims of terrorism with a judicial forum to remedy their grievances. In most cases, these actions have led to claims that are essentially in the form of either restoration or reparation. As expected, these measures have been challenged by Iran in USA courts and before the ICJ. Many

commented that "a range of questions might arise that the 2012 *Jurisdictional Immunities* case has left unanswered" and that the court would be in a position to *inter alia* "shed light on matters such as the exact regime relating to the property of central banks," in particular between the stricter provisions of the UNCSI and those of more "liberal" state practice.[38] The ICJ was not forced to reach any conclusion on those issues due to a successful jurisdictional challenge. The court also turned down the opportunity to elaborate further in obiter dictum.

As expressly mentioned in 2012, the language in Article 19 of the UNCSI provides for a general rule of immunity under customary international law. To what extent the exceptions form part of customary international law is less certain. Additionally, five categories are listed as immune *ipso facto* in Article 21, including "property of the central bank or other monetary authority of the State." Whether these exceptions form part of customary international law is debatable.[39] If it does, the property of a central bank enjoys virtually absolute immunity categorically, because the exception is not qualified by governmental non-commercial use or for property used within a central bank's traditional functions. As of today, we are not even sure whether Article 19(c) of UNCSI makes the *nexus* requirement an obligation pursuant to customary international law, let alone that Article 21(c) would represent customary international law.

§13.04 SOVEREIGN IMMUNITY IN SWEDEN

There is no legislation on sovereign immunity in Sweden.[40] Thus, the Swedish law on sovereign immunity remains non-statutory. As a result, the rules are to be extracted from customary international law, which entails an analysis of decisional law (municipal and international) and views expressed in renowned scholarly work.[41] As mentioned already, there is no multilateral treaty in force yet, but Sweden did ratify the UNCSI and, as the ICJ has done,[42] the Swedish Supreme Court has emphatically endorsed parts of the convention as a codification of customary international law.[43]

The liberal and pragmatic Swedish attitude seem partly to be reflected in the willingness of the courts—the Supreme Court in particular, but also the courts of

of the USA-based court judgments have resulted in default judgments in favor of the claimants because Iran refused to participate in the proceedings.

38. Philipp Janig & Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 German Yearbook of International Law (2016).
39. *Ibid.*, "Yet, again, judicial as well as legislative State practice so far have been reluctant to award special protection to property of a central bank. Only a limited number of States enacted legislation as to that effect. Thus, the customary nature of this provision is 'contentious', and courts usually apply the general rules to property of the central bank as well."
40. Ove Bring, Said Mahmoudi, & Pål Wrange, I *Sverige och Folkrätten* 97 (2011).
41. *See* Kaj Hobér, *International Commercial Arbitration in Sweden*, 21 (Oxford: Oxford University Press, 2011). Ove Bring, Said Mahmoudi & Pål Wrange, *Sverige och Folkrätten*, 97 (2011).
42. Jurisdictional Immunities of the State *(Germany v. Italy: Greece Intervening)*, Judgment, (2012), I.C.J, ¶ 26 (Feb 3) and *Islamic Republic of Iran v. United States,* Certain Iranian Assets, Judgment of February 13, 2019 (preliminary objections), ICJ Reports 2019.
43. *See Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475).

appeal and the district courts—to entertain a comparative legal approach vis-á-vis the rule of sovereign immunity. This comparative pragmatism can be traced back to 1942 and the decision in *The Charente*.[44] The Supreme Court held that:

> [I]t is of utmost importance that the principle of sovereign immunity is recognized without any modifications, or with only minor modifications, by most countries, including such major and highly culturally developed nations, which are close to Sweden, such as Germany, France and the United Kingdom, as well as the United States. Having regard to the significance of the problem to international commerce it cannot be assumed, unless compelling reasons are presented—which in fact are entirely missing—that Swedish law takes a different position on the principle as such of recognition of sovereign immunity.[45]

This decision may appear to endorse a doctrine of absolute sovereign immunity, especially since the United States (U.S.) subscribed to the restrictive doctrine on immunity first in 1956, the U.K. in 1977, France in 1969, and Germany in 1963 but definitely in 1972. However, what is progressive is not the holding itself, but rather the reasoning.[46] Post-*Charente*, it was a generally accepted view that Swedish courts adopted the globally prevailing doctrine—including modifications—on sovereign immunity as those of "culturally aligned" states.[47]

The court positioned itself in the world of legal governance.[48] Thus, implicitly the Swedish Supreme Court already in 1942 recognized that the law on sovereign immunity can best—or only—be understood through the lens of a comparative legal methodology and was not to be considered in isolation of historical, political, economic, cultural, and legal evolution. In a word, the Swedish Supreme Court implicitly took a decidedly liberal and pragmatic position, namely, that international commerce, trade, and investment, will dictate the evolution of the doctrine as reflected in major trading nations that adhere to liberal capitalism and a liberal democratic world order. In fact, this rationale proved instrumental as the developed world transitioned from the doctrine of absolute to restrictive immunity.[49] In other words, Swedish courts have increasingly and incrementally held that immunity from suit (and to a lesser extent,

44. NJA 1942, para. 65.
45. *The Charente,* NJA 1942 para. 65, at 74–75; Hobér, *supra* n. 41, at 21 (For another Supreme Court case entrenching the old and more rigid doctrine of sovereign immunity, *see Åke Beckman v. People's Republic of China* NJA 1957 195.).
46. Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. (1952) (US); *The Philippine Admiral* [1977] AC 373, 401–402 (actions in rem), *Trendtex Trading Corporation v. The Central Bank of Nigeria* [1977] QB 529 (actions in personam), and *I Congreso del Partido* [1983] 1 AC 244 (UK); *Administration v. Société Levant*, France (1969) 52 ILR 315; *Englander v. Statni,* France (1969) 52 ILR 335; *Société v. Chaussois*, France (1969) 65 ILR 44, 45–46 (France); and (Germany).
47. *See* Hobér, *supra* n. 41, at 21; Ove Bring, Said Mahmoudi & Pål Wrange, *sverige och folkrätten*, 99 (2011).
48. From a non-legal standpoint—especially considering the political element of the doctrine pre-1970s—it is important to note that Sweden started endorsing and embracing a move towards a liberal democratic order with a fully integrated market economy system. This kind of reasoning proved instrumental for Swedish prosperity.
49. It has been said that "[t]he history of the law of [sovereign] immunity is the history of the triumph of the doctrine of restrictive immunity over that of absolute immunity." Yang, *supra* n. 20, at 6.

immunity from execution) for commercial or private law dealings (or property) is not compatible with modern trade, commerce, and investment.[50] This transition has happened gradually and really took off from the 1970s and onwards.[51]

Given the contextual reality in 1942, the reasoning and sound approach taken in *The Charente* is to be applauded.[52] This kind of Swedish judicial pragmatism echoes as clear and loud today as it did then. Issues and challenges in international commerce, trade, and investments have changed and so has the role of the sovereign in the twenty-first century. *The Charente* rationale is not outdated, it treats the law on sovereign immunity in Sweden as a living non-statutory rule of law. Hobér duly noted that:

> The significance of [the rationale in *The Charente* is that,] in the view of the [Swedish Supreme Court,] Swedish law should be adopted—and presumably changed, if need be—to developments in law in other countries which from a political, legislative, and cultural point of view are similar to Sweden.[53]

Today, almost eighty years later, one of the major issues pertaining to the general rule of sovereign immunity is whether the otherwise rather elaborate exceptions to it also extend to immunity from execution of foreign arbitral awards.[54] This issue is a prevalent one due to the distinction between immunity from jurisdiction and immunity from enforcement.[55] Because immunity is treated narrower in the context of execution compared to that of jurisdiction, it has rightly been pointed out to be "the last fortress, the last bastion of [sovereign] immunity."[56] While immunity from jurisdiction attracts a lot of attention *inter alia* in the human rights context, it remains uncontroversial in the arbitration context. The same is not true for immunity from execution.

Another area that surprisingly has proved to be controversial in the arbitration context is the distinction between "enforcement" and "execution."[57] Sometimes states invoke immunity from execution in order to avoid enforcement of an arbitral award. A clear distinction should be made between recognition, enforcement, and execution (*see* further below in V(c)(ii)).

50. *See*, e.g., *Kuwait Airways v. Iraqi Airways Co* [1995] 1 WLR 1147, 1171 (HL) (*per* Lord Mustill, "[t]he rationale of the common law doctrine of the restricted immunity, of which section 3 is the counterpart, is that where the sovereign chooses to doff his robes and descend into the market place he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil.").
51. Fox & Webb, *supra* n. 13, at 321.
52. For an interesting discussion on the case, *see* V.V. Veeder, "*A Swedish-British Story. The 'Charente' on State Immunity*" in Eric Bylander, Anna Jonsson Cornell and Jakob Ragnwaldh (eds.), *Forward! Bnepëð! Framåt! Essays in Honor of Prof Dr Kaj Hobér* (Iustus Förlag 2019).
53. Hobér, *supra* n. 41, at 21.
54. *Ibid*., at 22. *See* Dautaj, *supra* n. 22.
55. *See* Jurisdictional Immunities of the State *(Germany v. Italy: Greece Intervening)*, Judgment, (2012), I.C.J. Feb 3).
56. International Law Commission Commentary to Art. 18, para. 1.
57. *See Micula and others v. Romania* [2020] UKSC 5 and *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157.

From a practical standpoint, it is unequivocally the case that Sweden will not alone set the global agenda on whether and how to qualify the general rule of immunity from execution from foreign arbitral awards. That said, the courts will continue to act as a leading architect in elaborating a sustainable transnational enforcement framework by consolidating pragmatic and liberal efforts reflected in foreign decisional law and renowned scholarly work. The Swedish approach, thus far, transcend nationalism, idiosyncrasy, and parochialism. As will be shown in this chapter, the Swedish experience represents a best practice that could serve as guidance to foreign courts, legislators, and the ICJ. A minor caveat is the recent regressive decision from the Svea Court of Appeal, which will likely be the subject for appeal to the Supreme Court, which should grant *a certiori*.[58]

[A] Decisional Law

In a surprising decision from 1999, the Swedish Supreme Court held that Iceland enjoyed immunity from execution with respect to a contract that had both a public and private law character.[59] The Swedish Supreme Court followed the lines of the Court of Appeal, which had in turn affirmed the district court's decision, where it had concluded that: (1) the contract had both a public law and private law character; (2) both parties were public law entities, (3) the contract was concluded ancillary to specifically designated cooperation between the Nordic states, and (4) the contract *ipso facto* had a public law character.[60] For the reasons mentioned, Iceland was granted immunity.[61] The Swedish Supreme Court tuned in by first recognizing the doctrine of restrictive immunity. However, then it embarked upon determining whether the action was indeed commercial in *nature*. It did so by, *inter alia*, referring to the *nature* of the act and the *purpose* of the act.[62] The court highlighted that it is controversial whether it is the form of activity or the nature of the activity that is to be given emphasis.[63] The court suggested that, because there was no binding decisional law on this point, each individual case demands an overall assessment of all the circumstances.[64] In this case, due to the public nature of the agreement and the intergovernmental agreement between the Nordic states, Iceland was considered to enjoy immunity for what the court characterized as "public acts."[65]

58. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020).
59. *Västerås kommun v. Republic of* Iceland NJA 1999 821. Hobér, *supra* n. 41, at 22–23.
60. The Swedish District Courts (especially Nacka) and the Court of Appeal, too, are usually pragmatic *vis-á-vis* transnational adjudication and often renders very sensible and sound judgments.
61. *See* Hobér, *supra* n. 41, at 24.
62. *Ibid*.
63. Ove Bring, Said Mahmoudi & Pål Wrange, *Sverige och folkrätten*, 101 (Norstedts Juridik AB 2011).
64. *Ibid.*, it should be noted that a "totality of circumstances approach" is indeed a good device (or tool) in the context of deciding whether to grant, condition, or withhold immunity.
65. NJA 1999, 821–825. Hobér, *supra* n. 41, at 24.

It can be said that the court indeed followed its de facto regressive and conservative holding in *The Charente*, but it also disregarded the more liberal and pragmatic reasoning which should have retained its precedential value and ethos some fifty years later. In this regard, Hobér has written that:

> Given, in particular, the nature of the Contract, its purpose, as well as the intention of the parties, an appropriate application of the restrictive immunity would—and probably should—have resulted in a denial of sovereign immunity. The Supreme Court seems to have given too much weight to the fact that both parties to the contract were public entities.[66]

It remains a mystery and very unfortunate that the court decided to undercut its otherwise sound and rational commercial approach when confronted with mixed agreements. In 1999 the courts were well aware of the distinction between sovereign and commercial acts.[67]

It would be comfortable to analyze Sweden's more recent decisional law and completely reject the 1999 decision as a thing of the past. From a historical context that would be unwise and even an intellectually lazy approach. The decision unfortunately reflects and underscores the underlying tension of the doctrine *ipso facto*, namely, the fact that despite the present majority adherence to restrictive immunity, "sovereignty nonetheless remains an obdurate obstacle to adjudicatory civilization."[68] More than that, it reflects the hard-felt truth that even liberal, pragmatic, and commercially oriented states will defer to sovereignty at times where the political pressure may be too strenuous. The decision also reflects the ad hoc nature—and instances of regression—of the evolution of the law on sovereign immunity. Thus, the decision actually underscores great practical and theoretical concerns, viz.: (1) the constant fear of either ad hoc set-backs or, more systematically, that the pendulum will swing back to absolute immunity or near absolute immunity; and (2) whether concepts such as equality, dignity, independence appropriately can justify the rule of immunity or its exceptions. It seems that much of the decisional law globally (regardless of developed/underdeveloped, capitalist/socialist, or any other sharp difference) rests primarily on political concerns and policy objectives. It is submitted that this lack of a firmly entrenched theoretical framework leaves global merchants in limbo in its practical consequences. Bring, Mahmoudi, and Wrange have written that:

> The Supreme Court's decision in [the *Västerås kommun v. Republic of Iceland* of 1999] goes to show that the court decides to neglect the commercial character and purpose of the agreement (to purchase services in exchange for compensation), despite being aware of the distinction between *acta jure imperii* and *acta jure gestionis* and the criterion that are available in order to separate the two from each other. The Supreme Court [was] instead satisfied with the fact that both parties

66. Hobér, *supra* n. 41, at 24.
67. *See* Bring, Mahmoudi & Wrange, *supra* n. 63.
68. Thomas E. Carbonneau, *The Law and Practice of Arbitration*, 545 (JurisNet, 2020).

> [were] public law entities, and thus grant[ed] Iceland immunity. This is an implicit application of the old-fashioned principle on absolute immunity.[69]

However, the surprising decision from 1999 was partly remedied by the Swedish Supreme Court's decision in *Bostadsrättsföreningen Villagatan 13 v. Kingdom of Belgium*.[70] In that case, the court reversed and remanded the decision of the district court (that had been affirmed by the Court of Appeal), in which it had been held that Belgium enjoyed immunity vis-á-vis a declaratory judgment for a lease contract to be used by the Belgian Embassy, in which the Embassy undertook to refurbish the apartment and bear the costs thereof.[71] The court endorsed the principle of restrictive immunity by referring to the 2004 UN Convention.[72] The court went on to discuss how to characterize an act as either sovereign or commercial—it focused on the *nature* of the act, "adding that sometimes also the purpose of the act should be taken into account."[73] Despite Belgium trying to argue that the premises were going to be used as an embassy, the Swedish Supreme Court characterized the contract as commercial (it was a private law setting) and one that could have been entered into by private law entities, too.[74] This case demonstrates the semi-consistency in the Swedish decisional law vis-á-vis sovereign immunity. On this topic, Hobér highlighted that:

> [T]he approach taken by the Supreme Court with respect to immunity from jurisdiction of courts is in line with the approaches of other countries which subscribe to the theory of restrictive immunity. The reasoning in [*Bostadsrätts-föreningen Villagatan 13*] very much echoes the approach taken in the […] *Charente*, viz, Swedish law should adapt to developments in the leading trading nations.[75]

Going forward, it should come as no surprise that Swedish courts will continue to closely monitor and follow the approaches taken by the leading trading nations, including but not limited to England, U.S., France, and Germany. Meanwhile, it is evident that Swedish courts are rightly treating UNCSI as a stepping-stone for further analysis and indeed as constituting in part a codification of customary international law. Additionally, Swedish courts have and will continue to contribute to developing the law of sovereign immunity. For good reasons, other States should look at the Swedish jurisdiction in order to adapt to the developments in this jurisdiction.

A few broader-perspective take-aways merit close attention. First, Sweden is the financial, political, and cultural center of Scandinavia. As a corollary, Sweden has a large embassy community, museums and other exhibitions, and significant foreign investments are made in the Swedish stock market and elsewhere. These factors

69. Ove Bring, Said Mahmoudi & Pål Wrange, *sverige och folkrätten*, 101 (2011) (Translated from Swedish). Translated from Swedish.
70. NJA 2009 p. 95, Case No. Ö 2753-07.
71. *See* Hobér, *supra* n. 41, at 24–25. Moreover, the Supreme Court made a distinction between state immunity and diplomatic immunity; the latter which was raised by Belgium as a potential issue. *See* Bring, Mahmoudi & Wrange, *supra* n. 63.
72. NJA 2009 p. 95, Case No. Ö 2753-07.
73. Hobér, *supra* n. 41, at 25. Case No. Ö 2753-07, 5–7.
74. Hobér, *supra* n. 41, at 25.
75. *Ibid.*, 26.

combined with Sweden being a robust pro-arbitration jurisdiction means that investors will continue to try to enforce awards against States in Sweden. Second, as a form of "anchoring state," the neighboring Scandinavian countries should keep track of—and perhaps even adopt a similar approach as—the Swedish courts vis-á-vis public international law, in general, and the enforcement of foreign judgments and arbitral awards, in particular. Finally, Sweden is a neutral participant in global affairs and has rightly earned a reputation for having a highly developed rule of law country. Thus, the Swedish courts' decisional law has enjoyed a strong currency globally and its legal community has a reputable standing among its peers. In a word, Sweden has—and will continue to—significantly contributed to developing the framework of transnational adjudication. In this role, the courts have assumed a great responsibility to live up to.

§13.05 SOVEREIGN IMMUNITY AND ARBITRATION

There is no need to delve deep into immunity from jurisdiction in the arbitration context, apart from the ancillary jurisdictional issue that has been at the forefront of the debate again, namely, municipal courts' jurisdiction in the *sensu stricto* enforcement phase (which does not deal with attachment nor execution).[76] There is a generally held view that an arbitration clause constitutes a waiver of immunity from jurisdiction for the arbitral process. In a word, the restrictive theory on immunity was complimented by the implied waiver doctrine.[77] In the arbitration context, the crux of the matter for the waiver debate has been, firstly, whether this jurisdictional waiver extends to municipal courts jurisdiction to enforce the award, and secondarily but more controversial and intrusive, whether the waiver extends to immunity from execution. From a practical point of view, the more relevant debate has focused on what kind of property is considered to be used for a "commercial purpose." Put colloquially, what property or assets can be attached and executed pursuant to the restrictive theory of immunity from execution?

Enforcing foreign arbitral awards happens primarily pursuant to the enforcement regime established by *New York Convention* or the *ICSID Convention*. "Both conventions are widely adopted and followed in letter as well as in spirit."[78] The enforcement framework can well be represented as the "edifice of trust upon which the international arbitration system rests."[79] As learned arbitration scholars put it:

> Unless parties can be sure that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, an award in their favour will be only a pyrrhic victory. Further, the high degree of voluntary

76. *See Micula and others v. Romania* [2020] UKSC 5; *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157; and *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 2.
77. Where legislation is provided for, the waiver doctrine is mostly codified as one of the exceptions.
78. Dautaj, *supra* n. 22.
79. The New York Convention has been held to be 'the pillar on which the edifice of international arbitration rests.' J. Gillis Wetter, *The Present Status of the International Court of Arbitration in the ICC: An Appraisal*, 1(1) The American Review of International Arbitration 91–107 (1990). Dautaj, *supra* n. 22.

> compliance is due to there being an effective system for the enforcement of awards in case of non-compliance.[80]

"Put simply, the international arbitral framework has elaborated a transnational legal order that transcends municipal barriers, parochiality, and idiosyncrasy"[81] and at times it is the role of municipal courts to guarantee that the last link of international arbitration does not remain the weakest.[82] On this positive note it remains perplexing that neither of the two enforcement conventions deals effectively with sovereign immunity. In fact, the ICSID Convention makes this explicit, i.e., Article 54(3) reads in part that "execution of the award shall be governed by the laws concerning the execution" of judgments in the state where execution is sought, while Article 55 reiterates that for sovereign immunities nothing in the *ICSID Convention* should be construed as derogating from municipal laws on the matter.

An award-creditor should be aware of the simple fact that "recognition and enforcement of awards is in the coercive power of the court" and that sovereign immunity could potentially present itself as a barrier.[83] Counsel should advice clients to carefully take into account several factors when seeking to enforce an award, such as whether the courts' outlook is likely to be internationalist or parochial and whether the attitude of the forum State with respect to sovereign immunity is liberal and pragmatic.[84] In this respect, Fox and Webb write that:

> A debtor [state] determined not to honor his commercial obligations can always use the law to delay, if not to evade, his liability[;] but these cases [of invoking immunity from execution] additionally illustrate that, beyond the inevitable differences which arise between trading parties, the complexity of the current law of [sovereign] immunity from enforcement offers a debtor state additional methods of denying [the award-]creditor execution in satisfaction of a valid award obtained in respect of a commercial transaction.[85]

Delaying or obstructing voluntary compliance with an arbitral award is a powerful tool/right that a host State can (ab)use unilaterally either as a tactic to avoid responsibility or as a strategy to renegotiate the quantum. It is an inequality of arms that has the potential to detrimentally hurt investors—in particular small and medium enterprises. The defense of sovereign immunity can indeed manifest itself as a barrier and an obstacle to the mission of achieving the ideals of international arbitration. It can be said that "sovereign immunity remains a significant obstacle to obtaining forced satisfaction of [foreign arbitral] awards against states."[86]

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80. Lew, Mistelis & Kröll, *supra* n. 12, at 688.
81. Dautaj, *supra* n. 22.
82. *Ibid.*
83. Lew, Mistelis & Kröll, *supra* n. 12, at 689.
84. Nigel Blackaby, *Redfern and Hunter on International Arbitration,* 613 (New York: Oxford University Press, 2009).
85. Fox & Webb, *supra* n. 13, at 536. *See*, e.g., *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475) (the creditor eventually was finally able to attach Russian assets after seventeen years).
86. Philippe Fouchard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 377 (The Hague; Boston: Kluwer Law International, 1999).

[A] Arbitration in Sweden

Sweden has earned the highest possible reputation as a jurisdiction with a strong rule of law and a neutral liberal democracy that embraces capitalism. Thus, the Swedish jurisdiction has the right ingredients to perform as a world-leading pro-arbitration jurisdiction. It is submitted that the Swedish courts' consistently commercially sound, liberal, and pragmatic decisional law has led the way in that direction.[87] Swedish courts have made sure that the last link of the arbitral legal order remains effective. Arbitral awards in Sweden are truly treated as final, binding, and directly enforceable. The Swedish jurisdiction makes little distinction between international commercial arbitration awards and investment treaty arbitration awards. One should add that part of the Swedish arbitration success story is attributed to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), which is one of the major service providers for institutional arbitration and competes globally for arbitration business. Leading scholars rightly noted that:

> Sweden has a modern arbitration law and a very well-functioning legal system. A long tradition of arbitration practice gives it the foundation to offer not just reliable, but also a responsive, arbitration service. This is also reflected when it comes to recognition and enforcement of foreign arbitral awards.[88]

It is unequivocally the case that Sweden has provided the global arbitration community with a perfect balance between institutional arbitration services, a robust arbitration legal framework, and a highly pro-arbitration supervisory and enforcing judicial function.[89]

[B] Sovereign Immunity from Jurisdiction in Sweden

Generally speaking, a valid arbitration clause constitutes a waiver of sovereign immunity from jurisdiction. However, this was not always the case; for example, in *Tekno-Pharma AB v. State of Iran*,[90] the court addressed the validity and scope implied waiver. Tekno-Pharma had an arbitration agreement with Iran. Despite this, Iran invoked immunity from jurisdiction. The Swedish Supreme Court confirmed the Court of Appeal's holding that it did not "consider the arbitration clause […] to be equivalent to an express waiver of immunity."[91] Today, however, it is a generally held view among leading Swedish scholars and practitioners that a State cannot plead immunity from jurisdiction when the parties have agreed to submit any future or existing dispute

87. *See* Ulf Franke, Annette Magnusson & Joel Dahlquist, *Arbitrating for Peace: How Arbitration Made a Difference* (Kluwer Law International 2015), One could add SU ICAL and now UU ITAP.
88. Ulf Franke, et al, *International Arbitration in Sweden: A Practitioner's Guide*, 296 (Kluwer Law International;, 2013).
89. The court rejects enforcement in very few cases. *See Compilation of enforcement decisions of the Court of Appeal (2000-2012)* in *Ibid.*, at 300–302.
90. NJA 1972 C No. 434.
91. *Ibid*. Hobér, *supra* n. 41, at 29.

to arbitration.[92] In a word, where the state has signed an arbitration agreement, it is considered to have waived its immunity from jurisdiction.

A more controversial matter, but equally one that should have been as firmly entrenched as a matter of law, is that of immunity from jurisdiction *of* the enforcing court. The Swedish courts have been pragmatic in this perspective for decades. In *LIAMCO v. State of Libya*,[93] the Court of Appeal held that Libya did not enjoy immunity from the jurisdiction of the Swedish courts ancillary to arbitration (namely in the enforcement phase). As is mostly the case thanks to the New York Convention and the ICSID Convention, arbitral awards are considered to be as enforceable as a court judgment. In *LIAMCO*, the majority of the court held that:

> By accepting the arbitration clause contained in […] the concession agreements[,] Libya—which otherwise in its capacity as a sovereign state enjoys extensive rights to immunity from the jurisdiction of the courts of Sweden—must be deemed to have waived its right to invoke immunity.[94]

Because the case was settled shortly following Libya's appeal, the case never reached the docket of the Swedish Supreme Court. But it is very likely that the Swedish Supreme Court would have aligned.

Surprisingly, this distinction between immunity from jurisdiction *over* the arbitral tribunal and the enforcing court has been at the forefront of the debate. Incidentally, this debate highlights the complexity of the distinction between *sensu stricto* enforcement and post-judgment measures of constraint, such as attachment and execution.[95]

The distinction between immunity from jurisdiction and immunity from execution still presents theoretical as well as practical obstacles. In 2018, the Republic of Kazakhstan invoked that it enjoyed immunity from jurisdiction of Swedish courts with respect to proceedings that it considered were not strictly about enforcement but rather about the creation of an enforceable title, which is considered to be a separate legal procedure.[96] The Stockholm District Court, however, disagreed and held that "[i]mmunity from the jurisdiction and immunity from enforcement are two different concepts, which are to be examined separately."[97] Further, the district court reasoned that:

> The case before the District Court concerns only attachment; when the decision is rendered, the case is closed. Against this background, it is difficult to see how this case should be categorized if not as an enforcement matter in the sense that the Supreme Court obviously refers to. It would be unreasonable to examine the question about immunity from the jurisdiction separately in a case as the one at

92. *See*, e.g., Franke, Magnusson & Dahlquist, *supra* n. 87.
93. Case No. Ö 261/79 (1980). *See also* Jan Paulson, *Sweden: Court of Appeals of Svea Judgment Concerning Recognition and Enforcement of Arbitral Awards*, 20(4) International Legal Materials (1981).
94. 20 ILM (1981) 895–896; Hobér, *supra* n. 41, at 30.
95. *See Micula and others v. Romania* [2020] UKSC 5 and *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157.
96. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 22.
97. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 21 (referring both to the headings in the UNCSI and the Government Bill 2008:09:204 79).

> hand, but not when the Enforcement Authority's subsequent enforcement decision is appealed to court.[98]

At this stage, the matter was essentially one of making a judgment of the arbitral award, namely turning it into an enforceable title. The procedure at hand was one of declaring property attachable, i.e., "sequestration" (sw: "Kvarstad"). It is argued that Kazakhstan conflated enforcement jurisdiction with execution. This procedure was clearly a matter ancillary or incidental to enforcement but not one that deals with execution. It was thus, as the Court rightly noted, an "enforcement matter against property of a foreign state."[99]

As is the routine practice in Sweden, the Swedish Enforcement Agency (Kronofogden) makes the decision on execution, but it first needs an enforceable title in order to execute against property. In Sweden, an arbitral award cannot be enforced without giving the opposing party the opportunity to comment on it. It is subsequent to the Enforcement Agency's final decision with respect to execution that the debtor-State can challenge the decision on the basis of immunity from execution or perhaps other post-judgment measures of constraint, such as attachment of specific (not generic) property.

Kazakhstan also invoked immunity from post-judgment measures of constraint pursuant to Articles 19(c) and 21(c) of the UNCSI before the Stockholm District Court. It is argued that the Court should have closed this discussion by holding that Kazakhstan had clearly and unmistakably waived its immunity from jurisdiction, which includes any jurisdiction matter ancillary or incidental to the arbitral procedure, such as making a judgment of the arbitral award by creating an enforceable title. There was no need to discuss Article 19(c) or 21(c) of the UNCSI any further at this stage. The Stockholm District Court did not attach specific property.[100] The plea of immunity from post-judgment measures of constraint—attachment and execution—should have been presented only to the Nacka District Court when challenging the Enforcement Agency's decision vis-á-vis execution. Put simply, there was no need to consider whether the property indicated was of the nature stated in Article 19. In fact, the Court rightly noted that:

> The requirements set out in article 19 will be examined in the subsequent enforcement proceedings in relation to the specific property which the Enforcement Authority intends to seize and the parties will be provided the opportunity to comment further with regard to this.[101]

The matter eventually came back to the Enforcement Agency. The agency, with an enforceable title at its disposal, then directed enforcement (execution) measures against several assets allegedly located in Sweden.

And this lends us to the crux of this chapter, namely, immunity from execution of foreign arbitral awards. At the end of the day, despite the "procedural ping-pong" and

98. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 22.
99. *Ibid*., 23.
100. *See* Chapter 15 section 1 of the Code of Judicial Procedure.
101. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 24.

temporary enforcement success, an arbitral award remains a piece of paper without coercive force.[102] And because it is not the role of the arbitral tribunal to guarantee the ends of arbitration, the role of municipal courts often turns into the last and most important link of the arbitral procedure.[103]

[C] Sovereign Immunity from Execution (and Attachment) of Arbitral Awards in Sweden

The two exceptions to the general rule of immunity from execution that becomes relevant in the arbitration context are "*waivers*" and "*property used for a commercial purpose*." However, if the UNCSI is subscribed to in its fullest extent, some property of the State will be treated as categorically immune *ipso facto* pursuant to Article 21 of the convention.

There is a generally held view that a waiver from jurisdiction does not translate into a waiver of immunity from execution.[104] Albeit an important academic topic for discourse, any such debate will for now remain theoretical and *de lege ferenda* at best. Thus, an award-creditor must rely on the commercial purpose test, which makes things way more difficult. One of the outstanding sub-issues of immunity from execution is to determine what property or which assets are considered to be in use for a "commercial purpose." In this light, the Swedish courts have proved to endorse and embrace a liberal and pragmatic point of view. However, the recent application of Article 21 of the UNCSI as constituting customary international law is cumbersome to fit into the previous Swedish practice.[105]

It must also be noted that any interference with immunity from execution is traditionally considered a greater infringement with State sovereignty than simply

102. This is a simplified point of view and merits a bigger contextualization; that is, the award has commercial value despite the temporary lack of compliance. Immunity does not equal impunity and the investor can go on for an asset-hunt (indefinitely), the award can be sold, third-party funders can assist, etc. *See* Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-enforcement*, 28(1) ICSID Review 64–87 (2013). *See also* Franz J. Sedelmayer, *Welcome to Putingrad* (Welcome to Putingrad LLC, 2017). *See also* IA Reporter, Damien Charlotin, *Looking Back: German Investor, Franz Sedelmayer, Was Early-Adopter of Investment Treaty Arbitration, but Had to Engage in Decade-Long Assets Hunt Against Russia*, https://www.iareporter.com/articles/looking-back-german-investor-franz-sedelmayer-was-early-adopter-of-investment-treaty-arbitration-but-had-to-engage-in-decade-long-assets-hunt/.

103. *See*, e.g., *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157 para. 63 (" The arbitrators, whose jurisdiction arises from the consent of the parties, do not have powers of coercion in relation to property—their decisions can only have that effect through the means of enforcement by judgment of a court and then execution.").

104. Crawford, *supra* n. 3, at 1961. The most notable exception to this presumption was presented in France, in *Creighton v. Qatar* Case (Court of Cassation, 2000) the Court held that the arbitration agreement constituted a waiver for purposes of execution, too. *See* Crawford, *supra* n. 3, at 503 ("[I]t is well established that the regimes governing immunity from adjudicative jurisdiction and immunity from execution are separate.").

105. *See The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020).

rejecting immunity from jurisdiction.[106] It has been said that the restrictive immunity theory (discussed in section §13.02 above) has not received the same breakthrough in customary international law with respect to immunity from execution.[107]

[1] Commercial Activity Exception

The issues pertaining to sovereign immunity from execution of foreign arbitral awards came to test before the Swedish Supreme Court in a case between Mr. Sedelmayer and the Russian Federation (*Sedelmayer v. The Russian Federation*).[108] In this case, Mr. Sedelmayer had won an investment treaty arbitration against the Russian Federation. Russia was not keen on complying voluntarily. As a result, he had to engage in an "asset-hunt," tracing Russian assets to execute the award against in various jurisdictions. Subsequent to a long search for commercial assets, he was successful with real estate in Cologne, Germany, and then sought to execute against real estate also in Sweden.

The issue at hand was whether a property owned by the Russian Federation was used for commercial purposes (i.e., *jure gestionis*) or sovereign purposes (i.e., *jure imperii*). In other words, the question culminated in whether Mr. Sedelmayer could enforce and execute an arbitral award or whether the Russian Federation could invoke the plea of sovereign immunity in order to shield its property.

The Swedish Supreme Court duly noted that the real estate had mixed uses as it was partly resided by diplomatic staff; or put differently, was used for diplomatic purposes. However, ultimately the court concluded that the property was mainly used for "non-official," non-governmental purposes. The fact of the matter was that apartments in this large complex were sublet for rental purposes. Consequently, the Swedish Supreme Court held that Russia could not be shielded from enforcement by virtue of sovereign immunity.

Apart from the pro-investor decision itself, this case had broader implications on the overall law of sovereign immunity. First, the Swedish Supreme Court interpreted the UNCSI as a stepping-stone. The Court pointed to the fact that Sweden had ratified convention and that parts of it could be viewed as a codification of customary international law.[109] Second, the Court "broke from the traditional commercial/noncommercial dichotomy and held that state-owned property used for noncommercial uses may not be immune from attachment."[110] This distinction was itself a major step in the right direction, but the fact that it was taken despite the "mixed-use" of the property and despite the Vienna Convention on Diplomatic Relations was a strong signal to the legal community that the Swedish jurisdiction has endorsed and embraced transnational adjudication as a mechanism, indeed a vehicle,

106. *Ibid.*, at p. 7.
107. *Ibid.*, at p. 9.
108. Swedish Supreme Court Case No. Ö 170-10 (reported in NJA 2011 p. 475). For a good analysis, *see* Pål Wrange, *Sedelmayer v. Russian Federation*, 106(2) American Journal of International Law (2012).
109. *Ibid.*, at 12.
110. *Ibid.*, at 21–23 (unofficial translation).

that enables cross-border business and holds the participants accountable to their undertakings and obligations. *Pacta sunt servanda* was given increased standing and currency.[111] Going forward, if a debtor State has property with mixed uses, but predominantly for commercial use, the plea of immunity may not suffice to obstruct enforcement.[112]

As important *The Sedelmayer* may be, it reflects the Swedish position and echoes the *rationale* elaborated already in *The Charente*. The Swedish Court may have taken an additional step; that is, not "only" did it align with "highly culturally developed nations" but it acted as an architect in developing the law of sovereign immunity. The objective but liberal and pragmatic stance on the otherwise controversial "mixed-use" question was in a league of its own and should be firmly entrenched as a best practice to be followed by other courts and subsequently crystallized as a matter of customary international law.

In Sweden, the sovereign is treated as having exchanged absolute or near absolute immunity for the benefits of honest participation in the global market. In the new global legal order, promises are made and international arbitration makes sure that they are kept. Ultimately, however, it will continue to be municipal courts that bear the responsibility of securing that the last link of the arbitral legal order will not be the weakest. Pro-arbitration Swedish courts have helped legitimize this new global institutional order by unqualified and unequivocal support for the enforcement of a transnational rule of law. *Sedelmayer* was not a deviation from the norm, and it reflects the very spirit of the Swedish approach vis-á-vis sovereign immunity. The reasoning and decision reflect a pattern established as far back as in *The Charente* and Sweden's positioning as a world center for business and arbitration.

The rationale in *The Charente*, shining bright in the cases of *LIAMCO* and *Sedelmayer*, is a testament to the Swedish position with respect to the law on sovereign immunity vis-á-vis international arbitration. And unless the pendulum swings back,[113] the trend seems to go further in this commercially pragmatic direction.

In 2017, award-creditors sought to enforce an arbitral award against the Republic of Kazakhstan in Sweden.[114] In 2018, the Stockholm District Court ordered, as a conservatory measure, the sequestration of property belonging to Kazakhstan for the amount sufficient to cover the outstanding debt of roughly USD 500 million.[115] The

111. *See* Hobér, *supra* n. 41, at 30; 20 ILM (1981) 895–896 ("The principle or immunity should not, in a case like this, be allowed to keep fundamental principles of contract law from being applied. I therefore take the view that execution of the arbitral award should be allowed.").
112. *See* Franke, *supra* n. 88 ("In such case, the different purposes must be considered collectively and an assessment made whether they are of a qualified nature, thus covered by state immunity from enforcement.").
113. Which is per se a common and reoccurring legal feature. It should be noted that a minority in *LIAMCO v. State of Libya* sided with language from *Tekno-Pharma AB v. State of Iran*, in which the court took the opposite approach *vis-á-vis* arbitration clauses constituting implied waivers (*see* above).
114. This award had been rendered by an SCC Tribunal in 2013. In 2014, Kazakhstan applied to the Court of Appeal to set aside the award. It was unsuccessful. In 2017, Kazakhstan requested the Supreme Court to reopen the case based on alleged miscarriage of justice. The request was rejected.
115. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 2.

court concluded that it was an enforcement matter against the property of a foreign State and that the issue of immunity from jurisdiction "should not be examined separately."[116] Both parties referred to *The Sedelmayer* and to the UNCSI as binding law, reinstating the importance of treating the latter as a stepping-stone for further analysis. Kazakhstan invoked immunity against post-judgment measures of constraint. The Court could have rejected Kazakhstan's invoking of Articles 19(c) and 21 of the UNCSI on the basis that the arbitration clause is a waiver of enforcement jurisdiction, but it did not.

First and foremost, Kazakhstan argued that the property did not belong to it and that it was not located in Sweden.[117] Moreover, Kazakhstan argued that the property (shares, subscription rights, share dividend, etc.) were used for a non-commercial *purpose*.[118] Additionally, Kazakhstan made the case that even if the property was considered to belong to Kazakhstan, it was "property of the central bank or other monetary authority of the State," and thus immune. The applicants noted that the *nexus* questions are subject to the subsequent enforcement proceedings, but went on to make the case that the property belongs to Kazakhstan, is used for other than governmental non-commercial purposes, and that it is indeed located in Sweden. The Stockholm District Court held that "there is no immunity that would hinder enforcement" and that there was no hindrance for attachment for the same reason because: (1) the property belongs to Kazakhstan, (2) the property is exclusively used or intended to be used for other than governmental non-commercial purposes, and (3) the property is located in Sweden.[119] The Stockholm District Court rejected Kazakhstan's argument that the matter is not one of enforcement. The Court reasoned that a matter of a conservatory measure, i.e., the sequestration, was to be considered an enforcement matter as had been clarified by the Supreme Court.

When the Stockholm District Court had rendered its decision on sequestration of generic assets corresponding to the outstanding debt amount, the Enforcement Authority decided to direct enforcement measures against specific assets, including property allegedly belonging to the debtor State's National Bank (central bank). The State and its National Bank challenged the decision in the Nacka District Court, invoking immunity from execution. The Nacka District Court rejected the appeal and dismissed "the matters from further action with respect to the decisions on enforcement of sequestration."[120] The Court held:

116. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 23.
117. *See* The "*nexus*" requirement in Article 19 (c) of the UNCSI, "[…] and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."
118. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 13: "The purpose of the holding of the shares is to stabilize the social and economic development of Kazakhstan. This is a sovereign act and the property is therefore subject to immunity under Article 19."
119. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court T 10498-17 24–26.
120. *The Republic of Kazakhstan and The National Bank of Kazakhstan v. Stati, Ascom, et al*, Nacka District Court (Procedural Order, July 5, 2019) p. 3.

> In sum, the District Court concludes that the appellants have not established that the purpose of the holding of the property is of such qualified nature by belonging to the Central Bank under the Convention or otherwise. None of the circumstances invoked by the appellants entails that the property is immune against measures of constraint.[121]

In short, given the available information about the property at hand, the Nacka District Court decided that (i) the property is located in Sweden; (ii) the property belong to Kazakhstan; and (iii) that there is no impediment to enforcement due to sovereign immunity.[122] The case was then challenged to the Svea Court of Appeal, which reversed the decision on 17 June 2020 (*see* section §13.05[C][2] below) by focusing on the heightened element of sensitivity.

The Stockholm and Nacka District Courts followed the ethos in *The Charente* and *Sedelmayer*, but the Svea Court of Appeal seems to have gone in the opposite, and more regressive, direction. Several similar proceedings between the same parties are also on-going in, *inter alia*, England and Belgium. Those courts may benefit from the Swedish contribution to the law on sovereign immunity from execution of foreign arbitral awards; but first, the Supreme Court should realign the case law with the liberal and pragmatic spirit that used to represent the Swedish position.

[2] Property Immune Ipso Facto *(Diplomatic Property and Central Bank Property)*

As mentioned in section §13.02 above, certain property is considered categorically immune *ipso facto* pursuant to Article 21 of the UNCSI. In *Sedelmayer*, the Court referenced to Article 21 once and quickly concluded that the property may be used for various purposes.[123] The Court then highlighted the difficulty in mixed-use situations.[124] Finally, the Court concluded that the property was not "to a substantial part used for the official purposes of the Russian Federation."[125] The Swedish contribution was thus one of pragmatism and in sync with furthering the ideals of a liberal doctrine of sovereign immunity.

Recently, however, Kazakhstan and the National Bank challenged the decision from Nacka District Court's decision to reject the plea of immunity (*see* section §13.05[C][1] above). Kazakhstan and its National Bank claimed that the attached property (i) does not belong to Kazakhstan; (ii) is not located in Sweden; (iii) is protected by sovereign immunity; and (iv) cannot be executed due to ordre public. The Svea Court of Appeal started with the plea of immunity from execution, and for the

121. *The Republic of Kazakhstan and The National Bank of Kazakhstan v. Stati, Ascom, et al*, Nacka District Court (Procedural Order, July 5, 2019) p. 3.
122. *The Republic of Kazakhstan and The National Bank of Kazakhstan v. Stati, Ascom, et al*, Nacka District Court (Procedural Order, July 5, 2019) p. 3.
123. *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case no. Ö 170-10 (reported in NJA 2011 p. 475), paras. 14–15.
124. *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case no. Ö 170-10 (reported in NJA 2011 p. 475), para. 16.
125. *Sedelmayer v. The Russian Federation*, Swedish Supreme Court Case no. Ö 170-10 (reported in NJA 2011 p. 475), para. 23.

sake of its analysis presumed that the property belongs to Kazakhstan and that it is located in Sweden.

The Court reached the final conclusion that the attached property is absolutely immune because it constitutes central bank property, and such property is categorically immune *ipso facto* pursuant to Article 21(c) of the UNCSI. Thus, the Court held that Kazakhstan and the National Bank enjoyed immunity pursuant to Article 21(c), and therefore, that there is no need to analyze Article 19(c) of the UNCSI any further. As a result, because the said property enjoys immunity, it cannot be executed and the on-going procedure at the Enforcement Agency must be stopped.[126]

The Court rightly noted that prior case law has referenced to the UNCSI as partly codifying customary international law.[127] The Court also noted—as it should—that each provision of the UNCSI cannot automatically be treated as customary international law.[128] It is argued that the Court was right to treat the UNCSI as a starting point for further inquiry, but it should not treat each and every provision as a codification of customary international law. Especially not such provisions that were clearly agreed upon as a concession between liberal and conservative States in an attempt to reach multilateral consensus between divergent views. The fact of the matter is that state practice is divergent on whether central banks enjoy virtually absolute immunity with respect to attachment and execution of its property. Some states' legislation provides near absolute immunity from execution of central bank property (which seems to be in line with the UNCSI); other States protect central bank property only when it is used for central bank functions or for governmental purposes; and a third category of states provides no special protection at all.[129] Sweden could have endorsed the middle-ground approach and reasoned in light of the ethos in *Sedelmayer*.

Furthermore, the Court rightly noted that an examination of international customary international law is called for.[130] Unfortunately, the Court does not seem to have engaged in an analysis of what level of protection customary international law mandates, and instead surprisingly outright treated Article 21(c) of the UNCSI as a codification of customary international law. Article 21(c) offers essentially absolute immunity to central bank property by treating such as categorically immune *ipso facto*. As mentioned, the alternative viewpoint would be to treat the immunity question as in *Sedelmayer* and in the District Court of the aforementioned case, i.e., determine whether the specific property is used, in the first step, solely for commercial purposes, and in the second step (if necessary), if the use is predominantly for commercial or governmental purposes. Notwithstanding this, such interpretation would not align

126. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 26.
127. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 9 (citing NJA 2009 section 905 and NJA 2011 section 475).
128. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 9.
129. Ingrid Wuerth, *"Immunity from Execution of Central Bank Assets"* in Tom Ruys and Nicolas Angelet (eds.), *Cambridge Handbook on Immunities and International Law*, 266 (Cambridge: Cambridge University Press; 2019).
130. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 13.

with the language of the provision. However, whether the provision should have been the only focal point is the crux of the matter; that is, the Court should first have determined whether Article 21(c) of the UNCI does represent customary international law. Only thereafter should the Court have proceeded with the textual inquiry. The Court circumvented a threshold issue, and thus the result may have been flawed.

An interpretation of Article 21(c) based on the Vienna Convention on the Law of Treaties (VCLT) makes it clear that a categorical application is mandated. This becomes evident when comparing the protection offered to other types of property under the same article, which allows for an analysis of the particular use and functions. An alternative interpretation would be to read the provision in light of Article 2(1)(b)(iii), which makes a reference to "acts in the exercise of sovereign authority of the state." According to this author, the strongest argument in favor of a categorical application was that presented by Professor Wrange in his expert testimony, namely, that the structure of Article 21 is such that another specifically protected property has language qualifying the *ipso facto* protection (i.e., by its functions), while subsection (c) does not.[131] A limitation in (c) that central bank property specifically protected should be used for "central bank" functions or used for governmental purposes is non-existent. The other main point validating a categorical interpretation is that the purpose of Article 21 is to provide an additional set of protection, otherwise it would have been futile per se.[132] This position gets reinstated by the governmental bill to the Swedish ratification of the UNCSI; that is, the property in Article 21 by its very nature is such that it is presumed to be used or intended to be used exclusively for governmental purposes, without any commercial purposes whatsoever.[133] For the reasons mentioned, the interpretation of the UNCSI was likely not flawed per se, even if the alternative interpretation lending itself toward a functional application was equally compelling.

What is even more perplexing is that when all was said and done, the Court nevertheless qualified the now de facto rule of absolute immunity in this context by stating that it may not be ruled out that situations may appear in which a property of a central bank may not enjoy immunity pursuant to Article 21(c). This purported position is indeed mutually exclusive from the categorical approach endorsed. This can only mean one thing, namely, that a textual interpretation in accordance with Article 21(c) should not lend itself toward a categorical application where the result would render the outcome manifestly absurd or unreasonable.[134]

Thus, the Court should have started the analysis backwards by answering two threshold questions: (1) whether Article 21(c) should be treated as customary international law, and (2) whether this is a situation where the functions are so separate from the ordinary functions of a central bank that a grant of immunity would be

131. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 20.
132. *See The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 21.
133. Govt. Bill 2008/09:204, p. 82.
134. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), pp. 23–24.

manifestly absurd or unreasonable. It is the firm opinion of this author that (1) Article 21(c) does not represent customary international law, and (2) that the functions of the National Bank with respect to the property under dispute was so clearly separate from the ordinary functions of a central bank that a grant of immunity was manifestly absurd and definitely unreasonable. However, the Court should not have side-stepped the full analysis necessary. The ICJ made it emphatically clear that the UNCSI only constitutes a codification of customary international law in part. It is this author's opinion that Article 21(c) does not represent a codification of customary international law and that the Swedish practice should not endorse the more regressive of divergent state practices.

To summarize the case, the Court had to determine (1) whether the National Bank is a central bank pursuant to Article 21(c); (2) whether the property belongs to the National Bank; and (3) whether the Article 21(c) should be applied categorically or functionally.[135] The Court concluded that the National Bank—given its nature and function—constitutes a central bank pursuant to Article 21 of the UNCSI, and, furthermore, that the property belongs to the National Bank in the manner prescribed in Article 21.[136] With respect to the third issue, the Court reasoned that a categorical application lends Kazakhstan immunity, while a functional application mandates a position on whether the property is used for governmental non-commercial purposes or not. Based on this, the Court concluded that the property is immune *ipso facto* because the article supposedly mandates a categorical application. The Court reached its decision on the basis of treaty interpretation in accordance with the VCLT.

[3] Implied Waiver Doctrine

In Sweden, a valid arbitration clause constitutes a waiver of sovereign immunity from jurisdiction. Whether this should extend to immunity from execution was for long a debated issue.[137] Nowadays, it is almost a firmly established view that an arbitration clause should not be treated as a waiver of immunity from execution. Whether an arbitration clause constitutes a waiver of immunity from enforcement jurisdiction is more cumbersome to discern. Enforcement jurisdiction does not include post-judgment measures of constraint such as attachment and execution. Such is a matter to be treated separately.

In the 2018 case between an award creditor and the Republic of Kazakhstan, the latter argued that the district court "has to declare its position regarding the question about immunity from jurisdiction of the courts of another state" prior to addressing immunity from post-judgment measures of constraint.[138] As outlined above, the Stockholm District Court rejected this argument. It is this author's opinion that the

135. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), pp. 14–15.
136. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020), p. 18.
137. *See* Franke, *supra* n. 88.
138. *Stati, Ascom, et al v. The Republic of Kazakhstan*, Stockholm District Court case No. T 10498-17 12.

court could have taken yet another step. The court had an opportunity to make clear that an arbitration clause constitutes a waiver from immunity vis-á-vis jurisdiction, including enforcement jurisdiction (as opposed to execution) in municipal courts. There was no need to elaborate on Articles 19 and 21 of the UNCSI at the stage of attaching generic assets, i.e., turning the award into an enforceable title. The elaboration of a robust waiver doctrine would make it clear that States can only invoke immunity from *execution* and that such immunity would only encompass property that is clearly used for governmental purposes. The burden of proof should be on the State in proving that the property is used for governmental purposes exclusively or majorly.

In theory, the Svea Court of Appeal could have elaborated a full-fetched double-waiver doctrine, namely, holding that an arbitration clause constitutes a waiver of immunity from execution, too, in non-ICSID arbitration. The investors argued that Kazakhstan was obliged to comply with the arbitral award pursuant to Energy Charter Treaty (ECT) Article 26(8):

> The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. […] Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

The investors argued that the invoking of sovereign immunity was a means to undercut the enforcement, and therefore was an attempt to circumvent its treaty obligations. The investors essentially alleged that the treatment of immunity as a shield in circumventing its obligations was an "abuse of rights," namely, a procedural tool disposed to avoid complying with the award. However, the argument falls flat on its face because immunity is treated as a procedural plea and it does not imply impunity. A misuse of rights (or privileges rather) is thus, as the Court noted, incompatible with the rules on sovereign immunity.

However, the parties could at least have made the argument that Article 26 of the ECT constitutes an implied waiver of immunity from execution. It is true that the double waiver doctrine is not fashionable nowadays, but at least it would force the court to reconsider its important role as the last link in effectuating a transnational dispute resolution regime that has brought the rule of law to all corners of the world. Political concerns and policy objectives of yesterday may—and probably will—eventually be reconsidered. At least this author remains hopeful that the Swedish jurisdiction will in a not too distant time resume where the French Court took off (and eventually capitulated).[139]

That said, one should not be too wishful or naive with requests that are not yet ripe for reconsideration, even in the most pro-arbitration jurisdictions. The regressive outcome in the Svea Court of Appeal may itself prove to be a testimony to the fact that pendulums swing in both directions. The fact of the matter is that we live in an era of investor-state backlash, where political concerns and policy objectives sometimes

139. *Creighton v. Qatar* (July 6, 2000). Cf *Noga and Republic of Cameroon v. Winslow Bank & Trust Paris Court of Appeals on August 10, 2000* and Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, 9 December 2016 ("The Sapin 2 law").

interfere with legal logic and equal accountability for all parties to a dispute. But, as mentioned, pendulums do swing and proponents of the double waiver doctrine should not waste an opportunity to make their voices heard loud and clear. Come the day for an honest reconsideration of the double waiver doctrine, it is likely that one of the main reasons for justifying the doctrine will be that rogue states have for too long been abusing their procedural privileges to circumvent ancient principles of legal wisdom, such as *pacta sunt servanda*.

Sweden has the potential to be the leading architect among other "developed nations, which are close to Sweden."[140] Therefore, this author hopes that the day will come where an arbitration clause is finally treated as a waiver of immunity from execution, with the exception only for certain specifically outlined property, which is used for governmental purposes and fulfills the functions of the institution it seeks to protect (e.g., diplomatic property or pure central bank property). Given the Swedish experience and contribution to this area of law, it is not unlikely that the Swedish courts will pave that way. But first, the Supreme Court has to reclaim the liberal and pragmatic Swedish position by rejecting the reasoning in and perhaps reverse the holding of the Svea Court of Appeal in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al*.

§13.06 CONCLUDING REMARKS

Sweden has since long embraced the international trend toward a restrictive doctrine of immunity. Moreover, Swedish courts have given effect to the general rule of immunity as forming part of customary international law, which is now firmly entrenched since the ICJ decision from 2012. As is the case under the doctrine of restrictive immunity, the general rule is qualified by several exceptions.[141] What the exceptions are and how they operate in practice remain unclear. The UNCSI has provided some guidance, especially making it unequivocal that there is an overall consensus that certain exceptions should be approved at the execution stage as well as at the adjudicative stage. The UNCSI is not yet binding but it partly represents a codification of customary international law. As a result, municipal courts are still rather free to carve-out further exceptions or to navigate the scope, degree, and extent of the exceptions in the yet to be entered into force convention. Thus, the law and legal theory on sovereign immunity keeps on posing hard questions relating to, *inter alia*, statutory or treaty interpretation, the justification for the law, the lack of uniformity, and the desire for removal of legal barriers. Moreover, it throws up sensitive debates on various political, legal, historic, and cultural issues—e.g., whether and why economically and politically influential Western countries have been the leaders in elaborating the doctrine on sovereign immunity, despite it being a public international law concept.

140. As expressed in *The Charente* NJA 1942 65, at 74–75.
141. *See*, e.g., Crawford, *supra* n. 3, at 489; Foreign Sovereign Immunities Act 1976; State Immunity Act 1978; the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property; and *Germany v. Italy: Greece Intervening,* Jurisdictional Immunities of the State, Judgment of February 3, ICJ Reports 2012.

In the author's view, the final arbiter of defining the law on sovereign immunity should be the ICJ. As the main judicial branch of public international law, the ICJ has a natural standing to consolidate, crystallize, and interpret public international law. When cases reach the court, the judges will be tasked with orienting the maze of foreign decisional law, legislative developments, and scholarly work, only to embrace some of it. The ICJ should take into account the best state practices from all over the world. In that task, the Swedish jurisdiction has a unique voice by the fact that it is a neutral country that belongs to a legal tradition that constitutes a kind of mixture of common and civil legal families. ICJ judges should look to Sweden for guidance. Moreover, the rarity of cases reaching the ICJ means that municipal courts must engage in a comparative legal methodology by looking at foreign decisional law to fill the gaps. This is especially so in the arbitration context. The Swedish contribution will be helpful to any court that seeks to align with a legally and commercially sensible pro-arbitration doctrine of sovereign immunity.

The Swedish experience and contribution demonstrate a liberal and pragmatic approach to the law. The approach squarely resonates with liberal capitalism and liberal democracy. Conclusively, if a court decides to endorse a balanced pro-business doctrine of sovereign immunity, the Swedish decisional law in this area should be highlighted and strenuously praised. Especially in the arbitration context where Swedish courts have been architects of an unequivocal pro-arbitration policy. Put simply, Swedish courts do not shy away from enforcing arbitral awards against States.

Furthermore, from a philosophical standpoint, it can be argued that Swedish courts have understood their role in legal civilization. The courts have assumed their duty to assist and supervise a new global legal order by being active, pragmatic and progressive participants of the system. The development started with *The Charente* and has continued that path with only minor deviations. Sweden early on undertook a leading position as architect of a pro-arbitral legal order and has kept true to that promise ever since.[142]

Sedelmayer is the decision that shines the brightest. The decision is to be applauded. It will likely be cemented as one of the Swedish Supreme Court's greatest arbitration legacies. The decision leaves us with two main take-aways, i.e., (1) the courts treat the UNCSI as a manifestation of customary international law, and thus a stepping-stone for further analysis on the law of sovereign immunity; and (2) the courts interpret the convention through the lens of liberal, pro-business pragmatism. In a word, in *Sedelmayer*, the Swedish Supreme Court started off by analyzing the UNCSI only to fill the gaps by reasoning pragmatically vis-á-vis property used for "mixed

142. With the exception of the decision in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020). The investor has been on an asset-hunt ever since the arbitral award was rendered on December 19, 2013. Subsequent to the Court decision in *The Republic of Kazakhstan and The National Bank of Kazakhstan v. Stati, Ascom, et al*, Nacka District Court (Procedural Order, July 5, 2019), Anatolie Stati, CEO and shareholder of Ascom Group, said that "We welcome the latest judgment of Nacka District Court, which confirms the pro arbitration policy adopted by Swedish courts." Hopefully the Supreme Court can revive the Swedish pro-arbitration policy *vis-á-vis* immunity from execution.

purposes." It is likely that the Swedish courts will continue to engage in defining the contours of the law of sovereign immunity, viz., to determine when and how the general rule of immunity should be qualified.

One large caveat remains lurking in the Swedish horizon, namely the recent decision by the Svea Court of Appeal in *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al.*[143] It is hoped that the Supreme Court will eventually redirect the case law to reflect the ethos previously endorsed. It was perplexing to see that the Svea Court of Appeal, without proper justification, decided to disregard a discussion on divergent state practice and instead outright treating Article 21(c) as *de lege lata*. Unless the Supreme Court overturns the decision or the reasoning in it, Sweden's latest contribution to the law on sovereign immunity would risk endorsing the vision of the proponents of absolute immunity. That would indeed be a surprise and a regret.

143. *The Republic of Kazakhstan and the National Bank of Kazakhstan v. Stati, Ascom, et al* ÖÄ 7709-19 (juni 17, 2020).