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STATE IMMUNITY

INTRODUCTION

Prior to the State Immunity Act 1978, the doctrine of state immunity applied in English courts as a matter of common law and precedent. The doctrine is a rule of customary international law and requires a domestic court to respect the immunity of a foreign state from the court's jurisdiction both in relation to suit and enforcement. It is a derogation from the court's jurisdiction justified on the basis of the sovereign equality and independence of states. The late 20th century saw a shift from an absolute to a restrictive doctrine and the arguments today are about the limits of the restrictions. In essence, a state is no longer immune in respect of its commercial activities (*acte jure gestionis*) but remains immune from domestic litigation for almost all else (*acte jure imperii*), which may include war crimes and acts of torture (unless classified as a tort and committed in the jurisdiction). Enforcement action against states is limited to the pursuit of assets in use for commercial purposes. The law differentiates between states as such and separate state entities whose immunity is more restricted. State and diplomatic immunity (the immunity of the individual diplomat or diplomatic premises) must also be distinguished. This article does not cover diplomatic immunity. The immunity of states with respect to criminal proceedings is absolute.

OVERVIEW

1. **The rationale for jurisdictional immunity and the move to a restrictive doctrine:** The potential injustice of an unfettered application of the absolute doctrine, the increasing involvement of states in commerce and a growing number of sovereign defaults led to calls for a restrictive doctrine. The European Convention on State Immunity 1972 adopted the restrictive doctrine as did the UK State Immunity Act 1978 ("SIA"). Most common law jurisdictions have legislated (The US Foreign Sovereign Immunities Act 1976, the Canadian State Immunity Act 1985 (as amended) and the Australian Foreign States Immunities Act 1985 (as amended) are good examples). In 2004 the UN Convention on Jurisdictional Immunities of States and their Property (the "UN Convention") was signed but is not yet in force. In 2012 the International Court of Justice reconfirmed that restrictive immunity applied as a matter of customary law in *Jurisdictional Immunities of the State (Germany v Italy)* ICJ Rep

2012. Some states, including China and Brazil, remain absolutists. The difficulty with the restrictive doctrine lies in finding a formula for determining when a state is not acting in a sovereign capacity (*acte jure imperii*). The debate centred for a time on whether the purpose or nature of the relevant act or transaction should define its immune status. The UN Convention and the UK and other common law statutes resolve the issue by adopting a legislative approach of absolute immunity subject to enumerated exceptions essentially centred on the nature test.

2. **The UK moves to the restrictive doctrine:** The absolute doctrine of immunity from suit and enforcement applied until the late 1970s when almost simultaneously the common law rule shifted and Parliament adopted the SIA (in force 22 November 1978). Lord Denning famously suggested that the English courts had to follow customary international law and move to a restrictive approach notwithstanding binding precedent in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] Q.B. 529 just as the State Immunity Bill was going through Parliament echoing the views of the City of London that if states were to descend into the market place they had to be treated like merchants. The House of Lords unanimously endorsed the restrictive doctrine in *Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido* [1983] 1 A.C. 244 in 1981 (decided on pre SIA facts) - but divided on its application to the facts of that case. Lord Wilberforce defined the common law test as one of determining the nature of the act in the context- permitting a court to look beyond nature alone- which the SIA only permits in very limited circumstances as explained below. The SIA applies in most cases decided today. Notable exceptions include the activities of foreign troops in the UK (see s 16 (2) and *Holland v Lampen-Wolfe* [2000] 1 W.L.R. 1573, *US v Nolan* [2015] UKSC 63) and head of state immunity (by analogy to diplomatic immunity). State immunity is a preliminary procedural plea but by pleading immunity a state is not deemed to have submitted to the jurisdiction s 2 (1) SIA.
3. **Scope of Immunity from suit:** distinguishing sovereign from non-sovereign acts: The SIA provides that a state will be immune from suit and therefore enforcement unless the activity in question falls within one of the exceptions enumerated in the Act (s.1). A state will always be immune in respect of criminal proceedings (s 16 SIA) but will not be immune where:
 - a. It has waived its immunity (distinguish waiver from suit and enforcement) s.2;

- b. The suit relates to the state's commercial activities s.3;
 - c. The litigation relates to a contract of employment s.4; or
 - d. The state has allegedly committed a tort in the jurisdiction resulting in death or personal injury or loss of tangible property s.5.
4. Immunity is also removed in relation to a number of other areas covered by ss 6-11 of the SIA as discussed below.

5. **Suing a state:**

- a. **Waiver:** Section 2 of the SIA provides that a state may waive its immunity by submitting to the jurisdiction after a dispute has arisen or by prior written agreement. A waiver from suit does not amount to a waiver from execution but the courts do not construe agreements to waive narrowly. A waiver after a dispute has arisen must be given by the Head of Mission of the relevant state. Where immunity is the only bar to jurisdiction a waiver is equivalent to submission. Issues arise when it is alleged that a state has impliedly waived its immunity by taking a step in the proceedings. A choice of English law clause is not a waiver. A submission to arbitration may have the effect of a waiver see discussion about s.9 below at para.13. Cases on waiver include: *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361; *A Company v Republic of X* [1990] 2 Lloyd's Rep. 520 ; *Sabah Shipyard (Pakistan) Ltd v Pakistan* [2002] EWCA Civ 1643; [2003] 2 Lloyd's Rep. 571 ; *NML Capital Ltd v Argentina* [2011] UKSC 31; [2011] 2 A.C. 495 ; *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm); [2007] 1 Lloyd's Rep. 397 ; *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529; [2007] Q.B. 886 ; *Egypt v Gamal-Eldin* [1996] 2 All E.R. 237 ; and *Ahmed v Saudi Arabia* [1996] 2 All E.R. 248.
- b. **Submission** (s 2 SIA): State immunity is a preliminary procedural plea but by pleading immunity a state is not deemed to have submitted to the jurisdiction: s 2 (1) SIA. As soon as immunity is raised proceedings must be halted to give consideration to the plea. If a state takes a step in the proceedings it will be deemed to have submitted s 2(3) (b) (subject to exceptions s 2 (4) and (5)). In *London Steam Ship Owners Mutual Insurance Association Ltd v Spain* also known as “The Prestige” [2015] EWCA Civ 333 an application for relief under the Arbitration Act 1996 was a step in the

proceedings otherwise than for the sole purpose of claiming immunity and Spain was thus deemed to have submitted to the jurisdiction under s.2(3)(b) of the 1978 Act applying *Kuwait Airways Corp v Iraqi Airways Co (No.1)* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694; 1 Lloyd's Rep. 25. On submission and arbitration agreements see par 13 below. Once a state has submitted to the jurisdiction it cannot preserve sovereign immunity: *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank* [2015] EWHC 55 (Ch). Equally if a state has not claimed immunity at the outset it cannot later revive any such claim: *US v Nolan* [2015] UKSC 63.

- c. **Service on a state** (s12 SIA): S 12 SIA specifies procedures for service of process on a state which must be complied with strictly. Service effectively has to take place outside the jurisdiction using diplomatic channels. In *Gold Reserve Inc v Venezuela* [2016] EWHC 153 it was decided that s 12(1) only applies to writs or other documents that are "required to be served" and has no application to service of an arbitration claim form. *AIC Ltd v Nigeria* [2003] EWHC 1357(QB) was not followed in this respect. *PCL v Regional Government of X* [2015] EWHC 68 was not cited. In that case applications to serve proceedings on solicitors and to abridge time were set aside under s 12. In applying *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 the court in *PCL* (also referred to as *L v Y Regional Government of X*) found the wording of s 12(1) to be "general and unqualified" and to apply to service of an arbitration claim form. It is interesting that the judge in *Gold Reserve* also took a different approach to non-disclosure in relation to immunity to that taken in *PCL*. The *PCL* case is related to the proceedings in *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 discussed at paragraph 13 and 21 below.

6. **The commercial activity exception:** If a state engages in commercial activities it will not benefit from immunity in litigation arising from those activities. The problem lies in finding an appropriate form of words to define commercial activity and in determining whether a state's sovereign purpose should be ignored-the paradigm example being a contract for the purchase of boots for a state's army. The question has been addressed in many jurisdictions and at the international level. The approach taken by the SIA broadly conforms to international law but may go a bit further in removing immunity. Section 3 of the SIA

distinguishes between contractual obligations for which immunity is removed absolutely by virtue of the contract being made or performed in the UK, and other "commercial activities" as defined for which there is no jurisdictional nexus requirement. The extent of the restrictions on immunity while perfectly consistent with international law- are somewhat surprising in removing any nexus in relation to contracts for the sale of goods and financial instruments - which may reflect a desire to make London a destination of choice in international commercial matters.

7. **Defining commercial activity: Section 3 of SIA** provides that a state will not be immune in respect of proceedings relating to:
 - a. a commercial transaction entered into by the state, or
 - b. an obligation which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
8. A commercial transaction is defined in s.3(3) as:
 - a. a contract for the supply of goods or services;
 - b. any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
 - c. any other transaction or activity (whether of a commercial, industrial, financial professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.
9. The statute is generally straightforward to apply- but in cases not involving contracts for sale or financial services the sovereign nature of the activity is of concern. Generally speaking s.3 has not led to major litigation and the English courts have been practical in their approach while preserving a state's immunity where clearly required. The Court of Appeal has found that the employment by a diplomat of domestic servant is not a commercial activity in *Al-Malki v Reyes* [2015] EWCA Civ 32.
10. **Examples of the application of s.3:**
 - a. a contract for the sale of parts of the Iraqi "supergun" did not attract immunity (*Commissioners of Customs and Excise v Ministry of Industries and Military Manufacturing, Republic of Iraq* (unreported), see 'A "commercial transaction" under the State Immunity Act 1978' I.C.L.Q. 1994, 43(1), 193-202)

- b. s.3 does not apply to actions in tort ("activity" not to be interpreted to include tortious liability: see *New Zealand Banking Group v Australia* 1989 transcript and Lord Millett obiter in *Holland v Lampen-Wolfe*). It has been suggested that immunity might be removed for the tort of negligent misrepresentation under s.3 (3)(c) where a commercial transaction is defined as any other activity but this was rejected in the Tin Council case of *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418 and doubted by Lord Millet in *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* [2000] 1 A.C. 147.
- c. proceedings to register a foreign judgment were not proceedings relating to a commercial transaction so immunity did not apply even though foreign judgment was in respect of a commercial activity (*AIC Ltd. V Federal Government of Nigeria* [2003] EWHC 1357 approved by Court of Appeal in *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529; [2007] Q.B. 886 but s.31 of the Civil Jurisdiction and Judgments Act 1982 may provide a way around this - see *NML Capital Ltd v Argentina* [2011] UKSC 31; [2011] 2 A.C. 495).
- d. the contract in s.3(1)(b) does not need as such to have been entered into by the state itself -a difficult argument see the many actions arising out of the Tin Council litigation especially *Maclaine Watson v DTI* [1988] 3WLR 1033 .
- e. what is left for the plea of the exercise of sovereign authority (s.3(3)(c) is thin but so far not directly litigated by a state- (see separate entities and s.14 below at para.21)?

11. **Employment: SIA s.4:** A state will not usually be immune in relation to proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or is to be performed wholly or partly in the UK. Immunity remains with respect to employees of the embassy or a consular mission under s.16(1) subject to the appeal in *Benkharbouche v Embassy of the Republic of Sudan and another case* [2015] EWCA Civ 33. Other cases include: *Egypt v Gamal-Eldin* [1996] 2 All E.R. 237; *Ahmed v Saudi Arabia* [1996] 2 All E.R. 248 and *Aziz v Yemen* [2005] EWCA Civ 745; [2005] I.C.R. 1391. It has been argued that the effect of state immunity in this context (s.4(2)) may go further than permitted under international law or European human rights rules either as discriminatory or as

a denial of access to justice under art.6 of the European Convention on Human Rights. In *Al-Adsani v United Kingdom* (35763/97) (2002) 34 E.H.R.R. 11 (a case involving an allegation of torture see under Human Rights below) state immunity trumped art.6 rights according to the English Court of Appeal and a bare majority of the European Court of Human Rights (*Al-Adsani v United Kingdom* (35763/97) (2002) 34 E.H.R.R. 11). This approach was followed in *Jones v UK* (34356/06) (2014) 59 E.H.R.R.1. In *Al-Malki v Reyes* [2015] EWCA Civ 32 domestic workers employed by Saudi Arabian diplomats in London who were the victims of trafficking and had brought claims for racial discrimination, harassment and failure to pay the minimum wage were unable to pursue their claims because of diplomatic immunity. The Court of Appeal was prepared to assume art 6 was engaged but found that diplomatic immunity was not incompatible with art 6 by reference to international practice. This case is to be contrasted with the Court of Appeal's decision in *Benkharbouche v Embassy of the Republic of Sudan and another case* [2015] EWCA Civ 33 to the effect that s 16(1) (a) of the SIA granting state immunity in cases brought by domestic staff employed by embassies in the UK was incompatible with art 6 as the immunity was not required by a rule of international law. S 4 (2) (b) of SIA was found to be discriminatory against foreign nationals and also incompatible with ECHR rights. The case is on appeal to the Supreme Court. An incompatibility argument was rejected in *Ogelegbanwei v Nigeria* [2016] EWHC 8.

12. **Torts causing personal injuries or tangible property loss:**

SIA s.5: A state is not immune in proceedings in respect of death or personal injury or loss of tangible property caused by an act or omission in the UK. Immunity remains for foreign torts (including torture see Human Rights below). The territorial nexus is consistent with international law. In *Jurisdictional Immunities of the State* (Germany v Italy) ICJ Reports 2012 the International Court of Justice confirmed that in customary international law the "territorial tort" exception did not apply to the acts of the armed forces of one state on the territory of another. The same result applies in England by the application of s 16 SIA. Recent cases include: 1) the rejection of an argument that the territorial nexus requirement in s 5 is incompatible with European Human Rights law in *Ogelegbanwei v Nigeria* [2016] EWHC 8; and 2) a new look at the meaning of "territory" in *Ben-Rafael v Iran* [2015] EWHC 3203. In this case Whipple J allowed service out of the jurisdiction on Iran in respect of an application to enforce a decision of a US court against it. The US judgment was for damages arising out of

a terrorist incident in Argentina which the US court found had been carried out by Hezbollah but funded by Iran. The requirement for service out (that a court in the UK would have found it had jurisdiction in similar circumstances) was satisfied as the US court held that this was a composite tort (conspiracy) caused by an act or omission in the US as one element of the tort had occurred in the US. Note that the court did not require that a constituent element of the tort be found to have occurred in the jurisdiction. This may be to expand on the customary concept of territory.

13. **Arbitration: SIA s.9:** By s.9 a submission to arbitration acts as a waiver of immunity in relation to arbitration proceedings. Recent issues have focused on the enforceability of foreign arbitral awards. Claiming under an insurance policy as a third party can amount to agreeing to the original arbitration provisions and result in a loss of state immunity see *London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige)* [2015] EWCA Civ 333. In that case the court also found that the defendants' pursuit of a claim in the Spanish proceedings amounted to an adoption of the arbitration agreement under s.9(1) (para.70) even though there was no written arbitration agreement. Section 9 refers to "proceedings relating to arbitration" and this has been interpreted to include enforcement proceedings relating to a foreign award. A distinction has to be made between seeking to have a foreign arbitral award recognized by the English courts where immunity is precluded by s.9 and seeking to enforce against assets of the state to give effect to the award which would be covered by s.13 discussed below. In *Gold Reserve Inc v Venezuela* [2016] EWHC 153 Teare J, following *Republic of Ecuador v Occidental Exploration and Production Company* [2006] 2 WLR 70, found that Venezuela had submitted to arbitration in writing by entering into a Bilateral Investment Treaty (BIT) with Canada, the state of incorporation of the claimant (an "investor" although this itself was in dispute). See paragraph 3(c) above about service and arbitration. In *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 the relationship between SIA s 9 and s 13 is considered. See para 21 below.
14. **Admiralty Proceedings:** Section 10 deals with admiralty proceedings and removes immunity from State-owned ships in use or intended for use for commercial purposes consistently with the UK's obligations under the 1926 Brussels Convention on the Immunity of State-Owned vessels and the Protocol of 24 May 1934 -note there is no territorial link - claims in respect of

conversion on the High Seas are perfectly justiciable subject to the normal rules on jurisdiction.

15. Immunity from adjudication: the rest:

- a. s.6 removes immunity in relation to immovable property (including indirect impleading see *Rafidain Bank (No.1)*, Re [1992] B.C.C. 376) but does not cover diplomatic premises s.16(1) see *Intpro Properties (UK) v Sauvel* [1983] 2 W.L.R. 908
- b. s.7 removes immunity from proceedings relating to patents, trademarks, design, or plant breeders' rights. There have been no decided cases.
- c. s.8 removes immunity in respect of membership of bodies corporate and unincorporated associations and partnerships- no decided cases directly on this point.
- d. s.11 provides that states shall not be immune in proceedings relating to VAT, customs duties, excise duty, agricultural levies or rates on premises occupied for commercial purposes. Nothing in SIA deals with immunity from liability for tax- the interplay with the Diplomatic Privileges Act 1964 s.2 is relevant to considerations of tax as it exempts sending states and the head of mission from certain taxes. There is controversy over the congestion charge and business rates but no recent decisions.
- e. *Belhaj v Straw* [2014] EWCA Civ 1394 decided that China, Malaysia, Thailand and Libya were not indirectly impleaded in a case involving liability of UK defendants for unlawful rendition. (on act of state see para 24 below).

16. Immunity from Enforcement: The restrictive doctrine has severely limited a state's ability to plead immunity in respect of the adjudicative jurisdiction in relation to commercial activities but by s.13 state assets remain immune from enforcement action:

- a. unless they are "in use of intended for use for commercial purposes" being those purposes referred to in s.3(3) or
- b. the state consents.

17. The attachment of state assets is a more serious erosion of immunity and can only be justified in very limited circumstances-a position which may leave a judgment creditor without a domestic remedy. Section 13 also prohibits specific enforcement, pre judgment attachment, injunctions, freezing orders and orders for discovery. Special provisions apply with respect to Central Bank

funds under s.14. In *Alcom v Colombia* [1984] A.C. 580 the House of Lords restrictively interpreted s.13 and refused to allow the bank account of the Embassy of Columbia to be attached. While some of the funds in the account were used to pay commercial debts, the use was mixed and the HOL concluded that the legislation excluded attachment unless the account was "solely" in use for commercial purposes. This is perfectly consistent with international law and highlights how the purpose test remains key when it comes to enforcement.

18. Recent cases relating to enforcement have:

- confirmed that asset freezing orders are not permissible without the express consent of the state: *ETI Euro Telecom International NV v Bolivia* [2008] EWCA Civ 880; [2009] 1 W.L.R. 665;
- decided that the original source of funds in a state's bank account is not determinative of their commercial use -it is the use at the time of attempted execution that counts: *SerVaas Inc v Rafidain Bank* [2012] UKSC 40; [2013] 1 A.C. 595 ; and *AIC Ltd. V Federal Government of Nigeria* [2003] EWHC 1357;
- held that proceeds of oil sales in a borrower's account for the purpose of making repayments to the World Bank were commercial assets within s.13(4) *Orascom Telecom Holding SAE v Chad* [2008] EWHC 1841 (Comm); [2009] 1 All E.R. (Comm) 315 ;
- reiterated that assets of a state-owned company are not state "assets" for enforcement purposes *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All E.R. 409 ; and
- highlighted that the head of mission's certificate as to the use to which a state asset is put is conclusive s.13(5) and *SerVaas*, above.

19. Central Banks s.14(4): As befits London's status as one of the world's most important financial centres a large number of states maintain bank accounts in London in the name of their central bank. The SIA (going further than required by international law) provides absolute immunity from enforcement against the balances in those accounts. Under s 14(4) the state's central bank or other monetary authority's property is never to be regarded as in use for commercial purposes. Even if it is a separate entity (see below) its property benefits from the protections of s.13. See *AIG*

Capital Partners Inc v Kazakhstan [2005] EWHC 2239 (Comm); [2006] 1 W.L.R. 1420 , on the meaning of property and the application of s.14(4) and more recently Thai-Lao Lignite (Thailand) Co Ltd v Laos [2013] EWHC 2466 (Comm); [2013] 2 All E.R. (Comm) 883 . See also Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq [2013] EWHC 3494 (Comm); [2014] 1 All E.R. (Comm) 942 in which Field J found the balance in the account of the Central Bank of Iraq to be immune from attachment applying s.14(4) SIA and following *AlG Capital Partners*. On appeal the case turned on the situs of the debt created by a letter of credit [2015] EWCA Civ 835.

20. What is a "state" for immunity purposes? s.14: Section 14 of the SIA deals with the meaning of "state" and largely reflects common law and customary international law. A distinction is made between the state, the head of state, its constituent/federal parts, and entities which may carry on the activities of the state but are not part of the state itself. Whether a territory is a state or not is settled by a certificate from The Secretary of State for Foreign and Commonwealth Affairs (s.21 SIA). A constituent territory of a federal state is only immune if an Order in Council so states (See *Pocket Kings Ltd v Safenames Ltd* [2009] EWHC 2529 (Ch); [2010] Ch. 438 about the US state of Kentucky). Section 14 permits the sovereign or head of state acting in a public capacity, the government of the state and any department of the state to claim immunity. There is no immunity for the estate of a deceased head of state in respect of private acts done whilst head of state *Harb v Aziz* [2015] EWCA Civ 481 (*R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* [2000] 1 A.C. 147 considered). Police officers and prison guards have been found to benefit from immunity as the state see *Propend Finance Pty Ltd v Sing Times*, May 2, 1997, *Jones v Saudi Arabia* [2006] UKHL 26; [2007] 1 A.C. 270. See also *Apex Global Management Ltd v Fi Call Ltd* also known as: *Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2013] EWCA Civ 642; [2013] 4 All E.R. 216 which decided that two Saudi Arabian princes, who were the half-brother and nephew of the King, were not "members of his family forming part of his household" for the purposes of state immunity under the State Immunity Act 1978 s.20(1)(b). The princes could not therefore claim sovereign immunity from claims made against them in an unfair prejudice petition.

21. Section 14(4) the immunity of separate entities: Section 14 deals in part with the so called "separate entity" - that is an entity

that might claim to be part of the state but is separate by being distinct from the executive organs of the state and capable of suing and sued. A separate entity is only immune if the state itself would have been immune and the entity is exercising sovereign authority s14(4). Yang refers to this as a "presumption of non-immunity for separate entities". The courts have to deal with two issues: how to determine what 'separate' means and how to assess if the entity is exercising sovereign authority. The relevance of the law of the state and the context dominate the first while difficult jurisprudential questions about the nature of sovereignty determine the second. Lord Mance's judgment in *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All E.R. 409 (followed in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2015] EWCA Civ 835) refers to the need to "have regard to the formulation of the more nuanced principles governing immunity in current international and national law" which seems to mean that as trading relations become more complex so does the search for the meaning of an exercise of sovereign authority by a separate entity. The sovereign authority debate is between whether the nature or purpose of the act in its context will be determinative. At common law their Lordships were divided on whether the decision by Cuba to divert a cargo of sugar bound for Chile because Cuba was unhappy about the coup against Allende was sovereign or not (*Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido* [1983] 1 A.C. 244). The SIA sets out a two-step process- determine if the entity is acting in a sovereign capacity on behalf of the state and then decide if the state would have been immune in the circumstances. In practice these tests can be conflated see *Kuwait Airways Corp v Iraqi Airways Co (No.1)* [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694; 1 Lloyd's Rep. 25. More recently Mr Justice Gross favoured the nature test in *Ministry of Trade of Iraq v Tsavlis Salvage (International) Ltd (The Altair)* [2008] EWHC 612 (Comm); [2008] 2 All E.R. (Comm) 805. Mr Justice Burton in *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 had to consider the test in the context of an application to enforce a peremptory order of arbitrators. He decided that the correct approach was to consider if there was an exercise of the sovereign authority of the state itself or of the separate entity. Having concluded it was the later there could be no immunity. He also found obiter that the proceedings did relate to an exercise of sovereign authority by the state under SIA s 14 (2). He examined the relationship between s 9, s 13 and s 14 and decided that s 13 (on enforcement) would have applied even if immunity from suit had been removed by s 9 (submission to

arbitration). His further conclusion that an application under s 42 of the Arbitration Act 1996 was not an application for an injunction and therefore outside s13 (2) was made following the Court of Appeal in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Re 208. Finally he decided that the waiver of immunity in this case would have sufficed as a waiver in respect of injunctive relief under s 13 (2). It was not necessary for the waiver to spell out consent in respect of s 13 (2) (a) relief.

22. Human Rights and State Immunity: A decision upholding state immunity per se deprives the claimant of a remedy or at the very least the right to argue about his rights. Human rights lawyers have suggested that immunity:

- a. should not prevail when gross violations of human rights such as torture (as a tort) are alleged; and
- b. is a denial of access to justice prohibited by art.6 of the European Convention on Human Rights and therefore the Human Rights Act.

23. The debate is an international one and the International Court of Justice in *Germany v Italy* found decisively that human rights (even jus cogens norms) do not trump immunity as a matter of international law (both customary and under the UN Convention). Lord Bingham concluded obiter in *Jones v Saudi Arabia* approving Lord Millett's approach in *Holland v Lampen-Wolfe* (and that of the UK government) that as the effect of immunity is to remove any jurisdiction the forum state might have had over the foreign state, art.6 is simply not relevant but that it might be engaged following the European Court of Human Rights decision in *Al Adsani* . The public international lawyer's response is that the appropriate forum for the resolution of such issues is through diplomatic channels. This is of little comfort to the private litigant if the forum state is not prepared to so act. *Al Adsani* (followed in *Jones v UK* (34356/06) (2014) 59 E.H.R.R.1) The English Court of Appeal has now accepted it seems that art 6 is engaged when issues of immunity arise. See *Al-Malki v Reyes* [2015] EWCA Civ 32 (on diplomatic immunity) and *Benkharbouche v Embassy of the Republic of Sudan and another case* [2015] EWCA Civ 33. to the effect that s 16(1) (a) of the SIA granting state immunity in cases brought by domestic staff employed by embassies in the UK was incompatible with art 6 as it was not required by a rule of international law. S 4 (2) (b) of SIA was found to be discriminatory against foreign nationals and also incompatible with ECHR rights.

24. Act of State/Immunity and Non-Justiciability: It is important but not easy to distinguish between state immunity, and the two doctrines of non-justiciability and act of state. All three are "avoidance techniques" (Lady Fox). Act of state and non-justiciability may be relevant whether the state is a party to the proceedings or not. Act of state can be pleaded as a defence and requires an English court to exercise restraint in disputes involving a consideration of the legislative or other governmental acts of foreign states on their territory. Non-justiciability requires the court to abstain from hearing matters involving international relations on the basis that the court has no judicial or manageable standards by which to resolve them. A state can fail on a plea of immunity but still avoid liability on one of these other grounds which may be political. See the important unanimous Court of Appeal decision in *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855; [2014] Q.B. 458. The Court of Appeal has decided in *Belhaj v Straw* [2014] EWCA Civ 1394 that claims for damages against, inter alia, the then Foreign Secretary Jack Straw arising out of the Government's alleged participation in the unlawful rendition of a Libyan man and his Moroccan wife can proceed. The High Court had held that while the claims were not barred by a plea of state immunity, they were under the doctrine of act of state. The Court of Appeal concluded the claim was not barred by the act of state doctrine because the case fell within the limitation on grounds of public policy in cases of violations of international law and fundamental human rights. This has been followed in *Rahmatullah v Ministry of Defence* and *Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 where the Court of Appeal refused to bar a claim in tort against the government for unlawful detention in Afghanistan based on act of state. These cases are on appeal to the Supreme Court.

25. International and EU law: This Insight article has looked only at English law and focused on civil proceedings. The UN Convention and the European Convention are clearly important sources which may assist an English court in its interpretation of the SIA. The SIA gives effect to the UK's obligations under the European Convention and the UK can ratify the UN Convention arguably without amending domestic law. Broadly therefore English law conforms to the international position. It differs in adopting a nature only test for commercial transactions (other than those covered by s.3(3)(c)) and, in distinguishing between pre and post judgment forms of attachment. It may be more pro-state than some European states. The SIA differs in many respects from the US FSIA notably in relation to nexus requirements. The SIA is more protective of central bank assets than was the common law or is the US FSIA. The act

may also not get the balance right between human rights and state rights in employment matters but this is being addressed in recent cases such as *Benkharbouche v Embassy of the Republic of Sudan* [2015] EWCA Civ 33. It is clearly therefore vital to get advice about local law if advising on an immunity issue in another jurisdiction.

KEY ACTS

Diplomatic Privileges Act 1964

State Immunity Act 1978

US Foreign Sovereign Immunities Act 1976

Civil Jurisdiction and Judgments Act 1982

Human Rights Act 1998

KEY SUBORDINATE LEGISLATION

Civil Procedure Rules 1998/3132

KEY QUASI LEGISLATION

None.

KEY EUROPEAN LEGISLATION

Brussels International Convention for the Unification of Certain Rules relating to the Immunity of States-owned Vessels 1926

European Convention on Human Rights 1950

European Convention on State Immunity 1972

UN Convention on the Jurisdictional Immunities of States and their Property Dec 2004

Charter of Fundamental rights of the European Union 2000

KEY CASES

US v Nolan [2015] UKSC 63)

PCL v Regional Government of X [2015] EWHC 68 (also referred to as *L v Y Regional Government of X*)

Harb v Aziz [2015] EWCA Civ 481

R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3) [2000] 1 A.C. 147.

Soleh Boneh International Ltd v Government of the Republic of Uganda [1993] 2 Lloyd's Re 208

Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq [2015] EWHC 3361

Gold Reserve Inc v Venezuela [2016] EWHC 153

Republic of Ecuador v Occidental Exploration and Production Company [2006] 2 WLR 70,

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) ICJ 2002

Jurisdictional Immunities of the State (Germany v Italy), ICJ 2012

Trendtex Trading Corp v Central Bank of Nigeria [1977] Q.B. 529

Owners of Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido [1983] 1 A.C. 244

Holland v Lampen-Wolfe [2000] 1 W.L.R. 1573

SIA Commissioners of Customs and Excise v Ministry of Industries and Military Manufacturing, Republic of Iraq (unreported) see A "commercial transaction" under the State Immunity Act 1978 I.C.L.Q. 1994, 43(1), 193-202

Alcom v Colombia [1984] A.C. 580

New Zealand Banking Group v Australia 1989 transcript

Ogelegbanwei v Nigeria [2016] EWHC 8

Kuwait Airways Corp v Iraqi Airways Co (No.1) [1995] 1 W.L.R. 1147; [1995] 3 All E.R. 694; 1 Lloyd's Rep. 25

Kuwait Airways Corp v Iraqi Airways Co (No.6) [2002] UKHL 19; [2002] 2 A.C. 883

AIC Ltd v Federal Government of Nigeria [2003] EWHC 1357

Svenska Petroleum Exploration AB v Lithuania (No.2) [2006] EWCA Civ 1529; [2007] Q.B. 886

NML Capital Ltd v Argentina [2011] UKSC 31; [2011] 2 A.C. 495

Maclaine Watson v DTI [1988] 3WLR 1033

A Company v Republic of X [1990] 2 Lloyd's Rep. 520

Sabah Shipyard (Pakistan) Ltd v Pakistan [2002] EWCA Civ 1643; [2003] 2 Lloyd's Rep. 571

Donegal International Ltd v Zambia [2007] EWHC 197 (Comm); [2007] 1 Lloyd's Rep. 397

Egypt v Gamal-Eldin [1996] 2 All E.R. 237

Ahmed v Saudi Arabia [1996] 2 All E.R. 248

Aziz v Yemen [2005] EWCA Civ 745; [2005] I.C.R. 1391

London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige) [2013] EWHC 3188 (Comm); [2014] 1 Lloyd's Rep. 309

Rafidain Bank (No.1), Re [1992] B.C.C. 376

Intro Properties (UK) v Sauvel [1983] 2 W.L.R. 908

ETI Euro Telecom International NV v Bolivia [2008] EWCA Civ 880; [2009] 1 W.L.R. 665

SerVaas Inc v Rafidain Bank [2012] UKSC 40; [2013] 1 A.C. 595

Orascom Telecom Holding SAE v Chad [2008] EWHC 1841 (Comm); [2009] 1 All E.R. (Comm) 315

La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC [2012] UKPC 27; [2013] 1 All E.R. 409

Thai-Lao Lignite (Thailand) Co Ltd v Laos [2013] EWHC 2466 (Comm); [2013] 2 All E.R. (Comm) 883

Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq [2015] EWCA Civ 835

Pocket Kings Ltd v Safenames Ltd [2009] EWHC 2529 (Ch); [2010] Ch. 438

Propend Finance Pty Ltd v Sing Times, May 2, 1997

Jones v Saudi Arabia [2006] UKHL 26; [2007] 1 A.C. 270

Ministry of Trade of Iraq v Tsavliris Salvage (International) Ltd (The Altair) [2008] EWHC 612 (Comm); [2008] 2 All E.R. (Comm) 805

Yukos Capital Sarl v OJSC Rosneft Oil Co [2012] EWCA Civ 855; [2014] Q.B. 458

Al-Adsani v United Kingdom (35763/97) (2002) 34 E.H.R.R. 11

Benkharbouche v Embassy of the Republic of Sudan and another case [2015] EWCA Civ 33.

Rahmatullah v Ministry of Defence and Mohammed v Secretary of State for Defence [2015] EWCA Civ 843 Al-Malki v Reyes [2015] EWCA Civ 32.

High Commissioner for Pakistan in the United Kingdom v National Westminster Bank [2015] EWHC 55 (Ch).

Jones v UK (34356/06) (2014) 59 E.H.R.R.1.

Belhaj v Straw [2014] EWCA Civ 1394

Apex Global Management Ltd v Fi Call Ltd also known as: Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2013] EWCA Civ 642; [2013] 4 All E.R. 216

KEY TEXTS

H. Fox and P. Webb, The Law of State Immunity, 3rd Ed. (Oxford University Press, revised 2015)

O'Keefe, R and CJ. Tams, (eds) The UN Convention on Jurisdictional Immunities of States and their Properties: A Commentary (Oxford University Press, 2013)

X. Yang, State Immunity in International Law (Cambridge University Press, 2012)

FURTHER READING

J. Crawford, Brownlie's Principles of Public International Law, 8th Ed. (Oxford University Press, 2012)

M. Shaw, International Law, 7th Ed. (Cambridge University Press, 2014)