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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 with respect 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 distinguishes 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 1977, The Canadian State Immunity Act (as amended) 1982 and the Australian Foreign States Immunities Act (as amended) 1985 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)*. 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. 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.

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 v The Central Bank of Nigeria* [1977] 1 QB 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 *I Congreso* 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 *Holland v Lampen Wolfe* [2000] 1 WLR 1573) 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. A court is bound to raise immunity if the parties do not. As soon as immunity is raised proceedings must be halted to give consideration to the plea.

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 not be immune where:

- It has waived its immunity (distinguish waiver from suit and enforcement) s 2;
- The suit relates to the state's commercial activities s3;
- The litigation relates to a contract of employment s4; or
- The state has allegedly committed a tort in the jurisdiction resulting in death or personal injury or loss of tangible property s 5.

The state is also not immune in relation to a number of other areas covered by sections 6-11 of the SIA discussed below.

4. 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.

5. 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.

A commercial transaction is defined in S 3(3) as:

(a) a contract for the sale or supply of 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.

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.

6. Examples of the application of s 3

- 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* see 1994 43 *ICLQ* 194)
- s 3 does 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*)
- 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 Nigeria* [2003] EWHC 1357 approved by Court of Appeal in *Svenska Petroleum v Lithuania* [2006] EWCA Civ 1529 but s 31 of the Civil Jurisdiction and Judgments Act 1982 may provide a way around this – see *NML Capital v Republic of Argentina* [2011] UK 2 AC 495)
- 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
- what is left for the plea of the exercise of sovereign authority (s 3 (3) ©) is thin but so far not directly litigated by a state- (see separate entities and s 14 below).

7. Waiver

S 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 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. Cases on waiver include: *A Company v Republic of X* [1990] 2 LL Rep. 520; *Sabah Shipyard v Pakistan* [2002] EWCA Civ 1643; *NML Capital V Republic of Argentina* [2011] 2 AC 495; *Donegal v Zambia* [2007] EWHC 197 (Comm); *Svenska Petroleum v Lithuania* [2006] EWCA Civ 1529; *Egypt v Gamal- Eldin* [1996] 2 All ER 237; and *Ahmed v United Kingdom of Saudi Arabia* [1996] 2 All ER 248.

8. 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 (s 16(1)). Cases include: *Egypt v Gamal- Eldin* [1996] 2 All ER 237; *Ahmed v United Kingdom of Saudi Arabia* [1996] 2 All ER 248 and *Aziz v Republic of Yemen* [2005] EWCA Civ 745. It has been argued that the effect of state immunity in this context may go further than permitted under international law or European human rights rules either as discriminatory s 4 (2) or a denial of access to justice under article 6 of the European Convention on Human Rights. In *Al-Adsani v UK* (a case in involving an allegation of torture see under Human Rights below) state immunity trumped article 6 rights according to the English Court of Appeal and a bare majority of the European Court of Human Rights (*Al-Adsani v UK* 34 EHHR 11)). In *Benkharbouche v Embassy of the Republic of Sudan and another case* UKEAT/0401/12; 0020/13, 4 October 2013 the EAT (without considering *Al Adsani*) accepted that art 6 might take precedence over state immunity by looking at the UN Convention (which does not restrict suit by third party nationals s11) -this may be reversed on appeal.

9. **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.
It has been suggested that immunity might be precluded for the tort of negligent misrepresentation under s 3(3) © where a commercial transaction is defined as any other activity but this was rejected in the Tin Council case of *JH Rayner v DTI* [1989] 3 WLR 969 and doubted by Lord Millet in *R V Bow Street Metropolitain Stipendiary ex parte Pinochet Ugarte* (No 3) [2000] 1AC 147.

10. Arbitration : s 9

By s 9 a submission to arbitration acts as a waiver of immunity in relation to arbitration proceedings. Recent issues have centered 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 Steamship Owners Mutual Insurance Association Ltd v Spain* [2013] EWHC 3188 (Comm). S 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.

11. Admiralty Proceedings

S 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.

12. Immunity from adjudication: the rest

- S 6 removes immunity in relation to immovable property (including indirect impleading see *Re Rafidain Bank* [1992] BCLC 301) but does not cover diplomatic premises s 16 (1) see *Intpro properties (UK) Ltd v Samuel and Others* [1083]2 All ER 495
- S7 removes immunity from proceedings relating to patents, trademarks, design, or plant breeders' rights. There have been no decided cases.
- S 8 removes immunity in respect of membership of bodies corporate and unincorporated associations and partnerships- no decided cases directly on this point.
- S 11 states 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.

13. 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:

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

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 any domestic remedy.

S 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 Republic of Colombia* [1984] 1 AC 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.

14 Recent cases relating to enforcement

Recent cases have:

- confirmed that asset freezing orders are not permissible without the express consent of the state: *ETI Euro Telecom International NV v Republic of Bolivia and anor* [2008] EWCA Civ 880;
- 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 Incorporated v Rafidain Bank and others* [2012] UKSC 40; 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 Holdings SAE v Republic of Chad & Ors* [2008] EWHC 1841 (Comm);
- reiterated that assets of a state-owned company are not state "assets" for enforcement purposes *La Generale des Carrieres et des Mines v F.G. Hemisphere LLC* [2012] UKPC 27; 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.

15 Central Banks s14 (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 v Republic of Kazakstan* [2005] EWHC 2239 (Comm), [2005] All ER (D) 223 on the meaning of property and the application of s 14(4) and more recently *Thai-Lao Lignite (Thailand) Co. Ltd, Hongsa Lignite (Lao Pdr) Co. Ltd v Government of the Lao People's Democratic Republic v The Bank of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) 2013 WL 3994851. See also *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2013] EWHC 3494 (Comm) 2013 WL 6047231 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 *AIG Capital Partners*. This is on appeal and its treatment of the "separate legal entity" is discussed below.

16 What is a 'state' for immunity purposes? S 14

S 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* [2010] 2 WLR 1110 about the US state of Kentucky. S 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. Police officers and prison guards have been found to benefit from immunity as the state see *Propend Finance v Sing* , The Times 2 May 1997, *Jones V Saudi Arabia* [2007] 1 AC 270.

17. S 14(4) the immunity of separate entities

S 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 s 14 (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 *Hemisphere* followed in *Taurus* 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 separate entity.
The sovereign capacity 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. The SIA sets out a two step process- determine if the state would have been immune and then decide if the entity is acting in a sovereign capacity. In practice these tests seems to be conflated see *Kuwait Airways Corp v Iraqi Airways Co (No 2*) [2002] UKHL 19. More recently Mr Justice Gross favoured the nature test in *Tsavliris Salvage (International) Ltd v Grain Board of Iraq [2008] EWHC 612 (Comm)* [2008] 1 C.L.C. 592

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

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, article 6 is simply not relevant but that it might be engaged following the European Court of Human Rights decision in *Al Adsani.*
The 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.

19 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 v OJSC Rosneft Oil* [2013] 3 WLR 1329

20 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) ©) 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. 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

UK 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

KEY INTERNATIONAL TREATIES

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

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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

Domestic UK
Common Law:
Trendtex Trading Corp. v. Central Bank of Nigeria, 1977 2 WLR 356
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Commissioners of Customs and Excise v Ministry of Industries and Military Manufacturing, Republic of Iraq see 1994 43 *ICLQ* 194
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ECHR decision
Al-Adsani v UK (2002) 34 EHRR 273

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FURTHER READING
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