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Arbitration and State Immunity: Time for a Reassessment?


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Introduction

The issue of State immunity is attracting renewed interest. In the last year, courts in the US and UK have lifted stays of proceedings brought by Yukos shareholders to enforce against the Russian Federation arbitral awards of more than US$50 billion. Those courts will now address questions of State immunity.[1] This is against the background of Russia's invasion of Ukraine. Arbitration proceedings under the Russia/Ukraine Bilateral Investment Treaty had already been brought in relation to Russia's seizure of Crimea in 2014.[2] There are indications now of further arbitration claims in connection with losses sustained since the invasion.[3] It is possible too that Western investors may seek to bring claims under investment treaties in respect of assets that have been subject to measures in Russia; with Russia, for its part, potentially claiming where its property has been sanctioned.

Trying to enforce an arbitral award against a State is difficult. Some award creditors try for many years to make recoveries against non-paying States.[4] The challenges include identifying State assets in the first place. However, the principal obstacle is State immunity: demonstrating the commercial – as opposed to sovereign – use of the assets and persuading the local, enforcing court that State immunity does not apply. This chapter looks at these issues, as well as the connected problem of enforcement against State-owned entities ("**SOEs**").

State Immunity – Overview

"State" or "sovereign" immunity is based on the international law principle of the sovereign equality of States.[5] According to this principle, no State can adjudicate over another because they are equals. If a State (the Foreign State) is sued by a private person in the courts of another State (the Forum State) then, should the Foreign State be successful in its plea of State immunity, the Forum State will dismiss the claim.

The State immunity which is the subject of the present chapter is to be distinguished from other forms of immunity, such as diplomatic immunity, and certain other doctrines such as the common law doctrines of act of State and non-justiciability.

The sources of State immunity are a mix of international and domestic law. On the international plane, State immunity is a rule of customary international law. It is not a mere expression of comity between nations but an obligation on the Forum State to uphold a Foreign State's claim to immunity.[6] So each State stands potentially to be a beneficiary of the system, as well as being subject to an obligation to uphold it.

However, the detail of the application of State immunity in any particular situation (for example, the extent to which there are any exceptions) will likely depend on any treaties to which the relevant States may be parties and their own domestic laws on State immunity.

There are a number of international law instruments, including the European Convention on State Immunity 1972 (the "**ECSI**").[7] There is also the United Nations Convention on Jurisdictional Immunities of State and Their Property 2004 (the "**UNCSI**") although this is not yet in force, as the necessary number of ratifications have not yet been received.[8] Also of relevance are the International Law Commission Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries, 1991 ("**ILC Commentary**"),[9] which led to the adoption of the text of the UNCSI. Whilst treaty coverage on the subject of State immunity is not presently very extensive, State immunity is recognised as a rule of customary international law and is therefore binding on States.

At the national level, some countries have their own bespoke domestic laws dealing with State immunity, significant examples being the United States' Foreign Sovereign Immunities Act 1976 ("**US FSIA**") and the United Kingdom's State Immunity Act 1978 ("**UK SIA**"). However, other countries do not have their own domestic law of State immunity. In which case, the State's rules on immunity may be very limited and found in a single provision in a statute dealing with private international law or civil procedure. Or the national courts, in determining cases where the question of State immunity arises, may refer exclusively to customary international law (so far as it can be ascertained).

In the *Jurisdictional Immunities Case*, the International Court of Justice ("**ICJ**") held that the law of State immunity is procedural in nature and is not concerned with whether the conduct of the defendant State in question was itself lawful or unlawful.[10] Moreover, the question of immunity should be dealt with as a preliminary matter at an early stage of proceedings and before consideration of the merits.[11] If the Forum Court decides that the assertion of State immunity by the respondent State is made out, then the Forum Court should dismiss the claim. A Forum Court is obliged to raise the matter of State immunity of its own motion if it is clear that there may be an issue.[12]

The law of State immunity draws a general distinction between two basic situations where it may be invoked. First, where the Foreign State as defendant says that it is immune from the jurisdiction of the Forum State in matters of liability (known as "jurisdiction" or "adjudication immunity"). Secondly, where the Foreign State says that its property is immune from enforcement ("enforcement immunity"). In addition to these two situations there are other scenarios where the court of the Forum State's powers may be said to interfere with the sovereignty of the Foreign State; for example, where interim measures of attachment are imposed as security for a claim. Accordingly, issues of State immunity can arise at different points in a dispute and the precise rules that apply at any particular stage may vary.[13] By and large,

the rules giving immunity from enforcement are even stronger than those providing a State with immunity from adjudication.[14]

Absolute *v.* restrictive immunity and exceptions to immunity

Historically, there have been two principal theories of State immunity: absolute immunity; and restrictive immunity. The theory of absolute State immunity is that, no matter in what capacity it is acting or the nature of its dealings, a sovereign State cannot be sued before the courts of another State unless it expressly consents.[15] By contrast, the theory of restrictive immunity draws a distinction between different types of State activity: acts in the exercise of sovereign authority (*acta jure imperii*); and acts of a non-sovereign nature such as private and commercial activities (*acta jure gestionis*). The rationale is that, whilst a State may not be sued in exercises of its sovereign authority, in circumstances where the State is, in reality, acting like a private commercial party, it should not be able to hide behind the cloak of State immunity to avoid claims from counterparties.

Restrictive immunity is now the most widely accepted approach to be found in treaties such as the ECSI and UNCSI and in national legislation. Leaders in adopting the restrictive theory of immunity were Italy and Belgium towards the end of the 19th century.[16] Other countries gradually followed suit: for example, the United States after the Second World War, and the UK in the 1970s. Some States such as the Soviet Union held on to the absolute approach for longer due to their political and economic systems. Subsequent Russian court practice and academic commentary showed, however, a growing tendency towards the restrictive approach, and in 2015 a law was adopted which implemented a restrictive model.[17] Ukraine's law on State immunity is still, formally speaking, an example of the absolute doctrine although some contemporary practice shows a restrictive approach.[18] China has traditionally been cited as one of the last adherents of the absolute doctrine; it too may now be moving towards a more restrictive approach.[19]

Broadly speaking, the exceptions to State immunity that form part of the restrictive immunity model cover situations including the following: commercial transactions; contracts of employment; claims for personal injury and damage to property in the Forum State (the "territorial tort exception"); ownership of property or IP rights in the Forum State; or participation in a company in the Forum State. Finally, of particular relevance to the present discussion are the express exceptions in international and national laws to State immunity in situations where there is an arbitration agreement.[20]

In the next sections, we consider the interaction of arbitration and State immunity in three specific contexts:

(i) To what extent may a Foreign State be immune from court proceedings relating to arbitration?

(ii) Against what State property may an arbitral award be enforced?

(iii) Can SOEs be subject to enforcement?

This chapter looks at these issues by reference to UK law.

State immunity and court proceedings "which relate to the arbitration"

Under UK law, a State is immune from the jurisdiction of the courts of the UK except as otherwise provided in the UK SIA. This amounts to a presumption of immunity, subject to any specific exceptions in the Act which apply.[21] One of these exceptions is the exception to State immunity "*as respects proceedings in the courts of the United Kingdom which relate to the arbitration*".[22] In this, UK law is like the ECSI and UNCSI and other laws of State immunity which adopt a "restrictive" approach. However, what exactly is understood by "court proceedings which relate to arbitration" may vary from jurisdiction to jurisdiction.

"Court proceedings which relate to arbitration" will likely include proceedings in the court at the seat of arbitration in its capacity as curial court. This would include those proceedings (with the notable exception of applications for measures of constraint – which we deal with below) where the court is exercising powers in support of the arbitration, such as orders to appoint arbitrators in default of party agreement. The role of the curial court also includes the hearing of applications for set-aside of an award. Those too are court proceedings relating to arbitration. Therefore, if a Foreign State has agreed to arbitration, it cannot object on the ground of State immunity to the curial court (Forum State) hearing applications arising from the underlying arbitration. By virtue of the arbitration agreement, the State has waived immunity.

How does a State agree to arbitration for these purposes? In UK SIA s.9(1), there is a requirement for the State to agree in writing to submit to arbitration. The writing requirement has been satisfied in the situation of a non-signatory State as third party claiming under a policy of insurance containing an arbitration agreement and thereby itself being treated as a party to the arbitration agreement.[23] In the context of investment treaty arbitration, the English court has held that an agreement to arbitrate arises through the State's unilateral offer to investors to arbitrate in the treaty being accepted by an investor when it commences arbitration.[24] The waiver of immunity for proceedings which relate to arbitration is subject to any contrary provision in the arbitration agreement.[25]

In UK law, the waiver of immunity before the UK courts is not limited to arbitrations on UK soil. The waiver in UK SIA s.9 also applies to foreign awards being brought into the UK for recognition and enforcement. As it was put by the Court of Appeal in *Svenska Petroleum v Lithuania*: "*[A]rbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective.*"[26] Accordingly, procedures for recognition and enforcement of an award are also court proceedings relating to arbitration under s.9, in respect of which the State's immunity is excluded.[27]

This is not the case under all State immunity regimes. The ECSI, for example, spells out three types of court proceedings relating to arbitration where immunity may not be claimed. These are proceedings relating to: (1) the validity or interpretation of the arbitration agreement; (2) the arbitration procedure; and (3) the setting aside of the award. Furthermore, the ECSI arbitration exception expressly limits itself to the jurisdiction of the Contracting State on whose territory or according to the law of which the arbitration takes place.[28] Therefore, where provisions reflecting the ECSI are applied, immunity from jurisdiction will still be available in proceedings for the recognition and enforcement of foreign arbitral awards.

Moreover, even in those jurisdictions where no immunity applies to proceedings for the recognition and enforcement of an award, it may still be impossible actually to execute the award against State property. We consider this further in the following section.

Enforcing an award against State property; measures of constraint

Immunity from execution has been described as "*the last bastion of State immunity*".[29] It is also the most difficult to breach. This is because the execution of an award or judgment and other

measures of constraint which directly interfere with a State's use of its assets are considered to be the most intrusive measures. Proceedings for the recognition and enforcement of an arbitral award may be regarded in many jurisdictions as not giving rise to immunity because such proceedings simply bring the arbitral award into the legal order of the Forum State, so that it acquire *res judicata* effect and becomes a local court judgment. By contrast, enforcement by way of execution is the final stage in the journey of an award. It may lead to a Foreign State definitively losing ownership and control over its property at the hands of the Forum State. At the interim stage, measures of preliminary attachment by way of security for a claim are also objectionable to the principle of sovereign equality of States since, here too, the Foreign State loses control over its property, albeit on a temporary basis.

As a result of this general conservatism regarding the execution of judgments and awards against State property, the widely adopted approach is that execution is only possible with the Foreign State's express consent. Furthermore, the State's consent to arbitration in general terms is not deemed to be a consent to execution against property subsequently. The approach in the UNCSI is that neither pre-judgment nor post-judgment measures of constraint may be taken against the property of a State unless (a) the State has expressly consented to the taking of such measures, (b) the State has allocated property for the satisfaction of the claim, or (c) (in respect of post-judgment measures only) it has been established that the property is in use for other than "government non-commercial purposes" (i.e. it is being used for commercial rather than sovereign purposes) and provided that the measure is only taken against property that has a connection with the entity against which the proceeding was directed.[30]

The UNCSI also sets out five categories of State property which are accorded an even higher level of immunity: in summary, property (a) used in the performance of the functions of the State's diplomatic and other missions, (b) of a military character, (c) of a central bank or other monetary authority, (d) forming part of the cultural heritage of the State, and (e) forming part of a scientific, cultural or historical exhibition and which is not for sale.[31]

Therefore, the UNCSI sets out a very restricted regime for execution against State property. At the core of this is the requirement for the State's consent to execution. The exception to consent at UNCSI A.19(c) is circumscribed, in that it can only be relied upon where the property in question is used for commercial purposes and has a connection with the entity which is the subject of the claim.

Although the regime under UK law for execution against State property is also restrictive, the commercial purpose exception is arguably more permissive than that under the UNCSI and in many other countries. UK SIA s.13(4) provides that the restriction against process for enforcement of a judgment or an award against property of a State (at UK SIA s.13(2)(b)) shall "*not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes*".[32]

Under UK SIA, "*commercial purposes*" means the purposes of such transactions or activities as are mentioned in UK SIA s.3(3): (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance, any guarantee or indemnity in respect of such transaction or any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.[33] So the idea of commercial purposes is widely drawn. Moreover, unlike the UNCSI, the property does not have to be connected to the entity which is the subject of the claim.

In assessing whether property is in use or intended for use for commercial purposes, it is the current or intended use of the property that matters, not its origin.[34] The creditor will need to show that the property is used solely for commercial purposes (save for *de minimis* exceptions).[35]

However, despite the wide meaning of "*property … in use or intended for use for commercial purposes*", the task of showing that a State's property is not subject to immunity can still be a difficult one. UK law provides that the head of a State's diplomatic mission in the UK may give a certificate to the effect that property is not in use or intended for use for commercial purposes.[36] The burden then is on the creditor seeking to enforce the award to show the contrary.[37] This means rebutting by way of evidence the statutory presumption further to the ambassador's certificate, which often will not be possible.[38] Nevertheless, there may be situations where the creditor is able to find assets and the ambassador's certificate is not accepted as representing the true position. The property will be held, in fact, to be for commercial purposes.[39]

UK law, like other laws, also creates special status for the property of central banks. Further to UK SIA s.14(4), the commercial purposes exception does not apply to central banks or other monetary authorities. They are conferred with total immunity from execution, whatever purposes their property is put to. Central banks are therefore treated differently from any other department of a State where, in principle, the commercial purposes exception is available. The immunity of a central bank extends to all of the property concerned, even if another State department also has an interest in the same property.[40] Diplomatic privileges are also expressly preserved by the UK SIA and property used for the purposes of a diplomatic mission remains subject to immunity.[41]

SOEs

SOEs present a particular dilemma for creditors. On the one hand, an SOE may appear to be an attractive target if its activities are commercial. It may be easier to enforce against than the State itself, whose activities and property are more likely to fall on the *jus imperii* side of the line. On the other hand, an SOE may well have separate corporate personality and not be co-liable for the debts of the State. So, legally, if the award is against the State, there would be no grounds for enforcing against the SOE at all.

State-controlled entities are a known feature of commercial life. The distinction between them and their governing State may appear artificial, but it is a legally accepted distinction.[42] Under UK law, one initial enquiry is to understand what constitutes the "State". UK SIA s.14(1) says references to a State include references to (a) the sovereign or other head of that State in his public capacity, (b) the government of that State, and (c) any department of that government. Excluded from the understanding of "State" is what is known as a "*separate entity*", which is an entity that is distinct from the executive organs of the government of the State and is capable of suing or being sued.

The distinction is significant because, according to UK SIA s.14(2), a separate entity is immune from the jurisdiction of the UK courts if, and only if: (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that the State would have been immune.

There is no single test for distinguishing between a department of government and a separate entity. Some of the factors for consideration include: the status of the entity under the law of its home State; the entity's constitution, powers, duties and its activities; and its relationship with the State. The view of the government concerned should be taken into account, but it is not decisive. The court that is dealing with the issue of State immunity should examine all of the relevant circumstances.[43]

Even if the entity is held to be a "separate entity" then, further to UK SIA s.14(2), it may still be entitled to State immunity if

the proceedings relate to anything done by it in the exercise of sovereign authority. The ultimate test of what constitutes an act *jure imperii* is whether the act is a governmental act, as opposed to an act which any private citizen can perform. In the case of acts done by a separate entity, it is not enough that the entity acted on the directions of the State, because the act may not itself possess the character of a governmental act.[44] So, in *Tsavliris v Grain Board of Iraq*, although the motive of the Grain Board (a State-owned, separate entity) in acquiring grain was the public benefit, the actual act (entering into an agreement for salvage of the grain) did not have the character of a governmental act. Even if the motive or purpose of the act had a governmental interest, that is not the test. The relevant test goes to the character of the act, rather than its motive or purpose.[45]

So even if 100% State-owned, an SOE may not be able to avail itself of immunity if its activities are, in fact, of a commercial nature. Yet, the problem of showing that the SOE is co-liable for the State's debts remains. It was held in *La Générale des Carrières et des Mines v FG Hemisphere* that, where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. It takes quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. The affairs of the entity and the State must be so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and *vice versa*.[46]

Despite the stringency of the test, there have been circumstances where the corporate veil has been pierced. In *Kensington International v Congo*, intermediate sellers and buyers in a chain of contracts for the sale of oil were not, in fact, independent companies. They were determined to be part of a sham arrangement the purposes of which was to conceal the debt due to Congo (which the applicant sought to attach).[47]

Recent Developments

The preceding sections have set out the difficulties which can arise when a private party arbitrates with a State and tries to enforce its award. Against that background, it is interesting to consider recent developments and what they might mean for arbitration and the law of State immunity.

Russia's war against Ukraine has led to the freezing by Western countries and other allies of an estimated US$300 billion in Russian Central Bank assets held outside Russia as currency reserves.[48] However, freezing is not the same thing as seizing, and there has been extensive discussion as to whether there are lawful mechanisms by which these assets can be applied as funds for the recovery of Ukraine and other claims against Russia.[49] A number of proposals have been made, some of which could have significant impact on the concept of State immunity; first, the idea that State immunity is limited to judicial processes and does not apply to executive/legislative freezing and seizing of assets. Secondly, the possible application of the international law of countermeasures to justify State action in seizing property and to excuse the seizing State from international responsibility. Thirdly, by way of departure from the *Jurisdictional Immunities Case*, the idea that a State should not be able to invoke State immunity where, for example, it has breached peremptory norms of international law.

The context for these proposals is the extreme situation of the war against Ukraine. However, it cannot be excluded that force of circumstances will lead to developments to the law of State immunity, both generally and in specific fields such as arbitration. There is certainly pressure on the system, now that arbitration claimants and award creditors realise that their entitlements stand alongside efforts to achieve reparation for the war. In short, there may be a rush for assets.[50] Moreover, it is possible to imagine that considerations of justice and access to the courts could particularly play a part in cases where there are issues of human rights and international humanitarian law. Courts in Ukraine are already adopting the third proposal referred to above, by denying Russia immunity on grounds of its breaches of international law and upholding instead a claimant's right to a fair trial.[51] Finally, State immunity is an evolving area of the law, in which the overall direction of travel has been from more (absolute) to less (restrictive) immunity. The tendency, therefore, could be towards less formalism in questions of State immunity and greater scope for exceptions such as those relating to arbitration and enforcement against property used for commercial purposes.

Endnotes

1. Arbitration – PCA Cases No. AA 226, 227 and 228, *Hulley Enterprises Limited, Yukos Universal Limited & Veteran Petroleum Limited v Russian Federation*, Final Awards dated 18 July 2014; US proceedings - *Hulley Enterprises Ltd et al v The Russian Federation* US District Court of Columbia, Judgment dated 13 April 2022; UK proceedings – *Hulley Enterprises Ltd & Ors v The Russian Federation* [2022] EWHC 2690 (Comm).
2. *Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* dated 27 November 1998.
3. https://globalarbitrationreview.com/article/ukraines-richest-man-brings-treaty-claim-against-russia in *Global Arbitration Review*, Law Business Research ("**GAR**"), 11 April 2023 [accessed 26 May 2023]; https://globalarbitrationreview.com/article/ukrainian-state-nuclear-company-threatens-claim-against-russia in GAR, 17 April 2023 [accessed 26 May 2023].
4. See, for example, the efforts of award creditors against the Russian Federation in the *Noga* and *Sedelmayer* cases, summarised in Starzhenetskiy, V., "Russian Approach to State Immunity: If You Want Peace, Prepare for War" in Bismuth, R., Rusinova, V., Starzhenetskiy, V. & Ulfstein, G. (ed.), *Sovereign Immunity Under Pressure*, Switzerland, Springer, 2022 ("**Immunity Under Pressure**"), at pp 59–61. On the trials and tribulations of creditors (including commercial award and ICSID award creditors) in their pursuit of Peru and Argentina after economic crises and sovereign default, see Cymrot, M., "Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World" in Ruys, T., Angelet, N. & Ferro, L. (ed.), *The Cambridge Handbook of Immunities and International Law*, Cambridge, Cambridge University Press, 2019 ("**Handbook of Immunities**"), at pp 350–378. Mr Cymrot concludes (p. 378) that disputes were resolved through isolating States from international financial markets and exerting leverage through institutions, diplomacy and sanctions.
5. *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* Judgment of 3 February 2012 (the "***Jurisdictional Immunities Case***"), ICJ Reports 2012, p. 99, para. 57.
6. *Jurisdictional Immunities Case*, paras 53–56.
7. The ECSI is in force for Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland and the UK.
8. The UNCSI requires 30 ratifications by State parties to bring it into force. To date, there have been 23 instruments of ratification, acceptance, approval or accession.
9. Text adopted by the International Law Commission ("**ILC**") at its 43rd session in 1991 and submitted to the General Assembly (A/46/10).
10. *Jurisdictional Immunities Case*, paras 58 and 93. The *Jurisdictional Immunities Case* concerned a claim by Germany against Italy

for the latter's breach of the obligation to respect Germany's immunity when claims were brought in the Italian courts against Germany for war crimes during the Second World War. The ICJ rejected Italy's arguments that Germany's immunity should be disapplied on the grounds that (1) the activities of armed forces fell within the "territorial tort" exception to immunity, (2) war crimes, as breaches of peremptory norms of international law (*jus cogens*), trumped State immunity, and (3) there was no other recourse for the claimants. With respect to the second argument, the ICJ decided that the rule of State immunity and the *jus cogens* rules addressed different matters. The former was procedural and did not bear upon the lawfulness of the latter (para. 93).

11. *Jurisdictional Immunities Case*, paras 82 and 106.
12. See, for example, UNCSI A.6(1) and UK SIA s.1(2).
13. *Jurisdictional Immunities Case*, para. 113.
14. Or, as it is put in Fox, H. and Webb, P., *The Law of State Immunity*, 2015, Oxford, Oxford University Press, 3rd ed., at p. 23: "*Immunity of the foreign State from adjudication jurisdiction and the delivery of judgments against a foreign State may properly be restricted by exceptions, whereas immunity from enforcement jurisdiction in respect of such proceedings remains largely absolute.*"
15. In a sense then, "absolute immunity" is not truly absolute, since it is possible for a State to consent to another State's jurisdiction over it and participate voluntarily in proceedings: ILC Commentary Article 5 Commentary (2) and Article 7 Commentary (3).
16. ILC Commentary, Article 10 Commentary (16).
17. *Immunity Under Pressure*, pp 57–59; *Federal Law of 3 November 2015 N.297-FZ* "On the Jurisdictional Immunities of a Foreign State and the Property of a Foreign State in the Russian Federation".
18. Law of Ukraine "*On Private International Law*" dated 23 June 2005 No. 2709-IV, Article 79 (Judicial Immunity); *Everest Estate LLC and others v The Russian Federation*, Case No. 796/165/2018, Judgment of Supreme Court of Ukraine dated 25 January 2019.
19. Wang, P., "From Diplomacy to Law: Half-Way in Institutional Transition of China's Regime on State Immunity" in Immunity Under Pressure, pp 141–170. There is report of a new draft law on State immunity that has been published and which takes a restrictive approach, echoing the UNCSI: Dodge, B., "China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory" on Conflict of Laws.net, 12 April 2023, https://conflictoflaws.net/2023/chinas-draft-law-on-foreign-state-immunity-would-adopt-restrictive-theory/ [accessed 30 May 2023].
20. See, for example, ECSI Article 12, UNCSI Article 17, UK SIA s.9.
21. UK SIA s.1(1); *Svenska Petroleum Exploration AB v (1) Government of the Republic of Lithuania (2) AB Geonafta* [2006] EWCA Civ 1529 ("***Svenska Petroleum v Lithuania***") at para. 113 (Moore-Bick LJ).
22. UK SIA s.9, which reads in full: "*(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.*"
23. *London Steam-Ship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige)* [2013] EWHC 3188 (Comm). See too *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq* [2008] EWHC 612 (Comm) ("***Tsavliris v Grain Board of Iraq***"), where a non-signatory cargo owner was bound to the arbitration agreement in a salvage agreement by operation of the International Convention on Salvage 1989.
24. *Gold Reserve Inc. v Venezuela* [2016] EWHC 153 (Comm).
25. UK SIA s.9(2).
26. *Svenska Petroleum v Lithuania*, at para. 117 (Moore-Bick LJ).
27. *Svenska Petroleum v Lithuania*; see too *LR Avionics Technologies Limited v The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm) ("***LR Avionics v Nigeria***").
28. ECSI A.12.
29. ILC Commentary, Article 18 Commentary (2).
30. UNCSI A.18 and 19.
31. UNCSI A.21.
32. UK SIA s.13(4). S.13(4) provides different rules when the property is of a State party to the ECSI.
33. UK SIA s.17(1).
34. *SerVaas Inc. v Rafidain Bank* [2012] UKSC 40 ("***SerVaas v Rafidain***"), citing at para. 25 the similar practice of US courts, including the case of *Connecticut Bank of Commerce v Republic of Congo*, 309 F 3d 240 (US Court of Appeals, 5th Cir, Texas, 2002) in which Judge Garza said (p. 251): "*What matters under the statute is what the property is 'used for', now how it was generated or produced. … What matters under the statute is not how the Congo made its money, but how it spends it"* and (at p. 254): *"the statute means what it says: property of a foreign sovereign … may be executed against only if it is 'used for' a commercial activity.*"
35. *Alcom Ltd v Republic of Columbia* [1984] AC 580 ("***Alcom v Columbia***"), p. 604; *SerVaas v Rafidain* at para. 19.
36. UK SIA s.13(5).
37. *Alcom v Columbia*; *SerVaas v Rafidain*.
38. See, for example, *Alcom v Columbia* (ambassador's certificate conclusive evidence that money on embassy accounts with commercial bank only for expenditure of diplomatic mission); *SerVaas v Rafidain* (the intended use of monies payable under debt and against which a third-party debt order had been sought was payment to the Development Fund for Iraq, "*manifestly not a commercial purpose*", at [2012] UKSC 40 para. 32); *LR Avionics v Nigeria* (property in use for consular purposes).
39. *Orascom Telecom Holding SAE v Chad* [2008] EWHC 1841 (Comm) (State's bank account operated for commercial purposes: receipt of proceeds from oil sales and for repayment of loans).
40. *AIG Capital Partners Inc v The Republic of Kazakhstan* [2005] EWHC 2239 (Comm).
41. UK SIA s.16(1).
42. *Owners of the Cargo Lately Laden on Board the Playa Larga v Owners of the I Congreso del Partido* [1983] 1 A.C. 244 ("***I Congreso del Partido***"), at p. 258 (Lord Wilberforce).
43. *Tsavliris v Grain Board of Iraq*, considering *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529, *Czarnikow Ltd v Rolimpex* [1979] AC 351, and *I Congreso del Partido*.
44. *Kuwait Airways Corpn. v Iraqi Airways Co.* [1995] 1 WLR 1147, at p. 1160 (Lord Goff).
45. *Tsavliris v Grain Board of Iraq*, paras 78–80.
46. *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, at para. 29.
47. *Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 (Comm).
48. Wintour, P., "UK to keep Kremlin assets frozen until Russia pays compensation to Ukraine", 25 May 2023, *The Guardian*: https://www.theguardian.com/politics/2023/may/25/uk-to-keep-kremlin-assets-frozen-until-russia-pays-compensation-to-ukraine [accessed 25 May 2023].
49. See, for example: Webb, P., *Ukraine Symposium – Building Momentum: Next Steps towards Justice for Ukraine*, 2 May 2022, Lieber.westpoint.edu, https://lieber.westpoint.edu/building-momentum-next-steps-justice-ukraine [accessed 30 May 2023]; Stephan, P., *Seizing Russian Assets*, June 2022, University of Virginia School of Law; Moiseienko, A., *Frozen Russian Assets and the Reconstruction of Ukraine – Legal Options*, Research Paper July 2022, World Refugee and Migration Council, Ottawa.

50. See, in *Hulley Enterprises Ltd et al v The Russian Federation* US District Court of Columbia, Judgment dated 13 April 2022, pp 7 and 18 – the fear of the Yukos shareholders that sanctions imposed on Russia will make finding and executing against assets more difficult; hence, their opposition to a further stay on proceedings for confirmation of the award. The Court agreed with the shareholders and denied Russia's application for a stay.

51. See Judgments of the Supreme Court of Ukraine dated 14 April 2022 in Case No. 308/9708/19 and 18 May 2022 in Case No. 760/17232/20.

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