

LECTURE ONE

Introduction to Private International Law

Some definitions

*“Private international law is the body of conventions, model laws, legal guides, and other documents and instruments that regulate private relationships across national borders. Private international law has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.”*¹

“Private International Law is the law which regulates which courts should take charge, which law should apply and whether judgments should be recognised and enforced across borders in cases with an international dimension. It also includes mechanisms for co-operation and exchange of information between governments and courts in different countries, where these are designed to support mutual recognition of each other’s laws and judgments.

*Some Private International Law is made by the EU, and this is a growing area of work. Some comes from other international organisations such as the Hague Conference and the Council of Europe.”*²

“Private international law consists of the rules of law which govern legal relationships of private law nature (family law, inheritance law, contract law, company law etc.) featuring an international aspect. Private international law answers mainly the following questions: which national law applies? which jurisdiction is competent? under what conditions will a decision that has been handed down in a particular State be recognised and enforced in another State?

*Some matters are regulated by international treaties which were drafted by international organizations like the Hague Conference on Private International Law, the UN Commission on International Trade Law (UNCITRAL) or the Council of Europe.”*³

Conflict of laws from Wikipedia⁴

*“Conflict of laws, or private international law, or international private law is that branch of international law and interstate law that regulates all lawsuits involving a “foreign” law element, where a difference in result will occur depending on which laws are applied as the *lex causae*. Firstly, it is concerned with determining whether the proposed forum has jurisdiction to adjudicate and is the appropriate venue for dealing with the dispute, and, secondly, with determining which of the competing state’s laws are to be applied to resolve the dispute. It also deals with the enforcement of foreign judgments.*

Its three different names are generally interchangeable, although none of them is wholly accurate or properly descriptive. Within local federal systems where inter-state legal conflicts require resolution, (such as in the United States), the term “Conflict of Laws” is preferred simply because such cases are not an international issue. Hence the term “Conflict of Laws” is a more general term for a legal process for resolving similar disputes, regardless if the relevant legal systems are international or inter-state, though this term is also criticised as being misleading in that the object is the resolution of conflicts between competing systems rather than “conflict” itself.

History

The first instances of conflict of laws can be traced to Roman law where parties from foreign countries would go before a praetor perigrinus in Rome to plead their case. The praetor perigrinus would often choose to apply the law native to the foreign parties rather than Roman law.

¹ ASIL Electronic Resource Guide, Private International Law by Louise Tsang .

² Scottish Government web site.

³ Swiss Federal Department of Justice. www.bj.admin.ch/bj/en/home/themen/wirtschaft/internationales_privatrecht.html

⁴ "http://en.wikipedia.org/wiki/Conflict_of_laws". Whilst the site is not ideal for in-depth academic study, being somewhat short on references and case law, this brief outline provides a useful snap shot of the subject. Many of the terms referred to are hyperlinked so that explanations of the terminology, in an easy to understand and digestible form are available as a starting point for further study – but given the fact that content is not scrutinized, it is not infallible and inaccuracies are possible. (Do not reference Wikipedia)

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The modern field of conflicts emerged in the United States during the 19th century with the publishing of Joseph Story's treatise on the Conflict of Laws in 1834. Story's work had a great influence on the subsequent development of the field in England such as those written by A.V. Dicey. Much of the English law then became the basis for conflict of laws for most commonwealth countries.

The stages in a conflict case

1. The court must first decide whether it has jurisdiction and, if so, whether it is the appropriate venue given the problem of forum shopping.
2. The next step is the characterisation of the cause of action into its component legal categories which may sometimes involve an incidental question (also note the distinction between procedural and substantive laws).
3. Each legal category has one or more choice of law rules to determine which of the competing laws should be applied to each issue. A key element in this may be the rules on renvoi.
4. Once it has been decided which laws to apply, those laws must be proved before the forum court and applied to reach a judgment.
5. The successful party must then enforce the judgment which will first involve the task of securing cross-border recognition of the judgment.

In those states with an underdeveloped set of Conflict rules, decisions on jurisdiction tend to be made on an ad hoc basis, with such choice of law rules as have been developed embedded into each subject area of private law and tending to favour the application of the lex fori or local law. In states with a more mature system, the set of Conflict rules stands apart from the local private civil law and adopts a more international point of view both in its terminology and concepts. For example, in the European Union, all major jurisdictional matters are regulated under the Brussels Regime, e.g. the rule of *lis alibi pendens* from Brussels apply in EU Member States and its interpretation is controlled by the European Court of Justice rather than by local courts. That and other elements of the Conflict rules are produced supranationally and implemented by treaty or convention. Because these rules are directly connected with aspects of sovereignty and the extraterritorial application of laws in the courts of the signatory states, they take on a flavour of public rather than private law because each state is compromising the usual expectations of their own citizens that they will have access to their local courts, and that local laws will apply in those local courts. Such aspects of public policy have direct constitutional significance whether applied in the European context or in federated nations such as the United States, Canada, and Australia where the courts have to contend not only with jurisdiction and law conflicts between the constituent states or territories, but also as between state and federal courts, and as between constituent states and relevant laws from other states outside the federation

Choice of law rules

Courts faced with a choice of law issue have a two-stage process:

- 1 the court will apply the law of the forum (*lex fori*) to all procedural matters (including, self-evidently, the choice of law rules); and
- 2 it counts the factors that connect or link the legal issues to the laws of potentially relevant states and applies the laws that have the greatest connection, e.g. the law of nationality (*lex patriae*) or domicile (*lex domicilii*) will define legal status and capacity, the law of the state in which land is situated (*lex situs*) will be applied to determine all questions of title, the law of the place where a transaction physically takes place or of the occurrence that gave rise to the litigation (*lex loci actus*) will often be the controlling law selected when the matter is substantive, but the proper law has become a more common choice.

For example, suppose that A who has a French nationality and residence in Germany, corresponds with B who has American nationality, domicile in Arizona, and residence in Austria, over the internet. They agree the joint purchase of land in Switzerland, currently owned by C who is a Swiss national, but they never physically meet, executing initial contract documents by using fax machines, followed by a postal exchange of hard copies. A pays his share of the deposit but, before the transaction is completed, B admits that although he has capacity to buy land under his *lex domicilii* and the law of his residence, he is too young to own land under Swiss law. The rules to determine which courts would have jurisdiction and which laws would be applied to each aspect of the case are defined in each state's laws so, in theory, no matter which court in which country actually accepts the case, the outcome will be the same (albeit that the measure of damages might differ from country to country which is why forum shopping is such a problem). In reality, however, moves to harmonise the conflictual system have not reached the point where standardisation of outcome can be guaranteed.

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Pre-dispute provisions

Many contracts and other forms of legally binding agreement include a jurisdiction or arbitration clause specifying the parties' choice of venue for any litigation (called a forum selection clause). Then, choice of law clauses may specify which laws the court or tribunal should apply to each aspect of the dispute. This matches the substantive policy of freedom of contract. Judges have accepted that the principle of party autonomy allows the parties to select the law most appropriate to their transaction. Obviously, this judicial acceptance of subjective intent excludes the traditional reliance on objective connecting factors, but it does work well in practice.

The status of foreign law

Generally, when the court is to apply a foreign law, it must be proved by foreign law experts. It cannot merely be pleaded, as the court has no expertise in the laws of foreign countries nor in how they might be applied in a foreign court. Such foreign law may be considered no more than evidence, rather than law because of the issue of sovereignty. If the local court is actually giving extraterritorial effect to a foreign law, it is less than sovereign and so acting in a way that is potentially unconstitutional. The theoretical responses to this issue are:

- (a) that each court has an inherent jurisdiction to apply the laws of another country where it is necessary to achieving a just outcome; or
- (b) that the local court creates a right in its own laws to match that available under the foreign law. This explanation is sustainable because, even in states which apply a system of binding legal precedents, any precedent emerging from a conflicts case can only apply to future conflicts cases. There will be no *ratio decidendi* that binds future litigants in entirely local cases.

Once the *lex causae* has been selected, it will be respected except when it appears to contravene an overriding mandatory rule of the *lex fori*. Each judge is the guardian of his or her own principles of *ordre public* (public policy) and the parties cannot, by their own act, oust the fundamental principles of the local municipal law which generally underpin areas such as labour law, insurance, competition regulation, agency rules, embargoes, import-export regulations, and securities exchange regulations. Furthermore, the *lex fori* will prevail in cases where an application of the *lex causae* would otherwise result in a fundamentally immoral outcome, or give extraterritorial effect to confiscatory or other territorially limited laws.

In some countries, there is occasional evidence of parochialism when courts have determined that if the foreign law cannot be proved to a "satisfactory standard", then local law may be applied. In the United Kingdom, in the absence of evidence being led, the foreign law is presumed to be the same as the *lex fori*. Similarly, judges might assume in default of express evidence to the contrary that the place where the cause of action arose would provide certain basic protections, e.g. that the foreign court would provide a remedy to someone who was injured due to the negligence of another. Finally, some American courts have held that local law will be applied if the injury occurred in an "uncivilized place that has no law or legal system." See **Walton v. Arabian American Oil Co.**, 233 F.2d 541 (2d Cir. 1956).

If the case has been submitted to arbitration rather than a national court, say because of a forum selection clause, an arbitrator may decide not to apply local mandatory policies in the face of a choice of law by the parties if this would defeat their commercial objectives. However, the arbitral award may be challenged in the country where it was made or where enforcement is sought by one of the parties on the ground that the relevant *ordre public* should have been applied. If the *lex loci arbitri* has been ignored, but there was no real and substantial connection between the place of arbitration and the agreement made by the parties, a court in which enforcement is sought may well accept the tribunal's decision. But if the appeal is to the courts in the state where the arbitration was held, the judge cannot ignore the mandatory provisions of the *lex fori*.

Harmonisation

To apply one national legal system as against another may never be an entirely satisfactory approach. The parties' interests may always be better protected by applying a law conceived with international realities in mind. The Hague Conference on Private International Law is a treaty organisation that oversees conventions designed to develop a uniform system. The deliberations of the conference have recently been the subject of controversy over the extent of cross-border jurisdiction on electronic commerce and defamation issues. There is a general recognition that there is a need for an international law of contracts: for example, many nations have ratified the Vienna Convention on the International Sale of Goods, the Rome Convention on the Law Applicable to Contractual Obligations offers less specialised uniformity, and there is support for the UNIDROIT Principles of International Commercial Contracts, a

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private restatement, all of which represent continuing efforts to produce international standards as the internet and other technologies encourage ever more interstate commerce. But other branches of the law are less well served and the dominant trend remains the role of the forum law rather than a supranational system for Conflict purposes. Even the EU, which has institutions capable of creating uniform rules with direct effect, has failed to produce a universal system for the common market. Nevertheless, the Treaty of Amsterdam does confer authority on the Community's institutions to legislate by Council Regulation in this area with supranational effect. Article 177 would give the Court of Justice jurisdiction to interpret and apply their principles so, if the political will arises, uniformity may gradually emerge in letter. Whether the domestic courts of the Member States would be consistent in applying those letters is speculative.

Comment

The reference above to pre-dispute provisions is somewhat deceptive, but quite common from a lawyer's perspective, in that anything that does not involve them in litigation before the courts is not really their concern. Pre-dispute procedures are about dispute prevention mechanisms such as partnership arrangements to identify problems and develop joint solution. Anything procedure adopted after a dispute crystallises to determine that dispute is a dispute resolution procedure. If the court determines the dispute the procedure is known as litigation. Otherwise, an alternative to the court may be used, be it mediation (*including variants on third party assisted negotiation*) or private adjudication (*including variants*).

In the world of international commerce, which is the central concern of this course, alternative dispute resolution is the primary mechanism for dispute resolution. Unlike most Private International / Conflicts of Laws programs, this course will consider, in addition, the institutions and rules that apply to international arbitration and dispute board resolution and apply conflicts of law in the context of international arbitral practice, followed by the law concerning the enforcement or otherwise of arbitral awards. Non-commercial aspects of Private International Law, such as cross border family disputes, which are not amenable to arbitration are addressed only in passing.

The Public / Private International Law divide forms an important aspect of international commercial dispute resolution where one of the trading parties is or has connections to a State. The extent to which and the mechanisms that apply to the settlement of disputes between the citizen and the State are matters for the domestic courts of each State and fall within the remit of Constitutional and Administrative or Public Law and are not of concern for us here. However, when a State operates in the international commercial field and disputes arise between a State and a foreign private body the question of Act of State and State Immunity falls to be determined. Inward foreign investment is central feature of globalisation but inevitably gives rise to tensions between State interests in national resources and the interests of multi-national companies in safeguarding returns on investments. The Public / Private International Law divide is of growing relevance today with the advent of International Public /Private finance initiatives.⁵ It is not uncommon for State Trading partners to plead State Immunity or to seek to exploit uncertainties within conflicts of law and international arbitration law to evade contractual obligations. This is not new. In the 1930'ies Gulf State oil exploration concession contracts gave rise to extensive litigation. The same problem is re-occurring in Russia, where domestic environmental legislation is impacting on the validity of foreign investment, coupled with allegations of tax evasion and fraudulent conduct by private partners.

Whilst the focus of Conflicts of Law concerns choices between substantive and procedural law from different but competing jurisdictions, as adjudicated upon by domestic courts, the most important "LAW" of the contract and that normally with the greatest amount of relevant detail, is the contract itself. Standard form contracts with general international recognition are thus as important, if not of more immediate importance to the parties. The text of international contracts today increasingly rely on the terms of International Conventions developed by UNCITRAL in a wide range of spheres. Whilst it is not possible to address all of these in this course, the Vienna Convention on the International Sales of Goods is considered as an exemplar of the issues and methodologies involved in cross referencing a contract to an international convention.

⁵ *Channel Tunnel Group Ltd, R v SS For Environment, Transport & Regions [2001] EWCA Civ 1185* A jurisdiction clause does not exclude the jurisdiction of the courts unless the parties submit the dispute to arbitration which had not occurred in this case. Classic example of the mover towards PFI initiatives in international contracts, here between UK and France. Peter Gibson LJ; Laws LJ; Sir Martin Nourse

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Finally, it should be noted that whilst the role of international arbitral institutions is considered, the examination is conducted in the context of conflicts of law as applied by the courts of England & Wales rather than from the perspective of a *lex mercatoria* and even less so from the perspective of foreign domestic law. For those readers who practice in other jurisdictions, there will be a need to have recourse to the conflict laws that operate within one's own jurisdiction.

ADDITIONAL READING

References

- *American Law Institute. Restatement of the Law, Second: Conflict of Laws. St. Paul: American Law Institute.*
- *Dicey and Morris on the Conflict of Laws (13th edition) (edited by Albert V. Dicey, C.G.J. Morse, McClean, Adrian Briggs, Jonathan Hill, & Lawrence Collins). London: Sweet & Maxwell 2000.*
- *North, Peter & Fawcett James. (1999). Cheshire and North's Private International Law (13th edition). London: Butterworths.*
- *Reed, Alan. (2003). Anglo-American Perspectives on Private International Law. Lewiston, N.Y.: E. Mellen Press. "*

External links

- *ASIL Guide to Electronic Resources for International Law <http://www.asil.org/resource/pil1.htm>*
- *Hague Conference on Private International Law official website.*
- *International Chamber of Commerce <http://www.iccwbo.org/>*
- *International Court of Arbitration http://www.iccwbo.org/index_court.asp*
- *International Institute for the Unification of Private Law (UNIDROIT) <http://www.unidroit.org/>*
- *News and views in private international law - CONFLICT OF LAWS .NET*
- *United Nations Commission for International Trade Law (UNCITRAL) <http://www.uncitral.org/>*
- *U.S. State Department Private International Law Database http://www.state.gov/www/global/legal_affairs/private_intl_law.html*
- *Why the Hague Convention on jurisdiction threatens to strangle e-commerce & Internet free speech, by Chris Sprigman*

WORKSHOP QUESTION

- 1 Provide your own definition of Private International Law, stating why you consider it to be most apposite.
2. Identify the relevant aspects of substantive law, if any, that the principal international convention regimes provide for.

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TERMINOLOGY : RESEARCH TASK.⁶

During the course of your studies in Private International Law the following terms, amongst others, will be referred to. Your first task therefore is to provide yourself with working definitions of the following terms which will enable you to make sense of what you are reading. Note that both The State of Louisiana (based on the French Code) and Scotland (based on Roman Law) use Civil Law terminology, not common law terminology. Furthermore, whilst the Woolf Reforms attempted to remove Latin terms, this has had no impact on international legal practice, which is immune from developments in the English Legal System.

<i>TERM</i>	<i>DEFINITION</i>
<i>absolvitor</i>	
<i>assoilzie</i>	
<i>domestic law</i>	
<i>double jeopardy</i>	
<i>lex causae</i>	
<i>lex domicilii</i>	
<i>lex fori</i>	
<i>lex loci actus</i>	
<i>lex loci celebrationis</i>	
<i>lex loci contractus</i>	
<i>lex loci arbitri</i>	
<i>lex mercatoria</i>	
<i>lex patriae</i>	
<i>lex situs</i>	
<i>lex ultimi domicilii</i>	
<i>lis alibi pendens</i>	
<i>foreign law</i>	
<i>forum (law of)</i>	
<i>forum conveniens</i>	
<i>forum inconveniens</i>	
<i>international law</i>	
<i>order public</i>	
<i>private international law</i>	
<i>procedural law</i>	
<i>proper law</i>	
<i>public international law</i>	
<i>renvoi</i>	
<i>res judicata</i>	
<i>seize - seized</i>	
<i>sist</i>	
<i>stay</i>	
<i>Vacatur</i>	

⁶ Prof. William Tetley *Glossary of Conflict of Laws* www.mcgill.ca/maritimelaw/glossaries/conflictlaws/

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JURISDICTION OF THE HIGH COURT, ENGLAND & WALES.

Choice of Forum & Choice of Law at Common Law

Where a clause chooses the law of a particular country, it is known as “a choice of law clause”. Where a clause chooses the jurisdiction of a particular country, it is known as “a choice of jurisdiction clause”. Frequently the two concepts may be combined in a “choice of law and jurisdiction” clause. An example of such a clause is as follows:- “**Jurisdiction.** Any dispute arising under this contract shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply”

The English courts may be called on to settle a dispute applying French Law e.g. *Elder Demspster v Dunn* [1909].⁷ where the bill of lading was governed by French Law. The dispute concerned whether or not the shipowner was liable to the endorsee of the bill of lading for losses arising out of inaccurate tally marks. The charterparty and thus the employment and indemnity (E&I) clauses being governed by English Law meant that the ship owner / charterer dispute was heard by the English court.

Similarly international law may be brought into focus as a consequence of incorporating a Convention such as the Universal Customs and Practices of Documentary Credits (U.C.P. 600), the Hague Rules, the Hague Visby Rules or the Hamburg Rules into the contract, though this incorporation may be implied by law since some conventions may be incorporated into English Law automatically by statute.

Many charterparties and bills of lading contain a clause which states that in the event of any disputes arising they are to be determined according to the law of a particular country and or in the courts of a particular country. The English court has a discretion in such cases whether to set the action aside or whether to permit it to continue under *s19 Supreme Court Act 1981* for general commercial actions and *s20-24 Supreme Court Act 1981* in relation to admiralty actions. Whether or not the English High Court will accept jurisdiction is not necessarily that easy to predict.

Supreme Court Act 1981 (c. 54)

THE HIGH COURT

General jurisdiction

General jurisdiction of High Court.

19. (1) The High Court shall be a superior court of record.

19. (2) Subject to the provisions of this Act, there shall be exercisable by the High Court—

- (a) all such jurisdiction (whether civil or criminal) as is conferred on it by this or any other Act; and
- (b) all such other jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act (including jurisdiction conferred on a judge of the High Court by any statutory provision).

19. (3) Any jurisdiction of the High Court shall be exercised only by a single judge of that court, except in so far as it is—

- (a) by or by virtue of rules of court or any other statutory provision required to be exercised by a divisional court; or
- (b) by rules of court made exercisable by a master, registrar or other officer of the court, or by any other person.

19.(4) The specific mention elsewhere in this Act of any jurisdiction covered by subsection (2) shall not derogate from the generality of that subsection.

This provision covers most of the general international commercial contract actions brought before the court including import export sales contracts, claims for loss or damage to cargo pursuant to contracts of carriage and bills of lading and marine insurance claims. It should be noted that the High Court has jurisdiction to act under section 19. It is not compelled to do so.

As to jurisdiction in tort, the most common actions here relate to maritime incidents, namely collisions and tug tow services. These are governed by the following sections of the Supreme Court Act 1981. Some of the actions covered here however, also concern damage to cargo during transit. The sections provide for the arrest of vessels in actions in rem to provide security for the claimant in the action.

⁷ *Elder Demspster v Dunn* [1909] 15 Com Cas 49

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Admiralty jurisdiction

Admiralty jurisdiction of High Court.

20. (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say—
- (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
 - (b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);
 - (c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and
 - (d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.
- 20.(2) The questions and claims referred to in subsection (1)(a) are—
- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
 - (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
 - (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
 - (d) any claim for damage received by a ship;
 - (e) any claim for damage done by a ship;
 - (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—
 - (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
 - (g) any claim for loss of or damage to goods carried in a ship;
 - (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
 - (j) any claim—
 - (i) under the Salvage Convention 1989;
 - (ii) under any contract for or in relation to salvage services; or
 - (iii) in the nature of salvage not falling within (i) or (ii) above; or any corresponding claim in connection with an aircraft;]
 - (k) any claim in the nature of towage in respect of a ship or an aircraft;
 - (l) any claim in the nature of pilotage in respect of a ship or an aircraft;
 - (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
 - (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
 - (o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
 - (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
 - (q) any claim arising out of an act which is or is claimed to be a general average act;
 - (r) any claim arising out of bottomry;
 - (s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.
- 20.(3) The proceedings referred to in subsection (1)(b) are—
- (a) any application to the High Court under the Merchant Shipping Acts 1894 to 1979 other than an application under the Merchant Shipping Act 1995;
 - (b) any action to enforce a claim for damage, loss of life or personal injury arising out of—
 - (i) a collision between ships; or
 - (ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
 - (iii) non-compliance, on the part of one or more of two or more ships, with the collision regulations;
 - (c) any action by shipowners or other persons under the Merchant Shipping Act 1995 for the limitation of the amount of their liability in connection with a ship or other property.

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- 20.(4) The jurisdiction of the High Court under subsection (2)(b) includes power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the court thinks fit.
- 20.(5) Subsection (2)(e) extends to—
- (a) any claim in respect of a liability incurred under the Chapter III of Part VI of the Merchant Shipping Act 1995; and
 - (b) any claim in respect of a liability falling on the International Oil Pollution Compensation Fund, or on the International Oil Compensation Fund 1984, under Chapter IV of Part VI of the Merchant Shipping Act 1995.
- 20.(6) In subsection (2)(j)—
- (a) the “Salvage Convention 1989” means the International Convention on Salvage, 1989 as it has effect under section 224 of the Merchant Shipping Act 1995;
 - (b) the reference to salvage services includes services rendered in saving life from a ship and the reference to any claim under any contract for or in relation to salvage services includes any claim arising out of such a contract whether or not arising during the provision of the services;
 - (c) the reference to a corresponding claim in connection with an aircraft is a reference to any claim corresponding to any claim mentioned in sub-paragraph (i) or (ii) of paragraph (j) which is available under section 87 of the Civil Aviation Act 1982.
- 20.(7) The preceding provisions of this section apply—
- (a) in relation to all ships or aircraft, whether British or not and whether registered or not and wherever the residence or domicile of their owners may be;
 - (b) in relation to all claims, wherever arising (including, in the case of cargo or wreck salvage, claims in respect of cargo or wreck found on land); and
 - (c) so far as they relate to mortgages and charges, to all mortgages or charges, whether registered or not and whether legal or equitable, including mortgages and charges created under foreign law:
- Provided that nothing in this subsection shall be construed as extending the cases in which money or property is recoverable under any of the provisions of the Merchant Shipping Act 1995.

Mode of exercise of Admiralty jurisdiction.

- 21.(1) Subject to section 22, an action in personam may be brought in the High Court in all cases within the Admiralty jurisdiction of that court.
- 21.(2) In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.
- 21.(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.
- 21.(4) In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—
- (a) the claim arises in connection with a ship; and
 - (b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—
 - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
 - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.
- 21.(5) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action in rem may be brought in the High Court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action in personam.
- 21.(6) Where, in the exercise of its Admiralty jurisdiction, the High Court orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.

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- 21.(7) In determining for the purposes of subsections (4) and (5) whether a person would be liable on a claim in an action in personam it shall be assumed that he has his habitual residence or a place of business within England or Wales.
- 21.(8) Where, as regards any such claim as is mentioned in section 20(2)(e) to (r), a ship has been served with a writ or arrested in an action in rem brought to enforce that claim, no other ship may be served with a writ or arrested in that or any other action in rem brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.

Restrictions on entertainment of actions in personam in collision and other similar cases.

- 22.(1) This section applies to any claim for damage, loss of life or personal injury arising out of—
- (a) a collision between ships; or
 - (b) the carrying out of, or omission to carry out, a manoeuvre in the case of one or more of two or more ships; or
 - (c) non-compliance, on the part of one or more of two or more ships, with the collision regulations.
- 22.(2) The High Court shall not entertain any action in personam to enforce a claim to which this section applies unless—
- (a) the defendant has his habitual residence or a place of business within England or Wales; or
 - (b) the cause of action arose within inland waters of England or Wales or within the limits of a port of England or Wales; or
 - (c) an action arising out of the same incident or series of incidents is proceeding in the court or has been heard and determined in the court.
- In this subsection—
- “inland waters” includes any part of the sea adjacent to the coast of the United Kingdom certified by the Secretary of State to be waters falling by international law to be treated as within the territorial sovereignty of Her Majesty apart from the operation of that law in relation to territorial waters;
- “port” means any port, harbour, river, estuary, haven, dock, canal or other place so long as a person or body of persons is empowered by or under an Act to make charges in respect of ships entering it or using the facilities therein, and “limits of a port” means the limits thereof as fixed by or under the Act in question or, as the case may be, by the relevant charter or custom;
- “charges” means any charges with the exception of light dues, local light dues and any other charges in respect of lighthouses, buoys or beacons and of charges in respect of pilotage.
- 22.(3) The High Court shall not entertain any action in personam to enforce a claim to which this section applies until any proceedings previously brought by the plaintiff in any court outside England and Wales against the same defendant in respect of the same incident or series of incidents have been discontinued or otherwise come to an end.
- 22.(4) Subsections (2) and (3) shall apply to counterclaims (except counterclaims in proceedings arising out of the same incident or series of incidents) as they apply to actions, the references to the plaintiff and the defendant being for this purpose read as references to the plaintiff on the counterclaim and the defendant to the counterclaim respectively.
- 22.(5) Subsections (2) and (3) shall not apply to any action or counterclaim if the defendant thereto submits or has agreed to submit to the jurisdiction of the court.
- 22.(6) Subject to the provisions of subsection (3), the High Court shall have jurisdiction to entertain an action in personam to enforce a claim to which this section applies whenever any of the conditions specified in subsection (2)(a) to (c) is satisfied, and the rules of court relating to the service of process outside the jurisdiction shall make such provision as may appear to the rule-making authority to be appropriate having regard to the provisions of this subsection.
- 22.(7) Nothing in this section shall prevent an action which is brought in accordance with the provisions of this section in the High Court being transferred, in accordance with the enactments in that behalf, to some other court.
- 22.(8) For the avoidance of doubt it is hereby declared that this section applies in relation to the jurisdiction of the High Court not being Admiralty jurisdiction, as well as in relation to its Admiralty jurisdiction.

High Court not to have jurisdiction in cases within Rhine Convention.

23. The High Court shall not have jurisdiction to determine any claim or question certified by the Secretary of State to be a claim or question which, under the Rhine Navigation Convention, falls to be determined in accordance with the provisions of that Convention; and any proceedings to enforce such a claim which are commenced in the High Court shall be set aside.

PRIVATE INTERNATIONAL LAW

Supplementary provisions as to Admiralty jurisdiction.

24.(1) In sections 20 to 23 and this section, unless the context otherwise requires—

“collision regulations” means safety regulations under section 85 of the Merchant Shipping Act 1995;

“goods” includes baggage;

“master” has the same meaning as in the Merchant Shipping Act 1995, and accordingly includes every person (except a pilot) having command or charge of a ship;

“the Rhine Navigation Convention” means the Convention of the 7th October 1868 as revised by any subsequent Convention;

“ship” includes any description of vessel used in navigation and (except in the definition of “port” in section 22(2) and in subsection (2)(c) of this section) includes, subject to section 2(3) of the Hovercraft Act 1968, a hovercraft;

“towage” and “pilotage”, in relation to an aircraft, mean towage and pilotage while the aircraft is water-borne.

24.(2) Nothing in sections 20 to 23 shall—

(a) be construed as limiting the jurisdiction of the High Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a British ship;

(b) affect the provisions of section 226 of the Merchant Shipping Act 1995 (power of a receiver of wreck to detain a ship in respect of a salvage claim); or

(c) authorise proceedings in rem in respect of any claim against the Crown, or the arrest, detention or sale of any of Her Majesty’s ships or Her Majesty’s aircraft, or, subject to section 2(3) of the Hovercraft Act 1968, Her Majesty’s hovercraft, or of any cargo or other property belonging to the Crown.

24.(3) In this section—

“Her Majesty’s ships” and “Her Majesty’s aircraft” have the meanings given by section 38(2) of the Crown Proceedings Act 1947;

“Her Majesty’s hovercraft” means hovercraft belonging to the Crown in right of Her Majesty’s Government in the United Kingdom or Her Majesty’s Government in Northern Ireland.

Exercise of the discretion to accept jurisdiction.

The following cases demonstrate that it cannot be taken for granted that the High Court will accept jurisdiction.

The Eleftheria [1969].⁸ The court permitted an action to be stayed on the ground that the parties had agreed to any disputes being heard before a Greek Court and that this should be upheld.

The Adolf Warski [1976].⁹ The C.A. upheld a judgment of Brandon J at first instance where he refused to grant a stay of the action where the contracts had stated that any disputes should be heard before the Polish Court and settled according to Polish Law. The Plaintiffs had in fact allowed their action to become time barred in Poland but claimed Poland was unsafe for them.

The Makefjell [1976].¹⁰ The C.A. upheld Brandon J again, where he did stay an action where the contract provided for disputes to be held in Oslo according to Norwegian Law.

Grounds for declining jurisdiction.

Inconvenient forum - vexatious action.

It is open to a party to ask for an action to be stayed before the English court on the grounds that it is not a convenient forum or that the action has been commenced there in order to prejudice the defendant. Again it is a matter for the discretion of the court but the House of Lords has ruled that the English Courts should not seek to encourage forum shopping. *Atlantic Star* [1973].¹¹

Where the court does exercise its discretion to allow an action it may well impose certain conditions for doing so. For example it will certainly require the plaintiff to cease any action he may have commenced against the defendant in another jurisdiction. *The Moscanthy* [1971]¹²

⁸ *The Eleftheria* [1969] 1 Lloyd's Rep 237.

⁹ *The Adolf Warski* [1976] 2 Lloyd's Rep 241.

¹⁰ *The Makefjell* [1976] 2 Lloyd's Rep 29.

¹¹ *Atlantic Star* [1973] 2 Lloyd's Rep.

¹² *The Moscanthy* [1971] 1 Lloyd's Rep 37.

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Ismael v Government of Indonesia. The appellants, owners of a steamship chartered her to the Indonesian government on successive charterparties the last of which was due to end on the 30th June 1952. In February 1952, S purporting to act as agent for the appellants had agreed for the sale of the vessel to P as agent for the respondents on terms on which made it was clear that S had no authority to sell the ship. This fact was well known to P. From this time on until June 1952, the Indonesian Government acted as if they owned the vessel and actually had her placed on the Indonesian Ship's Register. When the vessel was in Hong Kong for repairs the appellants issued a writ in rem and sought to have the vessel arrested. The respondents claimed that the court had no jurisdiction to entertain the issue since the vessel belonged to a foreign state. The Indonesian Government gave notice of a motion to have the proceedings set aside on the 9th July 1952.

Held : That at the time when the Indonesian Government gave notice to have the proceedings set aside the only interest they had in the vessel was based on the purported sale in Feb 1952. The evidence available showed that their title was manifestly defective and for this reason they had not shown that they possessed such an interest in the steamship as would take the case outside the jurisdiction of the court. There was therefore no case for setting aside the writ.

HM S.S. Foreign & Commonwealth Affairs v Percy Thomas Partnership [1998],¹³ Inordinate delay : *Arbitration Act 1950*. Contract performed 1986/87. Applications to appoint an arbitrator in April 1996 in respect of a defective roof. Notices of appointment issued in 1992 & 1993. Trial delayed pending supporting evidence. Court struck applications out for inordinate delay.

JURISDICTION AND STATE IMMUNITY

As we have seen, Conflicts of Law and Arbitration are of particular relevance to maritime activities both from the perspective of tort (Admiralty Law – accidents, tug tow, salvage) and contract (International Transportation Law) given the global range of sea going vessels. The parties to such disputes are frequently based in different jurisdictions. One of the parties to a dispute may well be a State entity, be it the UK government or a foreign government.

Ships under requisition to the crown or to a foreign government.

Where a public vessel is not owned by the crown or by a foreign sovereign or state, but merely requisitioned by it, although it may not be arrested while in the possession of the crown or foreign state, the position in relation to whether or not a maritime lien may attach is not at all clear.

- a). **Where the incident occurs prior to the requisition.** In this case, although the vessel could not be arrested whilst actually requisitioned, there seems no reason why the maritime lien should not remain dormant during this period, but be enforceable upon the vessel being returned to her former owners or on her later sale into private ownership.
- b). **Where the incident occurs during the period of requisition.** The position in this case is somewhat more difficult. Obviously during the time of requisition or demise no action can be brought in rem against the vessel. It is arguable however that the happening of the particular incident that a maritime lien does attach although it remains dormant until the vessel is either returned to her former owner or sold to a private purchaser. The cases on this point are not very satisfactory.

The Sylvian Arrow [1923].¹⁴ It was held in the case of a collision claim made in respect of a collision which occurred whilst the vessel was under requisition to the U.S. Gov that a maritime lien did not attach and that the vessel could not be proceeded against by way of an action in rem when the vessel was returned to her former owners.

The Meandros [1925].¹⁵ It was held that in the case of a salvage claim made in respect of salvage services rendered to a Greek vessel whilst under requisition of the Greek Government that a maritime lien did attach and that the vessel might be proceeded against by way of an action in rem on the vessel being returned to her former owners.

¹³ *HM S.S. Foreign and Commonwealth Affairs v Percy Thomas Partnership* [1998] EWHC TCC 348 per HHJ Bowsher QC

¹⁴ *The Sylvian Arrow* [1923] Probate 220.

¹⁵ *The Meandros* [1925] Probate 61.

PRIVATE INTERNATIONAL LAW

Preservation of property : Security for judgments, awards and costs and State Entities.

Given the mobility of vessels and the ease with which ownership may be transferred to a third party it is not uncommon for a party to seek an award of security either against the person (in personam) or against property (in rem) and in particular a vessel where it was involved in the incident concerned. In Admiralty the latter takes the form of a maritime lien (security against the vessel) whereby the vessel is arrested to prevent disposal of assets. A lien may be available both in respect of litigation or arbitration.

Another important aspect of international litigation involves domestic courts and applications for security of costs. *Republic of Kazakhstan v Istil* [2005].¹⁶ Security of costs application in respect of a s67 / s68 Arbitration Act 1996 challenges. Security set at £120K.

Exceptions to the rules relating to Maritime Liens and actions in Rem

Vessels owned by the Crown. No maritime lien will arise at all in relation to a Crown owned vessel even though the incident which has occurred would normally have given rise to a maritime lien nor may an action in rem be maintained against such a vessel. Since no maritime lien arises in this case, a later bona fide purchaser for value takes the vessel absolutely clear of any maritime lien. *The Tervaete* [1922].¹⁷

The expression 'Crown Ships' includes ships of the Royal Navy and Government owned ships.

This freedom from attachment of maritime liens and from arrest exists in respect of Crown cargo whether being carried on Crown vessels or otherwise.

s29(1) Crown Proceedings Act 1947 states that "*nothing in this Act shall authorise proceedings in rem in respect of any claim against the Crown, or the arrest, detention or sale of any of H.M.'s ships or aircraft, or of any cargo or other property belonging to the crown or give to any person any lien on any such ship, aircraft cargo or other property.*"

A similar exemption from arrest in relation to the subject matter mentioned above is given in respect of the statutory actions in rem granted under s20 S.C.A. 1981 - see s24(2)(c) S.C.A. and includes Hovercraft.

Vessels owned by foreign sovereigns or governments.

Where an incident occurs in relation to a vessel which normally gives rise to a maritime lien and that vessel is owned by a foreign sovereign or government, the former rule was that no action might be brought in the English Courts in relation to such incidents and it would appear that no maritime lien attached. Proceedings in rem will not be permitted in the case of property which is owned by a foreign sovereign or state. This immunity extends not only to the actual sovereign or his ambassadors but also to the property of members of the Embassies and even to delegates or certain foreign trade delegations.

The immunity formerly extended not only to such vessels as were on the public business of the state, but also to pleasure vessels and to vessels being used for trading purposes.

The Parlement Belge [1880].¹⁸ The Parlement Belge was a vessel owned by the King of the Belgians engaged in carrying mails in connection with the British Post Office together with cargo and passengers. Whilst near Dover she collided with a British Ship. Held : C.A. That the property of a foreign sovereign was exempt from the jurisdiction of the British Court and this principle applied to Admiralty Actions in Rem.

State owned vessels used for Commercial Purposes.

The position in respect of state owned vessels engaged in commercial purposes was the same as that for those vessels engaged on public duties until 1976. The position then changed as the courts sought to distinguish between public and commercial purposes. The original position can be found in the decision in *The Harmattan* [1976].¹⁹ and may be contrasted with the decision in the Privy Council in *The Phillipine Admiral* [1976].²⁰

¹⁶ *Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468 before Sir Anthony Clarke MR; Rix LJ; Richards LJ;

¹⁷ *The Tervaete* [1922] Probate 259.

¹⁸ *The Parlement Belge* [1880] 5 P.D. 197.

¹⁹ *The Harmattan* [1976] 2 Lloyds Rep 1.

²⁰ *The Phillipine Admiral* [1976] 1 Lloyd's Rep 367.

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The position in the U.K. is now governed by the *State Immunity Act 1978 (c.33)*²¹ which came into force on the 22nd Nov 1978- and enabled the U.K. to ratify an International Convention concerning the *Immunity of State Owned Vessels of 1936* and more particularly to give effect to the *European Convention on State Immunity of 1972*.

The major section in respect of Admiralty Claims is **s10 State Immunity Act 1978**.

s10(2) State Immunity Act 1978 provides that

" A state is not immune as respects

- a). an action in rem against a ship belonging to that state or
- b). an action in personam for enforcing a claim in connection with such a ship.

if at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes."

The right of sister-ship arrest (i.e. *an other vessel under the same ownership*) is also provided for, but in that case under **s10(3) State Immunity Act 1978** it is required that at the time when the cause of action arose both the sister ship and the ship in respect of which the incident arose were in use or intended for use for commercial purposes.

Under **s10(4) State Immunity Act 1978** immunity is withdrawn in respect of an action in rem against a cargo belonging to a State, or in an action in personam for enforcing a claim in connection with such a cargo if both the cargo and ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes.

A ship or cargo '*belonging to a state*' includes references to a ship or cargo in its possession or control or in which it claims an interest. **s10(5) State Immunity Act 1978**.

Under **s17(1) State Immunity Act 1978** Commercial purposes, transactions or activities **s3(3)** of the Act in particular these include

- a). Any 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 in which a State enters of in which it engages otherwise than in the exercise of sovereign authority.

Planmount Ltd v Republic of Zaire [1980].²² **s3 State Immunity Act 1978** does not apply if the parties to the dispute are states or have otherwise agreed in writing. Insofar as the parties may otherwise agree in writing, this would seem to cover inter alia actual agreement that immunity is to attach to agreements that the parties wish the dispute to be heard other than by U.K. courts, i.e. agreements that the dispute shall be heard by way of arbitration. Arbitration is specifically covered by **s9 State Immunity Act 1978** which provides that the fact that a state has agreed to submit a dispute which has arisen to arbitration does not render it immune as respects proceedings in the courts of the U.K. which relate to arbitration unless the arbitration agreement contains a contrary provision or the arbitration agreement is between states.

Jones v. Ministry of Interior, Saudi Arabia [2006] HL.²³ State immunity : Whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state.

Donegal International Ltd v Zambia [2007].²⁴ Declaration of state immunity refused. World wide freezing orders revisited.

AY Bank Ltd v Bosnia & Herzegovina [2006].²⁵ Liquidation of a bank in the UK owned by States emanating from the former state of Yugoslavia. Issues as to justiciability.

²¹ http://www.bailii.org/uk/legis/num_act/1978/1501906.html

²² *Planmount Ltd v Republic of Zaire* [1980] 2 Lloyd's Rep 393.

²³ *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia* [2006] UKHL 26. *before* Lords Bingham ; Hoffmann; Rodger; Walker; Carswell. 14th June 2006.

²⁴ *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm). Mr Justice Andrew Smith. 15th February 2007

²⁵ *AY Bank Ltd v Bosnia & Herzegovina* [2006] EWHC 830 (Ch). The Chancellor. 12th April 2006.

PRIVATE INTERNATIONAL LAW

State Immunity Act 1978

An Act to make new provision with respect to proceedings in the United Kingdom by or against other States; to provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes.

PART I PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction

1. **General immunity from jurisdiction.**

- (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
- (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

2. **Submission to jurisdiction.**

- (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
- (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
- (3) A State is deemed to have submitted —
 - (a) if it has instituted the proceedings; or
 - (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
- (4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of —
 - (a) claiming immunity; or
 - (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.
- (5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.
- (6) A submission in respect of any proceedings extends to any appeal but not to any counter-claim unless it arises out of the same legal relationship or facts as the claim.
- (7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

3. **Commercial transactions and contracts to be performed in United Kingdom.**

- (1) A State is not immune as respects proceedings relating to —
 - (a) a commercial transaction entered into by the State; or
 - (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.
- (2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.
- (3) In this section " commercial transaction " means —
 - (a) any 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;but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

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4. **Contracts of employment.**

- (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.
- (2) Subject to subsections (3) and (4) below, this section does not apply if —
 - (a) at the time when the proceedings are brought the individual is a national of the State concerned; or
 - (b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or
 - (c) the parties to the contract have otherwise agreed in writing.
- (3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.
- (4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.
- (5) In subsection (2)(b) above “ national of the United Kingdom ” means —
 - (a) a British citizen, a British Dependent Territories citizen a British National (Overseas)] or a British Overseas citizen; or
 - (b) a person who under the British Nationality Act 1981 is a British subject; or
 - (c) a British protected person (within the meaning of that Act)
- (6) In this section “ proceedings relating to a contract of employment ” includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled or subject as employer or employee.

5. **Personal injuries and damage to property.**

A State is not immune as respects proceedings in respect of —

- (a) death or personal injury; or
- (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

6. **Ownership, possession and use of property.**

- (1) A State is not immune as respects proceedings relating to —
 - (a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or
 - (b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.
- (2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.
- (3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.
- (4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property —
 - (a) which is in the possession or control of a State; or
 - (b) in which a State claims an interest,if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence.

7. **Patents, trade-marks etc.**

A State is not immune as respects proceedings relating to —

- (a) any patent, trade-mark, design or plant breeders ' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;
- (b) an alleged infringement by the State in the United Kingdom of any patent, trade-mark, design, plant breeders ' rights or copyright; or
- (c) the right to use a trade or business name in the United Kingdom.

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8. **Membership of bodies corporate etc.**

- (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which —
 - (a) has members other than States; and
 - (b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom,being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.
- (2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

9. **Arbitrations.**

- (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.

10. **Ships used for commercial purposes.**

- (1) This section applies to —
 - (a) Admiralty proceedings; and
 - (b) proceedings on any claim which could be made the subject of Admiralty proceedings.
- (2) A State is not immune as respects —
 - (a) an action in rem against a ship belonging to that State; or
 - (b) an action in personam for enforcing a claim in connection with such a ship,if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.
- (3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.
- (4) A State is not immune as respects —
 - (a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
 - (b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.
- (5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship.
- (6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

11. **Value added tax, customs duties etc.**

- A State is not immune as respects proceedings relating to its liability for —
- (a) value added tax, any duty of customs or excise or any agricultural levy; or
 - (b) rates in respect of premises occupied by it for commercial purposes.

Procedure

12. **Service of process and judgments in default of appearance.**

- (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.
- (2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

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- (3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.
- (4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.
- (5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.
- (6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.
- (7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

13. Other procedural privileges.

- (1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.
- (2) Subject to subsections (3) and (4) below —
 - (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
 - (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
- (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
- (4) Subsection (2)(b) above does 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; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if —
 - (a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or
 - (b) the process is for enforcing an arbitration award.
- (5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.
- (6) In the application of this section to Scotland —
 - (a) the reference to "injunction" shall be construed as a reference to "interdict";
 - (b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph —

"(b) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a decree arbitral or, in an action in rem, to arrestment or sale." ; and
 - (c) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue of any process" as a reference to "the doing of diligence" and the reference in subsection (4)(b) above to "an arbitration award" as a reference to "a decree arbitral".

Supplementary provisions

14. States entitled to immunities and privileges.

- (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and 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,

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but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

- (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom 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 a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.
- (3) If a separate entity (not being a State’s central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.
- (4) Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.
- (5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.
- (6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

15. **Restriction and extension of immunities and privileges.**

- (1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State –
 - (a) exceed those accorded by the law of that State in relation to the United Kingdom; or
 - (b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.
- (2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16. **Excluded matters.**

- (1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the ^{M2} Consular Relations Act 1968; and –
 - (a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;
 - (b) section 6(1) above does not apply to proceedings concerning a State’s title to or its possession of property used for the purposes of a diplomatic mission.
- (2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.
- (3) This Part of this Act does not apply to proceedings to which section 17(6) of the ^{M4} Nuclear Installations Act 1965 applies.
- (4) This Part of this Act does not apply to criminal proceedings.
- (5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17. **Interpretation of Part I.**

- (1) In this Part of this Act –
 - “ the Brussels Convention ” means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships signed in Brussels on 10th April 1926;
 - “ commercial purposes ” means purposes of such transactions or activities as are mentioned in section 3(3) above;
 - “ ship ” includes hovercraft.

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- (2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.
- (3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.
- (4) In sections 3(1), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the ^{MS} Continental Shelf Act 1964.
- (5) In relation to Scotland in this Part of this Act “ action in rem ” means such an action only in relation to Admiralty proceedings.

PART II JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

18. Recognition of judgments against United Kingdom.

- (1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State immunity, being a judgment –
 - (a) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 above; and
 - (b) which is final, that is to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.
- (2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in such proceedings.
- (3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.
- (4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

19. Exceptions to recognition.

- (1) A court need not give effect to section 18 above in the case of a judgment –
 - (a) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case; or
 - (b) if the judgment was given without provisions corresponding to those of section 12 above having been complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.
- (2) A court need not give effect to section 18 above in the case of a judgment –
 - (a) if proceedings between the same parties, based on the same facts and having the same purpose –
 - (i) are pending before a court in the United Kingdom and were the first to be instituted; or
 - (ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply; or
 - (b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and –
 - (i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final within the meaning of subsection (1)(b) of section 18 above; or
 - (ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.
- (3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give effect to section 18 above in respect of the judgment if the court that gave the judgment –
 - (a) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or
 - (b) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.

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- (4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III MISCELLANEOUS AND SUPPLEMENTARY

20. Heads of State.

- (1) Subject to the provisions of this section and to any necessary modifications, the ^{M6} Diplomatic Privileges Act 1964 shall apply to –
- (a) a sovereign or other head of State;
 - (b) members of his family forming part of his household; and
 - (c) his private servants,
- as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.
- (2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.
- (3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the ^{MZ} Immigration Act 1971.
- (4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.
- (5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

21. Evidence by certificate.

A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question –

- (a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;
- (b) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;
- (c) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;
- (d) whether, and if so when, a document has been served or received as mentioned in section 12(1) or (5) above.

22. General interpretation.

- (1) In this Act “ court ” includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.
- (2) In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.
- (3) In this Act “ the European Convention on State Immunity ” means the Convention of that name signed in Basle on 16th May 1972.
- (4) In this Act “ dependent territory ” means –
- (a) any of the Channel Islands;
 - (b) the Isle of Man;
 - (c) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or
 - (d) any country or territory outside Her Majesty ’ s dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.
- (5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

23. Short title, repeals, commencement and extent.

- (1) This Act may be cited as the State Immunity Act 1978.

(2) –(7) omitted

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STATE IMMUNITY, ARBITRATION AND JUDICIAL SUPPORT FOR ARBITRATION

Sabah Shipyard v Pakistan [2002].²⁶ Sabah sought to enforce an award against the Government of Pakistan. The Government and its trading party sought to appeal the award and procured an indefinite injunction in Pakistan. English Court issued an injunction against those proceedings. Government had waived state immunity before the English Court. Upheld on appeal.

Occidental Exploration v Republic of Ecuador [2005].²⁷ Challenge to jurisdiction of English court to hear a challenge to an award, whose seat was stated to be London England. Held the court had jurisdiction. Merits of the challenge not dealt with here. Plea of state immunity and non-justiciability rejected.

Svenska Petroleum Exploration v Lithuania [2005].²⁸ State Immunity. Lithuania took part in an arbitration in respect of an exploration venture defending a claim for damages in relation to the issuing of licences. The arbitral tribunal held that the State was a party to the arbitration agreement. Enforcement action in England unsuccessfully resisted on grounds of state immunity.

Svenska Petroleum Exploration v Lithuania [2006]:²⁹ Was the State of Lithuania a party to a commercial contract and an arbitration agreement : appeal against an enforcement of award action. In the circumstances State was a party. Award enforceable.

AIG Capital v Kazakhstan [2005].³⁰ Enforcement of arbitral award : State immunity - funds to the a/c of the National Bank of the State of Kazakhstan. Interim order attaching funds discharged.

Ecuador v Occidental Exploration [2006].³¹ Challenge *s67 & s68 Arbitration Act 1996*. Jurisdiction to deal with taxation excluded. Did this extend to application for return of VAT. Held No.

Republic of Kazakhstan v Istil [2006].³² Application to set aside : Arbitration Act s67. State Immunity raised.

Abu Dhabi Investment v Clarkson [2006].³³ *s9 Arbitration Act 1996* application for stay to arbitration in the UAE. Court held that since arbitration as opposed to litigation in the UAE, of a dispute not related to the execution of a contract, is permissive, not compulsory, this amounted to an application for a stay to litigation in the UAE. Accordingly the application was refused.

Intermet FZCO v Ansol Ltd [2007].³⁴ Application to injunct arbitral proceedings refused. Whether the same issue replicated in arbitration and litigation proceedings. However only one of the parties to the contract arbitration was also a party to the fraud litigation. Held : Both actions could proceed simultaneously.

ETI Euro Telecom v Republic of Bolivia [2008].³⁵ Freezing order - risk of dissipation of funds : State Immunity : New York arbitration pending under ICSID : unsuccessful appeal.

Entico v UNESCO [2008].³⁶ Whether the immunity from suit of the UN precluded arbitral jurisdiction in a contract for the production of a calendar. UN pulled out of contract – claimant seeks damages for loss.

Orascom v Republic of Chad [2008].³⁷ State immunity : application by the Claimant, for a final Third Party

²⁶ *Sabah Shipyard (Pakistan) Ltd. v Pakistan* [2002] EWCA Civ 1643 : CA before Pill LJ; Waller LJ; Sir Martin Nourse. 14th November 2002

²⁷ *Occidental Exploration & Production Company v Republic of Ecuador* [2005] EWCA Civ 1116 before Lord Phillips MR. Clarke LJ; Mance LJ. 9th September 2005

²⁸ *Svenska Petroleum Exploration AB v Lithuania* [2005] EWHC 2437 (Comm) per Mrs Justice Gloster

²⁹ *Svenska Petroleum Exploration AB v Lithuania* [2006] EWCA Civ 1529. CA before Sir Anthony Clarke MR; Scott Baker LJ ; Moore-Bick LJ. 13th November 2006.

³⁰ *AIG Capital Partners Inc v Kazakhstan* [2005] EWHC 2239 (Comm) per Mr Justice Aikens

³¹ *Ecuador v Occidental Exploration & Production Co* [2006] EWHC 345 (Comm) before Mr Justice Aikens. Commercial Division. 2nd March 2006.

³² *Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm) before Mr Justice David Steel : 3rd April 2006.

³³ *Abu Dhabi Investment Co v H Clarkson & Company Ltd.* [2006] EWHC 1252 (Comm) per Mr Justice Morison.

³⁴ *Intermet FZCO v Ansol Ltd* [2007] EWHC 226 (Comm). Gloster J .9th February 2007.

³⁵ *ETI Euro Telecom International NV v Republic of Bolivia & Anor* [2008] EWCA Civ 880 : CA before Tuckey LJ; Lawrence Collins LJ; Stanley Burnton LJ. 28th July 2008

³⁶ *Entico Corp Ltd v United Nations Educational Scientific & Cultural Assoc. (UNESCO)* [2008] EWHC 531 (Comm) Mr Justice Tomlinson 18th March 2008.

³⁷ *Orascom Telecom Holding SAE v Republic of Chad* [2008] EWHC 1841 (Comm) : Mr Justice Burton. 28th July 2008

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Debt Order (what used to be called a Garnishee Order) in respect of monies held by the Third Party Citibank NA for the First Defendant, the Republic of Chad in order to enforce its unpaid Arbitration Award by the International Chamber of Commerce against Chad.

Tsavliris Salvage v Grain Board of Iraq [2008].³⁸ Jurisdiction : No arbitration agreement : State Immunity.

PRIVACY AND STATE LITIGANTS.

Dept. Economic Policy & Dev. City of Moscow v Bankers Trust [2004].³⁹ Privacy - party autonomy and public policy : An appeal against an arbitration failed : The successful party wished the judgement to be published to demonstrate their business credentials to the world : The losing party wished to maintain privacy. C.A. upheld the privacy principal central to private dispute resolution.

WORKSHOP QUESTIONS

1. Critically examine the scope of jurisdiction of the English High Court and the exercise of discretion to exercise jurisdiction over disputes with a foreign element.
2. Critically examine the situations in which the High Court will refuse to exercise jurisdiction on the grounds of State Immunity.
3. Critically examine the situations in which the High Court will determine that an arbitral tribunal is deprived of jurisdiction over a dispute on the grounds of State Immunity.

ADDITIONAL READING

³⁸ *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq* [2008] EWHC 612 (Comm): Mr Justice. Gross 10th April 2008

³⁹ *Dept. Economic Policy & Dev. City of Moscow v Bankers Trust* [2004] EWCA Civ 314 before VC. Carnwarth LJ. Mance LJ. 25th March 2004.

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Supreme Court Act 1981 (c. 54)

Powers

Orders for interim payment.

- 32.(1) As regards proceedings pending in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to make an order requiring a party to the proceedings to make an interim payment of such amount as may be specified in the order, with provision for the payment to be made to such other party to the proceedings as may be so specified or, if the order so provides, by paying it into court.
- 32.(2) Any rules of court which make provision in accordance with subsection (1) may include provision for enabling a party to any proceedings who, in pursuance of such an order, has made an interim payment to recover the whole or part of the amount of the payment in such circumstances, and from such other party to the proceedings, as may be determined in accordance with the rules.
- 32.(3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.
- 32.(4) Nothing in this section shall be construed as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs.
- 32.(5) In this section "interim payment", in relation to a party to any proceedings, means a payment on account of any damages, debt or other sum (excluding any costs) which that party may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the court in the proceedings is given or made in favour of that other party.

Orders for provisional damages for personal injuries.

- 32A.(1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
- 32A.(2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—
- (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
 - (b) further damages at a future date if he develops the disease or suffers the deterioration.
- 32A. (3) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.
- 32A. (4) Nothing in this section shall be construed—
- (a) as affecting the exercise of any power relating to costs, including any power to make rules of court relating to costs; or
 - (b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

Powers of High Court exercisable before commencement of action.

33. (1) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—
- (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject-matter of subsequent proceedings in the High Court, or as to which any question may arise in any such proceedings; and
 - (b) the taking of samples of any such property as is mentioned in paragraph (a), and the carrying out of any experiment on or with any such property.
33. (2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court . . . the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
- (a) to disclose whether those documents are in his possession, custody or power; and

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- (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant's legal advisers; or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Power of High Court to order disclosure of documents, inspection of property etc. in proceedings for personal injuries or death.

- 34. (2) On the application, in accordance with rules of court, of a party to any proceedings [^{Ez}to which this section applies], the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim—
 - (a) to disclose whether those documents are in his possession, custody or power; and
 - (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
 - (i) to the applicant's legal advisers; or
 - (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
 - (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
- 34. (3) On the application, in accordance with rules of court, of a party to any proceedings to which this section applies, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—
 - (a) the inspection, photographing, preservation, custody and detention of property which is not the property of, or in the possession of, any party to the proceedings but which is the subject-matter of the proceedings or as to which any question arises in the proceedings;
 - (b) the taking of samples of any such property as is mentioned in paragraph (a) and the carrying out of any experiment on or with any such property.
- 34. (4) The preceding provisions of this section are without prejudice to the exercise by the High Court of any power to make orders which is exercisable apart from those provisions.

Provisions supplementary to ss. 33 and 34.

- 35. (1) The High Court shall not make an order under section 33 or 34 if it considers that compliance with the order, if made, would be likely to be injurious to the public interest.
- 35. (2) Rules of court may make provision as to the circumstances in which an order under section 33 or 34 can be made; and any rules making such provision may include such incidental, supplementary and consequential provisions as the rule-making authority may consider necessary or expedient.
- 35. (3) Without prejudice to the generality of subsection (2), rules of court shall be made for the purpose of ensuring that the costs of and incidental to proceedings for an order under section 33(2) or 34 incurred by the person against whom the order is sought shall be awarded to that person unless the court otherwise directs.
- 35. (4) Sections 33(2) and 34 and this section bind the Crown; and section 33(1) binds the Crown so far as it relates to property as to which it appears to the court that it may become the subject-matter of subsequent proceedings involving a claim in respect of personal injuries to a person or in respect of a person's death.

In this subsection references to the Crown do not include references to Her Majesty in Her private capacity or to Her Majesty in right of Her Duchy of Lancaster or to the Duke of Cornwall.
- 35. (5) In sections 32A, 33 and 34 and this section—
 - "property" includes any land, chattel or other corporeal property of any description;
 - "personal injuries" includes any disease and any impairment of a person's physical or mental condition.

Power of High Court to award interest on debts and damages.

- 35A. (1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—
 - (a) in the case of any sum paid before judgment, the date of the payment; and
 - (b) in the case of the sum for which judgment is given, the date of the judgment.

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- 35A.(2) In relation to a judgment given for damages for personal injuries or death which exceed £200 subsection (1) shall have effect—
- (a) with the substitution of “shall be included” for “may be included”; and
 - (b) with the addition of “unless the court is satisfied that there are special reasons to the contrary” after “given”, where first occurring.
- 35A.(3) Subject to rules of court, where—
- (a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and
 - (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings),
- the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.
- 35A.(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.
- 35A.(5) Without prejudice to the generality of section 84, rules of court may provide for a rate of interest by reference to the rate specified in section 17 of the Judgments Act 1838 as that section has effect from time to time or by reference to a rate for which any other enactment provides.
- 35A.(6) Interest under this section may be calculated at different rates in respect of different periods.
- 35A.(7) In this section “plaintiff” means the person seeking the debt or damages and “defendant” means the person from whom the plaintiff seeks the debt or damages and “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.
- 35A. (8) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.

Subpoena issued by High Court to run throughout United Kingdom.

- 36.(1) If in any cause or matter in the High Court it appears to the court that it is proper to compel the personal attendance at any trial of a witness who may not be within the jurisdiction of the court, it shall be lawful for the court, if in the discretion of the court it seems fit so to do, to order that a writ of subpoena ad testificandum or writ of subpoena duces tecum shall issue in special form commanding the witness to attend the trial wherever he shall be within the United Kingdom; and the service of any such writ in any part of the United Kingdom shall be as valid and effectual for all purposes as if it had been served within the jurisdiction of the High Court.
36. (2) Every such writ shall have at its foot a statement to the effect that it is issued by the special order of the High Court, and no such writ shall issue without such a special order.
36. (3) If any person served with a writ issued under this section does not appear as required by the writ, the High Court, on proof to the satisfaction of the court of the service of the writ and of the default, may transmit a certificate of the default under the seal of the court or under the hand of a judge of the court—
- (a) if the service was in Scotland, to the Court of Session at Edinburgh; or
 - (b) if the service was in Northern Ireland, to the High Court of Justice in Northern Ireland at Belfast;
- and the court to which the certificate is sent shall thereupon proceed against and punish the person in default in like manner as if that person had neglected or refused to appear in obedience to process issued out of that court.
36. (4) No court shall in any case proceed against or punish any person for having made such default as aforesaid unless it is shown to the court that a reasonable and sufficient sum of money to defray
- (a) the expenses of coming and attending to give evidence and of returning from giving evidence; and
 - (b) any other reasonable expenses which he has asked to be defrayed in connection with his evidence, was tendered to him at the time when the writ was served upon him.]
36. (5) Nothing in this section shall affect—
- (a) the power of the High Court to issue a commission for the examination of witnesses out of the jurisdiction of the court in any case in which, notwithstanding this section, the court thinks fit to issue such a commission; or
 - (b) the admissibility at any trial of any evidence which, if this section had not been enacted, would have been admissible on the ground of a witness being outside the jurisdiction of the court.
36. (6) In this section references to attendance at a trial include references to attendance before an examiner or commissioner appointed by the High Court in any cause or matter in that court, including an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

PRIVATE INTERNATIONAL LAW

Powers of High Court with respect to injunctions and receivers.

37. (1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
37. (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
37. (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.
37. (4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—
- (a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and
 - (b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.
37. (5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6 of the ^{M2}Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—
- (a) in proceedings for enforcing the charge; or
 - (b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

Relief against forfeiture for non-payment of rent.

38. (1) In any action in the High Court for the forfeiture of a lease for non-payment of rent, the court shall have power to grant relief against forfeiture in a summary manner, and may do so subject to the same terms and conditions as to the payment of rent, costs or otherwise as could have been imposed by it in such an action immediately before the commencement of this Act.
38. (2) Where the lessee or a person deriving title under him is granted relief under this section, he shall hold the demised premises in accordance with the terms of the lease without the necessity for a new lease.

Execution of instrument by person nominated by High Court.

39. (1) Where the High Court has given or made a judgment or order directing a person to execute any conveyance, contract or other document, or to indorse any negotiable instrument, then, if that person—
- (a) neglects or refuses to comply with the judgment or order; or
 - (b) cannot after reasonable inquiry be found,
- the High Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed, or that the negotiable instrument shall be indorsed, by such person as the court may nominate for that purpose.
39. (2) A conveyance, contract, document or instrument executed or indorsed in pursuance of an order under this section shall operate, and be for all purposes available, as if it had been executed or indorsed by the person originally directed to execute or indorse it.

Attachment of debts.

40. (1) Subject to any order for the time being in force under subsection (4), this section applies to any deposit account, and any withdrawable share account, with a deposit-taker.
40. (2) In determining whether, for the purposes of the jurisdiction of the High Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, a sum standing to the credit of a person in an account to which this section applies is a sum due or accruing to that person and, as such, attachable in accordance with rules of court, any condition mentioned in subsection (3) which applies to the account shall be disregarded.
40. (3) Those conditions are—
- (a) any condition that notice is required before any money or share is withdrawn;
 - (b) any condition that a personal application must be made before any money or share is withdrawn;
 - (c) any condition that a deposit book or share-account book must be produced before any money or share is withdrawn; or
 - (d) any other prescribed condition.

LECTURE ONE

40. (4) The Lord Chancellor may by order make such provision as he thinks fit, by way of amendment of this section or otherwise, for all or any of the following purposes, namely—
- (a) including in, or excluding from, the accounts to which this section applies accounts of any description specified in the order;
 - (b) excluding from the accounts to which this section applies all accounts with any particular deposit-taker so specified or with any deposit-taker of a description so specified.
40. (5) Any order under subsection (4) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
40. (6) “Deposit-taker” means a person who may, in the course of his business, lawfully accept deposits in the United Kingdom.
40. (7) Subsection (6) must be read with—
- (a) section 22 of the Financial Services and Markets Act 2000;
 - (b) any relevant order under that section; and
 - (c) Schedule 2 to that Act.

Administrative and clerical expenses of garnishees.

- 40A.(1) Where an interim third party debt order made in the exercise of the jurisdiction mentioned in subsection (2) of the preceding section is served on a deposit-taker, it may, subject to the provisions of this section, deduct from the relevant debt or debts an amount not exceeding the prescribed sum towards its administrative and clerical expenses in complying with the order; and the right . . . to make a deduction under this subsection shall be exercisable as from the time the interim third party debt order is served on it.
- (1A) In subsection (1) “the relevant debt or debts”, in relation to an interim third party debt order served on a deposit-taker, means the amount, as at the time the order is served on it, of the debt or debts of which the whole or a part is expressed to be attached by the order.
- (1B) A deduction may be made under subsection (1) in a case where the amount referred to in subsection (1A) is insufficient to cover both the amount of the deduction and the amount of the judgment debt and costs in respect of which the attachment was made, notwithstanding that the benefit of the attachment to the creditor is reduced as a result of the deduction.
- 40A.(2) An amount may not in pursuance of subsection (1) be deducted or, as the case may be, retained in a case where, by virtue of section 346 of the Insolvency Act 1986] or section 183 of the Insolvency Act 1986 or otherwise, the creditor is not entitled to retain the benefit of the attachment.
- 40A.(3) In this section—
- “deposit-taker” has the given by section 40(6); and
 - “prescribed” means prescribed by an order made by the Lord Chancellor.
- 40A(4) An order under this section—
- (a) may make different provision for different cases; . . .
 - (b) without prejudice to the generality of paragraph (a) of this subsection, may prescribe sums differing according to the amount due under the judgment or order to be satisfied.
 - (c) may provide for this section not to apply to deposit-takers of any prescribed description.
- 40A(5) Any such order shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament..

Wards of court.

41. (1) Subject to the provisions of this section, no minor shall be made a ward of court except by virtue of an order to that effect made by the High Court.
41. (2) Where an application is made for such an order in respect of a minor, the minor shall become a ward of court on the making of the application, but shall cease to be a ward of court at the end of such period as may be prescribed unless within that period an order has been made in accordance with the application.
- (2A) Subsection (2) does not apply with respect to a child who is the subject of a care order (as defined by section 105 of the Children Act 1989).
- 41.(3) The High Court may, either upon an application in that behalf or without such an application, order that any minor who is for the time being a ward of court shall cease to be a ward of court.

PRIVATE INTERNATIONAL LAW

Restriction of vexatious legal proceedings.

42. (1) If, on an application made by the Attorney General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground—

- (a) instituted vexatious civil proceedings, whether in the High Court or any inferior court, and whether against the same person or against different persons; or
- (b) made vexatious applications in any civil proceedings, whether in the High Court or any inferior court, and whether instituted by him or another, or
- (c) instituted vexatious prosecutions (whether against the same person or different persons),

the court may, after hearing that person or giving him an opportunity of being heard, make a civil proceedings order, a criminal proceedings order or an all proceedings order.]

(1A) In this section—

“civil proceedings order” means an order that—

- (a) no civil proceedings shall without the leave of the High Court be instituted in any court by the person against whom the order is made;
- (b) any civil proceedings instituted by him in any court before the making of the order shall not be continued by him without the leave of the High Court; and
- (c) no application (other than one for leave under this section) shall be made by him, in any civil proceedings instituted in any court by any person, without the leave of the High Court;

“criminal proceedings order” means an order that—

- (a) no information shall be laid before a justice of the peace by the person against whom the order is made without the leave of the High Court; and
- (b) no application for leave to prefer a bill of indictment shall be made by him without the leave of the High Court; and

“all proceedings order” means an order which has the combined effect of the two other orders.]

42. (2) An order under subsection (1) may provide that it is to cease to have effect at the end of a specified period, but shall otherwise remain in force indefinitely.

42. (3) Leave for the institution or continuance of, or for the making of an application in, any civil proceedings by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the proceedings or application are not an abuse of the process of the court in question and that there are reasonable grounds for the proceedings or application.

(3A) Leave for the laying of an information or for an application for leave to prefer a bill of indictment by a person who is the subject of an order for the time being in force under subsection (1) shall not be given unless the High Court is satisfied that the institution of the prosecution is not an abuse of the criminal process and that there are reasonable grounds for the institution of the prosecution by the applicant.

42. (4) No appeal shall lie from a decision of the High Court refusing leave required by virtue of this section.

42. (5) A copy of any order made under subsection (1) shall be published in the London Gazette.

Power of High Court to vary sentence on certiorari.

43. (1) Where a person who has been sentenced for an offence—

- (a) by a magistrates’ court; or
- (b) by the Crown Court after being convicted of the offence by a magistrates’ court and committed to the Crown Court for sentence; or
- (c) by the Crown Court on appeal against conviction or sentence,

applies to the High Court in accordance with section 31 for an order of certiorari to remove the proceedings of the magistrates’ court or the Crown Court into the High Court, then, if the High Court determines that the magistrates’ court or the Crown Court had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend it by substituting for the sentence passed any sentence which the magistrates’ court or, in a case within paragraph (b), the Crown Court had power to impose.

43.(2) Any sentence passed by the High Court by virtue of this section in substitution for the sentence passed in the proceedings of the magistrates’ court or the Crown Court shall, unless the High Court otherwise directs, begin to run from the time when it would have begun to run if passed in those proceedings; but in computing the term of the sentence, any time during which the offender was released on bail in pursuance of section 37(1)(d) of the Criminal Justice Act 1948 shall be disregarded.

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43.(3) Subsections (1) and (2) shall, with the necessary modifications, apply in relation to any order of a magistrates' court or the Crown Court which is made on, but does not form part of, the conviction of an offender as they apply in relation to a conviction and sentence.

Power of High Court to vary committal in default.

43ZA.(1) Where the High Court quashes the committal of a person to prison or detention by a magistrates' court or the Crown Court for—

- (a) a default in paying a sum adjudged to be paid by a conviction; or
- (b) want of sufficient distress to satisfy such a sum,

the High Court may deal with the person for the default or want of sufficient distress in any way in which the magistrates' court or Crown Court would have power to deal with him if it were dealing with him at the time when the committal is quashed.

43ZA.(2) If the High Court commits him to prison or detention, the period of imprisonment or detention shall, unless the High Court otherwise directs, be treated as having begun when the person was committed by the magistrates' court or the Crown Court (except that any time during which he was released on bail shall not be counted as part of the period).

Specific powers of arbitrator exercisable by High Court.

43A. In any cause or matter proceeding in the High Court in connection with any contract incorporating an arbitration agreement which confers specific powers upon the arbitrator, the High Court may, if all parties to the agreement agree, exercise any such powers.

In due course it will be necessary to cross reference these powers with the relevant Civil Procedure Rules and related Practice Directions, which flesh out the bare legislative powers with rules related to the exercise of the discretion of the court in exercising these powers and the procedures that the parties have to comply with in order to apply to the court to exercise these powers..

WORKSHOP QUESTIONS

- 1 Critically examine the powers of the English High Court to support legal actions with a foreign element.

ADDITIONAL READING