

Sovereign Immunity 2019

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Sovereign Immunity

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Lexology Getting The Deal Through is delighted to publish the second edition of *Sovereign Immunity*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Stephen Jagusch and Odysseas G Repousis of Quinn Emanuel Urquhart & Sullivan LLP, the contributing editors, for their continued assistance with this volume.



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BACKGROUND

Concept of sovereign immunity

- 1 | What is the general approach to the concept of sovereign immunity in your state?

Cyprus adheres to the 'restrictive immunity' principle and does not endorse 'absolute immunity'. The principle of restrictive immunity was upheld by the Supreme Court of Cyprus in *Charilaos Apostolides & Sia Ltd v Embassy of the Russian Federation and others* (1997) 113 CLR 802. The Supreme Court observed that international law has a variety of theories on immunity and confirmed that the general rule is that each state respects the sovereignty of other states and does not subject such state to the jurisdiction of its court. It also endorsed the principle that one sovereign power cannot exercise jurisdiction over another, and observed that the courts cannot exercise jurisdiction on a person or the property of a foreign state unless the foreign state itself accepted to be subjected to the jurisdiction of the court.

In *Unitica Enterprises Limited v Slovak Republic* (1999) 1A AA.284, the Supreme Court recognised that the principle of restrictive immunity is an expression of the modern tendency of international law and clarified that the privilege of sovereign immunity is granted when the foreign state acts in its sovereign capacity (*acta jure imperii*), and is not recognised when the state transacts or carries out an activity of an industrial, commercial or financial character that could also be conducted by a natural person (*acta jure gestionis*).

Therefore, the decisive factor on whether a state can rely on the privilege of state immunity is the nature of the cause of action asserted against it. With regard to acts of sovereignty, the state is entitled to the protection of state immunity; with regard to acts of a commercial nature, the defendant state is not entitled to the protection of state immunity. This approach is consistent with the provisions of the European Convention on State Immunity (the Convention), ratified by Cyprus in 1976 (Law No. 6/1976). The principle of restrictive immunity aligns Cyprus law with the provisions of the Convention. As explained by Lord Wilberforce in *Claim against the Empire of Iran* (1963) 45 ILR 57, a way of distinguishing acts *jure imperii* and *jure gestionis* would be to look at the nature of the transaction or the resulting legal relationship rather than the motive or purpose of the activity.

Legal basis

- 2 | What is the legal basis for the doctrine of sovereign immunity in your state?

The legal basis for recognising the protection of state immunity in Cyprus is the Convention, as well as case law on the issue.

Multilateral treaties

- 3 | Is your state a party to any multilateral treaties on sovereign immunity? Has the state made any reservations or declarations regarding the treaties?

Cyprus is a contracting party to the Convention (see question 1). Cyprus has also ratified the Additional Protocol to the Convention, which established a European Tribunal on issues of state immunity. The Convention is an elevated source of law in Cyprus, given that article 169(3) of the Constitution of Cyprus provides that international conventions prevail over national legislation, subject to the European *acquis communautaire*.

Cyprus is not a contracting party to the United Nations Convention on Jurisdictional Immunities of States and Their Property (the UN Convention).

JURISDICTIONAL IMMUNITY

Domestic law

- 4 | Describe domestic law governing the scope of jurisdictional immunity.

Cyprus adopts the principle that the immunity applies not only to the state per se but also in the sovereignty of the state acting in its public capacity; to the executive of the state; and to each section of the executive. For the purpose of defining these entities, the criterion of legal personality alone is not adequate as even a state authority may have legal personality without constituting an entity distinct from the state. On the other hand, it is considered that a dual test, comprising distinct existence separate from the executive organs of the state, and the capacity to sue or be sued (ie, the ability to assume the role of either plaintiff or defendant in court proceedings), could provide a satisfactory means of identifying those legal entities in contracting states that should not be treated as the state.

In *Tlais Enterprises Ltd v Her Majesty's Revenue & Customs (Ex Her Majesty's Customs and Excise)*, Appeal No. 109/2009, dated 18 March 2015, the Supreme Court observed that the Convention directly involves the state or contracting state. It does not include a provision that extends the concept of the state to its departments, and it expressly notes in its preamble that contracting states have taken into account that there is an observed tendency in international law to restrict the circumstances in which a state may rely on the immunity privilege regarding foreign courts. Nevertheless, it also endorsed the view that it is equally important for official external relations to be conducted by the authorised state organs only, and observed that the question of the extent to which state agencies and other instrumentalities are entitled to immunity may arise in some cases.

When the agency in question clearly constitutes a ministry or department engaged in public activity, immunity will be granted. Often, however, there may be some question as to whether an entity is in fact

an integral part of governmental machinery; in these instances, courts have usually given great weight to the views of the foreign state.

In the above case, the Supreme Court held that district courts should not rush to decide at an interim stage issues of immunity protection. The Supreme Court allowed the appeal and remitted the case back to the district court for reconsideration, noting that it was premature to rule that a tripartite agreement between Tlais, its UK principal and Her Majesty's Customs and Excise (subsequently absorbed into HMRC), which was intended to reduce import of contraband cigarettes into the United Kingdom via Cyprus or Dubai, was an agreement concerning the exercise of state power. On the contrary, the Supreme Court observed that the tripartite agreement appeared to be a commercial agreement but acknowledged that the matter should be examined in detail at the full trial of the dispute in the Limassol district court.

State waiver of immunity or consent

5 | How can the state, or its various organs and instrumentalities, waive immunity or consent to the exercise of jurisdiction?

Rules on submission to jurisdiction are set out under articles 1 to 4 of the Convention. These provisions need to be interpreted in light of the jurisprudence of the Supreme Court of Cyprus to the effect that, other than express manifestations of waiver of immunity privileges, a waiver of immunity privilege may also arise from the circumstances of the case and, if it arises by implication, it would be regarded as effective.

A contracting state that intervenes in proceedings before a Cyprus court would submit, for the purpose of those proceedings, to the jurisdiction of the court. This state would not be able to claim immunity from the jurisdiction of the courts in respect of any counterclaim arising out of the legal relationship or the facts on which the principal claim is based; or if, according to the provisions of the Convention, it would not have been entitled to invoke immunity in respect of that counterclaim had separate proceedings been brought against it before the court. Further, a state that makes a counterclaim in proceedings before a court would submit to the jurisdiction of the courts with respect not only to the counterclaim but also to the principal claim.

Also, a state cannot claim immunity from the jurisdiction of a Cyprus court if it has undertaken to submit to the jurisdiction of that court by international agreement, by an express term contained in a contract in writing (such as an arbitration agreement), or by express consent given after a dispute between the parties has arisen.

A state cannot claim immunity from the jurisdiction of a Cyprus court if, before claiming immunity, it takes any step in the proceedings relating to the merits. However, if the state satisfies the court by not acquiring knowledge of facts on which to base a claim to immunity until after such a step has been taken, it can claim immunity based on these facts if it does so at the earliest possible moment. A state is not deemed to have waived immunity if it appears before a Cyprus court to assert immunity. A contracting state that appears in the proceedings is deemed to have waived any objection to the method of service.

In relation to arbitration proceedings, article 11 of the Convention provides that immunity does not apply where a state has agreed in writing to submit to arbitration a dispute that has arisen or may arise out of a civil or commercial matter in relation to the validity or interpretation of the arbitration agreement, the arbitration procedure and the setting aside of the award, unless the arbitration agreement provides otherwise. In these circumstances, if the arbitration has taken place or will take place in Cyprus, or if it shall be conducted in accordance with Cyprus law, that state may not claim immunity from the jurisdiction of a court of Cyprus.

Even where a foreign state is properly subject to the jurisdiction of the local courts, execution of any judgment against the state may not be levied against its property unless it has separately waived its immunity from execution.

6 | In which types of transactions or proceedings do states not enjoy immunity from suit (even without the state's consent or waiver)? How does the law of your country assess whether a transaction falls into one of these categories?

Cyprus courts have observed that the types of transactions or proceedings where states do not enjoy immunity from suit are stipulated in articles 4 to 14 of the Convention. Briefly, a state cannot claim immunity from the jurisdiction of a Cyprus court if:

- the proceedings relate to an obligation of the state, which, by virtue of a contract, falls to be discharged in Cyprus, under the following conditions:
 - this does not apply in the case of a contract concluded between states;
 - the parties to the contract have otherwise agreed in writing; or
 - the state is party to a contract concluded on its territory and the obligation of the state is governed by its administrative law (article 4);
- the proceedings relate to a contract of employment between the state and an individual where the work has to be performed in Cyprus (article 5);
- the state participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business in Cyprus, and the proceedings concern the relationship arising out of that participation between the state and the entity or any other participant (article 7);
- the proceedings relate to:
 - intellectual property (a patent, industrial design, trademark, service mark or other similar right that, under Cyprus law, has been applied for, registered or deposited, or is otherwise protected, and in respect of which the state is the applicant or owner);
 - an alleged infringement by the state in Cyprus of such a right belonging to a third person and protected in Cyprus;
 - an alleged infringement by the state in Cyprus of copyright belonging to a third person and protected in under Cyprus law; or
 - the right to use a trade name in Cyprus (article 8);
- the proceedings relate to the state's rights or interests in, or its use or possession of, immovable property; or its obligations arising out of its rights or interests in, or use or possession of, immovable property, provided that the property is situated in Cyprus (article 9);
- the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia* (article 10); or
- in proceedings that relate to redress for injury to the person or damage to tangible property, the facts that occasioned the injury or damage occurred in Cyprus, and the author of the injury or damage was present in Cyprus at the time (article 11).

Article 14 of the Convention clarifies that the Convention does not prevent a Cyprus court from administering, supervising or arranging for the administration of property, such as trust property or the estate of the bankrupt, solely because another contracting state has a right or interest in the property.

7 | If one of the exceptions to sovereign immunity set out above applies, is there any related principle that could prevent a court having jurisdiction over the state?

Although the principle of non-justiciability and the doctrine of act of state have not been considered by Cyprus courts, it would be expected that a Cyprus court would:

- apply these principles without seeking to draw any particular distinction between the two doctrines, which have often been used interchangeably in international literature and case law;
- respect the principle of sovereign equality of states and international comity and not adjudicate upon the acts of a foreign state or their agents where the validity of these acts is directly challenged; and
- consider the scope of the doctrine on the facts of the case and adopt a balance between the right to be heard and the absolute nature of the bar to jurisdiction that it imposes where the court deems that it properly applies.

Proceedings against a state enterprise

- 8 | To what extent do proceedings against a state enterprise or similar entity affect the immunity enjoyed by the state? Is there precedent for piercing the corporate veil to subject the state itself to those proceedings?

Unless otherwise agreed in writing, a state would not be able to claim immunity from the jurisdiction of a Cyprus court if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business in Cyprus. This also applies if the proceedings concern the relationship arising out of that participation between the state and the entity or any other participant.

There is no precedent for piercing the corporate veil to subject the state itself to those proceedings.

Standing

- 9 | What is the nexus the plaintiff needs to have standing to bring a claim against a state?

The plaintiff needs to show that the Cyprus court would have jurisdiction to hear the case under Cyprus law. Jurisdiction against a foreign defendant could be asserted (and service out of jurisdiction could be allowed) if:

- the whole subject matter of the action is immovable property of any kind situated in Cyprus;
- any act, deed, will, contract, obligation or liability affecting immovable property of any kind situated in Cyprus is sought to be construed, rectified, set aside or enforced in the action;
- the action is for:
 - the administration of the movable property of any deceased person who at the time of his or her death was domiciled in Cyprus; or
 - the execution (as to property situated in Cyprus) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to Cyprus law;
- the action is:
 - brought to enforce, rescind, dissolve, annul or affect a contract;
 - brought to recover damages or other relief for, or in respect of, the breach of a contract made in Cyprus;
 - brought in respect of a breach committed in Cyprus of a contract wherever made, even though the breach was preceded or accompanied by a breach out of Cyprus that rendered impossible the performance of the part of the contract that ought to have been performed in Cyprus;
 - made by or through an agent trading or residing in Cyprus on behalf of a principal trading or residing out of Cyprus; or
 - founded on a civil wrong committed in Cyprus;
- any injunction is sought regarding an act performed in Cyprus, or any nuisance in Cyprus is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

- any person out of Cyprus is a necessary or proper party to an action properly brought against some other person duly served in Cyprus.

Nexus of forum court

- 10 | What is the nexus the forum court requires to exercise jurisdiction over a state if the property or conduct that forms the subject of the claim is outside the forum state's territory?

It would be a special and rare case for the courts to accept to exercise jurisdiction over a state if the claim relates to property situated or conduct occurring outside Cyprus.

Interim or injunctive relief

- 11 | When a state is subject to proceedings before a court or arbitral tribunal in your jurisdiction, what interim or injunctive relief is available?

Cyprus courts have jurisdiction to issue provisional and protective measures. Section 32 of the Courts of Justice Law No. 14/60 confers power on the court to grant an injunction 'in all cases in which it appears to the Court just or convenient so to do'. However, the justice and convenience of the case is not the sole consideration to which the court should pay heed in the case of an interlocutory injunction, and no such injunction should be granted, unless the following conditions are satisfied: a serious question arises to be tried at the hearing; there appears to be 'a probability' that the plaintiff is entitled to relief; and unless it shall be difficult or impossible to complete justice at a later stage without granting an interlocutory injunction. A similar jurisdiction exists to issue injunctive relief in aid of international commercial arbitration (section 9 of the International Commercial Arbitration Law No. 101/1987) or in aid of arbitration (Cap 4).

Final relief

- 12 | When a state is subject to proceedings before a court or arbitral tribunal in your jurisdiction, what type of final relief is available?

In contractual disputes, remedies are usually provided for in the contractual framework (eg, damages, injunction, specific performance) and courts are prone to enforce the contractual agreements on the premise that it reflects the intention of the parties.

In non-contractual disputes, the most common remedies are damages or injunction. Specific performance is not usually granted in non-contractual disputes; however, this cannot be precluded.

Service of process

- 13 | Identify the court or other entity that must be served with process before any proceeding against a state may be issued.

Civil proceedings against a state can be issued before the district court. There are no particular formalities to be followed on the filing stage.

In relation to service, the claimant would need to apply to court for leave to serve outside the jurisdiction of the Cyprus court.

- 14 | How is process served on a state?

Cyprus does not have specific rules on the service of proceedings to foreign states, and article 16(2) of the Convention would apply. Hence, the competent authority, in this case the Ministry of Foreign Affairs, transmits the document by which the proceedings are instituted and a copy of any judgment given by default against a state that was a defendant in the proceedings.

This is conducted through the diplomatic channel to the Ministry of Foreign Affairs of the defendant state, for onward transmission, where appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant state. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.

Judgment in absence of state participation

15 | Under what conditions will a judgment be made against a state that does not participate in proceedings?

Cyprus does not have specific rules on the service of proceedings to foreign states and article 16(7) of the Convention would apply. Hence, if the defendant state has not appeared, judgment by default may only be given against it if it is established that the document by which the proceedings were instituted has been transmitted in conformity with article 16(2) of the Convention, and that the time limits for entering an appearance provided for in article 16(4) and 16(5) have been observed.

The time limits within which the state must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date that the document by which the proceedings were instituted or copy of the judgment is received by the Ministry of Foreign Affairs. If it rests with the court to prescribe the time limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the state at least two months.

ENFORCEMENT IMMUNITY

Domestic law

16 | Describe domestic law governing the scope of enforcement immunity.

Enforcement immunity is quite strict under the Convention. Pursuant to article 23 of the Convention, no measures of execution or preventive measures against the property of a state may be taken in Cyprus, except where and to the extent that the state has expressly consented thereto in writing in any particular case.

In *Unitica Enterprises Limited v Slovak Republic* (2004) 1 AA.730, the Supreme Court considered issues relating to enforcement immunity. The claimant obtained default judgment because Slovakia failed to appear in the proceedings. Subsequently, the claimant applied for an encumbrance (memo) on property owned by Slovakia in Cyprus and obtained an order for compulsory sale of such assets. When Slovakia was informed for the enforcement measures of a court judgment issued against it, it issued a diplomatic note to the Ministry of Foreign Affairs of Cyprus. Immediately, when the Attorney General of Cyprus, Costas Clerides, found out, he applied to the Supreme Court to stay the sale process and cancel the decision issued. The first issue to be decided was the *locus standi* of the Attorney General. Applying English precedent on the issue, it was decided that the Attorney General had a right of intervention at the invitation or with the permission of the courts in a private suit whenever it may affect the prerogatives of Cyprus, including its relations with foreign states, or raises any question of public policy on which the executive may wish to bring to the notice of the courts. The Attorney General was successful, and both the claim and enforcement were cancelled.

Application of civil procedure codes

17 | When enforcing against a state, would debt collection statutes and the enforcement sections of civil procedure codes or similar codes also apply?

Subject to enforcement immunity being lifted, debt collection statutes and the enforcement sections of the Cyprus Civil Procedure Rules would apply against a foreign state.

Consent for further enforcement proceedings

18 | Does a prior submission to the jurisdiction of a court or tribunal constitute consent for any further enforcement proceedings against the property of the state?

No. Pursuant to article 23 of the Convention, no measures of execution or preventive measures against the property of a state may be taken in Cyprus, except where and to the extent that the state has expressly consented thereto in writing in any particular case.

Property or assets subject to enforcement or execution

19 | Describe the property or assets that would typically be subject to enforcement or execution.

Subject to enforcement immunity being lifted, any asset would be amenable to execution.

Assets covered by enforcement immunity

20 | Describe the assets that would normally be covered by enforcement immunity and give examples of any restrictive or broader interpretations adopted by the courts.

See above.

21 | Explain whether the property or bank accounts of a central bank or other monetary authority would be covered by enforcement immunity even when such property is in use or is intended for use for commercial purposes.

Subject to enforcement immunity being lifted, there is no prohibition on enforcement against the property or bank accounts of a central bank or other monetary authority.

Test for enforcement

22 | Explain whether domestic jurisprudence has developed any further test that must be satisfied before enforcement against a state is permitted.

Not applicable.

Service of arbitration award or judgment

23 | How is a state served with process or otherwise notified before an arbitration award or judgment against it (or its organs and instrumentalities) may be enforced?

There is no such requirement.

History of enforcement proceedings

24 | Is there a history of enforcement proceedings against states in your jurisdiction? What part of these proceedings is based on arbitral awards?

Not applicable.

Public databases

25 | Are there any public databases through which assets held by states may be identified?

No.

Court competency

26 | Would a court in your state be competent to assist with or otherwise intervene to help identify assets held by states in the territory?

It would be possible in conjunction with injunctive relief or in aid of enforcement.

IMMUNITY OF INTERNATIONAL ORGANISATIONS**Specific provisions**

27 | Does the state's law make specific provision for immunity of international organisations?

There is recognised immunity for officials and employees of the United Nations and their associated entities (UNFICYP). The Constitutional Charter of the UN (sections 104 and 105) provide that the organisation shall enjoy in the territory of each of its members such legal capacity, privileges and immunities as necessary for the exercise of its functions and the fulfilment of its purposes. It also provides that representatives of the members of the United Nations and officials of the organisation shall similarly enjoy such privileges and immunities as necessary for the independent exercise of their functions in connection with the organisation. Also, under the related convention between Cyprus and the UN/UNFICYP, it is expressly provided that the United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.

There is recognised immunity for officials and employees of the European Union.

Domestic legal personality

28 | Does the state consider international organisations headquartered or operating in its territory as enjoying domestic legal personality and could such organisations be subjected to proceedings before a court or arbitral tribunal?

No.

Enforcement immunity

29 | Would international organisations in the state enjoy enforcement immunity? Are there any cases where debtors sought to enforce against a state by attaching or executing assets held by international organisations?

Yes, international organisations in Cyprus would enjoy enforcement immunity. We are not aware of any cases where debtors sought to enforce against a state by attaching or executing assets held by international organisations.

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