Sovereign Immunity

Contributing editors
Tai-Heng Cheng and Odysseas G Repousis

2018

GETTING THE DEAL THROUGH

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First edition

Getting the Deal Through is delighted to publish the first edition of *Sovereign Immunity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 Tai-Heng Cheng and Odysseas G Repousis of Quinn Emanuel Urquhart & Sullivan LLP, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

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Introduction

Tai-Heng Cheng and Odysseas G Repousis
Quinn Emanuel Urquhart & Sullivan LLP

We are pleased to present the first edition of *Getting the Deal Through – Sovereign Immunity*. This is the first volume in the series to attempt to critically and comparatively assess the state of play of the law of sovereign immunity across key jurisdictions. This volume constitutes a systematic and user-friendly collection of the information that investors, awards- and judgment creditors should consider when contemplating litigation against sovereigns, state entities and international organisations, and assessing the enforceability and recoverability of any resulting award or judgment against sovereign states or state entities, including state-owned enterprises.

The contents of this volume will be important to sovereigns and state entities (the natural defendants in such proceedings), local and international counsel, funders and clients alike. We hope it will be the definitive point of reference for stakeholders looking for up-to-date, comprehensive and accurate analysis, presented in an accessible and concise manner, regarding issues of sovereign immunity.

Controversy in sovereign immunity

The need for this book arose as the result of significant sovereign litigation across key jurisdictions, owing to the ever-growing role of international arbitration, diversification of sovereign investment (eg, through sovereign wealth funds), and intensifying efforts to collect against states and other state entities through the enforcement of international arbitration awards or judgments. Further, the absence of a global framework governing sovereign immunity has made a jurisdiction-specific study on sovereign immunity even more pertinent.

The 1972 European Convention on State Immunity has only been ratified by a handful of states; the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property has not yet entered into force; and multilateral international treaties governing arbitration such as the 1958 New York Convention or the 1965 Washington Convention do not deal with issues of sovereign immunity. At the same time, a great part of transnational litigation and international arbitration (whether commercial or investment treaty) revolves around enforcement, execution and attachment proceedings against sovereign assets or assets held by state entities. With the proliferation of investment arbitration and investor-state arbitration awards, such proceedings have intensified, leading to the creation of a whole new corpus of jurisprudence on sovereign immunity.

However, issues of sovereign immunity remain complex and, to a certain extent, uncharted. This relates to the fluidity of this field of law, which is constantly undergoing change, moving from the absolute immunity test to the commercially oriented test of restrictive immunity. Moreover, sovereigns and sovereign-backed investment takes many forms and is channelled through multiple vehicles, making it difficult for the law of sovereign immunity to adapt to these new structures. There is also resistance from states themselves, which often tests the boundaries of the law of sovereign immunity and, in the process, helps explain aspects of this field of law that would have otherwise remained uncharted. In fact, litigating against sovereigns (whether before courts or arbitral tribunals) is part of the story. What is far more agonising and, at times, time-consuming, is enforcement, execution and attachment proceedings against sovereigns. This is the realm of sovereign immunity.

Indeed, one need only look at the saga of *Sedelmayer v Russia*, which epitomises the intricacies and idiosyncrasies of the law of sovereign immunity. In 1998, Mr Franz Sedelmayer secured a €2.3 million investment treaty award against Russia for the expropriation of his police supply and training company. Yet he spent almost two decades trying to enforce and collect that award, going as far as to attempt to seize payments by Lufthansa to Russia for flights over Russian airspace, and attach Russian assets displayed in events such as the International Aviation and Aerospace Exhibition in Berlin in 2006. Eventually, Mr Sedelmayer was successful in recovering the amount due through the attachment (and subsequent auction) of Russian assets in Sweden and Germany, but his story is a telling reminder of the importance of sovereign immunity.

Of similar importance is the more recent saga of *FG Hemisphere*, which involved FG Hemisphere's attempts to enforce two International Chamber of Commerce awards worth more than US$104 million against the Democratic Republic of the Congo. One such attempt was FG Hemisphere's effort to attach funds owed to the DRC by China Railways. This was blocked after the Hong Kong Court of Final Appeal determined that the doctrine of absolute sovereign immunity applies in Hong Kong (a decision later confirmed by the Standing Committee of the National People's Congress of China).

It is apparent that as transnational litigation and arbitration continue to grow, so will the law of sovereign immunity. The objective of this volume is to shed more light on the law of sovereign immunity, which often becomes a key battleground of sovereign litigation.

The contents of this volume

The chapters in this volume are organised by jurisdiction and contain responses to a set of 29 questions that we formulated based on our own extensive experience as advisers and counsel to both investors and sovereigns regarding litigation and arbitration. These questions were put to a select group of prominent practitioners and law firms, each based in one of the 13 jurisdictions around the world that this volume covers. The chapters of this volume cover major, common and civil law, and North and South American, European and Asian jurisdictions (in particular, Brazil, Canada, Cyprus, Egypt, France, Germany, Hong Kong, Italy, Malaysia, Russia, Switzerland, the United Kingdom and the United States) that are at the forefront of sovereign litigation.

The courts in these jurisdictions are also among those that administer the greatest volume of enforcement proceedings against sovereigns, state entities and international organisations. We trust that readers will find this guide both useful and enlightening.

Brazil

Ricardo Pagliari Levy
Pinheiro Neto Advogados

Background

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

In Brazil, the general approach to the concept of sovereign immunity of a state has two principal aspects: jurisdictional immunity and enforcement immunity. In the past, jurisdictional immunity was deemed to be absolute, regardless of the type of act practised by a certain state. However, such understanding has changed, and currently it is effectively presupposed that jurisdictional immunity is restricted.

In this context, if the acts practised are 'public or government acts of a state' – namely, acts related to a country's sovereignty, such as the act of sinking a ship during wartime – sovereign immunity will be granted. On the other hand, if the acts practised are 'private, merchant-like, commercial acts of the government of a state' – namely, acts involving issues related to the management of a certain state or organ, such as cases involving commercial relationships – jurisdictional immunity does not apply. This is because the state is not acting in a public or sovereign capacity.

As regards enforcement immunity, it is deemed absolute and should be submitted to international law at the enforcement phase, under penalty of diplomatic implications. However, if a state expressly waives the sovereignty over its own assets; or when there are, in the Brazilian territory, assets owned by the foreign state whose purpose or use is unrelated to diplomatic legacies or consular representations maintained thereby in Brazil (the Federal Supreme Court, Ordinary Civil Action, 1 August 2000), enforcement immunity may also be restricted.

As regards Brazil's own jurisdiction, there is no immunity, but there are prerogatives.

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

The principal legal basis is provided for by treaties acknowledged by the Brazilian legislation, particularly Decree 27,784/1950 adopted in London by the General Assembly of the United Nations on 13 February 1946, which enacted the Convention on the Privileges and Immunities of the United Nations. This Convention presents privileges and immunities to be granted to the UN so that it can perform its duties independently.

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

Yes, Brazil is a party to the Convention on the Privileges and Immunities of the United Nations (see question 2). In addition, Brazil is a party to the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the General Assembly on 21 November 1947.

There is no exception with regard to the aforementioned treaties.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Considering there is no specific legislation on jurisdictional immunity, except for the aforementioned Decrees, the scope of jurisdictional immunity is governed by consuetudinary law (ie, based on the understanding set forth under question 1).

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

A state can consent to the exercise of the Brazilian jurisdiction through arbitration clauses, contractual clauses or through international treaties. A state may resort to the court to expressly waive its immunity.

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?

The courts define any acts practised by the state as *acta jure imperii* or *acta jure gestionis*. Based on said difference, any commercial transaction, participation in foreign companies or ownership of real estate assets falling within the category of *acta jure gestionis* would remove the immunity from the state. In other words, the state could be subject to a cognisance proceeding.

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?

No. If the exception under *acta jure gestionis* applies, there are is no principle that could prevent a court from having jurisdiction over the state.

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?

Assuming a state enterprise is owned by the state, the principle mentioned under question 1 should indirectly apply to the purpose and use that is considered unrelated to the diplomatic activities or consular representations. There is no precedent for piercing the corporate veil to hold the state liable and restrict its immunity.

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

This will depend on the act practised and the substantive law involved therein. Usually it will be necessary to demonstrate the liability of the state, which, according to international law, may be deemed as the omission or commission of culpable or malicious acts causing moral or property damages to third parties.

Therefore, in this context, the action or inaction of the foreign state, existence of damage, causal relation and fault must be demonstrated.

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?

Articles 21 to 25 of the Brazilian Civil Procedure Code stipulate the limits of Brazilian jurisdiction. Accordingly, for a case to be tried by the Brazilian courts, it must involve an obligation to be fulfilled in Brazil, support payment action whose defendant has ties in Brazil (receipt of income, for instance), or involve parties that tacitly or expressly submit themselves to the Brazilian jurisdiction.

Thus, according to Brazilian legislation, Brazilian authorities may have jurisdiction over a foreign state, provided one of the requirements established by Brazilian legislation is present.

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

Considering the impossibility of enforcement against states that do not waive their immunity, no interim or injunctive relief can be provided. However, if there is a contractual provision establishing that the state may waive its jurisdictional immunity, including in the terms of enforcement against its assets, it would be subject to Brazilian legislation, which allows the granting of relief if there is a likelihood of success based on the merits of the case (*fumus boni juris*) or a danger in delaying the case (*periculum in mora*), which are essential requirements to grant such measure.

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

Although Brazil does not provide for the possibility of enforcing a decision against a foreign state or international organisation, this does not mean that the decision should be merely declaratory. The decision may have a sentencing nature, a situation in which the prevailing party should enforce it in the appropriate jurisdiction.

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

Not applicable. Brazilian legislation, court precedents and legal writing establish that no court or entity must be served with process before any proceeding against a state.

14 How is process served on a state?

The Brazilian Civil Procedure Code does not regulate specifically how a process is served on a foreign state, but establishes a general rule for the service of process on non-sovereign entities. Therefore, although Brazilian law does not provide for any specific procedure, some courts have not applied the general rule for the sake of good diplomatic relations between countries, determining that process should be served via the embassy or consulate of the state sued.

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

Brazil cannot exercise jurisdiction over a party that does not participate in proceedings. However, if a state is served process but does not file its defence, default judgment may be entered against it (ie, if it does not respond, despite service of process or notice of commencement of arbitration). In this event, a judgment would be made against the state, but with due regard for all aspects on state immunity mentioned under question 1.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

There is no specific law governing immunity in enforcement proceedings. Therefore, immunity applies based on the stand of the Federal Supreme Court.

The Federal Supreme Court continues to hold that enforcement immunity (which should not be mixed up with jurisdictional immunity) is absolute, except in the following events: when the foreign state waives the prerogative of sovereignty over its own assets; or when there are assets in the Brazilian territory that, despite belonging to the foreign state, are not allocated, in terms of destination and use, to accomplish the activities of diplomatic delegations or consular representations maintained by said state in Brazil.

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

No. Enforcement immunity is absolute in Brazil, except in the cases mentioned under question 1.

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. Enforcement immunity is absolute in Brazil. However, if a foreign state waives its immunity and becomes party to an enforcement proceeding, such waiver may be used against it in other enforcement proceedings on the grounds that immunity does not apply. But we have not identified court precedents to confirm whether the state's prior participation in proceedings constitutes consent for other enforcement proceedings against its property.

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

Enforcement in Brazil could only encompass assets whose sovereignty were expressly waived by the state, or assets that, despite belonging to the foreign state, are not allocated, in terms of destination and use, to accomplish the activities of diplomatic delegations or consular representations maintained by said state in Brazil.

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.

Enforcement immunity is absolute in Brazil, except in the cases mentioned under question 1. In addition, diplomatic immunity is also deemed absolute under the Brazilian legal system.

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.

This issue is not often discussed in Brazil. However, the property of central banks is deemed to be used in governmental activities of the states in which such banks are encompassed. Therefore, if used to exercise national sovereignty of each state, the property of central banks or other monetary authorities is covered by immunity and cannot be subject to enforcement.

If, however, said property is clearly used for commercial purposes, the prerogative of enforcement immunity will not apply.

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

Not applicable. There are no tests to be conducted in Brazil before enforcement against a state is permitted.

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?

No process is served before an arbitration award or judgment because, under the Brazilian legal system, enforcement against a state is not permitted. However, if the state waives its immunity, proceedings will follow a regular course pursuant to Brazilian law. In this context, if a judgment determines enforcement against a state, it will consider knowledge of the decision's tenor when it is officially published.

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

No. Enforcement immunity is absolute in Brazil, except in the cases mentioned under question 1.

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

No, there are no public databases to identify the assets held by a state.

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?

If the assets held by a foreign state fall within the events already mentioned, Brazilian judges and courts would have jurisdiction to determine measures requested by the suing party, which could help identify said assets.

Immunity of international organisations

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

Prevailing court precedents in Brazil hold that international organisations are entitled to jurisdictional immunity pursuant to international treaties signed by Brazil. In 2017, the Federal Supreme Court ruled that international organisations cannot be sued in court unless they have expressly waived such prerogative.

There are international treaties expressly recognising that international organisations and organisms enjoy jurisdictional immunity. Some examples are the Convention on the Privileges and Immunities of the United Nations, incorporated in Brazil by Decree No. 27,784/1950, and the Convention on the Privileges and Immunities of the Specialized Agencies, incorporated in Brazil by Decree No. 52,288/1963. Both Conventions extend jurisdictional immunity to the United Nations and its specialised agencies, respectively.

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?

International organisations headquartered in Brazil continue to enjoy international legal personality, as long as this provision is contained in international treaties signed by Brazil. Therefore, unless they have waived it, they have jurisdictional immunity.

If there is no such provision, according to Brazilian court precedents, international organisations do not enjoy jurisdictional 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?

The Federal Supreme Court has recently decided that the United Nations and its respective organisms are entitled to enforcement immunity, including in labour proceedings.

In this context, a majority of legal writings have held that enforcement immunity extends only to assets allocated to accomplishment of the core activities of a public entity and those that are concerned with diplomatic representation. However, there is not a well-established stance on this matter, which gives rise to divergent interpretations.

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Canada

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Background

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

Canada takes a restrictive approach to state immunity. That is, legislation provides for certain exceptions to the principle of state immunity consistent with the trend in industrial democracies restricting the scope of state immunity.

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

In Canada, state immunity from civil proceedings is governed by the State Immunity Act, RSC c S-18 (SIA). Section 3 of the SIA sets out the basic principle that foreign states are immune from the jurisdiction of any Canadian court except as provided in the SIA. The Supreme Court of Canada has described the SIA as a complete code as it relates to state immunity from civil proceedings in Canada such that it ousts the common law and international law as a potential source of exceptions to the immunity otherwise provided for in the SIA (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, paras 54 and 58). The common law and international law remain, however, valid interpretative guides for provisions of the SIA, where relevant and appropriate.

State immunity from criminal proceedings continues to be governed by common law and is outside the scope of the SIA. Section 18 of the SIA confirms, in this regard, that the Act does not apply to criminal proceedings or proceedings of that nature.

This chapter does not address immunity of Canadian federal or provincial governments, which is governed by separate federal and provincial laws addressing Crown immunity.

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

Canada is not party to any multilateral treaty on sovereign immunity.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Jurisdictional immunity covers the state itself and its organs and agencies, and extends to all activities unless specifically excepted in the SIA. Foreign states are defined in section 2 of the SIA as including:

- any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity;
- any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state; and
- any political subdivision of the foreign state.

The immunity of a foreign state extends to its functionaries or public officials acting in that capacity (see *Kazemi*, paras 85–90).

An 'agency' of a foreign state is defined in section 2 of the SIA as 'any legal entity that is an organ of the foreign state but that is separate from the foreign state'. The scope of jurisdictional immunity for agencies of a foreign state is substantively the same as for the state itself. However, the rules with respect to service of process on agencies are more flexible than they are with respect to states (see question 14). Additionally, the scope of relief available against a state agency, where it is not immune, is broader than that available against a foreign state (see question 12).

An 'organ' of a foreign state is not defined in the SIA per se, but as 'agency' is defined as an organ of the state that is separate from the state, it can be inferred that an organ is part of the state itself. 'Organ' has been defined through case law as an entity identified with the state, controlled by the state and that performs state functions. Whether an entity can be considered an organ of the state to attract the scope of immunity to which a state is entitled is determined on the basis of a test referred to as 'the alter ego test'. The test, developed through case law, involves the application of various factors, principally the amount of state control over the entity in question and its status under its governing legal regime (see *Defense Contract Management Agency – Americas (Canada) v Public Service Alliance of Canada*, 2013 ONSC 2005; and *Collavino Incorporated v Yemen (Tihama Development Authority)*, 2007 ABQB 212).

Jurisdictional immunity extends to all activities and proceedings involving a foreign state save those that are specifically excepted in the SIA. The Supreme Court of Canada has confirmed that this immunity extends to civil suits involving peremptory norm violations, such as alleged acts of torture (see *Kazemi Estate*, paragraph 104).

The Supreme Court of Canada has also clarified that jurisdictional immunity for foreign states applies to applications for recognition and enforcement of foreign judgments. Thus, an application for recognition and enforcement of a foreign judgment against a foreign state in Canada may only proceed if one of the exceptions to jurisdictional immunity is established (*Kuwait Airways Corp v Iraq*, 2010 SCC 40, paragraph 19).

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

Section 4 of the SIA provides that a state can waive immunity in one of three ways:

- by submitting to the jurisdiction of the court through a written agreement (or otherwise) before or after proceedings commence;
- by initiating court proceedings; and
- by intervening in or taking a step in court proceedings (other than for the purpose of claiming immunity).

Case law has further developed the contours of waivers of immunity; any waiver must be clear, explicit, unequivocal, unconditional, and certain, and it must be given by someone with the authority to give such waiver on behalf of the foreign state (*United States of America v Zakhary*, 2015 FC 335, paragraph 27).

An arbitration agreement has been held to be a submission to the jurisdiction of Canadian courts for purposes of recognition of an eventual award (see *Collavino*, paragraph 139).

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?

Section 3 of the SIA has been held to establish a presumption of immunity from the jurisdiction of Canadian courts in civil proceedings against foreign states that can only be overcome if a plaintiff establishes the application of one of the exceptions in the SIA. States do not enjoy immunity from the jurisdiction of Canadian courts in the following areas, which are specifically excepted in sections 5 to 8 of the SIA:

- commercial activities;
- activities causing death, personal or bodily injury, or property loss or damage if they occur in Canada;
- support of terrorism by a listed state;
- certain maritime-related actions;
- certain shipping-related actions; and
- interests or rights in property in Canada that arise by way of succession, gifts or *bona vacantia*.

The restrictions on immunity relating to maritime and shipping claims apply only in the context of commercial activities.

Commercial activities are defined in the SIA as 'any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character'. The Supreme Court of Canada has rejected a bright-line rule between sovereign acts and private or commercial acts for purposes of the commercial activity exception. Whether a state activity may be characterised as commercial for purposes of limiting the scope of a foreign state's immunity must be determined through a contextual approach (see *Kuwait Airways*, paras 31–32).

Canadian courts have been regularly called upon to consider the scope of the commercial activities exception in the context of employment-related claims. The leading case in such claims remains the 1992 Supreme Court of Canada judgment in *Re Canada Labour Code* ([1992] 2 SCR. 50). That case arose when the Public Service Alliance of Canada, a labour union, sought to have the Canada Labour Relations Board certify it to represent civilian employees at the United States naval base in Argentia, Newfoundland. The proposed bargaining unit would be composed of maintenance employees at the base. The Court adopted a contextual approach that considered both the nature and purpose of the state activity. The Court ultimately held that the commercial activity exception did not apply. Courts have applied the test in *Re Canada Labour Code* since 1992 with mixed results, illustrating the fact-intensive nature of the inquiry.

The commercial exception was held to apply by the Supreme Court in *Kuwait Airways*. Kuwait Airways sought to have a costs judgment of the English High Court of Justice against Iraq recognised in Canada. The conduct of Iraq in the management of the defence of the Iraqi Airways Company in English litigation, and the retention and use of aircraft belonging to Kuwait Airways Corporation by the Iraqi Airways Company that gave rise to the English litigation, were considered to fall within the commercial exception.

With regard to the exception from immunity for actions relating to death or bodily injury in section 6(a) of the SIA, the Supreme Court of Canada has confirmed that both the wrongful act and the injury or death must have occurred in Canada in order for a plaintiff to avail him or herself of the exception (*Kazemi Estate*, paragraph 73). The injury must also be physical in nature; mental distress and emotional upset are only relevant if they are connected to a physical injury (*Schreiber v Canada (Attorney General)*, 2002 SCC 62, paragraph 42). Finally, a plaintiff must also have suffered interference with his or her own physical integrity for the exception to apply. A claim cannot, for example, be brought against a state under the section 6(a) exception to immunity by a plaintiff who sustained only moral injury arising from interference with the physical integrity of another person (*Kazemi Estate*, paragraph 77).

Certain states identified as supporting terrorism and listed under the SIA (listed states) are also deprived of any immunity from the jurisdiction of a Canadian court in proceedings against the state in relation to the state's support of terrorism on or after 1 January 1985, or its terrorist activities. As of June 2018, only two states are so listed under the SIA: Iran and Syria. This exception to immunity under the SIA was enacted following passage by the Canadian Parliament of the Justice for Victims of Terrorism Act, SC 2012, c 1 (JVTA), which provides, among others, a private cause of action for claims against supporters of terrorism, where the loss or damage in or outside Canada is suffered as a result of a foreign state's activities in the nature of acts punishable under the terrorism offences listed in the Canadian Criminal Code.

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?

The principle of non-justiciability can be invoked by a foreign state in the same way that a private litigant may invoke the principle, to prevent a court from having subject-matter jurisdiction over a dispute. The principle cannot be invoked by a state to assert, indirectly, jurisdictional immunity that is meant to be removed by the exceptions set out in the SIA.

The act of state doctrine will be addressed by the Supreme Court of Canada in the case of *Nevsun Resources Ltd v Araya et al*, likely to be heard in 2019.

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?

Proceedings against a state enterprise or similar entity could, in certain circumstances, affect the immunity of a state (see question 4 on the distinction between an agency of a foreign state and an organ of the state), where one of the exceptions to immunity is also established. The test applied in the state immunity context is different from the criteria traditionally applied to pierce the corporate veil. That said, there is a precedent for subjecting the state itself to civil proceedings where the state enterprise or similar entity is found to be an organ of the state.

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

The nexus that the plaintiff needs to have is determined by certain exemptions to immunity set out in the SIA (see question 6), and by applicable provincial law regarding personal jurisdiction when the matter is before a superior court of a province, or the applicable law when the matter is before the Federal Court. The general principle is that there needs to be a real and substantial connection of the jurisdiction with the litigants or subject matter in dispute. Canadian courts will generally consider when applying the real and substantial connection test whether:

- the defendant is domiciled or resident in the jurisdiction;
- the defendant carries on business in the jurisdiction;
- the tort was committed in the jurisdiction; or
- a contract connected with the dispute was made in the jurisdiction or had to be performed there.

However, if the proceeding is the recognition of a foreign judgment against a foreign state, the requirement of a real and substantial connection applies between the foreign court and the litigants or subject matter in dispute. There need not be such a connection with the enforcing court. If the proceeding is the recognition of a foreign arbitral award, the criteria set out in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards apply.

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?

The required nexus is determined by certain exceptions to immunity set out in the SIA (see question 6) (eg, for the exception regarding activities causing damage to property or bodily injury, the property must be in Canada and the bodily harm must have occurred in Canada). The required nexus is also determined by applicable law relating to circumstances in which the forum court can take jurisdiction over civil matters. The general principle is that there must be a real and substantial connection between the jurisdiction and the litigants or with the subject matter in dispute (see question 9). Both the requirements of the SIA and the applicable law on personal jurisdiction have to be satisfied for the forum court to exercise jurisdiction.

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

Injunctive or interim relief against a foreign state is not available in Canada unless the state consents in writing to the relief. Where a foreign state does consent, any relief granted cannot exceed the scope of the consent. Section 11(2) of the SIA clarifies that submitting to the jurisdiction of a court in Canada does not constitute consent for purposes of consenting to be bound by injunctive 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?

The only final relief available against a foreign state in Canada is damages. Specific performance and the recovery of land or other property are only available where the state consents in writing, as with injunctive or interim relief (see question 11). This is not, however, the case in respect of state agencies or listed states (ie, those identified as supporting terrorism).

Although not specified in the SIA, Canadian courts have also found that where a court properly has jurisdiction over a state, such as where an exception to immunity applies, the state is not immune from an adverse costs award (*Kuwait Airways*, paragraph 36; *Tracy v Iran (Information and Security)*, 2017 ONCA 549, paras 135–136).

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

There is no prerequisite service on a court or other entity that is applicable before issuance of a proceeding and service of that proceeding on the state.

14 How is process served on a state?

Service of originating process on a state may be done in one of several ways. Where the state has agreed to accept service in a certain way, service may be made on the state in that way. If the state is a party to an international treaty on service of process, service may be effected in accordance with the terms of the treaty. Finally, pursuant to section 9(1)(c) and 9(2) of the SIA, service on a foreign state may be effected by delivering a copy of the document to the Deputy Minister of Foreign Affairs or a person designated by him or her for the purpose of then transmitting the document to the foreign state. It has been held that sections 9(1) and 9(2) of the SIA, regarding service on a state, are mandatory and exhaustive (*Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anomic Sirketi v Kyrgyz Republic*, 2015 ONCA 447, paragraph 49).

Service of process on a state agency differs from service of process on the state itself. Service can be made on a state agency in accordance with any applicable rules of court, in any manner agreed by the agency, or in accordance with any treaty that may be applicable to the agency. To the extent service cannot be made on a state agency by any of the prescribed means in the SIA, a court has the power to direct how service is to be made.

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

Default judgment can be entered against a state or state agency where the state or state agency fails to take, within the time stipulated in the applicable rules of court, the initial step required of a defendant or respondent, and 60 days have expired from service of the originating document. A certified copy of the default judgment must be served on the state or state agency, following which the state or state agency may, within 60 days of having been served, apply to have the judgment set aside or revoked.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

In general, the property of a foreign state in Canada is immune from attachment and execution and, in the case of an in rem action, from arrest, detention, seizure and forfeiture, save in the following circumstances:

- the state has waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the state has withdrawn its waiver according to any applicable terms of such withdrawal;
- the property is used or intended to be used for a commercial activity, or is used or intended to be used by a listed state to support or engage in terrorism;
- the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada; or
- the state is a listed state and the attachment or execution relates to a judgment rendered in an action brought against it for its support of terrorism or its own terrorists activity and to property other than property that has cultural or historical value.

Conversely, the property of an agency of a foreign state is not immune from attachment and execution. It is not immune either, in the case of an in rem action, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court. The sole exception to this is where the property in question is used or is intended to be used in connection with a military activity of the foreign state, and is military in nature or under the control of a military authority or defence agency.

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

Yes, to the extent execution immunity is not applicable.

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, the SIA makes a distinction between jurisdictional immunity and execution immunity. See question 16 for situations constituting exceptions to execution immunity.

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

Property that would typically be subject to execution would be property used or intended to be used for commercial activity, as the term is defined in the SIA.

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.

Under the Foreign Missions and International Organizations Act, SC 1991, C 41 (FMIOA), which implements various provisions of the Vienna Convention on Diplomatic Relations, foreign embassies and consulates, as well as their furnishings and other property on the premises, and the means of transport of the embassy or consulate, are immune from search, requisition, attachment or execution. This immunity extends to the private residences of foreign diplomats.

The Canadian Minister of Foreign Affairs may issue a certificate under section 11 of the FMIOA confirming which property in Canada enjoys diplomatic immunity.

Update and trends

For the doctrine of act of state, a case to look out for is *Nevsun Resources Ltd v Araya et al*, which will be heard by the Supreme Court of Canada, likely in 2019. On other fronts, a trend to look out for in Canada is a larger number of proceedings for recognition and enforcement of arbitral awards against foreign states, given the increasing involvement of states in commercial activities. Another potential trend is an increasing number of proceedings against listed states (ie, foreign states listed as supporters of terrorism), since the enactment of the JVTA.

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.

Foreign central banks and monetary authorities enjoy immunity from attachment and execution in respect of property held for the bank's own account that is not used or intended for a commercial activity. Immunity does not apply, however, where the bank, authority or its parent foreign government has explicitly waived the immunity, unless such waiver has been withdrawn in accordance with any applicable term relating to the withdrawal of the waiver.

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

There is no further test to be satisfied for the enforcement phase since the requirement of a real and substantial connection would have already been satisfied and the state property in question would need to fall within one of the exceptions set out in the SIA, such as the commercial activity exception.

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?

Section 10 of the SIA provides that where a judgment has been issued by default (whether it is a judgment on the merits, or a judgment recognising an award or foreign judgment), a certified copy of the judgment must be served before any enforcement step is taken. The state has 60 days to apply to have the default judgment set aside or revoked. Where the state appeared in the proceedings (whether it is a proceeding to determine liability or to recognise an award or foreign judgment) and lost on the merits, and the creditor wants to proceed with enforcement, the rules of service or notification are determined under the applicable legislation or rules of court governing the proceedings.

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

Yes, there is a history of enforcement proceedings against states, state organs and state agencies in Canada. A significant number of these proceedings are for the recognition and enforcement of arbitral awards.

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

There are no databases specifically dedicated to identifying state assets in Canada. However, there are general databases such as land registries, registries for personal property liens and corporate registries.

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?

Canadian courts are governed by an adversarial judicial process. Courts do not proactively provide assistance to litigants or otherwise intervene to help identify assets of defendants. Plaintiffs must do this on their own and seek court assistance for the enforcement of judgments in instances where defendants do not voluntarily pay. To that end, courts can provide those forms of assistance contemplated in the given court's rules of procedure or applicable law on remedies available to creditors. While courts may compel disclosure, such as through *Norwich Pharmacal* orders, immunity may still be engaged, however. For example, certain provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations have been implemented in Canada through the FMIOA and may be relevant.

Section 12.1 of the SIA provides, however, in respect of proceedings in which the exception to immunity based on a listed state's support of terrorism applies, that the Minister of Finance or the Minister of Foreign Affairs, upon request, may assist a judgment creditor in identifying and locating assets of the foreign state that are held within Canadian jurisdiction (in the case of the Minister of Finance) and property of the foreign state that is situated in Canada (in the case of the Minister of Foreign Affairs). The Minister of Foreign Affairs is entitled to refuse to assist any request where it is believed that to assist the request would be injurious to Canada's international relations, and either Minister may refuse to assist if it is believed that to assist the request would be injurious to Canada's other interests.

Immunity of international organisations

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

Yes, the FMIOA governs the privileges and immunities available to international organisations in Canada. The federal cabinet has the power to issue orders under this statute to provide for international organisations to have the privileges and immunities set out in articles 2 and 3 of the Convention on the Privileges and Immunities of the United Nations.

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?

Where so specified in an order issued by the federal cabinet, an international organisation may be deemed to have the legal capacity of a body corporate. In such cases, immunity from legal proceedings will turn on the provisions of the particular order governing the organisation's privileges and immunities.

The Supreme Court of Canada upheld the immunity of the North Atlantic Fisheries Organization (NAFO), an international organisation established by a convention and headquartered in Canada, against an employment-related claim on the basis of language in the federally

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issued NAFO Immunity Order providing that NAFO is immune from proceedings 'to such extent as may be required for the performance of its functions' (*Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66).

The Court reasoned that allowing employment-related claims of senior officials of NAFO to proceed in Canadian courts would constitute undue interference with NAFO's autonomy in performing its functions and amount to submitting NAFO's managerial operations to the review of Canadian courts. The Court allowed a claim to proceed against NAFO, however, for payment of a separation indemnity on the basis that this would not amount to submitting NAFO's managerial operations to the review of Canadian courts or interfere with NAFO's performance of its functions.

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?

International organisations in Canada enjoy the scope of immunity set out in the particular privileges and immunities order in respect of each international organisation issued by the federal cabinet pursuant to the FMIOA. The specific terms of the privileges and immunities order of each international organisation determines whether the organisation enjoys enforcement immunity and, if so, the scope of that immunity.

Cyprus

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Background

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.

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.

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

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.

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.

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.

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;

Update and trends

An enduring question and topic of much debate in recent years has been regarding the amendment of the Civil Procedure Institutions, concerning efforts towards implementing faster and more effective justice. However, these efforts have so far failed.

- 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 such 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.

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.

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).

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.

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.

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

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.

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.

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.

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.

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.

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

Not applicable.

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.

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.

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

No.

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

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.

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.

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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Background

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

There are no express legislative instruments or provisions regulating sovereign immunity. However, in practice, the general approach to sovereign immunity is that it is restricted, whereby the state enjoys judicial immunity only with respect to the limited 'acts of state' that are not subject to judicial scrutiny or review as per the general principles set forth by the judiciary.

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

Sovereign immunity is legally based on the Egyptian Constitution 2014 (article 1), customary international law, case law on jurisdictional and enforcement related immunity, the Vienna Convention on Diplomatic Relations 1961, and academic literature that considers article 35 of the Law on Civil and Commercial Procedures No. 13 of 1968 (LCCP) a manifestation of jurisdictional immunity. Article 35 states: 'if the defendant did not attend, and the forum courts were not competent to hear the claim, as per the preceding article, a court shall on its own motion rule itself incompetent to hear the claim.'

Customary international law has been integrated in national law, and without prejudice to any Egyptian provision, judicial immunity is not absolute, but restricted to acts exercised by the foreign state as a sovereign power. Civil and commercial transactions and any related disputes do not enjoy this immunity (Cassation Judgments, Challenges Nos. 1412, 1468 and 1495 of JY 50, dated 29 April 1986; and Nos. 641 and 668 of JY 60, dated 28 April 1991).

Scholars have suggested that the privileges and immunities granted to diplomatic missions are an extension of the personal jurisdiction of the state, and that such privileges and immunities are prerequisites for the diplomatic mission and its members to efficiently undertake the tasks entrusted to them in their formal (sovereign) capacity.

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

Egypt is party to the Vienna Convention on Diplomatic Relations 1961 by virtue of Presidential Decree No. 469 of 1961 and made reservation with respect to article 37(2) of this Convention.

Egypt is also a signatory to the Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947), and its instrument of accession was deposited on 28 September 1954; Egypt is equally a signatory to the Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946) and deposited its instrument of accession on 17 September 1948.

Egypt has also ratified the Treaty on the Privileges and Immunities of the Arab League, which is based on article 14 of the Charter of the Arab League.

However, Egypt is not party to either the 1972 European Convention on State Immunity or the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Since Egypt is a member to the 1961 Vienna Convention, the state, President, members of the diplomatic mission, members of the consulate and members of the armed forces all enjoy jurisdictional immunity.

Articles 28 to 35 of the Law of Civil and Commercial Procedures No. 13 of 1968 set the general principles for the jurisdiction of the Egyptian courts. That said, Egyptian courts generally have jurisdiction to hear cases brought against a foreign person residing in Egypt unless a specific legislative provision or instrument expressly confer immunity on certain foreigners.

A person shall enjoy immunity in his or her capacity as a representative of a sovereign state with respect to acts undertaken on behalf of the state. He or she cannot be subject to criminal proceedings such as arrest, detention, inspection or custody unless he or she was caught committing the crime (article 54 of the Egyptian Constitution 2014). A diplomatic package also enjoys immunity from inspection.

A person acting in his or her personal capacity does not generally enjoy jurisdictional immunity.

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

The main reference in this regard is article 32 of the 1961 Vienna Convention. Waiver of jurisdictional immunity of diplomatic agents may be waived by their state (Cassation Judgment in Challenge No. 295 of JY 51, Court Session of 25 March 1982). However, it must be express.

In any event, the state and its various organs and instrumentalities may waive immunity and submit to the jurisdiction of a court either expressly or by not invoking immunity before national courts. Moreover, consent to the exercise of jurisdiction is also waived if the state or its various organs and instrumentalities consent to arbitration or conclude arbitration agreements. However, two important points merit mentioning in this regard:

- Waiver of immunity from jurisdictional immunity does not imply a waiver from enforcement-related immunity with respect to the execution of a judgment. A separate waiver for execution is generally required, especially for public assets that are generally shielded from enforcement.
- Specifically concerning administrative contracts, Egyptian law requires the competent minister's approval of any arbitration agreement included in administrative contracts (article 1(2) of the Egyptian Arbitration Law). Administrative courts have also ruled that such approval must be express, otherwise the arbitration agreement becomes invalid and any award rendered in this respect would be set aside and refused recognition and enforcement.

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?

Insofar as a transaction or proceeding does not qualify as an 'act of state' undertaken by virtue of the state's prerogatives as a manifestation of its sovereign power, and the state is not dealing under its diplomatic and consular immunities and privileges, the transaction or

proceeding shall not be immune from suit. Thus, a state can be sued with respect to its civil and commercial acts or transactions, including participation in foreign companies as a private law person, and ownership of real estate assets for civil or commercial purposes.

Moreover, the state or an instrumentality thereof can be sued before the Egyptian State Council (Administrative Courts) with respect to administrative decrees, administrative contracts, concession contracts, public works contracts and public supply contracts. However, state council courts do not hear disputes relates to 'acts of state' (article 11 of thereof).

Commercial activities are listed in articles 4 to 9 of the Commercial Law No. 17 of 1999. For instance, 'commercial activities include purchase of movables of any kind with the aim of selling or leasing them as they are, or after shaping them in another form, and also selling or leasing these movables; renting movables with the aim of leasing them; founding trading firms.' All commercial companies are considered related to commercial law, and so participation in these companies will not carry any immunity from suit.

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?

Civil and administrative courts cannot hear claims or cases pertaining to acts of state. These acts cannot be subject to judicial review, cancellation, nullity or compensation. They are of a political nature and are undertaken to protect the interests of the state internally and abroad. State courts lack jurisdiction to hear disputes related to acts of state. See article 17 of Law No. 46 of 1972, Organisation of the Judiciary Authority, and article 11 of Law No. 47 of 1972, State Council Law.

In its Constitutional Judgment in Claim No. 48 of JY 4 (21 January 1984), the Supreme Constitutional Court held that:

> *the test in legal characterisation of what could qualify as acts of state or not is the nature of acts themselves, which are governed by a general frame that they are issued by the higher policy of the state by virtue of its supreme authority and sovereignty internally and abroad seeking the realisation of the political public interest in whole and respecting the rights guaranteed by the constitution and the regulation of its external relations between the state and other states, and securing its safety internally and defending its territory against foreign attack. The evaluation of this test is solely vested with the discretionary power of the judge.*

Further, the Court of Cassation held in its Judgments in Challenge No. 2427 of JY 55 (18 December 1986); and Challenge No. 2233 of JY 68 (26 January 2003), that:

> *Acts of State are distinguished from ordinary administrative acts by the significant political nature of the surrounding political considerations, they are issued from the executive authority in its capacity as a higher governing authority within its political competence to achieve the interest of the public in whole, and respecting its constitution and monitoring its relations with other states, securing its safety and security internally and abroad. Acts issued in that regard are not susceptible, by their very nature, to litigation, being overwhelmed by political considerations which justify authorising the executive authority to adopt whichever procedures it deems appropriate for the state's well-being, safety and security without review or scrutiny from the judiciary.*

And the Supreme Administrative Court, in Challenge No. 4878 of JY 58 (27 March 2010), defined acts of state as:

> *those acts which are issued by the government in its capacity as a governing authority but not as an administrative authority. On the one hand, they could be acts regulating the relation between the government and the parliament and Shura Council, or regulating the political relations with foreign countries. On the other hand, they could be measures to defend the general security from domestic disturbance, or to secure the safety of the state from an outer enemy. Acts of state, under this definition, which are closely related to the order of the state and its sovereignty internally and abroad cannot be subject to judicial scrutiny.*

However, characterising an act as an 'act of state' by the trial court is subject to the Court of Cassation's scrutiny (Cassation Judgment in Challenge No. 9552 of JY 64, 24 June 1999).

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?

Waiver of the immunity of the state cannot be assumed, and it has to be waived explicitly or implicitly by a conduct that unequivocally implies such waiver. Thus, a state enterprise or similar entity that is subject to court proceedings does not imply a further waiver of the judicial immunity of the state itself.

Piercing the corporate veil is not readily invoked or existent in court proceedings. However, in arbitral proceedings, Egyptian law recognises the possibility of extending the arbitration agreement to third parties (which may include the state if its instrumentality was party to the arbitration agreement) in certain circumstances. A very recent Egyptian Court of Cassation judgment illustrated examples of principles on the basis of which arbitration agreements could be extended to third parties. These included the following doctrines: groups of companies, groups of contracts, universal successors, mergers, and assignment. Thus, a state instrumentality or subsidiary could subject the state to proceedings brought against such instrumentality or subsidiary in cases where the evidence demonstrates that the acts of instrumentality or subsidiary were attributable to the state, or controlled or mandated by the state. However, this remains a fact-sensitive exercise to ascertain whether justifiable grounds exist to implicate the state.

It is also worth noting that piercing the corporate veil occurred in *Malicorp* (Case No. 382/2004 CRCICA), where the arbitration award rendered in 26 February 2006 was extended to Egypt.

As per an earlier 2004 decision of the Egyptian Court of Cassation, an arbitration clause extends to a party (ie, the state) if it participated clearly and effectively either in the negotiation, performance or termination of a contract concluded by its instrumentality or subsidiary. This is in application of the doctrine of group of companies referred to herein above.

More recently, Egyptian courts have had an opportunity to review an arbitral award rendered in Egypt in 22 March 2013 regarding a dispute involving a Kuwaiti investor (Mohamed Abdulmohsen Al Kharafi & Sons Co) and the government of Libya and others under the auspices of the Unified Agreement for the Investment of Arab Capital in the Arab States, dated 26 November 1980. While the Court of Appeal upheld the award against Libya, noting that the Treaty does not allow any form of review of arbitral awards, the Court of Cassation reversed the ruling of the Court of Appeal.

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

As per article 3 of the Civil Procedures Law, an action, claim or plea is not admitted before a court if the plaintiff does not have a direct, personal and an existing interest acknowledged by the law. Nevertheless, a probable interest may suffice if the purpose of the claim is to avoid an imminent damage or to secure a right for which evidence could be lost at the time of dispute. A court may rule, on its own motion, at any stage of the case, the claim inadmissible if it lacks any of these conditions.

In specific reference to arbitration, article 11 of the Arbitration Law provides: 'Arbitration agreements may only be concluded by natural or juridical persons having the capacity to dispose of their rights. Arbitration is not permitted in matters that cannot be subject to settlement.' It has also been seen that, in the specific context of administrative contracts, a claimant must evidence that the competent minister has approved the arbitration agreement.

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?

If the property that forms the subject of the claim is an immovable located outside the forum's territory, the forum court shall not have jurisdiction to hear the in rem disputes related to this immovable (articles 28 and 29 of the LCCP). However, rights in personam could be brought before the forum court, provided that the defendant was either

Egyptian (article 28) or a foreigner with a domicile or place of residence in the forum (article 29).

If the conduct that forms the subject of the claim is outside the forum state's territory, a forum court shall have jurisdiction to hear this claim provided:

- the foreigner has a domicile or a place of residence in the forum (article 29 of the LCCP);
- the foreigner has a has a domicile of choice (article 30 of the LCCP);
- the claim is related to: an obligation that created, performed or should have been performed in the forum; or a bankruptcy in the forum (article 30/1, 2);
- the claim is related to an issue of personal status where the plaintiff is a national or foreign resident with a domicile in the forum, the defendant does not have a known domicile abroad and Egyptian law is applicable to the dispute (article 30/7); or
- if one of the defendants has a domicile or a place of residence in the forum (ie, Egypt) (article 30/9).

Moreover, if the forum court was seised, it shall remain competent to settle the preliminary issues, incidental claims related to the main claim, and any related petition to this claim where considerations of justice entail deciding this petition with the main claim (article 33). Thus, if the property or conduct constitute the subject matter of a preliminary issue, incidental claim or related petition, the forum court may entertain jurisdiction to decide upon it together with the main claim over which the court retains jurisdiction.

The forum court is also competent to decide on interim and provisional measures in the forum even if it were not competent to hear the main dispute (article 34 of the LCCP).

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

Submission to the jurisdiction of the forum court entails being bound by any interim relief requested in court. Interim relief includes orders to secure rights that could be lost by a loss of evidence, to prove a fact that could cease to exist by lapse of time, or to avoid imminent harm; they generally aim to provide a certain interim expedited (urgent) protection before the final settlement of the dispute (such as an interim award of damages, judicial guardianship, depositing goods in a secure place, protective seizure or sale of goods susceptible to damage) (eg, article 133 of the Evidence Law No. 25 of 1968). The following conditions must be met to successfully secure interim relief:

- urgency condition: the need for an expedite judgment, order or measure to save the right or avoid imminent harm;
- the interim measure does not affect the substantive rights in dispute (article 45 of the LCCP);
- the measure is enforceable in the forum of the judge; and
- the interim or urgent judgment or order is sought by the concerned party with a vested interest.

By contrast, a state's consent to submit to an arbitral tribunal's jurisdiction does not amount to a consent to submit to the tribunal's jurisdiction to grant interim relief, unless any applicable institutional arbitration rules grant the tribunal such powers. According to article 24 of the Egyptian Arbitration Law:

> *Both parties to the arbitration may agree to confer upon the arbitral tribunal the power to order, upon request of either party, interim or conservatory measures as considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the ordered measure. If the party against whom the order was issued fails to execute it, the arbitral tribunal, upon the request of the other party, may authorise the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the competent Egyptian court to issue an execution order.*

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

Both specific performance and damages are available. Specific performance is the primary remedy if it is possible and feasible.

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

Serving a notice is, in principal, performed by a court bailiff. Unless a specific provision exists, according to article 13 (1, 2 and 6) of the LCCP, serving a copy of the notice on the state shall be to the competent ministers and heads of relevant public entities and governors or their representatives. Serving a state by a copy of statements of claim, statements of appeal (writs) or judgments, shall be directed to the State Lawsuits Authority, or its branches in the districts of the state as per the governing rules on local jurisdictions. The State Lawsuits Authority is acting on behalf of the state as a claimant or respondent in disputes, proposing any settlement thereto, and technically supervising the legal departments in the administrative body of the state with respect to the ongoing disputes (article 196 of the Egyptian Constitution 2014).

The president of the State Lawsuits Authority, or whoever he or she delegates, may contract with lawyers qualified to appear before courts to conduct a suit related to one of the public juridical persons before the foreign courts (article 6 of the Law of the State Lawsuits Authority No. 75 of 1963).

14 How is process served on a state?

If the process is served by Egypt on a foreign state, unless there is a specific provision by bilateral or multilateral treaties, the copy of the notice shall be delivered to the Egyptian public prosecution in Cairo, and the public prosecution shall deliver it to the Ministry of Foreign Affairs to be delivered by diplomatic means and subject to the condition of reciprocal treatment. The copy of the notice shall be delivered directly to the headquarters of the diplomatic mission of the foreign state.

A notice shall not, as per the 1961 Vienna Convention, be served on the diplomat in the diplomatic premises or accommodation unless it accepts to be served in person. This rule shall apply even in cases where the diplomat was legally subject to the national courts or waived his or her jurisdictional immunity. Serving a diplomat shall be conducted by the diplomatic means through the Ministry of Foreign Affairs, otherwise the notice would be null and void.

In the case of serving a person in a foreign state or serving a state that is a contracting party to the Hague Convention on the Service of Judicial or Extra-Judicial on 15 November Documents 1965, a notice shall be served to the public prosecution. The prosecution shall then deliver it to the office of the international cooperation at the Ministry of Justice to check if there are any bilateral or multilateral treaties with the concerned state. If such treaty exists, the provisions governing the service of notice therein shall apply.

If the process is served on Egypt, then it shall be served at the Lawsuits Authority.

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

A judgment may be made against a state that does not participate in the proceedings, provided that the state is validly notified of the proceedings.

If both the plaintiff and the defendant did not attend the session, a court can either decide the case if it was ready for a ruling, or it may decide to de-register the case. If 60 days have lapsed without a request from the parties to proceed with or expedite the case, or if both parties did not attend after the case was re-initiated, the court shall rule that the case never existed (article 82 of the LCCP).

If the state's representative attends any session or submits a statement of defence, the state would be deemed represented, any judgment or decision may be rendered against it, and it would be effective and enforceable in relation to the state (article 83 of the LCCP).

If the state is the defendant and did not attend the first session, despite being validly notified, the court can decide on the case in its absence. If the notice was invalidly served, the court can adjourn the case till the state is validly notified (article 84/1 of the LCCP).

Update and trends

Emerging trends

The new Investment Law No. 72 of 2017 excluded express reference to the International Centre for Settlement of Investment Disputes (ICSID) as an option for settlement of investment disputes. This now implies that resorting to ICSID can occur by one of two ways: the investor and the Egyptian state entering into a direct agreement explicitly referring to ICSID; or there is a bilateral investment treaty between Egypt and the investor's state offering access to ICSID. The local investment law route is no longer available as a third option.

Hot topics

The ministerial approval, or the approval of whoever exercises his or her competence for public juridical persons of arbitration agreements with respect to disputes of administrative contracts is considered by the state council a condition of validity, without which the arbitration agreement would be null and void for lacking the legal capacity (Supreme Administrative Court, the Circuit of Unifying Principles, in Challenge No. 8256 of JY 56 of 5 March 2016). A minister cannot delegate his or her power of approval on arbitration agreement (article 1 of the Arbitration Law). This rule is questionably perceived by courts to pertain to public policy that should be observed by the administrative entity, and the contracting party with this entity. Thus, a breach of the requirement of the signature of the competent minister on the arbitration agreement related administrative dispute renders the agreement susceptible to nullity. The preliminary signature accepting arbitration to settle an existing dispute does not appear to dispense with the requirement to sign the arbitration agreement itself by the competent minister. However, it is hoped and expected that this judicial trend will change in the near future.

Moreover, the topic of enforcement of annulled arbitral awards remains a hot topic in Egypt. However, it is not clear whether Egyptian courts would follow the French 'delocalisation approach' towards recognition and enforcement of foreign annulled arbitral awards. No test case has yet arisen in practice.

Further, the extension of arbitration agreements to third parties also remains a hot topic, although the Court of Cassation has most recently set the stage for the principle of extension and the doctrines on the basis of which extension may occur. Nevertheless, the Supreme Court listed such doctrines by way of illustration without exhaustively listing them.

If a case is adjourned upon the parties' agreement for a period of no more than three months following the court's approval, then the state (as a claimant or appellant) did not activate or expedite the case within eight days following the lapse of this period, the state is deemed to have waived its claim or appeal (article 128 of the LCCP).

If the state as a claimant abstains or did not participate in the proceedings, a party of an interest can ask the court to terminate the proceedings after the lapse of six months from the last procedure.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Egypt did not enact specific legislation governing its immunity from enforcement proceedings. Absent specific legislative provisions, the Egyptian judiciary will apply the provisions of enforcement immunity if any exists under the any treaty to which Egypt is a party. For example, this immunity is acknowledged under article 32 of the 1961 Vienna Convention and customary international law.

Generally, once an award or a judgment is rendered, a property of a state, insofar as it exists in the territory of the forum, may be subjected to enforcement procedures subject to the civil and commercial procedures enshrined in the LCCP. However, if there is a bilateral or multilateral convention, this will determine the types of assets and actions available to enforce over such assets.

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

As a matter of principal, under the Egyptian legal system, unless otherwise provided in a specific legislation or convention, the LCCP applies to all matters related to the proceedings of litigation and enforcement. Accordingly, since there is no specific legislation in Egypt that regulates enforcement immunity or sets out specific procedures, the debt collection statutes and enforcement sections of the LCCP (articles 296 to 301) shall apply.

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?

As previously mentioned, waiver of immunity from jurisdiction does not generally imply waiver of immunity from execution. However, commercial assets are subject to enforcement without the need for special waivers.

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

As a matter of Egyptian law, public domain assets dedicated for public interest use cannot be subject to enforcement or execution because they fall beyond the tradeable domain (article 87(2) of the Egyptian Civil Code; articles 32, 34 and 126 of the Egyptian Constitution 2014). These assets lose their public domain nature (ie, these assets shall cease to be public assets) when they cease to be dedicated to serve public interest; this can occur by either law, decree or a decision from the competent minister, or by conduct.

Private domain assets owned by the state can only be subject to enforcement or execution if allocated for commercial purposes. However, privately owned assets by the state that are dedicated to public interest are deemed as public assets and cannot be subject to seizure or enforcement.

According to Egyptian jurisprudence, sovereign immunity is limited to the sort of acts and transactions performed by a state in its sovereign capacity. Any other civil or commercial acts are not covered by sovereign immunity.

It is further established that is also permissible to initiate enforcement proceedings against a foreign state and seek to attach any bank account the state may hold.

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.

Since there is no specific law in Egypt that regulates sovereign immunity, the reference with respect to identifying the assets that would normally be covered by enforcement immunity would primarily be the ratified treaties in force and to which Egypt is a party. For example, the Vienna Convention on Diplomatic and Consular Relations refers to the assets that are immune from enforcement proceedings and this includes the premises of a diplomatic mission, which are also immune from police search, requisition, attachment or execution (article 22/3).

Egyptian domestic law could play a subsidiary role in determining such assets. To this effect, the Egyptian Civil Code mentions, by way of example, in Article 88-bis, assets that cannot be subject to seizure or enforcement. This would include buildings, tools, equipment or other property designated for the proper functioning of a public utility and that are deemed by law as public domain assets. These are non-commercial assets that fall beyond the domain of dealings and transactions insofar as they are allocated for public interest purposes.

The Egyptian courts apply a restrictive approach to the notion of public assets where courts have ruled more than once than a private asset owned by individuals, but those designated for public interest shall not be deemed a public asset until the property of such asset is transferred to the state.

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.

There is no specific legislation that provides for this kind of immunity, and Egypt is not a signatory to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides

immunity to central banks and other monetary authorities. However, the general principles stated above would apply. Thus, if the property or accounts of a central bank or other monetary authority are designated for public domain purposes, they would be covered by enforcement immunity. However, commercial purposes assets would not normally be covered by such immunity.

In Egyptian domestic law, the Banking Law No. 88 of 2003 regulating the Egyptian Central Bank and the Egyptian banking sector, which is not applicable to foreign central banks, did not regulate enforcement immunity; but article 4 provides that assets of the Central Bank are deemed private assets, except from a criminal law perspective, where they are considered public assets or funds as per article 23 of this Law.

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

No further test is developed or required before enforcement is permitted.

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?

Service of process on a foreign state would be specifically governed by the rules enshrined in any treaty to which Egypt is a party (whether bilateral or multilateral). Absent specific provisions or any applicable treaty, a service of process shall be effected through diplomatic and consular means, where the notice shall be delivered to the public prosecution in Cairo, and the public prosecution shall then deliver same to the Ministry of Foreign Affairs, which shall then use diplomatic means to deliver the notice directly to the headquarters of the diplomatic mission of the foreign state.

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

Yes. These are primarily enforcement proceedings based on arbitral awards. An example, is the arbitral award rendered against Libya in favour of a Kuwaiti investor under the auspices of the Arab Unified Treaty for Investment of Arab Funds in Arab States (*Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya and others*).

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

No.

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?

No.

Immunity of international organisations

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

The immunity of international organisations hosted in Egypt is subject to the relevant treaty.

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?

Egyptian legislation sets out the entities that enjoy legal personality, including 'religious groups and organisations which the state admits its juridical personality' (article 52 of the Egyptian Civil Code). Thus, an international organisation is granted the legal personality as per the charter of such organisation as acknowledged by Egypt in accordance with local procedures. By incorporating the organisation in Egypt, acknowledging its existence (if abroad) or registering the same as a foreign organisation with the Ministry of Foreign Affairs, the Egyptian state admits the legal personality of the respective organisation enabling it to operate in Egypt.

For example, Law No. 130 of 1951 ratified the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations. This Convention stipulates that all agencies listed therein (ie, international organisations) shall possess juridical personality. They shall have the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings (article 2 of the Convention).

Similarly, Law No. 82 of 1954 ratified the agreement between the International Civil Aviation Organization (ICAO) and the Egyptian government, which provides that the ICAO enjoys a juridical personality having legal capacity where it can conclude contracts, own movable and immovable assets in accordance with Egyptian law, and litigate (article 2, section 2 of the agreement). The agreement concluded between ICAO and the Egyptian Government provides that the said organisation, its properties and assets enjoy immunity from any judicial proceeding unless waived by the general secretary of the organisation (article 4 of the agreement).

Despite the jurisdictional immunity granted to the ICAO, it was subject to judicial proceedings before an Egyptian civil court in relation to a lease agreement. However, the Egyptian Court of Cassation rejected ICAO's defence of immunity where it held that such immunity is not extended to its contractual obligations, which confirms the restrictive approach adopted by the Egyptian courts in distinguishing private domain commercial dealings from public domain dealings.

Although the establishing treaty of the Arab Academy for Maritime Transport, signed in Cairo on 9 November 1975 and entered into force on 31 August 1975, provides under article 12 therein that experts and employees of the Academy shall enjoy the same diplomatic privileges and immunities accorded by virtue of the Treaty on the Privileges and Immunities of the Arab League approved by the League Council on 10 May 1953, Egypt, upon ratifying the latter Treaty by virtue of Law

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No. 89 of 1954, has reserved the application of article 22 of the said Treaty. This article affords the employees of the Arab League, their spouses, and their minor children the same privileges and immunities accorded to diplomatic missions. The legal counsel is not considered an expert who enjoys the diplomatic immunity under article 25 of the Treaty of Privileges and Immunities of the Arab League.

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?

The scope of enforcement immunity granted to an international organisation is identified under the relevant treaty establishing the same, or the charter of such organisation as recognised by Egypt.

An example of enforcement immunity of international organisations, the immunity granted to the Specialized Agencies of the United Nations by virtue of the Convention of 1947, which is ratified by Egypt. Under this Convention, it is provided that 'the specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution' (article 3, section 4).

Additionally, the relevant convention further provides that the property and assets of the specialised agencies are immune from search, requisition, confiscation, expropriation and any other form of inference, whether by executive, administrative, judicial or legislative action (article 3, section 5).

An example of enforcement immunity granted to international organisation or body is the treaty of establishing the headquarters of the Cairo Regional Centre for International Commercial Arbitration, which is further ratified by virtue of the Presidential Decree No. 399 of 1987. The said treaty stipulates that: 'the Centre, its properties, and assets, in the Arab Republic of Egypt, enjoy immunity from legal proceedings. The Committee may remove this immunity in any event determined from its side. Nevertheless, the elimination of the immunity does not extend to any enforcement procedures.'

Waiver of judicial immunity does not imply a waiver of enforcement immunity. Additionally, the same above treaty provides that the premises of the centre, properties, assets, and official documents are immune from search, requisition, expropriation, attachment or any other form of executory, administrative, judicial or legislatory intervention.

The ICAO also enjoys immunity from enforcement proceedings by virtue of the agreement referred to above under question 28. The said agreement provides that the premises of the ICAO, properties and assets are immune from search, requisition, expropriation, attachment or any other form of executory, or administrative or judicial or legislative intervention. However, the same agreement provides for one exception, according to which the ICAO is not immune from enforcement proceedings, namely expropriation for public interest. That is how a scope of a certain immunity may differ from one treaty to another. The premises of the Arab League's Headquarters enjoy enforcement immunity.

France

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Background

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

Before 1929, French courts applied the concept of absolute state immunity, thereby completely shielding foreign states from a forum court's jurisdiction. Since then, French case law has applied a restrictive approach to sovereign immunity such that courts consider the nature of the act performed, and not the nature of the entity performing the act, when determining the basis for jurisdictional immunity. Jurisdictional immunity remains the rule, but case law has progressively sought to identify several exceptions to this rule. Consequently, a state (or state organ) engaged in an act that does not constitute a sovereign act may not be covered by jurisdictional immunity concerning that specific act.

Regarding sovereign immunity from enforcement, absolute sovereignty has equally been replaced by a restrictive approach, whereby state assets that are allocated to performing sovereign acts or a public service are immune from enforcement, while those allocated to a purely commercial or economic activity arising from private law are not.

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

French law on sovereign immunity has historically been developed through case law. It is the French Court of Cassation that first established the rule that a government cannot be subject to the jurisdiction of a foreign state. This concept was developed via the courts' interpretation of international principles of immunity and international comity, and, in some recent cases, customary international law. Following the codification of customary international law through the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (the 2004 UN Convention), courts have also relied on this instrument, although it has not yet entered into force.

The French parliament has contributed little by way of statutory provisions governing sovereign immunity. The Sapin II Law, and specifically articles L.111-1-1 to L.111-1-3 of the French Civil Enforcement Proceedings Code (the CEPC) and article 153-1 of the French Monetary and Financial Code, constitute, however, examples of recent statutory contributions.

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

France is party to several multilateral treaties on sovereign immunity. It is a signatory to the 2004 UN Convention, despite having made no reservations or declarations. Although the 2004 UN Convention is not yet in force, since fewer than 30 countries have signed it, French case law has already referred to some of its provisions as customary international law (see question 2).

France has signed the 1961 Vienna Convention on Diplomatic Relations, but not the 1972 European Convention on State Immunity.

France has also entered into over 40 bilateral and multilateral consular agreements providing immunity and privilege to diplomatic agents and personnel, as well as several host agreements conferring legal personality on international organisations and granting them with immunity from suit and enforcement, subject to the exceptions expressly provided in these agreements.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

French law recognises the jurisdictional immunity of states, their organs and their instrumentalities in proceedings before a court. This immunity is not, however, absolute. French law does not generally grant such immunity to sub-national entities, such as regions and cities, unless, by way of exception, immunity is granted by way of a letter from the Foreign Ministry. The province of Quebec is one example.

As France uses a restrictive concept of sovereign immunity, it is not the nature of the entity performing the act, but rather the act that gave rise to a dispute that is the decisive factor in determining the scope of jurisdictional immunity. French case law considers, therefore, that jurisdictional immunity extends only to acts that constitute, by virtue of their nature or purpose, a sovereign act (as opposed to *acta jure gestionis* – see question 6).

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

French law recognises a state's waiver of immunity so long as it is done in a certain, explicit and unequivocal manner. In light of this, certain conduct may be considered a waiver of sovereign immunity from suit. This includes, for instance, disputes where the state is the claimant, or disputes where the state pleaded on the merits or actively participated in the proceedings.

The consent of a state, or its various organs and instrumentalities, to the exercise of jurisdiction by virtue of an arbitration agreement also constitutes a waiver of jurisdictional immunity. French courts have also held that a state cannot rely on its jurisdictional immunity where it has concluded a contract granting jurisdiction to a specific court.

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?

Under the restrictive immunity approach adopted by French courts, acts by the state (or its organs or instrumentalities) are either classified as sovereign acts (*acta jure imperii*) or commercial acts (*acta jure gestionis*). To determine which of these applies to a specific act, French courts look to the nature or the purpose of the act; that is, they look to determine whether the act constitutes an act of sovereign power (eg, because it contains 'exorbitant clauses') or, alternatively, whether the act is performed for the purpose of public service. This test is commonly known as the 'alternative criteria' test. Most of the time, this determination is made by reference to French law.

Depending on these alternative factors, French courts have deemed various acts of a state (or its organs or instrumentalities) to be commercial acts incapable of attracting jurisdictional immunity, such as:

- contracts based on private law norms, practices and terms;
- legal relationships strictly governed by private law;
- lease contracts for the housing of an embassy's employees; or
- a bank approval granted to a state (the court held that this constitutes a simple act of trade that was performed within the normal scope of activities of the bank such that no sovereign act could have been performed).

French case law has, therefore, developed an interpretation that generally excludes the benefit of sovereign immunity when states (or their organs or instrumentalities) engage in purely commercial transactions.

Another exception to jurisdictional immunity in France concerns employment disputes involving states (similar to article 11 of the 2004 UN Convention). French courts have also incorporated the exception to this rule for employment disputes, which maintains sovereign immunity despite the existence of an employment dispute (article 11.2). Following French courts' interpretation of this exception, especially in relation to employees recruited to perform particular functions in the exercise of governmental authority (article 11.2.a), the employer state has been denied jurisdictional immunity in relation to the following types of employees:

- a doorman;
- a translator of documents not known to be classified as containing military secrets;
- a deputy press secretary for the Argentinian Embassy in charge of collecting, formatting and transmitting documents related to the Argentine state;
- an administrative aide to a foreign consulate; and
- a chauffeur for the Congolese Embassy whose position as adviser in charge of Francophonie and UNESCO could not be proven.

Other exceptions exist concerning the ownership, possession and use of property, intellectual property, participation in companies or other collective bodies and ships not being used, at the time the cause of action arose, for governmental non-commercial purposes.

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?

The principle of non-justiciability and the act of state doctrine are based on common law and not used in French law on immunities. There is no other principle that could prevent a court from having jurisdiction over the state.

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?

Any entity acting on behalf of the state can claim jurisdictional immunity, as French case law holds that a company that does not benefit from autonomy from the state, whether in fact or according to law, and does not have assets that are distinct from those of the state, must be deemed an instrumentality of the state. These conditions are assessed case by case. The instrumentality will be deemed to be the state itself and will, as such, benefit from the state's jurisdictional immunity.

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

Article 31 of the Code of Civil Procedure (CCP) provides that the right of action is available to all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons it authorises to raise or oppose a claim, or to defend a particular interest. Other than this general requirement, there is no concept of nexus under French law that the plaintiff would need to establish in order to have standing to bring a claim against a state.

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?

Beyond the principles of sovereign immunity, there are no specific rules governing the jurisdiction of French courts over a state. This means that the rules of general French law on jurisdiction would apply to claims brought against a state in French courts: at the international level, the domestic rules of 'territorial' jurisdiction (articles 42 to 49 of the CCP) are applied to the issue, unless EU law, such as the Brussels I Regulation or a treaty, are applicable.

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

Broadly speaking, there are two types of measures that can be requested: provisional measures and conservatory measures. These measures are not specific to proceedings involving a state.

As a general rule, provisional measures will be requested before the *juge des référés* (in most cases, this judge will be the president of the court of first instance or of the commercial court) through expedited proceedings. A number of orders can be requested from this judge. Article 145 of the CCP, for instance, enables a party to file a request seeking, for a legitimate reason, to preserve or establish evidence of facts necessary for the resolution of the dispute on the merits. This is available to a party before the proceedings on the merits begin. Other measures include, in cases of urgency, 'all measures that do not encounter any serious challenge or which the existence of the dispute justifies'(articles 808 and 872 of the CCP). Further, even in cases where there is a serious challenge, the president can order, in a summary procedure, such protective measures or measures to restore the parties to their previous state as required, either to avoid an imminent damage or to abate a manifestly illegal nuisance. The *juge des référés* may also award an interim payment to the creditor or order the mandatory performance of the obligation when its existence is not seriously challengeable.

Overall, the CCP provides for a variety of measures that can be ordered against the state through expedited proceedings. This goes from the stay or suspension of proceedings to the nomination of a provisional administrator for a corporation.

Where an arbitration agreement exists, article 1449 of the CCP allows for this request to be made only before the constitution of the arbitral tribunal, provided the request is urgent. Once the arbitral tribunal is constituted, the power to order conservatory or interim measures shifts to the arbitral tribunal, which can order any type of provisional or preliminary measures that it deems appropriate (except conservatory attachments or judicial security).

Conservatory measures typically include attachment orders. Article L.111-1-1 of the CEPC, which codifies articles 18 and 19 of the 2004 UN Convention, makes no distinction between pre-judgment and post-judgment measures of constraint, as it provides that a claimant seeking to take conservatory or enforcement measures against a foreign state's asset must first get authorisation from the French *juge de l'exécution*. Although there are no limitations on the type of conservatory and enforcement measures available to the state's creditor, the creditor is required to seek prior authorisation from a judge, which constitutes a significant hurdle to the collection of foreign states' debts.

Pursuant to article L.111-1-2 of the CEPC, conservatory or enforcement measures cannot be granted unless:

- the state has expressly consented to the enforcement of such a measure;
- the state has allocated or earmarked property for the satisfaction of the claim that is the object of those proceedings; or
- a ruling or an arbitral award has been rendered against the state, and the property in question is specifically used or intended to be used by the state for non-public and non-commercial purposes, and this property shares a connection with the entity against which the proceedings have been initiated.

For a state's assets or property to be the subject of conservatory measures, French courts therefore require the state to have expressly consented to the enforcement of conservatory measures. Alternatively, the creditor is required to demonstrate that the relevant assets have been allocated for the satisfaction of the claim. Finally, the creditor, who has obtained a judgment or arbitral award against a state, will not only have to provide proof of said judgment or award, but will also have to show the link between the assets to be attached and an activity or aim that is not, in principle, protected by sovereign immunity. The claimant will also have to show the link between the debtor (state or other entity) and the assets. Assets and property covered by diplomatic immunity require an express and special waiver to allow attachment.

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

As with interim relief, there are no limitations on the final relief available against a state that is a party to proceedings before a court or arbitral tribunal. Parties are, therefore, free to seek such relief as damages, cost sanctions or attachment orders.

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

To notify the state (or any entity benefiting from jurisdictional immunity) of any proceeding, article 684 of the CCP provides that process may be served through a bailiff's deed submitted to the Public Prosecutor's Office, unless a European regulation or international treaty provides otherwise. Otherwise, there is no specific court or entity that must be served in relation to proceedings against a state.

14 How is process served on a state?

Article 684 of the CCP provides a method by which process may be served on a state (or any entity benefiting from jurisdictional immunity). This method involves addressing service of process, through a bailiff's deed, to the Public Prosecutor's Office. The notification is then executed through diplomatic channels and via the French Ministry of Justice.

Other possible applicable instruments include Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters, and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which may apply to documents instituting proceedings.

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

Judgments rendered against a state in absentia are governed by articles 471 to 479 of the CCP (these provisions are not specific to state-related proceedings). If the state fails to comply with the first subpoena to appear before the competent court, the judge may, following a request of the claimant or on its own initiative, issue a second subpoena against the state, or simply inform the state by way of letter of the consequences of the state's failure to appear before the court. The judgment rendered in absentia can only be made after the limitation period of either the first or second subpoena (the longer of the two) has lapsed and if it constitutes a final instance decision where the state was not subpoenaed in person. This judgment will be considered adversarial (and not ex parte) if the state is allowed to appeal and the state was personally served with the subpoena. Finally, the judgment rendered in absentia will be rendered only when the court is satisfied as to the validity, admissibility, and well-founded or non-frivolous nature of the claim.

Article 479 of the CCP provides that the judgment rendered in absentia against a person residing abroad must expressly indicate the efforts made to inform the defendant of the case that led to said judgment.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Before the advent of articles L.111-1-1 to L.111-1-3 of the CEPC, French law on enforcement immunities was governed almost exclusively by case law, customary international law and international treaties. Only a very formal provision in the CEPC provided that '[f]orced execution and conservatory measures are not applicable to persons that benefit from enforcement immunity' (article L.111-1, paragraph 3 of the CEPC), without any further explanation as to when enforcement immunity existed.

Under article L.111-1-1 of the CEPC, a claimant seeking to take interim or enforcement measures against a foreign state's asset must first get the authorisation from the French *juge de l'exécution*. Article L.111-1-2 then provides the scope of enforcement immunity (see question 11).

French law also recognises diplomatic enforcement immunity (article L.111-1-3 of the CEPC), whose beneficiaries include diplomatic agents.

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

Yes, specific sections of the CEPC will apply to state's assets (see question 16). A number of measures are available to the creditor (which are not specific to state-related proceedings), subject to the French *juge de l'exécution*'s authorisation, for instance third-party debt orders allowing a creditor to seek payment from a third party for money owed by the state, provided the creditor holds an execution order recognising a liquid and enforceable debt (eg, an award that has been recognised in France).

A number of other measures are available to states' creditors, including, for instance, foreclosure and sale orders for movable goods, orders compelling delivery by the debtor of targeted assets and restitution orders.

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?

Article L.111-1-2 of the CEPC provides three alternative criteria that allow a creditor to attach the state's assets (see question 11).

Further, the rules governing a state's diplomatic immunity are set out under article L.111-1-3 of the CEPC, which provides that enforcement measures (measures of constraint) may not be issued against the assets, including bank accounts, of a state used or intended to be used in the performance of diplomatic functions of foreign states or their consulates, their special missions or missions to international organisations, unless the relevant state has issued an express and specific waiver.

In practice, this means that a state's consent to waive its jurisdictional immunity will have no impact on the creditor's ability to attach state assets or property since the creditor will have to go through the filter of articles L.111-1-1 to L.111-1-3 of the CEPC to prove that either the debtor state has consented to waive its enforcement immunity, or the assets in question do not fall within the purview of the Sapin II provisions.

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

The Sapin II law provides a list of assets that are protected, in principle, by sovereign immunity (see question 20). Further, French law places the burden of proof on the judgment or award creditor, seeking to attach a state's assets, pursuant to article L.111-1-2 of the CEPC (see question 11).

Case law will be necessary to determine precisely which assets or property may be covered by enforcement immunity and which assets or property may not.

Before the entry into force of Sapin II, French courts had been consistent in interpreting sovereign immunity as a principle, subject to certain exceptions. As such, the burden of proof fell on the claimant to prove that the targeted assets or property had been allocated to the economic or commercial activity governed by private law that forms the object of the dispute. This allocation implied a link between the targeted asset and the economic or commercial activity forming the object of the dispute, which the creditor also had to prove.

French case law reversed, however, this burden of proof when the defendant was not the state itself but rather a distinct public entity, which has allocated assets or property to a main activity governed by private law. The burden of proof would then fall on this public entity to determine the public nature or allocation of these assets.

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.

Article L.111-1-2 of the CEPC provides a non-exhaustive list of assets and property that are, in principle, covered by enforcement immunity:

- assets, including bank accounts, that are used or intended for use in performing a state's diplomatic or consular functions; special

missions; missions to international organisations; and its delegations to international organisations and conferences;
- assets of a military nature or property used or intended for use in the exercise of military functions;
- assets that are part of the state's cultural heritage or its archives, which are not offered or intended for sale;
- assets that are part of an exhibition of objects of a scientific, cultural or historic interest, which are not offered or intended for sale; or
- tax or social receivables of the state.

Previously, French case law had established immunity of state assets and property as the rule, with the inapplicability of this rule being the exception.

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.

Assets or property held by foreign central banks and monetary authorities may indeed benefit from enforcement immunity under article L.153-1 of the French Monetary and Financial Code. This immunity is triggered when the assets, held by the bank or authority, either belong to said bank, authority or the state.

Article L.153-1, paragraph 2 of the French Monetary and Financial Code provides, however, an exception: although the central bank or authority may hold or manage its own assets and property, these assets and property will not benefit from enforcement immunity when the bank (or authority) allocates them to a main activity that is private in nature.

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

No. Other than the conditions established under Sapin II, French law has not developed any further tests for enforcement against a state. Since Sapin II is still fairly new, it remains to be seen how the courts will apply it and the scope they will give to the protection of sovereign assets.

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?

As discussed under question 14, article 684 of the CCP provides the general method by which a creditor may serve process on a state (or any entity benefiting from jurisdictional immunity).

Before the enforcement of an arbitration award or foreign judgment, a claimant is first required to seek an exequatur order authorising the enforcement of said award or judgment. The process of obtaining an exequatur order differs depending on whether the subject of the exequatur order is an arbitration award or a foreign judgment.

For an arbitration award, the procedure is simpler and quicker than the procedure concerning foreign judgments. Where an arbitration award has been rendered in France or abroad, the most diligent party (usually the winning party in the arbitration) will have to seek an exequatur order either before the territorially competent court of first instance or the High Court of Paris, respectively. The judge only verifies that the award does not violate French public policy (French international public policy in the case of foreign awards). The order is then typically rendered within one to four weeks. The exequatur request does not require the presence of the debtor (the state or its organs and instrumentalities) but the exequatur order must be notified to the debtor who may then raise an appeal on the grounds set out in article 1520 of the CCP. The debtor must appeal the exequatur order within three months of service of process.

With regard to foreign judgments, there are different applicable regimes. Under the French common regime, the creditor may seek an exequatur order before the territorially competent judge of the court of first instance. Contrary to the ex parte nature of an exequatur request regarding an arbitral award, the creditor of a foreign judgment must file a writ of summons thereby requiring the presence of the debtor (the state or its organs or instrumentalities). Submissions between the parties will then be exchanged and hearings convened.

Update and trends

The current hot topic concerning French law on immunities is the impact of the Sapin II Law, and especially its impact on the attractiveness of Paris as a premier place of arbitration and dispute resolution. The very terms of Sapin II show that the attachment of sovereign states' assets has been rendered much more difficult in France.

Execution of awards and foreign judgments must meet the additional conditions in articles L.111-1-1 and L.111-1-3 of the CEPC, and the courts' interpretation of the new rules will consequently affect parties' interest in having their foreign awards or judgments executed in France.

One recent case has retroactively applied these new rules to prevent the attachment of diplomatic assets by a creditor. It is too early, however, to determine the real impact of these new rules since French law on immunities relies heavily on case law.

The French judge examines the following three conditions: the foreign judge's jurisdiction; the foreign judgment's conformity with French international public policy; and the absence of fraud. The exequatur order rendered by the High Court judge may be appealed or contested following the recourse measures normally available under French law. After obtaining an exequatur order, the creditor may seek an enforcement order against the targeted assets under article L.111-1-1 of the CEPC.

A specific regime may apply to judgments within the scope of Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Brussels Regulation), especially articles 39 to 44. Under the Recast Brussels Regulation, the judgment creditor simply needs a certificate, attesting to the judgment's enforceability, from the jurisdiction that rendered the judgment. The creditor does not have to notify the debtor before seeking interim relief based on the judgment unless the judgment was rendered ex parte. To obtain enforcement orders, the certificate, along with the judgment, must be served on the debtor.

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

French case law has traditionally been the main source of the law on immunities. A large number of these cases involve enforcement proceedings against a state (or its organs and instrumentalities) and its assets.

For instance, in one case, the court established diplomatic immunity as being distinct from general enforcement immunity by declaring that the immunities of diplomatic agents or missions are inherently linked to the conduct of international relations and are, therefore, governed by different rules than state enforcement immunity, which is governed by international public law principles. In a subsequent case, French courts established the requirement of an express and specific waiver of immunity for diplomatic assets to be attached.

The principle was later overturned in a decision that held that waiver of such diplomatic enforcement immunity only needed to be express to allow attachment by the creditor. Following heated debates concerning the scope and strength of the protection to be afforded to diplomatic assets, the French parliament adopted the Sapin II Law, which reinstates the need for an express and specific waiver. The Court of Cassation recently applied Sapin II to facts that occurred before its entry into force.

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

No.

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?

No, there are no courts that assist with or otherwise intervene to help identify assets held by states in the territory.

Immunity of international organisations

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

No, French law does not provide for any specific immunity for international organisations. Immunity of international organisations largely stems from treaties or host agreements signed by France.

French courts have held that international organisations, whose constituting treaty or host agreement has been signed and ratified by France, benefit in principle from the immunity set out therein, unless there is a violation of a person's right to a hearing, an express exception within the relevant instrument, or a waiver by the relevant international organisation.

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?

International organisations established in France may be considered as legal persons. Although these organisations do not constitute sovereign entities such as states, French law recognises, by virtue of the host agreement or constituting treaty (for example, article 104 of the United Nations Charter), an international organisation's legal capacity 'as may be necessary for the exercise of its functions and the fulfilment of its purposes'.

An international organisation's legal personality does not, however, impact its ability to invoke immunity. This immunity is derived from the express terms of the relevant treaties and host agreements, which establish the contours of the international organisation's immunity protection.

This raises a question concerning the possible abuse of such immunity, especially concerning labour law. French case law sanctions, as a matter of public policy, international organisations that seek to invoke their jurisdictional immunity without providing any means of internal recourse for employees (former or current).

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?

Enforcement immunity of international organisations is essentially dependant on their statutes or constituting treaties. International organisations will enjoy enforcement immunity if this is stipulated in the constituting treaty or host agreement.

An international organisation may waive its enforcement immunity. The waiver is, however, examined case by case. This means that each time the international organisation's enforcement immunity is at issue, even before the same jurisdiction with the same parties but for two or more different disputes, the international organisation would have separately to waive its enforcement immunity for each dispute.

French case law is yet to adopt a uniform approach to the interpretation of an international organisation's immunity. In a specific case, however, the court explained that state and international organisation's immunities are different in that the latter's immunity is absolute, and only subject to the restrictions provided by the international organisation's host agreement.

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Background

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

German courts follow international law rules on restrictive immunity. The concept of restrictive immunity refers to the principle that a state may enjoy immunity in domestic courts when exercising its sovereign power (*acta jure imperii*) but not for commercial activities (*acta jure gestionis*).

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

Germany does not have a specific domestic law on state immunity. As confirmed by various German courts, the legal basis for the doctrine of sovereign immunity in Germany is customary international law. Pursuant to article 25 of the German Basic Law, the general rules of international law (ie, customary international law) is an integral part of federal law and shall take precedence over the laws.

The doctrine of sovereign immunity is also reflected in the German Courts Constitution Act governing the jurisdiction and organisation of German courts. For example, according to section 20, paragraph 2 of the Courts Constitution Act, German jurisdiction shall not apply to persons insofar as they are exempt therefrom, pursuant to the general rules of international law or on the basis of international agreements.

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

Germany ratified the 1972 European Convention on State Immunity on 15 May 1990. It declared that, in cases not falling within articles 1 to 13 of the Convention, German courts are entitled to entertain proceedings against another contracting state to the extent that its courts are entitled to entertain proceedings against states not party to the Convention. Such a declaration is without prejudice to the immunity from jurisdiction that foreign states enjoy in respect of acts performed in the exercise of sovereign authority.

Germany has not signed or ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Foreign states enjoy jurisdictional immunity based on customary international law, pursuant to article 25 of the German Basic Law (see question 2).

Sections 18 and 19 of the German Courts Constitution Act stipulate that the members of the diplomatic missions, their families and their private servants, as well as members of the consular posts, including the honorary consular officers, shall be exempt from German jurisdiction. Pursuant to section 20, paragraph 1 of the Courts Constitution Act, German jurisdiction does not apply to representatives of other states and persons accompanying them who are staying in the territory of application of this Act at the official invitation of the Federal Republic of Germany. In addition, section 20, paragraph 2 extends the exemption from German jurisdiction to persons that are exempt from German jurisdiction pursuant to the general rules of international law, international agreements or other legislation. This applies to heads of states, heads of governments and ministers of foreign affairs.

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

Immunity may be waived either explicitly or by implication (eg, by taking a substantive step in proceedings).

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?

In Germany, foreign states do not enjoy immunity from suits in respect to non-sovereign acts.

The decisive characteristic for the distinction between *acta jure imperii* and *acta jure gestionis* is, as repeatedly held by the German Federal Supreme Court, 'the nature of the act of the state or of the underlying legal relationship'. In other words: did the state exercise its sovereign power or did it act like any private person?

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?

As, according to the Federal Constitutional Court, the act of state doctrine cannot be considered part of the general rules of international law and is, therefore, not applicable in the German legal order, German courts are entitled to examine foreign sovereign acts where an exception to state immunity is given.

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?

While the immunity of state-owned enterprises is subject to debate, the prevailing jurisprudence of the higher German courts generally holds that immunity can be recognised only in respect of any specific sovereign acts. A state-owned enterprise may not claim immunity as regards acts of a commercial nature.

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

As a general procedural prerequisite for initiating a court case in Germany, the plaintiff must invoke that it is a potential holder of a right to have standing to bring a claim against the defendant.

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?

Where neither property nor conduct is located in Germany, German courts might generally be quite reluctant to assume jurisdiction. However, there are several exemptions to that principle.

For example, the competent court for summary proceedings in relation to a payment order is the local court where the claimant has his or her general venue (see section 689, paragraph 2 of the Code of

Update and trends

Draft legislation from 2017 proposes a specific German Federal Law on Privileges, Immunities, Exemptions and Facilitations of International Organisations in the Federal Republic of Germany as Host State (the Host State Law).

Civil Procedure). Further, section 29 of the Code of Civil Procedure stipulates that for any disputes arising from a contractual relationship or disputes regarding its existence, the court of that location shall have jurisdiction at which the obligation is to be performed that is at issue.

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

There are two types of interim relief available in Germany: seizure and injunctions.

The latter relates only to issues regarding the subject matter of the proceedings. Pursuant to section 935 of the Code of Civil Procedure, a party that is concerned that a change of the status quo might frustrate the realisation of its right, or might make realisation of such a right significantly more difficult, may apply for an injunction.

Section 916 of the Code of Civil Procedure stipulates that seizure is a remedy serving to secure compulsory enforcement against movable or immovable property for a monetary claim or a claim that may evolve to become a monetary claim. To obtain a seizure, the petitioner needs to demonstrate that it has a monetary claim against the respondent and that there are reasons to believe that, without the interim relief, the petitioner's chances to enforce its claim against the respondent's assets would be seriously hampered or rendered impossible. Such a reason exists, for example, where the respondent is said to move assets out of the country.

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

Any type of relief may be claimed against a state.

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

There is no precondition as to the effect that a court or entity must be served with process prior to service on the respondent state.

14 How is process served on a state?

According to section 54 of the Regulation on Civil Proceedings, a claim against a foreign state will be forwarded to the Federal Office of Justice. The Federal Foreign Office (Ministry of Foreign Affairs) will serve the documents via diplomatic channels (ie, the competent German diplomatic mission).

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

When a respondent does not participate in proceedings (ie, by not appearing before the court or refusing to file submissions), a claimant may apply for a default judgment pursuant to section 331 of the Code of Civil Procedure. In this case, the court will assess the relief sought on the basis of the facts as presented by the claimant.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Germany does not have a specific law governing enforcement immunity of foreign states. Customary international law guarantees foreign states enforcement immunity with respect to property in use or intended for use for sovereign or public purposes. German courts directly apply customary international law pursuant to article 25 of the German Basic Law, which stipulates that the general rules of international law form an integral part of federal law and take precedence over other laws.

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

In the case of enforcement measures against foreign states, German debt collection statutes and the enforcement sections of the German Code of Civil Procedure would generally apply.

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?

The German Federal Supreme Court held that a foreign state's prior waiver of jurisdictional immunity or consent to the exercise of jurisdiction does not constitute the state's consent to any further enforcement proceedings.

It is generally held that a waiver of immunity resulting from an arbitration agreement does not extend to the enforcement proceedings stage. The German Federal Supreme Court recently ruled that this issue must not be decided if the arbitration clause states that the award shall be enforced according to the law of the enforcing state. This was deemed as a waiver of immunity in respect of enforcement proceedings before German courts. If this is not the case, a waiver resulting from an arbitration agreement will not extend to the execution proceedings, for which, a separate explicit or implicit waiver is required.

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

German courts directly apply rules of customary international law (see question 2 on article 25 of the German Basic Law). Property or assets of foreign states in use or intended for commercial use and not for sovereign purposes is therefore subject to enforcement or execution in Germany.

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.

Enforcement against the property of a foreign state that is presented or situated in German territory is inadmissible without the consent of the foreign state if such property serves sovereign purposes of the foreign state. This especially includes property or assets serving the fulfilment of official functions of diplomatic missions of the foreign state.

The German Federal Constitutional Court noted that claims against a general current bank account of the embassy of a foreign state that exists in the state of the forum and where the purposes include covering the embassy's costs and expenses are not subject to forced execution by the state of the forum.

In the case of 'mixed use' property of foreign states, the Federal Constitutional Court noted that customary international law does not preclude enforcement measures with respect to such parts of property in use or intended for commercial purposes.

Notably, the German Federal Constitutional Court held that a general waiver of immunity contained in notes issued by a foreign state, may be sufficient to waive immunity for enforcement proceedings. According to the Federal Constitutional Court, this waiver may, however, not be construed as a waiver of sovereign immunity in relation to an embassy's bank accounts if those bank accounts are needed to uphold the rudimentary functioning of the embassy.

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.

German courts directly apply customary international law on enforcement immunity. Generally, a central bank or other monetary authority is protected by enforcement immunity. The German Federal Constitutional Court repeatedly declared that forced execution of judgment by the state of the forum under a writ of execution against a foreign state that has been issued in respect of non-sovereign acts of that state, or property of that state within the territory of the state of forum, is unlawful without the consent of the foreign state if such property serves sovereign purposes of the foreign state. With regard to bank accounts of a foreign state, the Federal Constitutional Court clarified that the decisive criterion is the purpose of the funds in the bank account.

The German Federal Supreme Court decided that currency reserves of a foreign state's central bank, in a bank account administered by a third-party debtor in Germany, serve sovereign or public purposes of the foreign state. It also decided that such a bank account is covered by enforcement immunity and cannot be subject to forced execution in Germany.

The Federal Supreme Court further noted that property or bank accounts of central banks or other monetary authorities enjoy absolute enforcement immunity under the United Nations Convention on Jurisdictional Immunities of States and Their Property, and that the Convention – which has not yet come into effect – reflects trends of commonly accepted rules of international law.

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

In Germany, domestic courts generally have not developed any further test that must be satisfied before enforcement against a foreign state is permitted.

However, if a claim or enforcement action is solely based on the fact that property or funds of a foreign state are located in Germany, which would allow German courts to have jurisdiction pursuant to section 23 of the Code of Civil Procedure, German courts require a sufficiently close nexus to Germany.

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?

Pursuant to section 750 and sections 794, paragraph 1, No. 4, letter a, 795 of the German Code of Civil Procedure, enforcement may be commenced only if judgments or decisions declaring arbitration awards as enforceable are served. According to section 54 of the Regulation on Civil Proceedings, documents to be served to a foreign state will be forwarded to the Federal Office of Justice. The Federal Foreign Office (Ministry of Foreign Affairs) will serve the documents via diplomatic channels (ie, the competent German diplomatic mission).

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

While there is a plethora of German jurisprudence in relation to enforcement proceedings against states, the percentile relating to the enforcement of arbitral awards cannot be stated with absolute certainty.

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

No.

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?

No.

Immunity of international organisations

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

Pursuant to section 20, paragraph 2 of the Courts Constitution Act, the jurisdiction of German courts does not extend to persons listed in section 18 of the Act (diplomats accredited to Germany, their families, and domestic staff members), section 19 (members of the consular staff in Germany), and section 20, paragraph 1 (representatives of foreign states and their attendance officially visiting Germany), and, furthermore, to 'other persons' enjoying jurisdictional immunity according to the general rules of international law (ie, customary international law), the rules of international treaties, or other legal rules. International organisations were counted among those 'other persons', either with reference to specific immunity clauses in international agreements establishing an international organisation to which Germany is a party (or protocols on privileges and immunities that complement such agreements), or with reference to general rules of international law.

Further, according to article 3 of the German Law on the Accession of the Federal Republic of Germany to the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations of 21 November 1947, the Federal Government, upon consent of the Federal Council, has the express power to extend the application of the Convention's rules on immunity to other international organisations.

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?

With respect to most international organisations created after 1945, their constituent treaties expressly provide that they enjoy legal personality within the treaty member states. This also applies to Germany as a member state of an international organisation. The domestic legal personality of international organisations is often functionally limited in nature (see, eg, article 104 of the UN Charter or article XV of the Statute of the International Atomic Energy Agency). Also 'headquarters agreements' or 'seat agreements', as bilateral treaties between an international organisation and Germany where the organisation has its headquarters or seat, typically include further provisions on the domestic legal personality of an international organisation.

The determination of domestic legal personality is more difficult where Germany is neither a member state of a particular international organisation nor bound to accord domestic legal personality in a headquarters or host agreement. In this case, German courts could have recourse to a customary international law rule providing for legal personality or to principles of private international law through which the

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domestic legal personality enjoyed by an international organisation in a third country can be recognised.

As outlined above, the legal basis for international organisations that are subjected to proceedings before domestic courts can be found in German legislation. According to section 20, paragraph 2 of the German Courts Constitution Act, international organisations that enjoy immunity under international law are exempted from the jurisdiction of German courts. This was confirmed by the Labour Court of Munich in a case initiated against the European Patent Organisation, among others.

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?

The immunity of international organisations based on, for example, international agreements establishing the organisation, headquarters agreements or seat agreements regularly includes immunity of the organisation from enforcement measures.

With respect to the UN, article 2, section 2 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, to which Germany is a member state, clarifies that immunity applies not only to the UN, but also to its assets, which may otherwise be subject to enforcement measures. It further clarifies that any waiver of immunity does not extend to enforcement measures. That means that, even in exceptional situations where German courts may be allowed to render a judgment, the resulting judgment cannot be directly enforced because the organisation would enjoy separate immunity from execution or enforcement measures.

The authors are not aware of a German enforcement case against a foreign state by attaching or executing assets held by an international organisation.

Hong Kong

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Background

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

Hong Kong is a Special Administrative Region of China and not a state.

The doctrine of absolute immunity applies in Hong Kong. This was provisionally confirmed by the Court of Final Appeal in *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2011] HKCFA 41. The Court referred the question to the standing committee of the National People's Congress of China pursuant to article 158(3) of the Basic Law, and the standing committee confirmed that the absolute immunity doctrine applies.

The doctrine of sovereign immunity only applies to foreign states. It does not apply to China because it is not a foreign state. Instead, the common law doctrine of crown immunity applies to China and its state organs. Crown immunity at common law is also absolute in the sense that there is no exception for commercial acts. Once it is shown that a particular entity, properly understood, is an emanation or organ of China Central People's Government, crown immunity will apply to render that entity immune from suit in Hong Kong. Importantly, however, Chinese state-owned enterprises will not enjoy crown immunity save for in extraordinary circumstances where the enterprise is authorised to and does act on behalf of China.

Crown immunity does not apply to the Hong Kong government, pursuant to the Crown Proceedings Ordinance.

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

Before the handover of sovereignty from the United Kingdom to China on 1 July 1997, the UK State Immunity Act 1978 applied in Hong Kong through the State Immunity (Overseas Territories) Order 1979. However, this statute ceased to apply upon the handover. No ordinance has been enacted to replace it.

In *FG Hemisphere* (see question 1), the Court of Final Appeal held that Hong Kong could not adhere to a different doctrine of state immunity from the doctrine adopted by China. China adopted the absolute sovereign immunity doctrine; therefore, it applies in Hong Kong.

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

Hong Kong is not a party to any multilateral treaty on sovereign immunity.

China is party to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. However, this treaty has not been extended to Hong Kong. Further, although China has signed this treaty, it has not ratified it, and its courts continue to adhere to the doctrine of absolute immunity.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

The doctrine of absolute sovereign immunity applies in Hong Kong. Accordingly, the scope of the immunity is absolute. All that must be shown for immunity to be afforded is that a particular entity is an emanation or organ of the state. Unlike in jurisdictions that have adopted the principle of restrictive sovereign immunity, there is no exception in Hong Kong for commercial transactions between the state and private parties.

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

Immunity can only be waived by 'an unequivocal submission to the jurisdiction of the forum State at the time when the forum State's jurisdiction is invoked against the impleaded State' (*FG Hemisphere*). For example, in *Hua Tian Long* (No. 2) [2010] 3 HKC 557, the Court of First Instance found that the Guangzhou Salvage Bureau was entitled to crown immunity, but had waived that entitlement by (among others) filing a counterclaim in the Hong Kong court proceedings.

An arbitration agreement will not amount to a waiver of state immunity. Rather, such an agreement is merely a contractual submission to the jurisdiction of the arbitrators; it is not a submission to the jurisdiction of any enforcing court. Failing to waive immunity in enforcement proceedings may amount to a breach of contract, but that is a different matter.

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?

As sovereign immunity in Hong Kong is absolute, states enjoy immunity from suit in all transactions and proceedings.

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?

Apart from waiver, there are no exceptions to sovereign immunity in Hong Kong.

There are, however, other doctrines that apply in Hong Kong apart from sovereign immunity. The act of state doctrine is enshrined in article 19 of the Basic Law and other legislation governing proceedings before the Hong Kong courts. Article 19(3) provides that Hong Kong courts 'shall have no jurisdiction over acts of state such as defence and foreign affairs'. In *FG Hemisphere*, the Court of Final Appeal observed that this was consistent with the common law act of state doctrine.

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?

In *TNB Fuel v China National Coal* [2017] HKCFI 1016, the Court of First Instance applied the common law 'control test' to determine whether a Chinese state-owned enterprise was afforded crown immunity. The higher the degree of control exercised by the Chinese government over the entity, the more likely it is to be considered an emanation of the state. The following factors are relevant:

- the level of independent discretion enjoyed by the entity;
- the degree of control exercised by the state as investor;
- the separate legal personality of the entity;
- the power of the state to appoint and remove senior officers; and
- the financial autonomy of the entity.

Update and trends

Recent discussion has focused on whether state-owned enterprises, in particular Chinese state-owned enterprises, are afforded sovereign or crown immunity in Hong Kong. As might be expected, a large number of Chinese state-owned enterprises operate and have assets in Hong Kong. *TNB Fuel v China National Coal*, handed down in 2017 by the Court of First Instance, was a welcome development, providing guidance concerning the test for determining whether a Chinese state-owned entity would be entitled to invoke sovereign immunity. Moreover, while the judgment was in respect of one particular state-owned enterprise, the reasoning provides strong confirmation that Chinese state-owned entities under SASAC are unlikely to be deemed as organs of China's central government and afforded crown immunity.

The Court may also consider the functions of the entity. A state-owned entity that exercises governmental or public functions is more likely to be viewed as an organ of the state and thus be entitled to invoke crown immunity.

In *TNB Fuel v China National Coal*, the entity in question was China National Coal Group Corporation (China Coal), a Chinese state-owned enterprise. China Coal was under the direct supervision of the State-owned Assets Supervision and Administration Commission (SASAC) of China's State Council. The Secretary for Justice of Hong Kong intervened in the proceedings. The Secretary produced to the court a letter it had received from the Hong Kong and Macao Affairs Office of the State Council. The letter stated that, under Chinese law, a state-owned enterprise is an independent legal entity with its own operations. The letter also stated that state-owned enterprises, when carrying out commercial activities, are not typically deemed part of the central government. Based on its review of this letter, and because China Coal was entitled to independent autonomy in its business operations, pursuant to the law of its incorporation (ie, PRC law), the court held that China Coal was not an organ of the state. The Court emphasised that China Coal had operational autonomy and extensive independence in carrying out its business, and held that the powers of SASAC were akin to those of a normal shareholder. The Court distinguished *Hua Tian Long* (No. 2), which held that the Guangzhou Salvage Bureau was entitled to immunity, on the basis that the Guangzhou Salvage Bureau was not a separate legal entity and was additionally under the direct control of the Ministry of Communications. Although the question of whether a particular entity is an organ of the state is a fact-specific inquiry, the approach adopted in *China Coal* and *Hua Tian Long* (No. 2) is likely to be followed in other cases involving Chinese state-owned enterprises.

There is no recent authority in Hong Kong on the approach to be taken in determining whether an entity is an organ of a foreign state for the purposes of sovereign immunity. However, the Court is likely to take a similar approach to that taken in respect of crown immunity.

In short, generally, state-owned enterprises formed to carry out industrial or commercial activity and independently constituted, with their own management and corporate governance, are unlikely to be afforded immunity in Hong Kong courts.

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

The Hong Kong courts have not articulated any specific standing requirements for claims to be brought against sovereign states. Rather, regular civil procedure rules would normally apply.

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?

This question has not been put before the courts in Hong Kong, and it is unclear what approach Hong Kong courts would take.

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

Interim measures and interlocutory injunctive relief may be available pending the resolution of any contested claim to sovereign or crown immunity (as it was in *FG Hemisphere*). Any application for such relief would be determined on the basis of the usual principles, namely that there is a serious question to be tried and that the balance of convenience weighs in favour of granting the injunction. If the claim to immunity succeeds, the injunction will be discharged (again, as occurred in *FG Hemisphere*).

In *FG Hemisphere*, the Court of Final Appeal left open the possibility that an arbitration clause may amount to an implied submission to the supervisory jurisdiction of the court of the seat of the arbitration. Thus, the Hong Kong Courts may grant interim measures in aid of a Hong Kong-seated arbitration involving an entity otherwise entitled to sovereign or state immunity.

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

Assuming that a state has waived immunity, there is no reason in principle that it could not be subject to the full range of the court's usual powers, which include an order for the payment of damages or specific performance.

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

Process is served on a state under Order 11, Rule 7 of the Rules of the High Court. Rule 7 states that before service is effected on a state, prior leave must first be obtained from the court. There is no requirement that the plaintiff address the issue of sovereign immunity at this stage.

14 How is process served on a state?

Under Order 11, Rule 7 of the Rules of the High Court, a plaintiff must lodge in the court registry a request for service on the state to be arranged by the Chief Secretary, along with a copy of the writ to be served and a translation of the writ in the official language of the state. Since 1997, such requests to the Chief Secretary are forwarded to China's Ministry of Foreign Affairs. The Ministry may then effect service through diplomatic channels. Rule 7 further provides that service on a state may also be effected by other methods agreed to by the state.

Problems have arisen in cases where the Ministry does not effect service on the respondent state, resulting in the plaintiff having complied with the requirements of service but knowing that it has not actually been brought to the attention of the state. Courts appear to have taken a pragmatic approach in dealing with such situations. In *FG Hemisphere*, the plaintiff attempted to remedy this issue by serving process informally on various government offices, ultimately resulting in the Democratic Republic of the Congo filing an acknowledgement of service through its solicitors in Hong Kong. The plaintiff then obtained an ex parte order for substituted service on the state's Hong Kong solicitors. This approach was approved by the Court of Appeal.

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

Hong Kong courts have not considered this issue. However, the Hong Kong courts would likely find recent English authority persuasive to the effect that proceedings may continue in the absence of the defendant, even where the defendant is a sovereign state (see *Certain Underwriters at Lloyds v Syrian Arab Republic* [2018] EWHC 385). Courts may, however, dismiss the suit for lack of jurisdiction if sovereign immunity applies.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

In Hong Kong, the doctrine of absolute sovereign immunity applies in respect of both jurisdictional immunity and enforcement immunity. In *FG Hemisphere*, the Court of Final Appeal found that China had consistently adhered to the doctrine that a state and its property enjoy absolute immunity from jurisdiction and from execution. The court held that this also applied in Hong Kong.

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

Assuming sovereign immunity does not apply (for instance, because it has been waived), the full range of remedies available to any judgment creditor should be available against a state, although this has not been tested by the Hong Kong courts. In *FG Hemisphere*, the Court of Appeal appeared to accept that receivers could be appointed over state assets in Hong Kong. However, as discussed above, the Court of Final Appeal overturned this decision on the basis that absolute sovereign immunity applied.

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?

Prior submission to jurisdiction does not constitute consent to further enforcement proceedings against the property of the state. Under common law, waiver must be established at two distinct stages: the state must have first waived its jurisdictional immunity from suit in the forum state, and also waived the immunity of its property from execution by the forum state's processes. This position was endorsed by the Court of Final Appeal in *FG Hemisphere*.

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

As sovereign immunity from enforcement in Hong Kong is absolute, all state property is immune from enforcement (unless immunity has been waived).

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 question 19.

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.

In October 2005, China's 'Law on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks' was added to Annex III of the Basic Law of Hong Kong. Annex III contains a list of Chinese legislation to be brought into force in Hong Kong through executive promulgation or legislative implementation.

Under this statute, property and bank accounts belonging to foreign central banks are immune from execution, unless the foreign central bank or state government waives such immunity in writing. Where waiver is given, the property or bank accounts sought to be executed against must have been designated for execution. Immunity granted under this statute is subject to the principle of reciprocity: immunity is only granted if the foreign state in question grants similar privileges to the China, Hong Kong and Macao central monetary authorities.

Legislation listed in Annex III of the Basic Law must first be brought into force through executive promulgation or legislative implementation. Neither appears yet to have occurred in respect of this statute.

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

No further test has been developed.

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?

Service of process is effected in the same way as described above. As required by Order 11, Rule 7 of the Rules of the High Court, leave to serve must first be obtained, following which a request has to be lodged with the Chief Secretary.

In Hong Kong, actions for enforcement of arbitral awards are viewed as actions involving jurisdictional immunity, not enforcement immunity. *FG Hemisphere* concerned proceedings to enforce a pair of arbitral awards against the Democratic Republic of the Congo in Hong Kong. The Court of Final Appeal found that the Democratic Republic of the Congo was immune from suit. The Court held that the 'suit' in Hong Kong was the plaintiff's application for leave to enforce the awards in Hong Kong under the Arbitration Ordinance. The Court observed that, even if recognition proceedings were successful, the applicant still had to seek to execute the award. At this stage the state would have a further right to object to execution against the targeted property on the grounds of state immunity.

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

There have not been many enforcement proceedings against states in Hong Kong.

Recent cases that have been brought have had to do with arbitral awards. *FG Hemisphere*, the leading recent case on sovereign immunity and proceedings against states, is a case concerning the enforcement of foreign arbitral awards.

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

Yes, Hong Kong maintains public databases that can be used to identify assets held by states. Examples include land registries, business registries, trademark registries and vehicle registries. These public databases provide varying amounts of information on ownership of assets.

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?

Hong Kong courts are generally competent to assist with identifying and enforcing against assets. Order 24 of the Rules of the High Court

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governs discovery of documents in Hong Kong proceedings, and Section 21M of the High Court Ordinance allows for interim relief to be sought in Hong Kong in relation to foreign proceedings, provided that the foreign proceedings are capable of giving rise to a judgment enforceable in Hong Kong. *Norwich Pharmacal* orders, *Bankers Trust* orders, and other similar orders are available to assist with obtaining information on assets held by third parties, such as banks.

However, it is unclear whether Hong Kong courts will take the same approach with respect to assets held by sovereign states, given that states are afforded absolute immunity in Hong Kong.

Immunity of international organisations

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

The International Organisations (Privileges and Immunities) Ordinance provides specifically for immunity of international organisations based on international agreements entered into by Hong Kong, or entered into by China and applied to Hong Kong. Under this Ordinance, the government may by order declare that provisions of such international agreements relating to immunities of international organisations shall have the force of law in Hong Kong.

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?

The above-mentioned Ordinance allows the government to give effect to provisions in international agreements on the status of various international organisations. Accordingly, whether a particular international organisation is afforded domestic legal personality, and whether they are given capacity to institute and respond to legal proceedings in Hong Kong, depends on the provisions of the international agreement in question and the domestic order giving effect to it.

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?

The extent and type of immunity afforded to international organisations depends on the order made by the government under the above-mentioned Ordinance giving legal status and immunity to the international organisation. In many cases, international organisations would be given enforcement immunity.

Italy

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Background

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

The Italian approach to sovereign immunity is focused on the restrictive immunity theory. Indeed, according to recent case law (eg, the Italian Court of Cassation, 18 September 2017, No. 21541), the principle that one sovereign power cannot exercise jurisdiction over another, which is the basis of state immunity, only applies to acts of sovereignty or authority provided by a state and does not apply to acts of commerce or administration performed by a state.

The immunity for acts of sovereignty or authority applies to states or foreign entities acting as subjects of international law or as an organ of a foreign state (eg, public entities, including embassies) (the Italian Court of Cassation, 6 June 2017, No. 13980).

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

Italy does not have a specific law on sovereign immunity. The topic is instead governed by article 10 of the Italian Constitution, according to which the Italian legal system must conform to international principles, including customary international principles.

The principle of restricted state immunity has its roots in customary international law, and this has been reiterated in 2012 by the International Court of Justice in the judgment 'Jurisdictional immunities of the State' (*Germany v Italy)*; the European Court of Human Rights, which stated that 'state immunity from jurisdiction is governed by customary international law, the codification of which is enshrined in the United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004' (*Sabeh El Leil v France*, 2011); and by the Italian Court of Cassation in several decisions. Thus, according to article 10 of the Italian Constitution, the restricted immunity customary principles apply in Italy.

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

While Italy did not sign the 1972 European Convention on State Immunity, it is one of the signatories of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (the 2004 Convention), not yet entered into force. Indeed, Italy ratified the Convention through the Law No. 5/2013, by which the President authorised the execution of the 2004 Convention.

In addition to this, the above-mentioned law is accompanied by a declaration by which it is ruled that the 2004 Convention does not apply to the activities of armed forces and their personnel, either carried out during an armed conflict as defined by international humanitarian law or undertaken in the exercise of their official duties. Similarly, the 2004 Convention does not apply where there are special immunity regimes, including those concerning the status of armed forces and associated personnel (ie, related to specific public officials of a state, such as the President).

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Because Italy does not have a domestic law concerning state immunity, any aspect of the topic is regulated by international law, particularly by the customary international principles, as codified by the 2004 Convention. In other words, even though the 2004 Convention has not yet come into force, its principles are regularly applied by the Italian courts, as per the aforementioned decision of the European Court of Human Rights stating that restricted state immunity is 'governed by customary international law' (see question 2).

According to these customary international principles, Italian courts do not have jurisdiction over acts of sovereignty or authority (ie, acts performing a public function or acts of auto-organisation of a state); or acts performed by a foreign state or a foreign entity acting as part of the foreign state, or as a subject of international law. On the contrary, a state or its organs and instrumentalities could be subject to Italian law if they engage in business transactions.

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

Customary international law, as codified by the 2004 Convention, provides that a state is entitled to be subject to the jurisdiction of a court only in cases of express consent arising from an international agreement, a written agreement, a declaration before the court or a written communication in a specific proceeding.

Moreover, a state can implicitly waive its immunity by bringing the proceeding, intervening in the proceeding or taking any other step relating to the merits of a pending proceeding. Last, a state waives its immunity when it brings any counterclaim arising out of the same legal relationship or facts as the principal claim in any type of proceeding in which the state itself is a party or intervener.

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?

Pursuant to Italian case law, a state does not enjoy immunity in connection with private and commercial activities and, therefore, for commercial transactions. To determine whether an act falls outside of the scope of state immunity, courts will assess whether the relevant act is performed by the foreign entity as a private entity (eg, economic activities related to an agreement). In other words, the immunity does not apply to activities that are, even indirectly, out of the scope or functions of a state and its public authority (including those activities merely ancillary to the performance of public functions by a state).

In a recent case, related to the sale and purchase of military helicopters, the Italian Court of Cassation stated that, even if the purchase of military equipment has a nexus with the primary scope of a state, such sale cannot be out of the jurisdiction of Italian courts given that it was based on private law and entered into with a private company operating on the market (Italian Court of Cassation, 24 November 2015, No. 23893).

Update and trends

In recent years, Italian courts have been involved in a controversial matter of international law concerning the compatibility between the sovereign immunity of a state and the protection of human rights.

The case was related to the damages suffered by an Italian citizen who was arrested and deported to Germany in 1944. In 2004, the Joint Chambers of the Italian Court of Cassation decided that the German state had to be held liable for the damages suffered by the Italian citizen as a result of the conduct of the German military forces on the Italian territory during the Second World War, which constituted a violation of international law.

Germany invoked state immunity, but the Court of Cassation confirmed the Italian jurisdiction over claims for compensation against the German state. The decision was based on the fact that state immunity shall not be recognised for acts that qualify as international crimes, even if adopted in carrying out the state's sovereignty. According to the Italian decision, these crimes violated superior rules that prevail over international customary law.

As a result of this decision, Germany brought the dispute before the International Court of Justice. On 3 February 2012, the Hague stated that Italy was required to decline its jurisdiction in relation to the acts of a foreign state (Germany) that constituted war crimes and crimes against humanity, impairing inviolable human rights. According to the Hague, the immunity would have been considered a preliminary matter and, therefore, its examination would have excluded any decision on the merits of the case.

On 22 October 2014, the Italian Constitutional Court was involved in the same case to assess whether certain dispositions of Italian law were compliant with the Italian Constitution and, in particular, whether the International Court's decisions were immediately applicable in Italy. The Italian Constitutional Court denied that customary international law concerning state immunity applies to war crimes and crimes against humanity.

According to the Italian Constitutional Court, even if state immunity is recognised by customary international law, as confirmed by the International Court of Justice in the 3 February 2012 decision, the applicability of the immunity to cases involving violations of human rights is against the Italian legal system and, therefore, cannot be automatically recognised under the Italian legal framework. Thus, the court confirmed the jurisdiction of Italian courts over claims related to damages suffered for acts performed by a foreign state, even if they are acts of sovereignty, when they are against the fundamental values of a human being.

Following the decision of the Italian Constitutional Court, the Italian Court of Cassation, with its Decision No. 15812 issued on 29 July 2016, confirmed the principle. Further, in its Decision No. 21946, issued on 28 October 2015, the Court stated that, in accordance with the principles affirmed by the Italian Constitutional Court, the applicability in Italy of the state immunity customary international law cannot be recognised in claims relating to damages deriving from war crimes and against human beings, even when they are performed by a sovereign state.

This decision clarified that the state immunity is not a right, but is a prerogative of a state, and cannot be recognised when crimes against international rules are committed. Italian courts, therefore, laid the groundwork for a restriction of state immunity to protect human rights.

Most of the decisions on the matter available on public databases are issued in connection with labour law disputes. In this regard, the Italian Court of Cassation repeatedly stated that the immunity is recognised when the employment relationship under discussion before a court is not related to, or does not have any impact on, the sovereign powers of the foreign state in terms of organisation of public offices and services.

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?

Under Italian case law, the act of a state doctrine and the principle of non-justiciability are not recognised. Both theories are not based on international law or customary international law and, therefore, are not directly applicable under Italian courts.

Under Italian law, once a court decides that an act performed by a foreign state is not included among those connected with the authority of a state, it has jurisdiction on the same. In this regard, Italian courts do not investigate a foreign act if it represents the sovereign power of a foreign state.

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?

Sovereign immunity is not jeopardised by proceedings against a state enterprise and no decisions by Italian courts can be recorded in connection with the piercing of the corporate veil. Case law distinguishes between activities performed as public functions and activities performed by an entity as a private entity. Each case considers a foreign state, or an organ or public entity of the foreign state; there are no decisions that deal with the matter at hand with respect to private companies acting privately, even if they are owned by a state (on the assumption that private companies cannot perform public functions).

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

To bring a claim against a state acting as a private entity, a plaintiff must provide evidences of the nexus in the following terms: in the case of a breach of an agreement, a plaintiff must demonstrate the nexus between the alleged breach and the damages suffered; and in the case of tort liability, a plaintiff has to provide evidences of the nexus between the illicit conduct and the damages suffered.

Moreover, in the case of a state, a plaintiff has to demonstrate that the act performed by a natural person was not performed on behalf of the state (ie, by that natural person acting as a private citizen).

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?

Under certain conditions, Italian courts' jurisdiction covers conducts performed abroad. In the case of extra-EU conducts, the Italian jurisdiction is governed by Law No. 218/1995. According to this law, Italian courts have jurisdiction in several cases, including:

- when the defendant is domiciled or resident in Italy, or has a representative in Italy who is entitled to appear in court;
- according to Sections 2, 3 and 4 of Title II of the Brussels Convention 1968, as amended (eg, when there are more defendants involved in the case, and one of them is based in Italy); and
- when parties agreed to apply the Italian jurisdiction (Italian jurisdiction does not include rights in rem related to properties situated outside Italy).

In the case of conducts performed in the EU, the Regulation (EU) No. 1215/2012 applies. Under this regulation, Italian courts have jurisdiction in several cases, including when a person is domiciled in Italy and when the damages arose in Italy. Even under the Regulation (EU) No. 1215/2012, Italian jurisdiction does not include rights in rem related to properties situated out of Italy.

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

Interim and injunctive relief are not available under an arbitral tribunal governed by Italian law. Before an ordinary court, a party is entitled to ask for an injunction order (in the case of a payment of receivables); or, where there is likelihood of success on the merit of the case and a danger in the delay (ie, there is the risk that the counterparty dissolves its assets during the ordinary proceedings), a party is entitled to ask for a seizure of the counterparty's assets. These same conditions apply to ask for a precautionary measure (eg, if a party wants to avoid further damages related to the behaviour of a counterparty and asks the court to forbid the other party's conduct).

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

As with any private entity subject to the jurisdiction of Italian courts, a state could be sentenced to compensation for material and personal damages, as well as subject to an order of specific performance.

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

Pursuant to the 1965 Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed by Italy, each contracting state shall designate a central authority, in compliance with its own laws, which will undertake to receive requests for service coming from other contracting states.

Further, Italy applies Regulation (EU) No. 1393/2007 concerning the service in EU member states of judicial and extrajudicial documents in civil or commercial matters. Similarly, Italy shall designate public officials, authorities or other persons competent for the receipt of judicial or extrajudicial documents from another member state.

14 How is process served on a state?

Following the application of the 1965 Convention, the authority designed by each state that is part of the 1965 Convention serves the document or arranges to have it served by an appropriate agency to the head of state or competent minister. In the case of application of Regulation (EU) No. 1393/2007, the head of state or competent minister are notified by the receiving agencies.

In exceptional circumstances, each member state is free to use consular or diplomatic channels to forward judicial documents for the purpose of the service or to the agencies of another member state who are competent for transmitting the document.

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

As with any private person, once a state has been properly served, it is free to decide whether to participate in a pending proceeding. If it does not appear, the court declares it at the first hearing. At the end of the proceeding, the decision issued by default affects the state. Decisions issued by default must be nevertheless be served to the counterparty (ie, the state).

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Pursuant to international customary law, a state's asset related to public services cannot be subjected to any enforcement proceedings; however, a state's asset related to private functions can be subject to enforcement proceedings.

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

Enforcement proceedings before Italian courts are governed by Italian law, including those against a state. Therefore, a foreign state acting as a private entity in the Italian territory is subject to enforcement proceedings according to the rules provided for under the Italian Code of Civil Procedure. This code provides that, to recover its receivables, a creditor is entitled to attach movable and immovable properties of the debtor. Moreover, the creditor is entitled to attach the amount due to its debtor by a third party. The latter applies to the attachment of bank accounts.

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, it does not. The waiver shall always be explicit.

The waiver to immunity from jurisdiction does not imply immunity from enforcement, which shall also always be explicit.

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

The assets that would typically be subject to enforcement are immovable or movable property or credits, and have to be used for private functions or related to private activities.

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.

Immunity from enforcement proceedings can be applied to assets related to public services, such as military assets, goods intended for diplomatic functions and accounts held by an embassy for public functions. In the past, case law gave a restrictive interpretation of immunity stating that it only applies when it is demonstrated that the asset is related to or connected with a public function.

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.

Under Italian case law, courts focus on the purpose of the transaction performed to recognise the immunity of a foreign authority. If a property is used for commercial purposes, it shall be subject to Italian jurisdiction.

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

There is no jurisprudence developing a further test to assess whether the enforcement against a state is permitted.

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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?

The service of an award or a decision follows the rules of the Italian Code of Civil Procedure or the applicable conventions or regulations (see questions 13 and 14).

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

There is no history of enforcement proceedings against a state in Italy (public databases available show less than 50 cases). Arbitral awards are not public and an estimate is not possible.

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

Yes, there are. Any person is entitled to access the register of the Chamber of Commerce and obtain a balance sheet of a company, including those owned by a state. A balance sheet may show, among others, properties owned by the company or its bank accounts. Moreover, a person is entitled to request access to the register where immovable assets are registered and to the register where registered movable assets (eg, cars, ships, helicopters) are listed. Finally, a person can be authorised by a court to access the fiscal data of a counterparty, including data related to a bank account.

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?

An Italian court is not entitled to assist in the identification of a debtor's assets. However, the Italian Code of Civil Procedure provides that the public official in charge of the enforcement is entitled to search a debtor's assets to attach them. Moreover, a debtor shall declare to the public official in charge of the enforcement where the assets available for the attachment are located.

Immunity of international organisations

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

Under Italian law, there are not specific provisions governing the immunity of international organisations. Case law stated that international organisations are covered by immunity when such immunity is provided by Italian law or the international convention that established such international organisations.

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?

International organisations headquartered or operating in Italy that do not have an international legal personality and are not covered by immunity are subject to proceedings before a court or an arbitral tribunal.

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?

The assets held by international organisations are subject to enforcement. There is no case law available in connection with enforcement against international organisations.

Malaysia

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Background

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

Malaysia subscribes to the common law doctrine of restrictive immunity.

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

Articles 32(1) and 181(2) of the Federal Constitution provide the legal basis for immunity against the Rulers in Malaysia; however, legal proceedings may be commenced against the Rulers in the Special Court.

As far as foreign sovereign immunity is concerned, the legal basis is section 3 of the Civil Law Act 1956, which applies the common law in Malaysia (*Village Holdings v Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656).

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

Even though the government has ratified a treaty that binds the government under international law, it has no domestic legal effect unless the legislature passes a law to give effect to that treaty. The following are some examples of statutes passed by Parliament to give effect to treaties concluded by Malaysia:

- the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 to give effect to the provisions of the New York Convention 1958. This piece of national legislation remained in force until it was repealed by the Arbitration Act 2005 as the enabling instrument to recognise the application of the New York Convention in Malaysia;
- the Convention on Settlement of Investment Disputes Act 1966 to give legal effect to the Washington Convention 1965;
- the Geneva Conventions Act 1962, as revised in 1993, to give effect to the Four Geneva Conventions for the Protection of the Victims of War of 1949;
- the Diplomatic Privileges (Vienna Convention) Act 1966, as amended in 1999, to give effect to the Vienna Convention on Diplomatic Relations 1961;
- the Carriage by Air Act 1974, to give effect to the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955 and the Guadalajara Convention of 1961;
- the Exclusive Economic Zone Act 1984, to give effect to certain provisions of the United Nations Convention on the Law of the Sea 1982;
- the International Organisations (Privileges and Immunities) Act 1992, to give effect to the Convention on the Privileges and Immunities of the United Nations 1946;
- the Consular Relations (Privileges and Immunities) Act 1999, to give effect to the Vienna Convention on Consular Relations 1963; and
- The Bilateral Investment Treaties with at least 71 countries around the globe, beginning with its first BIT signed with Germany on 22 December 1960.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

The scope of jurisdictional immunity depends on the international treaties entered by Malaysia. However, the international treaties will not have effect in Malaysia unless they are passed into domestic law by an act of Parliament.

Immunity does not extend to commercial transactions.

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

A state can waive jurisdictional immunity or consent to the exercise of jurisdiction by expressed submission to the jurisdiction of another state (eg, a party to an arbitration agreement or member of international treaties).

Alternatively, jurisdictional immunity can be waived by an implied submission to jurisdiction (eg, by taking part in the arbitration proceedings without raising his or her privilege or making an application to the court to set aside the arbitration award) (*Duff Development Company, Limited v Government of Kelantan and another Respondent* [1924] AC 797).

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?

Jurisdictional immunity is limited to acts of government. It does not extend to commercial transactions entered by the state or sovereign (*Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors* [2018] 7 MLJ 393).

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?

There are certain matters that are non-justiciable in Malaysia, set out in the Federal Constitution, State Constitution and Acts of Parliament. These are, for example, matters considered non-justiciable under the domestic law (ie, the Minister's decision in certain Acts of Parliament, including any proceedings in Parliament); matters that fall within the prerogative of the Ruler; and matters relating to succession of Rulers.

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?

There is no precedent for piercing the corporate veil to subject the state to proceedings faced by a state enterprise. Conversely, state immunity has been extended to certain organisations and representatives of the organisations pursuant to the International Organisations (Privileges and Immunities) Act 1992.

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

There is no case law or provision that prescribes the nexus required for the plaintiff to bring a claim against the state. From a legal perspective, the plaintiff will have the nexus so long as he or she is party to the commercial transaction with the state.

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?

The forum court would have to establish that there are sufficient connecting factors (eg, the whether the parties are domicile of that country, the currency used in the transaction and where the contract was entered into) to that particular country for it to be the appropriate country to exercise jurisdiction over the dispute.

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

Section 11 of the Arbitration Act 2005 provides a list of interim remedies available to parties to an arbitration. Pursuant to section 5 of the Arbitration Act 2005, the federal and state government is bound by the Arbitration Act 2005.

However, the interim remedies available under section 11 of the Arbitration Act 2005 is limited by section 29(1) of the Government Proceeding Act 1956: the courts do not have the power to grant an injunction against the government but may in lieu thereof make an order declaratory of the rights of the parties.

This is applicable to the federal and state government. There does not appear to be a corresponding legislation to cater for foreign states.

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

Pursuant to section 29(1) of the Government Proceeding Act 1956, the court shall have the power to make all such orders as it has in a matter between private citizens. However, the court shall not grant an injunction, make an order for specific performance, or order the recovery of land or property against the state, but may in lieu thereof make a declaration of the rights of the parties.

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

If a treaty relationship exists with a foreign country, the relevant bodies to be served would be identified in the treaties (ie, under the Hague Convention, the service of process is by sending a request to a central authority).

For example, in respect of mutual assistance for criminal matters, the designated authority is the Attorney General of Malaysia.

14 How is process served on a state?

A process can only be served on the state when the sovereign ruler or government submits to the jurisdiction of the court (*Village Holdings v Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656).

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

There is no case law or provision governing this point. However, as process can only be served on the state when the sovereign or government submit to the jurisdiction of the court, it is unlikely that the court may make a substantive judgment against a state that does not participate in the proceedings.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Section 29(1) of the Government Proceedings Act 1956 (GPA) provides that the court shall not make an order for the recovery of land or the delivery of property but may in lieu thereof make an order declaring that the aggrieved party is entitled to the said land or property.

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

Section 33(4) of the GPA provides that:

> *save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs.*

Essentially, the effect of this section is that the only way to enforce a money judgment against the government is by the issue of a certificate (section 33(2) of the GPA). Once a certificate is obtained and the government still refuses to comply with the said money judgment, the aggrieved party may then apply for a mandamus order to compel payment by the government (*Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641).

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. Case law suggested that even if there was some prior contractual agreement to submit, the sovereign can subsequently refuse to be impleaded (*Village Holdings Sdn Bhd v Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656).

Further, article 32(4) of the Vienna Convention on Diplomatic Relations 1961 provides that '[w]aiver of immunity from jurisdiction in respect of administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.'

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

Section 29(1) of the GPA provides that the court shall not make an order for the recovery of land or the delivery of property but may in lieu thereof make an order declaring that the aggrieved party is entitled to the said land or property. In this respect, the courts cannot make an order for delivery of property. The relief therefore generally sought is monetary in nature.

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.

Case law in Malaysia is silent on this point.

However, article 22(3) of the Vienna Convention on Diplomatic Relations 1961 provides that '[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.'

To date, there are no known cases of the diplomatic premises, embassy accounts or mixed embassy accounts of Malaysia having been the subject of any enforcement proceedings, let alone successful enforcement proceedings.

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.

Case law in Malaysia is silent on this point.

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

There is no further test but merely a further procedure to be followed.

The procedure for any enforcement against Malaysia or any of its states in domestic proceedings is set out in section 33 of the GPA (see question 17).

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?

No legislation lays down the process for a state to be served or notified before an arbitration or judgment against it may be enforced.

The Arbitration Act 2005 does not prescribe any service of process or notification before an arbitration award.

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

Yes. There are a number of cases where an arbitration award against the state government has been registered in the High Court; however, as stated above, any form of enforcement against a state is governed by section 33 of the GPA.

A landmark decision on the enforcement proceedings against the government is *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641.

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

No.

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?

No. Order 48 of the Rules of Court 2012, which set out that the procedure to examine of judgment debtor was held not to be an enforcement mechanism available against the government. (*Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; *Menteri Besar Negeri Pahang Daruk Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360.)

Immunity of international organisations

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

Yes. Section 4 of the International Organisations (Privileges and Immunities) Act 1992 laid down the power for the Minister charged with the responsibility for foreign affairs to grant certain privileges and immunities to certain international organisations and persons. These privileges and immunity are contained in the First to Fifth Schedule of the same Act.

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?

Section 10 of the International Organisations (Privileges and Immunities) Act 1992 provides that land may be granted, alienated, leased or transferred to or owned or held by an international organisation.

However, this Act and Malaysian case law is silent on whether such granted land (ie, international organisations headquarters) enjoys legal personality and is subject to legal proceedings.

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?

The international organisations will enjoy enforcement immunity if it is granted by the Minister (see question 27). However, there are no reported cases where debtors sought to enforce against a state by attaching or executing assets held by international organisations.

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Russia

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Background

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

Under the USSR, it was unquestionable that the state enjoyed absolute immunity. However, after the collapse of the Soviet Union and the establishment of the Russian Federation as an independent state, it adopted the restrictive immunity doctrine. In other words, the state does not enjoy sovereign immunity with respect to its commercial acts if they are not performed when exercising state functions.

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

The doctrine of sovereign immunity is based on a number of legislative provisions.

The Russian Civil Code of 1994 provides that Russia may enter into civil and commercial relationships on equal footing with natural persons and legal entities. Civil and commercial claims against Russia may also be enforced against state assets, with the exception of assets that may only be held by the state (eg, federal roads or rivers).

In 2015, Russia adopted Federal Law No. 297-FZ on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation (the Law on Jurisdictional Immunity), which is largely based on the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (the Convention), which Russia signed in 2006 but never ratified. The relevant provisions were also introduced in the procedural legislation to mirror the corresponding provisions of the Law on Jurisdictional Immunity.

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

Russia is not party to the 1972 European Convention on State Immunity.

Russia signed but never ratified the UN Convention on Jurisdictional Immunities; however, the provisions of the Convention have been largely adopted in the Law on Jurisdictional Immunity.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

The main statutory source setting the regime for sovereign immunity in Russia is the Law on Jurisdictional Immunity, which provides for limited sovereign immunity and adopts the restrictive immunity doctrine (see question 1).

Sovereign immunity from claims submitted by foreign persons is mostly unregulated and should follow the general rule that Russia does not enjoy sovereign immunity in civil and commercial relationships.

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

A state can waive immunity or consent to the exercise of jurisdiction by means of an international agreement, written consent or declaration before the court. These cannot be revoked. The law also expressly provides that consent cannot be derived from the foreign state's participation in the proceedings for the sole purpose of invoking immunity, or asserting a right or interest in property that is at issue in the proceedings.

The foreign state's consent to the application of Russian law in relation to a particular dispute, its non-participation in the proceedings and its involvement of a state representative as a witness or expert in the proceedings do not constitute consent to the exercise of jurisdiction.

Generally, consent to the exercise of jurisdiction in relation to a particular dispute does not affect the foreign state's immunity from provisional measures and enforcement.

A state will have waived immunity if it submits a claim to a Russian court or otherwise participates in court proceedings on the merits of a claim, and such waiver will include counterclaims. A state will not be allowed to refer to immunity with regard to court proceedings relating to an arbitration agreement concluded by the state.

The Law on Jurisdictional Immunity distinguishes between immunity against a state court's jurisdiction on the merits, immunity against provisional and interim measures, and immunity against enforcement. Each of these immunities may need to be waived separately. For example, in the most recent case on the matter (*Tatneft v Ukraine*, Case No. 40-67511/2017), the claimant sought to enforce in Russia an award rendered by a UNCITRAL tribunal in an investment dispute against Ukraine. While the court of first instance accepted Ukraine's immunity, this decision was overruled by the court of cassation, which noted that, as Ukraine consented to arbitrate the dispute with the investor and participated in the proceedings, it cannot invoke jurisdictional immunity at the enforcement stage. At the time of writing, the case was being reheard by the first instance court.

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?

Irrespective of the state's waiver, states do not enjoy immunity from suits arising out of commercial or civil law dealings of the state if the transactions were not connected with the state exercising its sovereign authority. This includes private transactions with individuals and legal entities, and other commercial acts undertaken in Russia or abroad that have effect in Russia. The court will be guided by both the nature and purpose of the transaction in question.

In addition, the law provides that immunity from a state court's jurisdiction cannot be invoked in disputes involving:

- employment contracts;
- participation in companies and other collective bodies;
- property rights;
- personal injury and damage to property;
- intellectual and industrial property; and
- civil ships that are owned and operated by the state.

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?

Certain exceptions apply in the context of labour disputes. For example, Russian courts would not generally have jurisdiction in a labour dispute involving a foreign state's embassy or consulate. Otherwise,

court practice has not yet developed any principles preventing courts from taking jurisdiction if one of these exceptions apply.

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?

As a general rule, dealings of state enterprises cannot be attributed to the state and, hence, would not affect state immunity.

There is only one reported case where the claimant attempted to pierce the corporate veil, which held the region of Moscow liable for the acts of one of its bodies: in 2013, a German claimant, S+T Handelsgesellschaft mbH & Co KG, won an arbitration proceeding administered by the International Commercial Arbitration Court (ICAC) at the Russian Chamber of Commerce and Industry. The tribunal agreed to hold a construction department of the region of Moscow liable to pay damages and effectively pierced the corporate veil to drag the government of Moscow to arbitration and hold it liable for the acts of the aforementioned department.

The Supreme Arbitrazh Court set the award aside, noting that piercing of the corporate veil is not possible as the relationship between the construction department and government of Moscow lie beyond the domain of private law, and no law allows piercing of the corporate veil between public bodies.

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

Russian procedural law does not provide for a specific nexus the plaintiff would need to have to bring a claim against the state.

As a general rule, however, the claim may be brought before the place of incorporation of the respondent or where the respondent's property is located. Consequently, the plaintiff may need to be able to show that the respondent's state's assets are within the jurisdiction of Russian courts to bring a claim. This would be the case in the context of enforcement of arbitral awards against a foreign state in Russia.

It should be noted, however, that there is no clear court practice in this regard.

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?

Russian courts would primarily exercise jurisdiction if the property or conduct is in the territory of Russia. The Law on Jurisdictional Immunity would apply if the conduct, such as a transaction entered into by the state, has at least some effect or consequences in Russia.

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

Consent to the exercise of jurisdiction or waiver of immunity from jurisdiction of a Russian court does not affect immunity from provisional measures. A state can therefore invoke these immunities unless it has expressly consented to the exercise of jurisdiction in relation to provisional measures or enforcement; or has allocated or earmarked property for satisfaction of the claim that is the object of the proceedings.

Subject to the above, interim measures are available against a state, including the prohibition of certain action and freezing of assets. However, in practice it is difficult to obtain interim measures from Russian courts because the courts have set a very high threshold for the applicant to satisfy the court that the measures are needed in a particular case. There have been no attempts so far to obtain interim measures from Russian courts against a foreign state.

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

There is no specific constraint or limitation on what types of final relief are available against a state. When it comes to civil and commercial matters, specific performance is usually a primary remedy as a matter of Russian law.

Update and trends

The court practice in the area of state immunity is very limited. This may be owing to the Law on Jurisdictional Immunity only being adopted in 2015; before that, there was virtually no legislation in this area. To what extent the adoption of this law would make Russia a popular destination for enforcement of claims, awards and judgments against foreign states remains to be seen.

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

The procedure for the service of process on a foreign state can be provided for in an international treaty. If no such treaty exists, the service of process is effected through diplomatic channels with the assistance of the Ministry of Justice and the Ministry of Foreign Affairs.

There is no specific state organ to be served with the proceedings issued against Russia. Usually, the service will be made on the relevant state organ that was involved in the acts giving rise to the claim.

14 How is process served on a state?

As a general rule, the Russian court would send notice to the Ministry of Justice, which would hand it over to the Ministry of Foreign Affairs for serving on the foreign state through diplomatic channels.

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

The court may proceed with the hearing and render a judgment even if the foreign state does not participate in the proceedings if:

- the foreign state is appropriately notified (see above);
- no less than six months have passed since the date when the notice was handed to the foreign state; and
- the state did not request reasonable extension, or the request has been rejected.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Generally, the enforcement immunity cannot be relied upon if it has been waived.

Further, immunity from enforcement cannot be invoked if the property in question is used or intended for use by the foreign state for purposes unrelated to the exercise of sovereign powers. The Law on Jurisdictional Immunity includes the list of assets that are presumed to be used for the exercise of sovereign powers, namely:

- property used for diplomatic or military purposes;
- items of cultural heritage or archives that are not intended for sale;
- property that forms part of various scientific, cultural or historical exhibitions not intended for sale; and
- property of the central bank or another supervisory body of a foreign state that is responsible for bank supervision.

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

Yes, usual laws and provisions on execution of judgments would apply to enforcement against states.

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, consent to jurisdiction or the waiver of immunity by a state would not automatically result in consent for enforcement; a separate waiver would be needed for enforcement purposes. However, to enforce a judgment against state assets used for purposes unrelated to the exercise of sovereign powers, no additional consent or waiver is necessary.

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

Usually, the enforcement would be sought against the property used for commercial purposes. The burden would be on the applicant to show the property is used for commercial or other non-sovereign purposes.

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.

The Law on Jurisdictional Immunity includes the list of assets that are presumed to be used for the exercise of sovereign powers and hence covered by enforcement immunity (see question 16).

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.

In accordance with article 16(1)(5) of the Law on Jurisdictional Immunity, property of the central bank or another supervisory body of a foreign state that is responsible for bank supervision is covered by enforcement immunity.

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

There are no further tests to satisfy to seek enforcement against a state. However, it should be noted that domestic jurisprudence on the matter is very limited.

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?

The state will need to be notified of the proceedings issued against it for the purposes of enforcement. The process of service is the same as the above.

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

The most relevant – if not only – case in this regard concerns the pending enforcement proceedings brought by the Russian state company Tatneft against Ukraine (Case No. 40-67511/2017). Tatneft sought to enforce in Russia an award rendered by a UNCITRAL tribunal in an investment dispute against Ukraine. While the court of first instance accepted Ukraine's immunity, this decision was overruled by the court of cassation.

The court of cassation noted that, as Ukraine consented to arbitrate the dispute with the investor and participated in the proceedings, it cannot invoke jurisdictional immunity at the enforcement stage. At the time of writing, the case was being reheard by the court of first instance. However, the parties have not yet discussed which Ukrainian assets in Russia are covered by enforcement immunity.

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

There is no such public database. The existing databases, such as the Unified Register of Property Rights, which contains information about the owners of real property in Russia, only allow searches by property, but not by name of the owner. Consequently, the property rights of a state can only be checked with respect to a particular asset.

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?

The courts may assist parties with collecting information that the parties cannot obtain by themselves, but there is no general power to help identify assets held by a state any other debtor in Russia. Accordingly, it would be for the claimant to identify relevant assets. Court bailiffs dealing with enforcement are empowered to search for assets owed by a debtor, and this is seemingly not prevented by immunity.

Immunity of international organisations

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

International organisations generally enjoy immunity specified in the applicable international treaty. Russian procedural codes only provide that the immunity of an international organisation has to be waived in accordance with the rules of such organisation.

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?

International organisations headquartered or operating in Russia enjoy immunity according to the applicable international treaty, and particularly where the relevant relationships are not of a commercial nature.

In 2011 (Case No. 40-43483/06-91-295), the Presidium of the Supreme Arbitrazh Court of Russia addressed the question of immunity of Interelectro, an international organisation headquartered in Moscow. The claim concerned rent agreement concluded by Interelectro. The Presidium held that payment of rent was not a commercial activity, as the sole purposes of the rented space was to provide offices for the organisation itself and not for commercial purposes.

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?

International organisations enjoy immunity prescribed by relevant treaties, particularly where the relevant relationships are not of a

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commercial nature. There are no publicly known cases where enforcement against a state was sought by means of enforcing against assets of an international organisation, and there are no reported cases where the enforcement against a state was sought by means of attaching the assets held by international organisation.

Switzerland

Sandrine Giroud and Veijo Heiskanen

LALIVE

Background

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

Switzerland has adopted a restrictive concept of state immunity. Accordingly, it distinguishes between matters involving foreign states acting in a sovereign capacity (*acta jure imperii*) and matters involving foreign states acting in a private capacity (*acta jure gestionis*). In the case of *acta jure imperii*, state immunity applies, and the state cannot be a party to proceedings before Swiss courts, nor can its assets be subject to measures of constraint. By contrast, in the case of *acta jure gestionis*, sovereign immunity may be lifted, provided the matter has a 'sufficient' connection with Switzerland.

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

There is no legislation concerning sovereign immunity in Switzerland. The issue is mainly governed by case law, in particular that of the Swiss Federal Supreme Court.

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

Switzerland is a party to a number of international treaties that apply directly, such as the European Convention on State Immunity of 1972 (the European Immunity Convention); the Additional Protocol to the Convention for the Establishment of a European Court for State Immunity of 1972; and the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 (the UN Immunity Convention), which was ratified by Switzerland on 16 April 2010 and will enter into force once ratified by 30 states, Switzerland being the ninth contracting party.

Switzerland made the following declaration regarding the European Immunity Convention: 'with Article 24 of the Convention, that in cases not falling within Articles 1 to 13, the Swiss courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not Party to the present Convention'.

Switzerland also made the following interpretative declarations in relation to the UN Immunity Convention:

- the Convention does not cover criminal proceedings;
- article 12 does not govern the question of pecuniary compensation for serious human rights violations that are alleged to be attributable to a state and are committed outside the state of the forum; consequently, the Convention is without prejudice to developments in international law in this regard; and
- service of process to a Swiss canton shall be made in the official language or one of the official languages of the canton in which process is to be served.

Although the UN Immunity Convention is not yet in force, it has already been considered in certain cases by the Swiss courts as a codification of customary international law regarding immunity from jurisdiction (see, however, Federal Supreme Court Decision 2C_820/2014, where the Federal Supreme Court left open the question of whether generally the provisions of the UN Immunity Convention could be invoked as customary international law). The UN Immunity Convention will not affect the rights and obligations of states under other international agreements relating to state immunity (eg, the European Immunity Convention). Given the limited scope of the European Immunity Convention, Switzerland has announced its intention to denounce it once the UN Immunity Convention enters into force.

Switzerland is also party to multilateral instruments that have a bearing on the regime of immunity from jurisdiction, such as the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations, respectively, and the 1958 Convention on High Seas.

Further, Switzerland is the home of many international organisations with which it has entered into headquarters agreements. Most of these agreements contain provisions relating to the immunity of the organisation. The 2007 Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (the Host State Act), as well as the corresponding Ordinance, set out, among others, the possible beneficiaries of privileges, immunities and facilities in accordance with international law.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

As stated under question 1, Switzerland has adopted a restrictive concept of jurisdictional immunity.

Exceptions to immunity from jurisdiction are essentially based on the case law of the Swiss Federal Supreme Court, which has consistently applied the concept of sovereign immunity restrictively. A distinction is made between cases in which the foreign state acts in its sovereign capacity, where immunity from jurisdiction is applicable, and cases in which the foreign state acts in a private capacity. In respect of the latter, cases may be brought before a Swiss court if the transaction out of which the claim against the foreign state arises has a sufficient connection to Switzerland.

The requirement of a connection to Switzerland arises exclusively under Swiss law and is not a matter of customary international law, and has been criticised by some scholars as preventing access to justice. The requirement is met and the required connection is established, for instance, when the claim originated or had to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland or the existence of a claim based on an award rendered by an arbitral tribunal seated in Switzerland does not create such a connection. The principal criterion to distinguish between *acta jure imperii* and *acta jure gestionis* is the nature of the transaction rather than its purpose.

Absence of immunity relates to the competence ratione materiae of the court and is, therefore, under Swiss law, a requirement for the admissibility of the claim (article 59 Swiss Code of Civil Procedure). In principle, this requirement must be examined ex officio by the judge before turning to the merits of the case (article 60 Swiss Code of Civil Procedure; see, however, the Geneva Court's decision of 29 January 2013 cited in Federal Supreme Court Decision 5A_200/2013) and must still exist at the time the judgment is rendered. If the plea of immunity succeeds, the court seized must decline jurisdiction to hear the case.

As to the scope of the concept of state and its instrumentalities, Switzerland adopts the common definition of state under international

law and, accordingly, a state will be recognised as such when the following three elements exist: a population, a delimited territory, and a public authority capable of effectively exercising sovereign power internally and externally. The Swiss practice is generally to recognise the existence of a state (but not of a government) when these elements are objectively met; however, Switzerland reserves the right to consider other elements, such as general recognition by the international community.

According to the relevant case law and legal doctrine, agencies and instrumentalities of the state or other entities also fall under the concept of 'state' to the extent that they are entitled to perform and are actually performing acts involving the exercise of sovereign authority.

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

A state may choose to waive its immunity from jurisdiction. For the waiver of immunity from jurisdiction to be valid, the state must consent to the exercise by the Swiss courts of jurisdiction over the dispute explicitly or implicitly. There is little case law on the issue, but generally, the state's consent may be considered given by entering into an arbitration agreement or by agreeing to a jurisdictional clause referring a dispute to Swiss courts, or if the state proceeds to the merits of a case without contesting the court's jurisdiction or raises a counterclaim.

As to the particular case of arbitration proceedings, by entering into an arbitration agreement, a state waives the right to invoke its immunity from jurisdiction with regard to both the arbitral tribunal and the local courts that are competent to exercise judicial review and supervisory powers over the arbitral proceedings. The question has, however, not been resolved by the Swiss Federal Supreme Court (*MINE v Guinea*, 4 December 1985). This is in line with the UN Immunity Convention, whereby a state that agrees in writing to submit to arbitration disputes related to a commercial transaction, cannot invoke immunity from jurisdiction in court proceedings regarding the validity, interpretation or application of the arbitration agreement, the arbitration procedure or the confirmation or setting aside of the award (article 17). Moreover, article 177(2) of the Private International Law Act provides that if a party to an arbitration agreement is a state or an enterprise, or an organisation controlled by a state, it may not invoke its own law to contest the arbitrability of a dispute or its capacity to be a party to arbitration.

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?

Exceptions to immunity from jurisdiction are essentially based on the case law of the Swiss Federal Supreme Court, which has consistently applied the concept of sovereign immunity restrictively (see question 4). The requirement of a connection to Switzerland arises exclusively under Swiss law and is not a matter of customary international law.

The current Swiss practice does not depart significantly from the UN Immunity Convention, which provides that a state cannot invoke immunity from jurisdiction in respect of proceedings concerning:

- commercial transactions;
- contracts of employment;
- personal injury and damage to property;
- determination of rights of ownership;
- possession and use of property;
- intellectual and industrial property;
- participation in companies or other collective bodies; and
- ships owned or operated by a state.

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?

There are no further doctrines or principles in addition to those set out in question 6 that would give rise to an exception from jurisdiction in relation to sovereign immunity. Under Swiss law, there are no doctrines such as non-justiciability of certain disputes or act of state.

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?

The legal doctrine and the limited case law of the Swiss Federal Supreme Court confirm the application (although restrictive) of the theory of piercing of the corporate veil in cases involving foreign states and connected persons. Exceptional circumstances are required. Mere economic identity between the state and the state-owned corporate body is not sufficient; the corporate body must have been manifestly put forward by the state in bad faith.

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

As mentioned under question 4, for a plaintiff to have standing to bring a claim against a state, the foreign state must have acted in a private capacity, and the transaction out of which the claim against the foreign state arises must have a sufficient connection to Switzerland (see question 4). Apart from these rules, ordinary rules on jurisdiction as set out in the Private International Law Act and, as the case may be, the Swiss Code of Civil Procedure, will apply to determine whether Swiss courts have jurisdiction.

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?

The conditions set out under question 9 will apply.

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

A distinction must be made between proceedings before state courts and before an arbitral tribunal.

As to arbitration proceedings, as stated under question 5, by entering into an arbitration agreement, a foreign state waives its right to assert a plea of immunity. Consequently, interim or injunctive relief could be issued by an arbitral tribunal pursuant to the rules applicable to the arbitration proceedings.

As to Swiss court proceedings, ordinary interim or injunctive relief will be available provided there is no immunity from jurisdiction (see questions 4 and 5 regarding the scope or waiver of immunity from jurisdiction).

As to interim or injunctive relief, Swiss law distinguishes between non-monetary and monetary claims. While enforcement of the former is regulated by the Swiss Code of Civil Procedure, enforcement of the latter is regulated by the Swiss Debt Enforcement and Bankruptcy Act. Interim relief, both before a claim has been filed or during the proceedings, can be requested by way of interim measures for non-monetary claims and attachment for monetary claims.

Swiss courts can order any interim measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 et seq Swiss Code of Civil Procedure). In particular, such interim relief can take the form of:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registry or third party;
- performance in kind; or
- the remittance of a sum of money (if provided by law).

In practice, interim measures that are frequently requested are the registration of property rights in a public register, such as the land register. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or movable property. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party. Moreover, while pretrial discovery is alien to Swiss civil procedure, the Swiss Code of Civil Procedure allows the taking of evidence before the initiation of legal proceedings exclusively in cases where evidence is at risk or where the applicant has a justified interest.

In the context of a monetary claim, assets may be frozen by way of attachment proceedings (article 272 et seq Swiss Debt Enforcement

and Bankruptcy Act). An attachment is granted ex parte and must subsequently be validated. In support of its application, the applicant must, prima facie:

- show a claim against the debtor;
- identify assets of the debtor that can be attached; and
- show that one of the specific grounds for attachment, as set out by law, exists (eg, if the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a recognition of debt; or if the creditor holds an enforceable title, such as judgment or award, against the debtor).

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

The relief available will depend on the applicable law. Under Swiss law, when issuing judgments on the merits, a court is not limited to monetary relief. It can also issue judgments for specific performance, declaratory judgments, cease-and-desist orders, judgments changing a legal right or status and partial judgments. Final relief granted in foreign judgments is generally recognised under Swiss domestic law unless they violate Swiss public order (eg, punitive damages).

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

Under Swiss law, service is handled by courts directly after the claimant has filed a claim. According to the legal doctrine and the Guidelines of the Swiss Federal Office of Justice, the same procedural requirements apply to court proceedings resulting from an application to secure the enforcement of an arbitral award against a foreign state and to proceedings for enforcement of a court judgment involving a foreign state.

For service on foreign states, article 16 of the European Immunity Convention applies by analogy; that is, service must proceed via diplomatic channels. The Swiss Federal Supreme Court does not yet recognise the time limits foreseen in the UN Immunity Convention for service as amounting to customary international law, and if the foreign state elects domicile with its mission, legal proceedings shall be served on the mission. The same holds true if the foreign state elects domicile with a lawyer. Reasonable time limits must also lapse before the court can enter a judgment by default against the foreign state and before the judgment becomes final (exhaustion of the right of appeal). According to the legal doctrine, state entities with a separate legal personality can be served in the same way as private entities.

14 How is process served on a state?

See question 13 with regard to service on foreign states.

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

Provided Swiss courts have jurisdiction, a judgment may be rendered against a state that does not participate in the proceedings if the foreign state has been duly served with the proceedings. This assumes that the claim and the service of process are made in an internationally admissible manner to the competent organ of the foreign state and that the state was granted a reasonable period of time to respond.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

The Swiss Federal Supreme Court treats immunity as a single concept and makes no distinction between immunity from jurisdiction and immunity from enforcement. The requirements set out in relation to jurisdictional immunity under question 4 applies mutatis mutandis to immunity from execution. The only particular feature of immunity in the context of enforcement is that assets that are linked to the acts of a state in the exercise of its functions as a public authority benefit from immunity, while assets that are linked to the private or commercial activities of a state do not.

Accordingly, the Swiss practice conditions enforcement measures against foreign sovereign states and related persons on three cumulative requirements:

- the foreign state must have acted in its private capacity and not in its sovereign capacity;
- the transaction out of which the claim against the foreign state arises must have a sufficient connection to Switzerland (see question 4); and
- the assets targeted by the enforcement measures must not be earmarked for tasks that are part of the foreign state's duty as a public authority, which are excluded from enforcement proceedings pursuant to article 92(1) of the Federal Debt Collection and Bankruptcy Act (Federal Supreme Court Decision 5A.681/2011).

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

Yes. General debt collection statutes and enforcement provisions apply, subject to the reservation set out under question 16 and specific provisions excluding enforcement on the ground of immunity, such as article 92(1) of the Federal Debt Collection and Bankruptcy Act, which provides that enforcement is excluded in relation to assets belonging to a foreign state or a central bank and earmarked for tasks that are part of their duty as public authorities.

Switzerland is also party to a number of international treaties that apply directly in this context, including the Conventions mentioned under question 3.

Finally, Switzerland is party to special multilateral instruments that have a bearing on the regime of immunity from enforcement:

- the 1961 and 1963 Vienna Conventions on Diplomatic Relations (articles 22, 30 and 31) on Consular Relations (article 31);
- the 1933 Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft;
- the 1944 Convention on International Civil Aviation;
- the 1948 Convention on the International Recognition of Rights in Aircraft;
- the 1926 International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages;
- the 1952 International Convention relating to the Arrest of Seagoing Ships; and
- the 1958 Convention on High Seas.

Further, Switzerland is the home of many international organisations with which it has entered into headquarters agreements. Most of these agreements include provisions relating to the immunity of enforcement against the assets they hold or against their employees. The Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (the Host State Act) as well as the corresponding Ordinance set out, inter alia, the possible beneficiaries of privileges, immunities and facilities in accordance with international law.

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?

A state can waive its immunity from enforcement by a clear and unequivocal statement, either explicitly or by conclusive acts. There can only be a waiver of immunity insofar as an immunity exists (ie, in respect of *acta jure imperii*).

The legal doctrine agrees that an explicit waiver may be contained in a treaty, an agreement or a binding contract or any other statement made in writing. A waiver may be implied where the state has earmarked funds or other assets specifically for the purpose of settling disputes or making payments for the debts incurred in relation to the transaction in dispute. A waiver may also be implied where the state, or the 'appearance' of a state, initiates court proceedings to defend a lawsuit before a court without raising a plea of immunity (Federal Supreme Court Decision 4A_541/2009). The legal doctrine is divided on whether entering into an arbitration agreement can alone imply a waiver of any immunity from enforcement. The most likely position is that the state's agreement to arbitrate will not imply a waiver of its immunity from enforcement, absent other conclusive acts.

Articles 32 of the Vienna Convention on Diplomatic Relations and 45 of the Vienna Convention on Consular Relations provide that a waiver must be express. Moreover, these conventions expressly provide that a waiver of immunity from jurisdiction does not imply a waiver of immunity from enforcement; separate waivers are required.

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

Any property located in Switzerland belonging to the state or its instrumentalities is subject to enforcement, with the exception of assets referred to under question 20. In general, such assets include all assets used or intended to be used for commercial purposes.

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.

Pursuant to article 92(1) of the Debt Collection and Bankruptcy Act, enforcement is excluded with respect to 'assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities'.

The concept of tasks belonging to a public authority is broadly interpreted by the Swiss Federal Supreme Court. It always includes the assets of diplomatic missions and generally includes cultural goods (items of significant cultural importance specific to the country's heritage). However, the Swiss Federal Supreme Court has considered that a dispute relating to a lease agreement entered into by the state was not covered by the immunity from enforcement. Further, whether in the form of cash or held on bank accounts, money is exempt from seizure only if clearly earmarked for concrete public purposes, which implies a separation from other assets. However, bank accounts and other assets belonging to an embassy are presumed to be for public purpose and are thus immune from enforcement. The same applies to funds specifically allocated to the purchase of arms; the rolling stock of a state railway company; the shares of an international corporation created by an international agreement but performing public functions; and a cultural centre or buildings for foreign citizens run by a foreign consulate in Switzerland. Swiss case law has also recognised overflight rights as assets falling under *acta jure imperii* and thus immune from enforcement.

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.

See question 16. Pursuant to article 92(1) of the Debt Collection and Bankruptcy Act, enforcement is excluded with respect to 'assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities'. Accordingly, property intended for performance of acts of public authority will be considered immune from enforcement, while property intended for private acts will be subject to execution.

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

As mentioned under questions 1 and 16, Swiss law requires a sufficient connection to Switzerland to allow lifting of sovereign immunity. As noted above, the connection to Switzerland arises exclusively under Swiss law and is not a matter of customary international law. The connection is established for instance when the claim originated or had to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland or the existence of a claim based on an award rendered by an arbitral tribunal seated in Switzerland does not create such a connection.

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?

See questions 13 and 14.

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

Yes. One of the leading wealth centres in the world and the host of many international organisations, Switzerland is a popular place for enforcement proceedings, including against states. There are, however, no statistics as to what extent these proceedings are based on arbitral awards. Some information is available in the ASA Bulletin, which is the official journal of the Swiss Arbitration Association (available at: www.arbitration-ch.org/en/publications/asa-bulletin/index.html) and includes leading decisions of Swiss courts to the extent that they enter the public domain.

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

No, there are no public databases identifying assets held by states or their instrumentalities.

However, there are several publicly available sources that provide information on assets located in Switzerland. In particular:

- The commercial register provides information on companies (eg, share capital, legal seat, address and corporate purpose). Each canton maintains its own register, which is freely accessible. A summary version of the commercial register is available online.
- The Swiss Official Gazette of Commerce, in addition to gathering some of the information published in cantonal commercial registers, provides information regarding bankruptcies, composition agreements, debt enforcement, calls to creditors, lost titles, precious metal control, other legal publications, balances and company notices.
- The land register records every single plot of land in Switzerland, with the exception of property in the public domain. Each canton maintains its own land register, which can be consulted upon the showing of a legitimate interest (eg, for purposes of contractual negotiations for the purchase of a property).
- The Swiss aircraft registry contains the records of all Swiss-registered aircraft and provides detailed information regarding the owner and the holder, the type of aircraft, its year of construction, the serial number, the maximum take-off mass and the fee according to its noise level.
- The debt enforcement and bankruptcy register includes all debt collection proceedings filed against a debtor, and can be consulted by anyone showing a prima facie legitimate interest, upon request. An unofficial will register that records wills and other testamentary dispositions also exists. This register is, however, not exhaustive and only contains information that has been provided voluntarily;
- In specific cantons (eg, Vaud and Fribourg), it is possible, under certain conditions, to access information contained in a person's tax certificate.
- Judgments rendered by civil courts are, in principle, accessible to the public (article 54 Swiss Code of Civil Procedure); a copy thereof is generally provided in a redacted form upon showing of a legitimate interest.

There is no register of bank accounts in Switzerland and Swiss banking secrecy protects the privacy of banks' clients.

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?

Swiss civil courts are not competent to assist with or otherwise intervene to help identify assets held by a foreign state or its instrumentalities. Moreover, there is no discovery process available under Swiss civil procedural law.

Immunity of international organisations

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

Yes. Switzerland is the home of many international organisations with which it has entered into headquarters agreements. Most of these agreements contain provisions relating to immunity.

The 2007 Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (the

Host State Act), as well as the corresponding Ordinance, set out, inter alia, the possible beneficiaries of privileges, immunities and facilities within the framework of international law. The Host State Act provides for different categories of organisations that qualify for privileges, immunities and facilities of varying scope. Switzerland has entered into host state agreements with organisations seated in Switzerland, setting out the status of the organisation as well as the extent of the immunity granted to it.

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?

Switzerland recognises the legal personality of international organisations as provided under international law.

Generally, international organisations headquartered or operating in Switzerland are immune from jurisdiction under their respective headquarters agreement with Switzerland. In general, these agreements provide that the organisation benefits for itself and for its property of immunity from any form of legal action, except to the extent that immunity has been formally waived by the director of the organisation or a duly authorised representative.

Subject to this reservation, an international organisation headquartered or operating in Switzerland may be subject to ordinary proceedings in Switzerland.

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?

See question 28.

There have been several attempts to attach assets held by the Bank for International Settlements.

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Background

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

The concept of state immunity that applies in the United Kingdom is that of restrictive immunity. As further explained under question 2, the statute giving effect to the doctrine of restrictive immunity is the State Immunity Act 1978, which came into force on 22 November 1978. This means that the immunity of a foreign state is not absolute but restricted to acts of a governmental nature (*acta jure imperii*). Therefore, acts of a commercial nature (*acta jure gestionis*) do not enjoy immunity. As Lord Denning MR eloquently put it in *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529, '[g]overnments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature.' It is, therefore, only in respect of its sovereign activities that a state may reasonably expect to be immune from proceedings in a foreign court.

The doctrine of state immunity only applies to foreign states. It does not, therefore, apply to the UK. Instead, the common law doctrine of Crown immunity applies to the UK itself and its state organs. The statute relating to the civil liabilities and rights of the Crown, and to civil proceedings by and against the Crown, is the Crown Proceedings Act 1947 (as amended).

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

The law of state immunity derives from international law, but the manner of its application in the UK is determined by the State Immunity Act 1978 (the Act). Specifically, section 1 of the Act establishes that the UK courts have no jurisdiction to adjudicate disputes against other states unless one of the exceptions described in the Act applies.

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

The UK is party to the 1972 European Convention on State Immunity. Specifically, the 1972 Convention was signed on 16 May 1972, ratified on 3 July 1979 and entered into force in the UK on 4 October 1979. The Convention has been extended to the following territories: British Antarctic Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Guernsey, Isle of Man, Jersey, Montserrat, Pitcairn Islands, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, St Helena, and Turks and Caicos.

The UK signed the United Nations Convention on Jurisdictional Immunities of States and Their Property on 30 September 2005, but has not yet ratified it. This treaty has not yet entered into force.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Jurisdictional immunity covers the state itself and its various organs, agencies and instrumentalities, and extends to all activities unless specifically excepted in the Act (see sections 2 to 11). Pursuant to section 14(1) of the Act, the term 'state' encapsulates the sovereign or other head of that state in his or her public capacity; the government of that state; and any department of that government, but does not include entities that are 'distinct from the executive organs of the government of the State and capable of suing or being sued' (ie, separate entities). According to section 14(2) of the Act, such separate entities are only immune if the proceedings relate to acts performed in the exercise of sovereign authority, and the circumstances are such that a state would have been so immune.

Whether a territory is a state is settled by a certificate from the Secretary of State for Foreign and Commonwealth Affairs.

A constituent territory of a federal state is only immune if an Order in Council so states. Therefore, absent an Order in Council, a constituent territory will be treated as a 'separate entity' (section 14(6) of the Act). For example, in *Pocket Kings v Safenames*, the English High Court held that the US state of Kentucky was a constituent territory of the sovereign federal state of the US and not entitled to immunity because it was not a sovereign state. Further, it was not entitled to immunity as a separate entity because it had not acted 'in the exercise of sovereign authority' (section 14(2) of the Act).

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

States may submit to the jurisdiction of the UK courts by prior written agreement; submitting to the jurisdiction of the courts of the UK after the dispute has arisen; and instituting or carrying out steps in relation to proceedings (other than for the purpose of claiming immunity). Once waiver or consent is effectuated, it is irrevocable.

Pursuant to section 9 of the Act, 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 [UK, which] relate to the arbitration'.

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?

Apart from submission to arbitration or submission to the jurisdiction of the UK courts by a choice of courts agreement, sections 3 to 11 of the Act also establish the following exceptions to state immunity:

- commercial activities;
- contracts of employment;
- personal injury and damage to property if they occur in the UK;
- interests or obligations arising out of property rights;
- patent, trademarks and similar industrial and intellectual property rights (such as designs, copyright, the right to use a trade or business name) ;
- proceedings relating to a state's membership of a body corporate, an unincorporated body or a partnership that has members other than states and is incorporated or constituted under the law of the UK, or is controlled from or has its principal place of business in the UK;
- admiralty proceedings (or proceedings on any claim that could be made the subject of admiralty proceedings) concerning ships that were in use or were intended for use for commercial purposes; and
- proceedings relating to a state's liability for value added tax, any duty of customs or excise or any agricultural levy or rates in respect of premises occupied by it for commercial purposes.

All of these are exceptions to jurisdictional immunity and do not in themselves overcome enforcement immunity.

Section 3 of the Act draws a distinction between 'commercial transactions' and contractual obligations that are performed wholly or partly in the UK. A 'commercial transaction' means 'any contract for the supply of goods or services', '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 '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'.

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?

In addition to sovereign immunity, the principle of non-justiciability and the act of state doctrine could also prevent a court in the UK from exercising jurisdiction over the state in question. The (foreign) act of state can be pleaded as a defence requiring a UK court to exercise restraint in disputes involving governmental or legislative acts of foreign states in their territory. Non-justiciability prevents a UK court from hearing matters involving a state's conduct of international relations. Depending, therefore, on the circumstances, failing or winning on immunity grounds may not be the end of the matter, since the claim may still be rejected on one of these other grounds.

In *Reliance Industries*, the English High Court (per Popplewell J) held that the act of state doctrine applies to arbitration just as it applies to court litigation (*Reliance Industries Ltd and another v Union of India* [2018] EWHC 822 (Comm)).

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?

As explained under question 4, section 14(1) of the Act provides that a separate entity is an entity that 'is distinct from the executive organs of the government of the State and capable of suing or being sued'. Pursuant to section 14(2) of the Act, such entity enjoys jurisdictional immunity only if the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a state would have been so immune. For example, if entities such as a national airline or other state-owned company are acting in the exercise of sovereign authority, they enjoy jurisdictional immunity.

However, to determine whether such entities will enjoy immunity, it needs to be established that the entity in question is separate from the state; that the entity acted in the exercise of sovereign authority; and that, if such act were performed by a state, it would have been immune in the circumstances. This is a complex inquiry, which often leads to heated legal debates and legal battles, as is evidenced in the recent decision of the Supreme Court in *Taurus* (see *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64; see also *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27, where Lord Mance called for 'more nuanced principles governing immunity').

In short, the question depends on all the circumstances and the fact that an entity is controlled by a state is not to be considered conclusive. Indeed, in *Tsavliris Salvage (International) Ltd v The Grain Board of Iraq* [2008] EWHC 612 (Comm), Gross J held that the fact that a salvage contract was intended to benefit the interests of a state (ie, Iraq), could not do away with the fact that such contracts represent typical and ordinary commercial transactions, and therefore do not involve the exercise of sovereign authority (see also *Wilhelm Finance Inc v Ente Administrador Del Astillero Rio Santiago* [2009] EWHC 1074, which held that an Argentine shipyard set up by government decree to build ships for the Argentine Navy as well as private ship owners was a separate entity).

Even if a separate entity is entitled to immunity, it may waive its jurisdictional immunity by submitting to the jurisdiction of the UK courts. Such waiver does not, however, bring about a waiver of enforcement immunity, which will continue to apply over the separate entity.

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

The nexus that the plaintiff needs to have is determined by applicable law regarding personal and subject matter jurisdiction. If the proceeding involves the recognition of a foreign judgment or arbitral award, such instruments as the 1972 Convention, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1965 Washington Convention may be applicable.

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?

The required nexus is determined by the exceptions to immunity set out in sections 2 to 11 of the Act. For example, under section 5 of the Act, the damage to or loss of tangible property must be caused by an act or omission in the UK. On the other hand, under section 3(1)(a), a commercial transaction need not necessarily fall to be performed in the UK.

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

Section 13(2) of the Act provides that:

> *(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.*

See Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, Oxford 2015), pp. 504–5.

This provision is subject to sections 13(3) and 13(4) of the Act. Pursuant to section 13(3), a state may provide written consent to the grant of any relief against it. It follows that a state may consent to the grant of interim or injunctive relief against it; however, the mere submission to the jurisdiction of the UK courts does not constitute such consent. Further, pursuant to section 13(4), 'the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes' is not otherwise prevented.

In this context, English courts have issued temporary injunctions against foreign states, such as freezing orders or orders for security for costs, but have generally not issued permanent orders of specific performance.

Similarly, the English Arbitration Act 1996 provides in section 48(5) that an arbitral 'tribunal has the same powers as the court . . . (b) to order specific performance of a contract (other than a contract relating to land)' unless this is excluded by the parties' agreement. It follows that whether an arbitral tribunal has the power to order interim or injunctive relief will be subject to the conditions discussed above and foremost a state party's written consent.

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 principle, the final relief available against a state in the UK will be damages. Specific performance will be subject to the conditions of section 13 of the Act (see question 11). These limitations do not, however, apply in respect of 'separate entities'.

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

Process is served on a state under section 12 of the SIA and Rule 6.44 of the Civil Procedure Rules (CPR). Typically, proceedings will be issued before the High Court.

14 How is process served on a state?

Under section 12 of the Act and Rule 6.44 CPR, service must be effected on a state by the transmission of the document 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. The period permitted for filing an acknowledgment of service or defence or for filing

or serving an admission does not begin to run until two months after the date on which the state is served. In general, absent an agreement to the contrary, the service requirements under section 12 of the Act are mandatory and service cannot be effectuated without adhering to them. That said, in *Certain Underwriters at Lloyd's London v Syrian Arab Republic* [2018] EWHC 385 (Comm), the English High Court adopted a more lenient approach, finding that an order dispensing service could be made (under CPR Rule 6.16(1)), in circumstances where the Syrian Foreign Ministry refused to accept a claim form. Further, section 12 only applies to writs or other documents 'required to be served' and therefore does not apply to service of an arbitration claim.

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

Proceedings may continue even when the defendant state does not participate in the proceedings. In this respect, article 1(2) of the Act provides that '[a] court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.' This means that, in ex parte or in absentia proceedings, a UK court might dismiss the suit for lack of jurisdiction if sovereign immunity applies.

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

Pursuant to section 13 of the Act, state assets 'shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for [their] arrest, detention or sale' unless the state has provided its written consent (see, for example, *Gold Reserve Inc v Venezuela* [2016] EWHC 153 (Comm), finding that Venezuela had submitted to arbitration in writing by entering into a bilateral investment treaty (BIT) with Canada) or the assets in question are 'in use or intended for use for commercial purposes' (section 13(2)–(4)). These provisions apply in respect to states alone as defined in section 14 of the Act, and do not therefore extend to separate entities (see question 8).

A party seeking to enforce the decision of an overseas court over a foreign state will also need to consider section 31 of the Civil Jurisdiction and Judgments Act 1982, which allows the UK courts to enforce a foreign judgment against a foreign state 'if, and only if' it would be so recognised and enforced if it had not been given against a state; and the court would have had jurisdiction in the matter if it had applied the jurisdictional immunity rules contained in sections 2 to 11 of the Act. In *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, the Supreme Court held by majority that Argentina could not invoke enforcement immunity in respect of proceedings to enforce a New York judgment because the requirements under section 31 were satisfied. That judgment had been rendered after NML had commenced proceedings in New York against Argentina under the fiscal agency agreement and the Argentinian sovereign bonds (which were both governed by the law of New York). It suffices to note that in that case, the 'waiver and jurisdiction clause' in the bonds provided that a judgment 'shall be conclusive and binding upon [Argentina] and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject . . . by a suit upon such judgment'.

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

Yes, to the extent enforcement immunity would not be applicable. For example, in *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), the English High Court discussed in length third-party debt and charging orders but rejected them on the basis of the central bank or monetary authority exception (see question 21).

In *Orascom Telecom v Chad* [2008] EWHC 1841 (Comm), the English High Court granted a third-party debt order against a government bank account, in which proceeds of oil sales were held for the purpose of making repayments to the World Bank (in connection with an oil pipeline project that the World Bank had financed).

Update and trends

Last year has seen the end of the *Taurus* litigation, one of the most heated debates on sovereign immunity, with the Supreme Court ultimately confirming the heightened degree of immunity that central banks or other monetary authorities enjoy under the Act (*Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64). On other fronts, the judgment of the Court of Appeal in *The Law Debenture Trust Corp Plc v Ukraine* is expected later this year. This is an appeal from [2017] EWHC 655 (Comm), where the English High court considered the doctrine of foreign act of state and non-justiciability in connection with Ukraine's default on its US$3 billion Eurodollar bonds.

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?

A provision merely submitting to the jurisdiction of a court or tribunal does not constitute consent to further enforcement proceedings against state assets (see section 13(3) of the Act).

Where a state has expressly agreed to submit a dispute to arbitration, it will be treated as having waived jurisdictional immunity. In accordance with section 9 of the Act, a state would also not be immune 'as respects proceedings in the courts of the United Kingdom which relate to the arbitration'. In this respect, seeking to have an arbitral award recognised in the UK is distinct from seeking to enforce by execution against state assets in order to collect under that award. The former relates to jurisdictional immunity whereas the latter to enforcement immunity.

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

The property or assets that would typically be subject to enforcement and execution would be property used or intended for use for commercial purposes, including movable and immovable property and choses in action (such as debts owed to a state by third parties in relation to commercial transactions).

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.

The UK Supreme Court has determined that the original source of the funds in a state's bank account is not conclusive. Rather, whether such funds are in use or intended for use for commercial purposes is considered at the time of the attempted execution. As explained above, in *Orascom*, the English High Court considered that proceeds of oil shares held in account, which were held for the purpose of making repayments to the World Bank, did not attract immunity. That said, under section 13(5) of the Act, the head of a state's diplomatic mission in the UK may issue a 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', which 'shall be accepted as sufficient evidence of that fact unless the contrary is proved'.

In *LR Avionics Technologies Ltd v The Federal Republic of Nigeria and another* [2016] EWHC 1761 (Comm), premises used for the performance of consular activities (such as passport and visa applications) were found to be immune from enforcement by execution, even though the premises in question had been leased to a privately owned company that carried out the relevant consular activities on the state's behalf (such as a liaison office). In *Alcom v Republic of Colombia* [1984] AC 580, the House of Lords held that enforcement action by execution could not be taken against a bank account that was used to make payments in relation to both commercial transactions and more general purposes ('mixed' embassy account) by Colombia's diplomatic mission in the UK.

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.

Pursuant to section 14(4) of the Act, '[p]roperty of a State's central bank or other monetary authority shall not be regarded . . . as in use or intended for use for commercial purposes' and 'where any such bank or authority is a separate entity . . . that section shall apply to it as if references to a State were references to the bank or authority'. This provision has been interpreted to mean that central banks enjoy absolute immunity from enforcement, regardless of whether their acts are in the exercise of sovereign authority, whether they are separate entities or whether assets are held for commercial purposes.

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

No further test has been developed.

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?

Service of process is effected in the same way as described above.

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

Yes, there is a long and ever-increasing line of cases relating to proceedings against states or state entities in the UK. A significant number of these proceedings are for the enforcement and execution of both commercial and investor-state awards.

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

Yes, assets held by states may be identified by undertaking a variety of searches of public information, including, inter alia, searches for real property through the land registry, the Companies House or the UK Register of Civil Aircraft.

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?

In principle yes, but in *Koo Golden East Mongolia v Bank of Nova Scotia and others* [2007] EWCA Civ 1443, the Court of Appeal refused to grant a *Norwich Pharmacal* order for disclosure against the agent of the central bank of Mongolia holding that state immunity prevented the claimant from obtaining such relief.

Immunity of international organisations

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

The privileges and immunities of international organisations are governed by the International Organisations Act 1968 (the 1968 Act).

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?

Under section 1(2) of the 1968 Act, 'legal capacities of a body corporate' may be conferred on an international organisation of which the UK is a member or host state by an Order in Council. This means that an international organisation possessing international legal personality will not automatically be recognised as possessing domestic legal personality.

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?

International organisations enjoy immunity from suit and legal process, and inviolability of official archives and premises (see Part I of Schedule 1 of the 1968 Act; see also *Sindicato Unico de Pescadores del Municipio v International Oil Pollution Compensation Fund* [2015] EWHC 2476 (QB), where the defendant (the IOPC Fund) succeeded in setting aside a registration order in respect of a Bolivian judgment on grounds of immunity).

Aside from sovereign immunity, non-justiciability will often also act as a bar to claims against international organisations. A famous example is the *Tin Council* case. The International Tin Council (ITC), an ill-fated and since dissolved international organisation that was accorded domestic legal personality by a series of Orders in Council, failed to meet substantial obligations to tin traders when its member states withdrew support for its activities (principally the sale and purchase of tin stocks to maintain world prices). The tin traders sought to hold the states that were members of the ITC liable. However, the House of Lords held that: '[m]unicipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law' (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418).

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Background

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

The concept of sovereign immunity applied in the United States is that of restrictive immunity. The statute giving effect to this doctrine is the Foreign Sovereign Immunities Act 1976 (as codified in 28 USC sections 1330 and 1602 to 1611) (the Act). Section 1602 provides that:

> *the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.*

The Act applies only to foreign states and therefore not to the federal government, or to state or tribal governments, whose immunity is determined based on the US Constitution and US common law.

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

The law of sovereign immunity derives from international law, but the United States was the first state to codify that law with the enactment of the Act (see question 1). Section 1330 of the Act establishes that US federal courts have jurisdiction to adjudicate disputes against foreign states provided one of the exceptions described in the Act applies (see sections 1604, 1605 to 1607, 1609 to 1611).

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

The United States is not a party to any multilateral treaty on sovereign immunity.

Jurisdictional immunity

4 Describe domestic law governing the scope of jurisdictional immunity.

Jurisdictional immunity covers the foreign state itself and its various organs, agencies and instrumentalities, and extends to all activities unless specifically excepted in the Act (see sections 1605 to 1607). Pursuant to section 1603, a 'foreign state' includes 'a political subdivision of a foreign state or an agency or instrumentality of a foreign state'. An 'agency or instrumentality of a foreign state' is an entity:

> *(1) which is a separate legal person, corporate or otherwise, and*
> *(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and*
> *(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country'.*

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

A foreign state may waive its immunity explicitly or implicitly (see section 1605(a)(1)). Waivers of immunity cannot be revoked unilaterally. An explicit waiver or consent may occur by treaty (as has been done with respect to commercial and other activities in a series of treaties of friendship, commerce and navigation) or in a contract between a foreign state and a private party. Implicit waiver of sovereign immunity from jurisdiction may be established where the foreign defendant has appeared in court (or has filed a responsive pleading in an action without raising the defence of immunity), has agreed to arbitrate in another country, or agreed that the law of particular country should govern a contract (see Report of the House Judiciary Committee, HR Rep No. 1487, 94th Congress, 2d Session (1976), at 18).

The Act also establishes the arbitration exception, which concerns actions to enforce arbitration agreements between private parties and foreign states or actions to confirm arbitration awards rendered pursuant to such agreements (see section 1605(a)(6)). In these cases, a foreign state is not immune from the jurisdiction of US courts.

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?

Apart from waiver and consent, foreign states do not enjoy sovereign immunity from the jurisdiction of US courts in the following areas:

- commercial activities (section 1605(a)(2));
- taking of property in violation of international law (ie, expropriation) (section 1605(a)(3));
- rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States (section 1605(a)(4));
- personal injury or death, or damage to or loss of property occurring in the United States (section 1605(a)(5));
- monetary damages concerning a terrorist act (section 1605A) or international terrorism (section 1605B);
- admiralty proceedings (specifically suits involving maritime liens) (section 1605(b)); and
- when the claim against a foreign state arises in the form of a counterclaim (section 1607).

All these are exceptions to jurisdictional immunity and do not in themselves overcome enforcement immunity.

The commercial activity exception is limited to those cases in which the action is based upon a commercial activity carried on by the foreign state, an act performed in connection with a commercial activity of the foreign state elsewhere, or an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States (section 1605(a)(2)). A 'commercial activity' is further defined as 'either a regular course of commercial conduct or a particular commercial transaction or act', whose commercial character 'shall be determined by reference to the nature of the course of conduct or particular

transaction or act, rather than by reference to its purpose' (section 1603(d)). On the other hand, a 'commercial activity carried on in the US by a foreign state' means commercial activity carried on by a state and having substantial contact with the United States (section 1603(e)).

In *Republic of Argentina v Weltover Inc*, the Supreme Court held that the issuance of bonds by Argentina constituted a commercial activity under the Act because Argentina had acted 'not as a regulator of a market, but in the manner of a private player within it' (504 US 607 (1992), at 614). Argentina argued that the nature-purpose distinction is not appropriate because the 'essence of an act is defined by its purpose', but the Supreme Court pointed to the wording of section 1605(a)(2) and considered that such an argument was 'squarely foreclosed by the language of the' Act, as however 'difficult it may be in some cases to separate "purpose" from "nature" . . . the statute unmistakably commands that to be done' (504 US 607 (1992), at 617). In another leading case on the commercial activity exception, *Texas Trading & Milling Corp v Federal Republic of Nigeria*, the Court of Appeals for the Second Circuit held that Nigeria's anticipatory breach of more than 100 contracts for the purchase of cement qualified as commercial (647 F2d 300 (2d Cir 1981) cert den). In another case, the Court of Appeals for the Seventh Circuit held that Greece had engaged in commercial activity and was thus amenable to suit where Greece had contracted with a healthcare provider for the provision of medical services to Greek nationals in the United States (see *Rush-Presbyterian-St Luke's Medical Center v Hellenic Republic*, 877 F2d 574 (7th Cir 1989) cert den).

The expropriation exception (section 1605(a)(3)) actually creates two exceptions to the general rule of sovereign immunity. First, a state is not immune in any case 'in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state'. Property is 'taken in violation of international law' through nationalisation or expropriation that does not serve a public purpose, is discriminatory in nature and is without payment of prompt, adequate and effective compensation (see, generally, *Zappia Middle E Constr Co v Emirate of Abu Dhabi*, 215 F3d 247 (2d Cir 2000)). Exhaustion of local remedies in the foreign jurisdiction is also not a statutory prerequisite to jurisdiction under the expropriation exception (see *Cassirer v Kingdom of Spain*, 616 F3d 1019 (9th Cir 2010) cert den; however, see also Restatement (Third) of Foreign Relations Law (1987), section 713, comment f: 'Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.').

Second, a state is not immune when the taken property or any property exchanged for that property 'is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States'. For example, in *De Sanchez v Banco Central de Nicaragua*, the court found that the defendant was engaged in commercial activity in the United States through the holding of funds in a US bank for the facilitation of currency exchanges (515 F Supp 900 (ED La 1981), at 911; and 770 F2d 1385 (5th Cir 1985)). Accordingly, in *Dayton v Czechoslovak Socialist Republic*, the Court of Appeals for the DC Circuit held that the nationalisation of textile plants without the payment of compensation did not fall within the expropriation exception because the plants were located in Czechoslovakia, no property exchanged for the plants was located in the United States and a Czechoslovakian trading company, which was sought to be held liable, did not own or operate the plants or property exchanged for them (*Dayton v Czechoslovak Socialist Republic*, 834 F2d 203 (DC Cir 1987) cert den).

Further, the Supreme Court recently opined that 'whether the rights asserted are rights of a certain kind, namely, rights in "property taken in violation of international law", is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible' (see *Bolivarian Republic of Venezuela v Helmerich & Payne Int'l Drilling Co*, 137 US 1312 (2017), at 1319).

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?

In addition to sovereign immunity, the act of state doctrine could also prevent a court from exercising jurisdiction over the foreign state in question. As the legislative history explains, the Act 'in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable' (see House Report, at 20; see also *Dayton v Czechoslovak Socialist Republic*, 672 F Supp 7 (DC Dist 1986), affd 834 F2d 203 (DC Cir 1987) cert den).

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?

As explained in question 4, section 1603 of the Act provides that a foreign state 'includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state'. A state enterprise may qualify as a foreign state provided the tripartite test in section 1603(b) is met, namely, that the enterprise is (i) a separate legal person, (ii) an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (iii) neither a citizen of the United States nor created under the laws of any third country.

When a state enterprise qualifies as a foreign state, whether it will be amenable to suit depends on the applicability of the exceptions to sovereign immunity set out in sections 1605 to 1607 of the Act. For example, an airline that was wholly owned by the government of the Dominican Republic was considered an instrumentality of a foreign state notwithstanding the fact that it had several offices and bank accounts in the United States and paid city, state and federal taxes (see *Arango v Guzman Travel Advisors*, 761 F2d 1527 (11th Cir 1985)). Likewise, an airline that was 97 per cent owned by the Ecuadorian Air Force was held to be an instrumentality of a foreign state (see *Keller v Transportes Aereos Militares Ecuadorianos*, 601 F Supp 787 (DC Dist 1985)).

However, in *Filler v Hanvit Bank*, the Court of Appeals for the Second Circuit held that certain South Korean commercial banks did not enjoy sovereign immunity under the Act because the majority of the banks' stock was owned by the Korean Deposit Insurance Corporation and was therefore not directly owned by South Korea (378 F3d 213 (2d Cir 2004) cert den). This follows the Supreme Court's ruling in *Dole Food Co v Patrickson*, which settled the issue of 'tiering', finding that a foreign state must itself directly own a majority of the shares of an enterprise if that enterprise is to be deemed an instrumentality of the state under the Act. In that case, ownership of the defendant company was at various times separated from the State of Israel by one or more corporate layers (see 538 US 468 (2003); compare with *In re Aircrash Disaster near Roselawn*, 909 F Supp 1083 (ND Ill 1995), in which jurisdiction was upheld despite the fact that the aircraft manufacturer was indirectly owned by French and Italian governments through tiers of government-owned corporations, holding that the manufacturer was entitled to foreign state status despite 'tiering' of ownership through intermediaries, since two foreign governments owned a majority of each intermediate corporation).

However, even if the entity is not majority owned by a foreign state, it may still qualify as an 'agency or instrumentality of a foreign state' if it is an 'organ' of a foreign state (section 1603(b)(2)). The term 'organ' is not defined in the Act and the US Circuit Courts have adopted differing tests to determine whether an entity is an organ of a foreign state. For example, in *USX Corp v Adriatic Ins Co*, the Court of Appeals for the Third Circuit considered whether an insurance company was an organ of the Irish government and concluded that 'for an entity to be an organ of a foreign state, it must engage in a public activity on behalf of foreign government' (see 345 F3d 190 (3d Cir 2003) at 208, considering the findings of the Ninth and Fifth Circuits in *EOTT Energy Operating Ltd P'Ship v Winterthur Swiss Ins Co*, 257 F3d 992 (9th Cir 2001) at 997 and *Kelly v Syria Shell Petroleum Dev BV*, 213 F3d 841 (5th Cir 2000) at 846 and 847).

The Third Circuit also synopsised the various factors employed by the Courts of Appeals for the Ninth and Fifth Circuits, in particular:

- the circumstances surrounding the entity's creation;
- the purpose of the entity's activities;
- the degree of supervision by the government;
- the level of government financial support;

- the entity's employment policies, particularly regarding whether the foreign entity requires the hiring of public employees and pays their salaries; and
- the entity's obligations and privileges, and added an additional factor, namely the ownership structure of the entity.

All these factors are relevant, but none is determinative. What is critical is whether the entity in question performs a governmental function. Indeed, in *Murphy v Korea Asset Management Corporation*, the Court of Appeals for the Second Circuit held that a corporation organised under the laws of the Republic of Korea qualified as a foreign state because that corporation had a quintessentially 'public' mission to service and stabilise the Korean economy by disposing of non-performing loans and restructuring failing corporations (see *Murphy v Korea Asset Mgmt Corp* (2005, SD NY) 421 F Supp 2d 627, affd (2006, CA2 NY), cert den). Conversely, in *Bd of Regents of Univ of Tex Sys v Nippon Tel & Tel Corp*, the Court of Appeals for the Fifth Circuit held that a Japanese telecommunications company was not an organ of Japan because it was not created for a national purpose, was not actively supervised by the Japanese government, was not required to hire public employees, did not hold exclusive rights under Japan's laws, and was not treated as a governmental organ under Japanese law (see 478 F3d 274 (5th Cir 2007), following the test developed in Kelly by the Court of Appeals for the Fifth Circuit).

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

The nexus that the plaintiff needs to have is determined by applicable law regarding personal and subject matter jurisdiction. However, the sole basis for obtaining jurisdiction over a foreign state is the Act (see *Youming Jin v Ministry of State Sec*, 557 F Supp 2d 131 (DC Dist 2008)). The Act provides for the exercise of personal jurisdiction under section 1330(b), but personal jurisdiction is satisfied if subject matter jurisdiction exists under the Act (ie, if one of the enumerated jurisdictional exceptions to immunity is satisfied) and service is perfected under section 1608 of the Act. Since the Supreme Court's decision in *Argentine Republic v Amerada Hess Shipping Corp*, it is clear that the Alien Tort Claims Act (also known as the Alien Tort Statute), or federal statutes other than the Act, may not form the basis for a suit against a foreign state or instrumentality (see 488 US 428 (1989) at 443).

Further, once a court determines that personal jurisdiction exists over the defendant state, it must then consider whether the exercise of jurisdiction over the defendant is permissible under the due process clause of the Fifth Amendment. In fact, although section 1330(b) grants district courts personal jurisdiction over foreign states in cases where those states are not entitled to sovereign immunity as determined in sections 1605 to 1607 of the Act, when service has been made pursuant to section 1608, the reach of section 1330(b) does not extend beyond those limits set by the minimum contacts standard set out in *International Shoe Co v Washington*, 326 US 310 (1945) (see also *Gilson v Republic of Ireland*, 606 F Supp 38 (DC Dist 1984), affd 787 F2d 655 (DC Cir 1986); and *Verlinden BV v Central Bank of Nigeria*, 488 F Supp 1284 (SDNY 1980), affd 647 F2d 320 (2d Cir 1981)). For example, the Court of Appeals for the Fifth Circuit held that personal jurisdiction over the National Grains Production Company, Ltd (NGPC) of Nigeria was properly exercised by the district court, because NGPC had, among others, established a joint venture with a US corporation to establish rice farming operations in Nigeria and there was a transmission of funds to the United States (*Hester International Corp v Federal Republic of Nigeria*, 681 F Supp 371 (ND Miss 1988), affd 879 F2d 170 (5th Cir 1989)).

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?

The required nexus is determined by sections 1330 and 1604 and the exceptions to immunity set out in sections 1605 to 1607 of the Act. For example, a state is not immune from jurisdiction when rights in immovable property are at issue (section 1605(a)(4)), or when an act occurring outside the United States in connection with a commercial activity of the foreign state elsewhere causes a direct effect in the United States (section 1605(a)(2)).

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

Pursuant to section 1606 of the Act:

> *[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.*

Nevertheless:

> *in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.*

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 principle, the final relief available against a state will be damages. Specific performance will be subject to the conditions of section 1606 of the Act (see question 11).

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

Process is served on a state under section 1608 of the Act. Typically, proceedings will be issued before the federal district courts.

14 How is process served on a state?

Under section 1608 of the Act process is served on a foreign state:

> *(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or*
> *(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or*
> *(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or*
> *(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.*

Similarly, process is served on an agency or instrumentality of a foreign state:

> *(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or*
> *(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or*
> *(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy*

Update and trends

During the past few years, a host of developments affecting the law of sovereign immunity have taken place. First, in 2016, Congress, overriding a veto from President Obama, passed the Justice Against Sponsors of Terrorism Act (JASTA), which amended the Act to allow suits against foreign states for injuries, death or damages from an act of international terrorism (such as lawsuits against Saudi Arabia) to proceed in US courts. Second, in June 2014, the Supreme Court ruled in Republic of *Argentina v NML Capital, Ltd* that the Act does not provide a foreign state with immunity from post-judgment discovery in execution proceedings, and affirmed the decision of the Court of Appeals for the Second Circuit allowing access to third-party records about Argentina's assets abroad (specifically, this allowed the district courts to compel banks to turn over information about Argentine assets or accounts) (134 S Ct 2250, 573 US __ 2014)).

In September 2014, the District Court for the Southern District of New York held Argentina in civil contempt of court, after Argentina had repeatedly violated court orders designed to enforce prior judgments (see *NML Capital, Ltd v The Republic of Argentina* (SDNY 29 September 2014) Order at 3). Third, there is an ever-increasing number of cases that arise from the enforcement of both ICISD and non-ICSID investment treaty awards that have affirmed that the Act is the sole source of jurisdiction in actions against foreign states and will continue to enrich the case law on enforcement, attachment and execution over assets of foreign states (eg, *Mobil Cerro Negro, Ltd v Bolivarian Republic of Venezuela*, 87 F3d 573 (SDNY 2015) and (2d Cir 2017), *Micula v Government of Romania* (SDNY 2015)).

of the summons and complaint, together with a translation of each into the official language of the foreign state (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or (C) as directed by order of the court consistent with the law of the place where service is to be made.

Strict compliance with the procedures set out in section 1608 of the Act is necessary. For example, a plaintiff, who sent a complaint in English by registered mail, did not perfect service on the Mexican Consulate (see *Gerritsen v Consulado Gen de Mexico* (989 F2d 340 (9th Circ 1993) cert den).

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

Under section 1608(e) of the Act, no judgment shall be made against a foreign entity unless satisfactory evidence of the right to relief. A copy of any default judgment must be sent to the foreign entity in the prescribed manner. Therefore, default judgment is proper, provided proper service of process is effectuated. In *Reichler, Milton & Medel v Republic of Liberia*, the District Court for the District of Columbia held that default judgment was proper against Liberia because Liberia was properly served and the claim was proven (see 484 F Supp 2d 1 (DC Dist 2007)). The courts have also held that default judgment is proper where provisions of the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards and of the Act were satisfied (see *Ipitrade International, SA v Federal Republic of Nigeria*, 465 F Supp 824 (DC Dist 1978)).

Enforcement immunity

16 Describe domestic law governing the scope of enforcement immunity.

The Act provides that 'the property . . . of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611' (see section 1609). Sections 1610 and 1611 establish several exceptions to enforcement immunity. These exceptions are generally similar to those from jurisdictional immunity under sections 1605 to 1607.

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

Yes, to the extent enforcement immunity would not be applicable. Specifically, under the Act and the Federal Rules of Civil Procedure, state law governs the circumstances and manner of attachment and execution proceedings. When a foreign state is not protected by sovereign immunity, the foreign state shall be liable in the same manner and to same extent as a private individual under like circumstances (see section 1606). Therefore, in attachment and execution proceedings involving foreign states, the federal courts will generally apply Fed R Civ P 69(a), which mandates the application of local state procedures (see *EM Ltd v Republic of Arg*, 473 F3d 463 (2d Cir 2007) cert den). For example, in an action in which the judgment creditors had obtained default judgments awarding compensatory damages against Cuba, the award creditors sought turnover orders pursuant to Fed R Civ P 13 and 69 and NY CPLR section 5225(b) against garnishees that held funds belonging to entities that allegedly were agencies and instrumentalities of Cuba (see *Weininger v Castro*, 462 F Supp 2d 457 (SDNY 2006)).

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?

Prior submission to the jurisdiction of a court or tribunal does not necessarily establish waiver or consent to further enforcement proceedings against state assets. The Act provides, among others, that a foreign state shall not be immune from execution or attachment if the 'foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication' (section 1610(a)(1)) or when 'judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement' (section 1610(a)(6)).

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

The property or assets that would be subject to enforcement, execution and attachment would be property used for a commercial activity in the United States.

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.

As explained above, only property used for a commercial activity in the United States would potentially be exempted from enforcement immunity. For example, in *Aurelius Capital Partners, LP v Republic of Argentina*, the Court of Appeals for the Second Circuit held that Argentinian social security funds were immune from attachment because those funds had not been used for any commercial activity whatsoever (584 F3d 120 (2d Cir 2009)). Conversely, in *Birch Shipping Corp v Embassy of United Republic of Tanzania*, the District Court for the District of Columbia held that a checking account used by the embassy of Tanzania was not immune from attachment (see 507 F Supp 311 (DC Dist 1980)).

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.

Pursuant to section 1611(b)(1), the property of a foreign state shall be immune from attachment and from execution, if 'the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver'. For example, the Court of Appeals for the Second Circuit held that funds deposited with Argentina's central bank were immune from attachment and the 'commercial activity' exception to enforcement immunity, holding that section 1610(a)(2) did not apply because the central bank used those funds for central banking purposes and therefore held the funds 'for its

own account' (see *NML Capital, Ltd v Banco Cent De La Republica Arg*, 652 F3d 172 (2d Cir 2011) cert den).

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

No further test has been developed (but see question 9).

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?

Service of process is effected as described in question 14.

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

Yes, there is a long and ever-increasing line of cases relating to proceedings against states or state entities in the United States. A significant number of these proceedings are for the enforcement and execution of both commercial and investor–state awards.

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

Yes, assets held by states may be identified by undertaking a variety of searches of public information, including, among others, searches on corporate registries or searches for real property through land registries (such as the office of the county tax assessor and the county recorder's and registrar's offices).

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?

In principle, yes (see section 1606 and question 17), but discovery is subject to the limitations under section 1605(g)(1)(A):

> *the court . . . shall stay any request, demand, or order for discovery on the United States that . . . would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.*

Immunity of international organisations

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

The privileges and immunities of international organisations are governed by the International Organizations Immunities Act (28 USC sections 288 et seq).

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?

Under section 288a(a), international organisations have the capacity to contract, acquire and dispose of real and personal property, and institute legal proceedings.

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?

International organisations enjoy enforcement immunity. Specifically, section 288a(b) provides that international organisations:

> *their property and their assets . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.*

Further, section 1611(a) of the Act provides that:

> *the property of those organizations . . . as . . . provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.*

In *OSS Nokalva, Inc v European Space Agency*, the Court of Appeals for the Third Circuit held that the International Organizations Immunities Act does not confer absolute immunity on international organisations ('as is enjoyed by foreign governments') and since foreign states do not generally enjoy immunity from claims based on commercial activities, the Court found no reason 'why a group of states acting through an international organization is entitled to broader immunity than its member states when acting alone' (617 F3d 756 (3d Cir 2010) at 764).

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