



ICLG

The International Comparative Legal Guide to:

Enforcement of Foreign Judgments 2019

4th edition

A practical cross-border insight into the enforcement of foreign judgments

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General Chapters:

1	Enforcement Against State Parties in England: A Creditor's Long Journey Through Sovereign Immunity – Louise Freeman & Chiz Nwokonkor, Covington & Burling LLP	1
2	European Union – Stefaan Loosveld & Nino De Lathauwer, Linklaters LLP	7
3	International Enforcement Strategy – An Overview – Andrew Bartlett, Osborne Clarke LLP	12

Country Question and Answer Chapters:

4	Angola	N-Advogados & CM Advogados: Nuno Albuquerque & Conceição Manita Ferreira	17
5	Australia	Bird & Bird: Sophie Dawson & Jarrad Parker	22
6	Austria	Konrad Partners: Dr Christian W. Konrad & Philipp A. Peters	28
7	Belgium	Linklaters LLP: Stefaan Loosveld & Nino De Lathauwer	35
8	Canada	Blake, Cassels & Graydon LLP: Erin Hoult & Josianne Rocca	40
9	China	King & Wood Mallesons: Zhang Mei	46
10	Cyprus	Montanios & Montanios LLC: Yiannis Papapetrou	52
11	Ecuador	Quevedo & Ponce: Alejandro Ponce Martínez & María Belén Merchán	58
12	England & Wales	Covington & Burling LLP: Louise Freeman & Chiz Nwokonkor	63
13	France	Archipel: Jacques-Alexandre Genet & Michaël Schlesinger	69
14	Germany	Herbert Smith Freehills Germany LLP: Catrice Gayer & Sören Flecks	74
15	Hong Kong	King & Wood Mallesons: Barbara Chiu & Crystal Luk	81
16	Hungary	Wolf Theiss Faludi Erős Attorneys-at-Law: Artúr Tamási & Enikő Lukács	87
17	India	CSL Chambers: Sumeet Lall & Sidhant Kapoor	92
18	Ireland	Matheson: Julie Murphy-O'Connor & Gearóid Carey	97
19	Italy	Legance – Avvocati Associati: Daniele Geronzi & Stefano Parlatore	105
20	Japan	Mori Hamada & Matsumoto: Yuko Kanamaru & Yoshinori Tatsuno	111
21	Liechtenstein	GASSER PARTNER Attorneys at Law: Thomas Nigg & Domenik Vogt	116
22	Luxembourg	KLEYR GRASSO: Emilie Waty & Ella Schonckert	122
23	Macedonia	Debarliev, Dameski and Kelesoska, Attorneys at Law: Ivan Debarliev & Martina Angelkovic	127
24	Malaysia	Rahmat Lim & Partners: Jack Yow & Daphne Koo	132
25	Malta	GANADO Advocates: Antoine Cremona & Luisa Cassar Pullicino	138
26	Myanmar	Allen & Gledhill (Myanmar) Co., Ltd.: Minn Naing Oo	142
27	Netherlands	Van Oosten Schulz De Korte: Jurjen de Korte	146
28	Nigeria	Roberts & Shoda: Adeniyi Shoda & Abolanle Davies	150
29	Portugal	N-Advogados & CM Advogados: Nuno Albuquerque & Filipa Braga Ferreira	157
30	Romania	Wolf Theiss Rechtsanwälte GmbH & Co KG: Andreea Zvâc & Andreea Anton	163
31	Singapore	Allen & Gledhill LLP: Tan Xeauwei & Melissa Mak	168
32	Spain	King & Wood Mallesons: Alfredo Guerrero & Fernando Badenes	174
33	Sweden	Advokatfirman Hammarstiöld & Co: Sandra Kaznova & Caroline Bogemyr	179
34	Switzerland	Bär & Karrer Ltd.: Saverio Lembo & Aurélie Conrad Hari	185
35	Taiwan	Brain Trust International Law Firm: Hung Ou Yang & Jia-Jun Fang	192

Continued Overleaf ➡

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Country Question and Answer Chapters:

36	Turkey	Esenyel Partners Lawyers & Consultants: Selcuk Esenyel	196
37	Turks and Caicos Islands	Prudhoe Caribbean: Willin Belliard & Tim Prudhoe	201
38	United Arab Emirates	Fichte & Co: Alessandro Tricoli & Jasamin Fichte	205
39	USA	Williams & Connolly LLP: John J. Buckley, Jr. & Ana C. Reyes	210

EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Enforcement of Foreign Judgments*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to the enforcement of foreign judgments.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting the enforcement of foreign judgments, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the enforcement of foreign judgments in 36 jurisdictions.

All chapters are written by leading lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Louise Freeman and Chiz Nwokonkor of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Enforcement Against State Parties in England: A Creditor's Long Journey Through Sovereign Immunity

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When a private party seeks to enforce a judgment they have obtained against a State party, they face a major obstacle on the hazardous path to reparation: the law of sovereign immunity.

What is Immunity About?

The law of sovereign immunity is a body of rules protecting States from interference by Domestic Courts with their people and property situated in other countries. The body of rules is well-developed in jurisdictions that are often chosen for enforcement proceedings, including England, the United States, Switzerland, France, The Netherlands and South America. It is also found in international treaty law, such as the European Convention on State Immunity 1972¹ and the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004,² and in customary international law.

In England, the law of sovereign immunity is found principally in the State Immunity Act 1978 (the "SIA"), as explained and interpreted in subsequent case law.

Immunity From What?

There is an important distinction to make at the outset between:

- a) *sovereign immunity from adjudication (or jurisdiction)* – this applies to the situation where a State is party to a substantive claim brought before the English Court. The question for the Court to answer will be: "Is the State party immune to the jurisdiction of the Court?" In other words, does the Court have adjudicative jurisdiction over this State and can it proceed to hear the dispute?; and
- b) *sovereign immunity from enforcement* – this applies to the situation where a State is party to enforcement proceedings instituted in England. Because the judgment creditor must start an action in the English Court for the value of the decision he is trying to enforce, the questions posed to the Court are twofold:
 - (i) "Is the sovereign party immune from jurisdiction of the English Court in relation to the enforcement proceedings instituted before it?" (this is a question of **State immunity from enforcement jurisdiction**); and
 - (ii) "Is the sovereign asset on which enforcement is sought immune from execution in England?" (this is a question of **State immunity from execution**).

This chapter focuses on category (b) above. Specifically, this chapter will focus on the rules applicable in circumstances where a private party seeks to enforce in England a decision made by a Court against a sovereign party and to execute it against foreign sovereign assets.

In addition, it is worth noting that State immunity principles and State privileges will impact on many procedural rules including those regarding service, burden of proof, disclosure and interim relief.

When Does Immunity From Enforcement Arise?

Immunity from enforcement can arise in three different scenarios:

- a) enforcement in England of an English judgment made against a foreign State;
- b) enforcement in England of a foreign judgment made against a foreign State – within which there are two scenarios:
 - (i) a judgment from State A against State A; or
 - (ii) a judgment of State A against State B; and
- c) enforcement of an arbitral award, made in England or abroad, against a foreign State.

Various principles and laws of sovereign immunity from enforcement have been developed for each of these situations, which need to be looked at together in order to provide a full understanding of the applicable principles.

Case study

The State of Rajatania entered into a contract with private English company Aluexploit Limited in 2010 for the purposes of aluminium mining in Rajatania. The agreement had a 50-year term but the parties rapidly fell into dispute and in 2017 Aluexploit obtained a judgment from the Courts of New York against the State of Rajatania in the sum of US\$100m. Aluexploit is now looking to enforce this judgment and believes there may be relevant assets of the State of Rajatania in England.

Which Rules Apply?

Chapter 12 sets out the English rules relating to enforcement of judgments in England generally, including the web of different regimes that may apply.

Case study

In relation to the judgment from New York against the State of Rajatania, the English common law would apply, as New York is not an EU Member State and England has no conventions with the USA in this regard.

At common law, subject to certain qualifications (set out in chapter 12), a judgment of a foreign Court is capable of recognition and enforcement in England. Aluexploit, as the judgment creditor, will have to commence proceedings in England to seek recognition and enforcement of the New York judgment.

Hurdle 1: State Immunity From Enforcement Jurisdiction

The first question before the Court in enforcement proceedings against a foreign State is whether the State in question is immune to the enforcement proceedings themselves. At this stage, the foreign State is likely to raise the shield of immunity from jurisdiction, or more precisely, from enforcement jurisdiction.

This issue arose in the case of *AIC Limited v (1) The Federal Government of Nigeria, (2) The Attorney General of the Federation of Nigeria*.³ In that case, the Court found that the registration of the foreign judgment itself was an adjudicative act subject to the Court's discretion and that it attracted sovereign immunity, such that the rules under the SIA apply to recognition or enforcement proceedings.

There are two (mutually exclusive) alternative regimes under which immunity from enforcement jurisdiction may fall to be considered:

- a) a regime that applies to recognition and enforcement of overseas Court judgments made against a State other than the United Kingdom or the State to which that Court belongs (i.e. a judgment from State A against State B). This regime arises under the Civil Jurisdiction and Judgments Act 1982 (the "CJJA") and is considered further below; or
- b) a regime that applies in all other cases (including English judgments or arbitral awards against foreign States), which will be considered first.

The general regime (category (b))

The general rule of immunity from jurisdiction

With regard to immunity from enforcement jurisdiction, as with immunity from adjudication, States enjoy a general immunity from suit.⁴

A "State" includes: (i) the sovereign or head of State; (ii) the three branches of government and other organs of the State; and (iii) any department of the government. It does not include a "separate legal entity", distinct from the organs of the State. In relation to separate legal entities, the presumption flips, such that that entity does not have immunity and is capable of being sued, unless it is acting in exercise of sovereign authority and in circumstances where a State would have been immune.

The SIA provides a few limited exceptions to the general rule. By providing these exceptions, English law adopts the doctrine of restrictive immunity, whereas many countries (including China, Russia and Portugal) still maintain a doctrine of absolute immunity (i.e. no exceptions).

The exceptions

The SIA exceptions to immunity from jurisdiction are as follows:

- a) submission to the jurisdiction of the English Court;
- b) arbitration agreement;
- c) commercial transaction; and
- d) contractual obligation to be performed in England.

The first two of these grounds are the most likely to be raised in the context of enforcement proceedings in England and are considered below (along with important recent developments in relation to the third ground, commercial transaction).

Exception: Submission

A State is not immune from proceedings in respect of which it has submitted to the jurisdiction of the English Court.⁵

The State may submit to jurisdiction after a dispute has arisen or by prior agreement. Submission by prior agreement – or 'waiver of

sovereign immunity' – must be clear. Under the SIA, an agreement in a transaction document that a contract will be governed by English governing law does not constitute submission to the jurisdiction of the English Court. Such agreement can be in writing (clearly setting out waiver of immunity and submission to the English Court) or by conduct. Agreement by conduct of the State includes the State commencing proceedings itself or taking an active part in proceedings brought against it, other than to claim sovereign immunity. For example, filing a Defence or bringing a counterclaim both constitute submission.

Once a State has submitted, its submission is irrevocable. In the case of *The High Commissioner for Pakistan in the United Kingdom v National Westminster bank plc*,⁶ Pakistan served a notice of discontinuance of proceedings to try to preserve sovereign immunity that it had waived by bringing an action. This was found to be an abuse of process and the notice was set aside.

Exception: Arbitration agreement

Where a State has agreed to submit a dispute which has arisen, or may arise, to arbitration, it is not immune from any proceedings in the English Court that "relate to the arbitration".⁷ The question that arises in this context is whether enforcement proceedings can be said to "relate to the arbitration", such that there is no immunity where proceedings are brought to enforce an arbitral award pursuant to an arbitration agreement.

This question arose in *Svenska Petroleum Exploration AB v Lithuania (No.2)*.⁸ The Court of Appeal found that there was no basis for construing the SIA as excluding proceedings relating to the enforcement of a foreign arbitral award. As such, an agreement to arbitrate will constitute a waiver of immunity in respect of proceedings to enforce an award as well as any other related proceedings before the English Court. Two recent examples of such a situation can be seen in *Gold Reserve Inc v The Bolivarian Republic of Venezuela*,⁹ handed down in February 2016 and *L R Avionics Technologies Ltd v Federal Republic of Nigeria and anor*,¹⁰ handed down in July 2016.

Exception: Commercial transaction

The ground that a State is not immune in proceedings relating to a commercial transaction entered into by the State is regarded as a key ground in resisting a claim to immunity from adjudication by a State generally. However, this ground has recently been found not to apply in the context of enforcement proceedings (see below, *NML Capital Limited v Republic of Argentina*). Rather, enforcement proceedings in relation to a foreign judgment are not proceedings relating to a commercial transaction, as they relate to the foreign judgment.

This is consistent with *AIC*,¹¹ a case in which the judgment creditor was trying to enforce a judgment obtained in the Nigerian Court against Nigeria itself (i.e. a judgment from State A against State A). The English Court found that the enforcement proceedings were immune within the meaning of section 1 of the SIA, as they related to the foreign judgment and not to the underlying transaction between AIC and the Nigerian government.

All of this means that a State is likely only to be subject to English enforcement jurisdiction if it has submitted to its jurisdiction or agreed to arbitrate. A practical consequence of this position is that clearly and comprehensively drafted clauses to either effect are more important than ever.

The CJJA regime (category (a))

There are alternative requirements that apply to recognition and enforcement of overseas Court judgments made against a State

other than the United Kingdom or the State to which that Court belongs (i.e. a judgment from State A against State B). These requirements do not concern English judgments or arbitral awards against foreign States.

This alternative scheme arises from section 31 of the CJA, and provides that an overseas Court judgment will only be enforced against another foreign State if:

- a) it would be recognised and enforced if it had not been given against a State; and
- b) the foreign State would not have been immune if the foreign proceedings had been brought in the UK.

The second limb involves the English Court examining whether the overseas Court had grounds to adjudicate the claim against the State, applying English rules. If none of the exceptions under the SIA listed above apply to the underlying claim, the judgment will not be enforced.

Key case

*NML Capital Limited v Republic of Argentina*¹²

Sovereign bonds issued by Argentina in 2000 contained an express submission to the New York Court's jurisdiction and a waiver of sovereign immunity in respect of any Court enforcing a judgment. In 2001, Argentina declared a moratorium on all its debt, which led NML to seek payment of the principal amount of the bonds plus interest. NML successfully obtained a New York judgment in this regard. NML sought to enforce its New York judgment in the English High Court. The case came before the English Supreme Court.

Case study

Aluexploit's judgment against Rajatania falls to be considered under the CJA regime, as it is a judgment of State A (New York) against State B (Rajatania).

The New York Court would have had jurisdiction under the SIA on the basis that the underlying transaction is a commercial transaction and also on the basis of submission to the New York Court as Rajatania's contract with Aluexploit contains a term submitting to the jurisdiction of the New York Court and providing that any judgment against it will be binding on it and expressly submitting to enforcement and execution proceedings in any Court to whose jurisdiction Rajatania could be subject. The judgment against Rajatania is one that would be recognised and enforced if it had not been given against a State and so the CJA is no bar to recognition and enforcement proceedings.

The English Court can therefore accept jurisdiction over Rajatania in relation to the enforcement proceedings and move on to Hurdle 2.

Hurdle 2: State Immunity From Execution

The general rule of immunity from execution

Having overcome the hurdle of establishing the jurisdiction of the English Court to hear the enforcement action (under either route outlined above), the next hurdle is identifying assets of the foreign State in England that are not protected by immunity from execution.

The SIA provides that no relief may be granted against the foreign State by way of recovery of land or other property, and that the property of a State is not subject to any enforcement of a judgment.¹³

These provisions protect State assets from execution action.

The exceptions

The SIA enables execution against a State's assets in two situations,¹⁴ namely:

- a) with the written consent of the State; or
- b) where the relevant property is in use or intended for use for commercial purposes.

Exception: Consent to Enforcement

This is often a difficult area for a party seeking to enforce. Only clear consent to enforcement will suffice. A clause submitting to the jurisdiction of the English Court may well not be enough to constitute consent to execution. Instead, clear consent to execution is required. This is most likely to involve an additional express reference to enforcement or execution against assets and/or waiver of immunity over property in the relevant clause.

A good example of an effective waiver of immunity in respect of execution can be found in *Donegal International v Republic of Zambia*.¹⁵ In that case, the Court accepted that the following waiver of immunity clause amounted to an effective consent to execution: "*if proceedings are brought against it or its assets*" in relation to the contract, "*no immunity from those proceedings (including without limitation, suit, attachment prior to judgment, other attachment, the obtaining of judgment, execution or other enforcement) will be claimed by or on behalf of itself or with respect to its assets*" (emphasis added).

It is possible that consent to execution may be obtained at the enforcement stage, should the State be willing to comply with the judgment, though this is reasonably rare. The organ within the State which has authority to provide valid consent on behalf of the State to execution on a State asset is the head of the State's diplomatic mission in the United Kingdom, or the person performing his functions.¹⁶

Case study

Rajatania's contract with Aluexploit contains a term by which it expressly submits to enforcement and execution proceedings and waives immunity in any Court to whose jurisdiction Rajatania could be subject in that regard. This constitutes consent to enforcement.

In addition, the contract provides that Rajatania waives its sovereign immunity defence for itself and for its property. This constitutes clear consent to execution over the State's property, which will allow the English Court to grant execution in relation to Rajatania's assets located in England.

Exception: Property Used for Commercial Purposes

State property used for commercial purposes will be available for enforcement even if that property is not connected to the dispute. But to execute an award or judgment against state-owned assets, those assets must be used or intended to be used **exclusively** for commercial purposes. Thus, if a bank account held in England by the foreign State is "mixed" because it is used for both the State's commercial transactions and also by its diplomatic mission, that bank account would not be considered to be used for "commercial purposes" within the meaning of section 13(4) of the SIA and will therefore be immune from execution.

The SIA defines "commercial purpose" by reference to section 3(3),¹⁷ i.e. as being for the purposes of commercial transactions in respect of which a State will not have immunity. However, it is important not to confuse the "commercial purpose" test of section 13(4), relating to exceptions to immunity from execution, with the "commercial transaction" test of section 3 relating to exceptions to

immunity from jurisdiction. The “commercial purpose” test is very rarely met, as foreign States tend to place their assets held abroad in the hands of their diplomatic missions or central banks (both considered further below).

The limits of this rule are well-illustrated by the case of *SerVaas Incorporated v Rafidian Bank and others*.¹⁸ SerVaas obtained a judgment in Iraq which it sought to enforce in England. Rafidian Bank (which had a branch in London) held large sums on behalf of Iraq, which SerVaas claimed had been acquired through commercial transactions between the bank and its creditors and so were available for enforcement.

The question before the Court was whether the sums held by Rafidian Bank were in use, or intended for use, for commercial purposes, such that there would be no immunity from enforcement. The Supreme Court found that immunity prevailed, on the basis that it was not the origin of the property that was important, but the present and future use of the property. Although the funds were held by the bank, their future use was for the specially created and UN-backed Development Fund of Iraq, which was sovereign in nature, not commercial.

A recent illustration of this rule was seen in the case of *L R Avionics*.¹⁹ L R Avionics brought proceedings to enforce a judgment of the Nigerian Federal Court (together with an arbitration award) made against Nigeria. L R Avionics was granted permission to register the Nigerian judgment in England and it subsequently obtained a final charging order in respect of premises located in London, which were owned by Nigeria. The London premises were leased to a company for the purpose of providing Nigerian visa and passport services, amongst other things. Nigeria applied to set aside the charging order on the basis that the property was immune from enforcement.

It was accepted that the use by a state of its own premises to carry out consular activities such as providing visa and passport services, could not be said to be a use for commercial purposes within the meaning of section 13(4) of the SIA. However, the Court had to consider the position if, instead of handling the applications itself, the state had granted a lease of the premises to a privately-owned company, to which the processing services were outsourced.

The Court found that the London premises were not being used for commercial purposes within the meaning of section 13(4). This was because, instead of processing the applications itself, the task had simply been outsourced by the state. The property was therefore being used for a consular activity which, even if outsourced, could only be carried out on the state’s behalf.

The commercial purpose exception allowing execution over State property is even more narrow where the foreign State is party to the European Convention on State Immunity 1972. Under that Convention, the exception will only be available where two conditions are met: (1) the foreign judgment to enforce is final (i.e. not subject to appeal); and (2) the foreign State has made a declaration²⁰ generally agreeing to enforcement proceedings within the territories of other State parties.²¹

Separate legal entities

Where a separate legal entity (i.e. an entity distinct from the executive organs of the government) is immune from jurisdiction under the rules described above but submits to jurisdiction, it is immune to enforcement action, subject to the same exceptions as applicable to States (i.e. written consent or commercial purposes).

State-Owned Entities (“SOE”)

The Privy Council decision in *Botas Petroleum Pipeline Corporation v Tepe Insaat Sanayii AS*²² raises some instructive points on the extent to which State immunity applies to the property of state-owned entities (albeit in the context of an enforcement of an arbitral award rather than a Court judgment).

The Privy Council held that the question of whether assets are State property is to be determined by first considering whether the property was owned by the State or a separate entity. The State must have some proprietary interest for immunity to be conferred, otherwise it would be difficult for a creditor to enforce against State property where it was used for a commercial purpose. Separate entities may have a close relationship with the State, and be subject to extensive control. Nevertheless, such bodies are not covered by State immunity unless they are acting “in exercise of sovereign authority”.

Special cases

Diplomatic property

Immunity from execution of assets held by a diplomatic mission arises out of the Diplomatic Privilege Act 1964 and is conferred upon a wide range of assets. Embassies, goods and monies held in banks on account for the diplomatic mission will attract immunity and as such will generally be unavailable for enforcement, and the exceptions to immunity provided by the SIA will not apply.

Central Banks

Sovereign assets located abroad are often held in the name of the Central Bank of that State and this acts as a bar to enforcement against these assets. A Central Bank is given absolute immunity under English law,²³ subject only to the exception of written consent of the Central Bank.

This was put beyond doubt in *AIC*, (where the question for the Court was whether funds in a bank account in the name of a Central Bank²⁴ were liable to execution if those funds were used or intended for use for commercial purposes).²⁵ The Court held that even where the use of the funds would be commercial, the property of a Central Bank should not be subject to execution; in other words, the protection afforded to Central Banks trumps the commercial purpose exception. This was considered and applied recently in (1) *Thai-Lao Lignite (Thailand) Co. Ltd*, (2) *Hongsa Lignite (Lao PDR) Co. Ltd v Government of the Lao People’s Democratic Republic, The Bank of the Lao People’s Democratic Republic*,²⁶ in which Thai-Lao had secured an arbitral award which it sought to enforce in England, and successfully obtained a freezing order against Laos over assets held by its Central Bank in England. Laos then applied to have the freezing order set aside on the grounds that it enjoyed sovereign immunity over those assets. The Court found that freezing accounts in the name of the Central Bank should not have been granted, as the funds benefitted from State immunity. As the funds were the property of the Central Bank, they were afforded special protection,²⁷ and no exception to State immunity applied in this instance.

Case study

Under a separate contract with Aluexploit, Rajatania has not consented to execution and so Aluexploit is seeking to rely on the commercial purpose exception. It has identified (a) a Rajatania embassy building in London, (b) a yacht used by Rajatania government officials, and (c) a bank account in the name of Rajatania’s Central Bank. Can it enforce against these assets?

- (a) A Rajatania embassy building in London – this would be immune under the Diplomatic Privilege Act 1964.
 - (b) A yacht used by Rajatania government officials – the purposes for which the yacht is used would be examined, but unless these are commercial, the yacht would not be available for execution.
 - (c) A bank account in the name of Rajatania’s Central Bank – these are not available even if used for commercial purposes, on the basis of *AIC*.
-

Debts of the foreign State held by a third party

Enforcing against a debt owed to a State by a third party located in England (usually a bank) has proved to be a common method to obtain reparation. This was the case in *Servaas* described above. This process of execution is known in England as a ‘third party debt order’ (or “TPDO”) and is provided for by Rule 72 of the Civil Procedural Rules (it used to be called a “garnishee order”). When applying for a TPDO, the judgment creditor is in effect seeking to obtain monies held by a private party – the bank – but belonging to the State. When granted by the Court, a TPDO will require the bank owing the debt to pay the judgment creditor instead of the creditor/State, and will discharge the bank of its obligation to pay the State.

The Court will only allow enforcement through TPDO where the monies are in England and where the exceptions under the SIA regarding jurisdiction and execution immunity are met. In *Société Eram Ltd v Compagnie Internationale de Navigation*²⁸ the House of Lords rejected an application for a TPDO on the basis that the debt was in fact sited in Hong Kong.

Conclusion – State Immunity in a Nutshell

- Immunity from enforcement involves a strict regime in favour of States. It can be a significant hurdle to enforcement.
- As with any potential enforcement issue, it is essential to consider the issue and confront it at the outset of litigation, to avoid the risk of a pyrrhic victory.
- There are two stages to the immunity question in enforcement of an overseas Court judgment in England: immunity from enforcement jurisdiction and immunity from execution. A judgment creditor must be able to overcome both to enforce successfully in England.
- Good drafting is critical. Alleged consent or submission in advance by the State is often central to State immunity issues but each such clause must be carefully analysed for its application to both limbs of immunity to execution. Submission for one purpose does not necessarily constitute submission for the other purpose.
- A judgment creditor needs to investigate carefully what assets of the State exist and whether they are likely to be available for execution.
- The number of cases coming before the English Court on these issues are testament to how difficult enforcement against a State can be and how hard-fought these issues are, but they also reveal some significant successes on the part of judgment creditors.

Endnotes

1. Drawn up within the Council of Europe and ratified by England.
2. Not yet implemented in UK law.
3. [2003] EWHC 1357 (QB).
4. Section 1 of the SIA.
5. Section 2(1) of the SIA.
6. [2015] EWHC 55 (Ch).
7. Section 9 of the SIA.
8. [2007] QB 886.
9. [2016] EWHC 153 (Comm).
10. [2016] EWHC 1761.
11. *Supra* at FN3.
12. [2011] UKSC 31.
13. Section 13 of the SIA.
14. Section 13(3)–(4).
15. [2007] EWHC 197 (Comm).
16. Section 13(5) of the SIA.
17. Section 17 of the SIA.
18. [2011] EWCA Civ 1256.
19. [2016] EWHC 1761.
20. Under Article 24 of the Convention.
21. Article 26 of the Convention.
22. [2018] UKPC 31.
23. Section 14(4) of the SIA.
24. Falling within section 14(4) of the SIA.
25. Falling within the exception to immunity under section 13(4) of the SIA.
26. [2013] EWHC 2466.
27. Under section 14(4) of the SIA.
28. [2003] UKHL 30.

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