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# **Enforcement of Foreign Judgments**

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Contributing Editor:  
**Louise Freeman**  
Covington & Burling LLP

**glg** Global Legal Group

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# State Immunity and Enforcement in England

Covington & Burling LLP



Louise Freeman



Tom Cusworth

There are significant obstacles to enforcing a judgment or an arbitral award obtained against a State party. This chapter provides an overview of the law of state immunity (also known as sovereign immunity) in England and the resulting challenges faced by parties seeking to enforce a judgment or arbitral award against State parties.

## 1 What is State Immunity?

State immunity is a protection afforded by a State to foreign States. It derives from international principles that protect States from interference with their interests, people and property by national courts of other States. Immunity restricts national courts from taking jurisdiction over certain proceedings against a State or State-owned entity and/or from allowing enforcement against a State's assets.

The international principles on immunity are found in international treaties such as the European Convention on State Immunity 1972<sup>1</sup> and the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004,<sup>2</sup> and customary international law.

Their principles have been adopted by many jurisdictions in which parties commonly seek to enforce against State parties, including England, France, Hong Kong, the Netherlands, Switzerland, and the United States. National courts apply the law of the forum when considering immunity of a foreign State brought as a party to proceedings, therefore a party seeking to enforce a judgment or arbitral award against a State will need to consider the national law of the jurisdiction in which a State's assets are located, as well as the national law of the place in which the original judgment or award was sought.

English law on state immunity derives from the State Immunity Act 1978 (the "SIA") and follows a restrictive approach to immunity. This means that immunity affects only those activities that are carried out in the *exercise of sovereign authority* and States, state-owned entities and their assets are not immune in the context of *commercial transactions*.

## 2 How Does Immunity Protect States in England?

There are two important ways in which state immunity protects a State or State-owned entity in England.

First, by way of immunity from *adjudication (or jurisdiction)*, under s1 of the SIA. This protects a State party by preventing the English Court from hearing a substantive claim brought against a State party. The question for the Court to answer will be: "Is the State party immune from the jurisdiction of the Court?". In other words, the Court will need to consider whether it has adjudicative jurisdiction over the relevant State party and if can it proceed to hear the claim.

Second, by way of immunity from *enforcement and execution*, under s1 and s13 of the SIA. This protects a State party from enforcement proceedings instituted in England and restricts the English Court from making an execution order over State assets. As a judgment creditor must start an action in the English Court for the value of the decision it is looking to enforce, the questions posed to the Court are twofold: (a) "Is the State party immune from jurisdiction of the English Court in relation to the enforcement proceedings instituted before it?" (immunity from enforcement); and (b) "Is the State asset on which enforcement is sought immune from execution in England?" (immunity from execution).

This chapter focuses on immunity from enforcement and execution. It provides an overview of the rules applicable where a private party seeks to enforce in the English Court a decision made by a foreign Court against a State party and to execute it against State assets.

This chapter does not address the enforcement of arbitral awards against a State in England in detail, although we note below the differences when enforcing an arbitral award against a State.

## 3 When Does Immunity from Enforcement and Execution Arise?

Immunity from enforcement and execution can arise in three different scenarios in the English court:

- (a) execution in England of an English judgment made against a foreign State;
- (b) enforcement in England of a foreign judgment made against a foreign State, which will generally be a judgment from a court in State A against State B; and
- (c) enforcement of an arbitral award, made by an arbitral tribunal seated in England or in a foreign jurisdiction against a foreign State.

The English rules relating to enforcement of judgments in England generally apply when considering the rules and regimes that may be used for enforcing a foreign judgment against a foreign State. Please see the England & Wales chapter (chapter 10) of this publication for more information on this.

## 4 State Immunity from Enforcement

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

### The general rule of State immunity from adjudication

The recognition and enforcement of the foreign judgment is an “adjudicative act” subject to the Court’s discretion. As such, the general rule is that a State is entitled to claim state immunity from enforcement proceedings under the SIA, unless an exception applies (s1 SIA).

A “State” includes: (i) the sovereign or head of State; (ii) the branches of government and other organs of the State; and (iii) any department of the government. It does not include a “separate legal entity” (or State-owned entity), distinct from the organs of the State.

As detailed further in section 6 below, for State-owned entities, the presumption flips. A State-owned entity therefore 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.

### Exceptions to the general rule for enforcement proceedings

The exceptions to immunity relevant to *enforcement* proceedings are contained in the SIA and the Civil Jurisdiction and Judgments Act 1982 (the “CJJA”): (a) submission to the jurisdiction of the English Court (s2(1) SIA); (b) for the enforcement of arbitral awards only, the State has agreed to submit a dispute to arbitration (s9 SIA); or (c) for the enforcement of foreign judgments only, the requirements of s31 of the CJJA are fulfilled (see further below).

The “commercial transaction” exception (s3(1)(a) SIA) that can apply to non-enforcement adjudicative proceedings does not apply to enforcement proceedings, even if the foreign judgment relates to a commercial transaction. Any enforcement proceedings in England relate to the foreign judgment, rather than the underlying commercial transaction.<sup>3</sup>

#### (a) Submission to jurisdiction

- A State is not immune from enforcement proceedings (in respect of a foreign judgment or an arbitral award) in respect of which it has submitted to the jurisdiction of the English Court (s2(1) SIA).
- 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, and an agreement that a contract will be governed by English governing law does not constitute submission to the jurisdiction of the English Court.
- An agreement can be in writing (clearly setting out waiver of immunity and/or submission to the English Court) or by conduct.
  - For an agreement in writing, it is sufficient for a State to waive its right to raise the defence of state immunity or to agree that any judgment made against it may be enforced in any other jurisdiction.
  - 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 (e.g., by filing a substantive defence or bringing a counterclaim).
- Once a State has submitted, its submission is irrevocable.<sup>4</sup>

#### (b) 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” (s9 SIA).

- Enforcement proceedings that relate to the recognition and enforcement of an arbitral award fall within this exception.<sup>5</sup>

- If an arbitral award has been issued against a State, the State may challenge the jurisdiction of the arbitral tribunal before the applicable national court of the seat of the arbitration. If the national court decides that the State did agree to arbitrate the disputes that were the subject of the relevant award, and is therefore not immune, the English court can conclude that the State may not claim immunity from enforcement proceedings for enforcing the relevant arbitral award.<sup>6</sup>

#### (c) CJJA regime

- Section 31 of the CJJA provides that a foreign judgment (given by any court except the court of the foreign State) will be enforced against a foreign State if: “(a) it would be so recognised and enforced if it had not been given against a state; and (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the [SIA]”.
- The conditions in s31 both need to be satisfied for a foreign judgment to be enforced against a State. In considering the second condition, the English court must be satisfied that one of the adjudicative exceptions in the SIA (including the commercial transactions exception) would be applicable if it had applied English law on immunity, such that a State would not be immune.<sup>7</sup>
- If a State is not immune, the English Court will go on to apply the general rules for the enforcement of a foreign judgment or arbitral award. Once the English Court has given judgment holding that a foreign judgment or arbitral award should be recognised and enforced, the judgment creditor will need to *execute* the English judgment against a State’s assets.

## 5 State Immunity from Execution

### General rule of immunity from execution

Having overcome the hurdle of establishing the jurisdiction of the English Court to hear the enforcement proceeding outlined above, the next hurdle for a judgment creditor will be identifying assets of the foreign State in England that are not protected by immunity from execution.

Under s13 SIA, the general rule is that no relief may be granted against the foreign State by way of recovery of land or other property, and property of a State may not be subject to the enforcement of a judgment or arbitral award.

There are two exceptions to this general rule: (1) with the written consent of the State (s13(3) SIA); or (2) where the relevant property is in use or intended for use for commercial purposes (s13(4) SIA).

#### (a) Consent to enforcement

- Such consent is rarely given by a State. Parties seeking to enforce will generally not have any consent or waiver, and even if some consent or waiver is given, only clear consent to execution over an asset is sufficient. This requires an express reference to enforcement or execution against assets and/or waiver of immunity over property, in addition to any waiver of immunity from adjudication.



- For instance, a State had given consent for execution against its assets under a provision that stated that “*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).<sup>8</sup>
  - It is possible, but very unlikely, that a State’s consent to execution may be obtained at the enforcement stage, through the head of the State’s diplomatic mission in the UK (s13(5) SIA). It is more common for the same individual to issue a certificate under s13(5), stating that any property is not in use or intended for use by or on behalf of the State for commercial purposes, to defeat a party seeking to enforce under the commercial purposes exception. Such a certificate will be accepted by the English Court as sufficient evidence of that fact unless the contrary is proved.
- (b) Property used for commercial purposes
- Assets owned directly by the State which are used for commercial purposes will be available for execution even if that property is not connected to the dispute. However, to execute an award or judgment against State-owned assets, those assets must be used or intended to be used *exclusively* for commercial purposes. This means that 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 would therefore be immune from execution.<sup>9</sup>
  - The SIA defines “commercial purpose” by reference to s3(3), i.e., as being for the purposes of commercial transactions, in respect of which a State will not have immunity (s13(5) SIA). However, it is important not to confuse the “commercial purpose” test of s13(4), relating to exceptions to immunity from *execution*, with the “commercial transaction” test of s3 relating to exceptions to immunity from *adjudication*. The “commercial purpose” test is rarely met, as States tend to place their assets held abroad in the hands of their diplomatic missions or central banks, which are immune without exception – see section 6 below.
  - The commercial purpose exception allowing execution over State property is even narrower 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 declaration<sup>10</sup> generally agreeing to enforcement proceedings within the territories of other State parties.<sup>11</sup>

## 6 Other Issues

### State-owned entities

A State-owned entity is a separate legal entity distinct from the executive organs of the State or the State’s government. Such entities only have immunity from adjudication if acting in the exercise of sovereign authority. This is a highly factual question and will depend on the nature and character of the specific act that is subject to a dispute.

The English Court will need to consider the entity’s juridical status, as well as the entity’s constitution, control and functions. There is a presumption that a State-owned entity is a separate legal entity if it was established for commercial or industrial purposes and with independent management, such that the State and the entity should not be held liable for one another. This presumption can only be overcome in “quite extreme circumstances”, if it can be proved that the entity has no effective independent existence from the State.<sup>12</sup>

### Diplomatic property

State assets that are diplomatic or consular in nature benefit from the general immunity under the SIA for State assets. Such assets cannot fall under the “commercial purposes” exception, as they are held for sovereign purposes. Immunity for 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

State assets located abroad are often held in the name of the Central Bank of that State, which will have a “super-immunity”. This acts as a bar to enforcement against these assets as central banks have absolute immunity under English law (s14(4) SIA), subject only to the exception of written consent of the Central Bank.<sup>13</sup>

### 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 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.<sup>14</sup>

## 7 State Immunity in a Nutshell

State immunity provides States with a significant advantage in resisting the enforcement of foreign judgments or arbitral awards and judgment creditors have significant obstacles to overcome, even with an initial victory at the merits stage.

As with any potential litigation, the location of State assets and immunity from enforcement and execution need to be considered and dealt with early on in proceedings. Otherwise, private parties risk a Pyrrhic victory, holding a judgment or arbitral award that they are unable to enforce.

The English Court considers the question of immunity in the context of enforcing a foreign judgment or arbitral award in two stages: first, immunity from enforcement; and secondly, immunity

from execution. A judgment creditor must be able to overcome both to enforce successfully and recover assets in England.

Clear drafting when contracting with State parties is therefore critical. Provisions that deal with submission to jurisdiction, arbitration agreements and/or consent or waiver must be drafted with care. Private parties need to be aware of the risks of contracting with a State or separate legal entity without a fulsome waiver of immunity, given the scope of immunity from adjudication and enforcement. Submission to the jurisdiction of the English Court for enforcement will not necessarily be sufficient to provide consent for execution.

The English Court has dealt with an increasing number of cases on issues relating to enforcement of foreign judgments and arbitral awards, as well as related issues as to the scope of procedural immunities under the SIA. These cases show how difficult it is to enforce against a State party, and the number of cases involving appeal courts show how hard-fought these issues are, although they also prove that it is possible (in some circumstances) for judgment creditors to enforce against State parties.

### Endnotes

1. Drawn up within the Council of Europe and ratified by the UK.
2. The UK has signed this Convention, but it has not yet been ratified by the UK or implemented in English law, as it has not yet entered into force (since it has not been ratified by 30 countries).
3. *NML Capital Limited v Republic of Argentina* [2011] UKSC 31.
4. *The High Commissioner for Pakistan in the United Kingdom v National Westminster bank plc* [2015] EWHC 55 (Ch).
5. *Svenska Petroleum Exploration AB v Lithuania (No.2)* [2006] EWCA Civ 1529.
6. *Hulley Enterprises Limited and others v The Russian Federation* [2023] EWHC 2704 (Comm).
7. *Dicey, Morris & Collins on the Conflict of Laws* 16<sup>th</sup> Ed. (2022) vol 1, para. 9-071. An earlier version of this statement was approved by the Supreme Court in *NML Capital Limited v Republic of Argentina* [2011] UKSC 31.
8. *Donegal International v Republic of Zambia* [2007] EWHC 197 (Comm).
9. *SerVaas Incorporated v Rafidian Bank and others* [2012] UKSC 40.
10. Under Article 24 of the Convention.
11. Article 26 of the Convention.
12. *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27.
13. *(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* [2013] EWHC 2466.
14. *Société Eram Ltd v Compagnie Internationale de Navigation* [2003] UKHL 30.



**Louise Freeman** represents parties in complex commercial disputes and class actions, and co-chairs the firm's Commercial Litigation and European Dispute Resolution Practice Groups.

Described by *The Legal 500* as "one of London's most effective partners" and by *Chambers* as "a class act", Louise helps clients to navigate challenging situations in a range of industries, including life sciences, technology and financial markets. Most of her cases involve multiple parties and jurisdictions, where her strategic, dynamic advice is invaluable.

Louise also represents parties in significant class action litigation, including a number of the leading cases in England.

**Covington & Burling LLP**  
22 Bishopsgate  
London EC2N 4BQ  
United Kingdom

Tel: +44 20 7067 2000  
Email: [lfreeman@cov.com](mailto:lfreeman@cov.com)  
LinkedIn: [www.linkedin.com/in/louise-freeman-29744535](https://www.linkedin.com/in/louise-freeman-29744535)



**Tom Cusworth** is a litigator in Covington's London office, with particular expertise in jurisdictional, immunity and conflict of law issues. Tom has experience advising corporates in the technology, life sciences, energy, consultancy and financial services sectors, as well as individual clients on high-value disputes, on international asset-tracing and enforcement of foreign awards and judgments in the UK. He focuses on complex commercial and contractual disputes, as well as insolvency disputes, and has represented clients in the English High Court, the Court of Justice of the European Union and before arbitral tribunals under LCIA, ICC and SCC rules.

**Covington & Burling LLP**  
22 Bishopsgate  
London EC2N 4BQ  
United Kingdom

Tel: +44 20 7067 2000  
Email: [tcusworth@cov.com](mailto:tcusworth@cov.com)  
LinkedIn: [www.linkedin.com/in/tom-cusworth-66a96730](https://www.linkedin.com/in/tom-cusworth-66a96730)

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