COVID-19 · STATE IMMUNITY AND THE PURCHASE OF ESSENTIAL MEDICAL SUPPLIES

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Introduction

1. An immediate and significant pressure on States arising from the COVID-19 pandemic is in sourcing urgently-required medical supplies such as personal protective equipment, ventilation machines, and other medical equipment. There have been numerous high-profile examples of the United Kingdom's own efforts to do so. On 3 April 2020 it was reported that millions of pieces of medical equipment had arrived in the United Kingdom from Shanghai. On 19 April 2020 it was reported that shipment to the United Kingdom from Turkey carrying vital PPE kit had been delayed.

2. Such is the urgency of the situation, it is expected that contracts put in place by States around the world to source such supplies have been concluded at speed and, as the delay in delivery from Turkey highlights, may not always be performed as expected—especially owing to 'lockdown' restrictions.

3. The conclusion of contracts in urgent and uncertain conditions often leads to litigation; but critical differences in these unprecedented circumstances are the scale at which essential medical supplies must be sourced and the common involvement of States or State entities as parties to the relevant contracts. Questions of State immunity are therefore likely to be pivotal in any resulting disputes. In light of this, this note looks at the application of state immunity rules in the United Kingdom to litigation arising from the purchase by or from States of medical supplies for the fight against COVID-19.

4. The law of state immunity in the United Kingdom is largely codified in the State Immunity Act 1978. But, as Lord Diplock said in *Alcom Ltd v Colombia* [1984] AC 580, 597, the provisions of the 1978 Act 'fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations'; indeed, to the extent the Act departs from customary international law it may conflict with the United Kingdom's obligations under, *eg*, the ECHR (*Benkharbouche v Embassy of the Republic of Sudan* [2019] AC 777). Those principles are largely reflected in the United Nations Convention on Jurisdictional Immunities of States and their Property (*Jones v*

Saudi Arabia [2007] AC 270, [8] (Lord Bingham)), adopted by the General Assembly on 16 December 2004 though yet to enter into force. The 1978 Act also implements the more limited European Convention on State Immunity, signed in Basel on 16 May 1972 and currently in force for eight States: Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, and the United Kingdom.

5. Section 1(1) of the 1978 Act enacts the general rule that, 'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.' But that general rule is subject to three important qualifications:

   (1) section 1(1) recognizes that the general rule is subject to the exceptions provided for in the 1978 Act, which critically for these purposes include certain exclusions accorded to 'commercial' activity or property

   (2) though s 1(1) is cast in general terms, there is a distinction between (i) immunity from adjudication and (ii) immunity from enforcement, with the result that the question of state immunity is considered separately at each stage

   (3) there is then the question as to whether a person or entitled is entitled to claim immunity as a State. Though logically prior to the above issues, is most easily addressed after them because it turns partly on what counts as 'commercial'.

6. This note therefore addresses immunity from adjudication, immunity from enforcement, and the definition of 'State', focusing on the first because it raises issues most directly relevant to the pandemic.

Scope of immunity from adjudication

7. Assuming that the UK court would otherwise have jurisdiction to hear the claim under its rules of private international law, the question arises whether the State is immune from that jurisdiction by the rules encapsulated in the 1978 Act.

8. The starting point is the general immunity conferred by s 1(1). But a major exception is soon encountered in s 3(1):

   (1) A State is not immune as respects proceedings relating to—

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.[1]

9. The exception in s 3(1)(a), the most relevant here, is broad. Sub-section (3) explains that 'commercial transaction' means, for these purposes:

(a) any contract for the supply of goods or services; … and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority …

10. In relation to the first category, the purchase of medical supplies the express exception from immunity of *any* contract for the supply of goods is likely to be crucial: provided the claim relates to a contract for the supply of goods, the State will benefit from no immunity from adjudication. As Lord Diplock observed in *Alcom Ltd v Colombia* [1984] AC 580, 603, a claim relating to such a supply will attract no immunity even if the transaction was entered into by the State exercising its sovereign power—that is, in a context or for purposes that might classically be regarded as essentially governmental rather than commercial. The editors of *Dicey, Morris, and Collins on the Conflict of Laws* (15th edn, 2012) § 10·33, put it starkly: even 'contracts for the purchase or sale of goods required for public purposes, such as arms, are within the Exception'.

11. The commercial-transaction exception, then, is apt to cover most potential claims relating to contracts for medical supplies. But one nuance, perhaps relevant to medical materials, turns on the meaning of 'supply of goods': though personal protective equipment and hospital equipment such as ventilators will naturally fall within that phrase, and therefore the commercial-transaction exception, there may be borderline cases where the material being supplied is more readily viewed as a component of the human body than as 'goods'.

12. One such material could be the plasma of those who have survived COVID-19 (DNA, by contrast, can readily be synthesized and amplified without having to be extracted directly from survivors). Whether that plasma can be 'goods' for these purposes is uncertain. As

[1] The exception in s 3(1)(b) is limited by sub-s (2): it 'does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law'.

the Court of Appeal observed in *Yearworth v North Bristol NHS Trust* [2010] QB 1, [29], the law 'has remained noticeably silent about *parts or products of a living human body*' (emphasis in original). *Yearworth* concerned a claim for damage to sperm stored in a sperm bank. The Court of Appeal held that the determination whether a part or product of a living human body might amount to property was necessarily context-specific, saying at [29]:

> … part of our inquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here the right, albeit limited, of the men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

13. But, as the discussion in *Benjamin's Sale of Goods* (10th edn, 2017) § 10·89 demonstrates, this provides little guidance for present purposes: the law concerning the sale of parts or products of the live human body is in a state of 'rapid' development.[2] Claims concerning the supply of parts or products of living persons are therefore likely to raise novel and difficult issues.

14. Even if a contract for the supply of medical material does not qualify as one for the supply of goods, it may still be a 'transaction … otherwise than in the exercise of sovereign authority' for the purposes of s 3(1)(c). But that leads to a definitional dead end, as such a transaction is no more or less than a 'commercial one'. That was not lost on the International Law Commission, whose 1991 Draft Articles on Jurisdictional Immunities of States and Their Property offered the further guidance in draft art 2(2) (the basis of the corresponding article of the UN Convention of 2004):

> In determining whether a contract or transaction is a 'commercial transaction' … reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if, in the practice of the State which is a party to it, that purpose is relevant to determining the non-commercial character of the contract or transaction.

[2] One may wonder what Benjamin's own views would have been. He was, as may be surmised from his being Secretary of State for War of the Confederate States of America, a prominent and enthusiastic 'owner' of many humans. As the Court of Appeal noted drily in *Yearworth*, [30], 'One consequence of the principles, albeit not recognised until the nineteenth century, is that, if our bodies cannot be our own property, it follows that they cannot be the property of other persons; and that therefore we cannot sell ourselves, or be sold, to others.'

15. It has been said that UK courts would not look to the purpose of the transaction in determining its commercial or sovereign character, by reference to *I Congreso del Partido* [1983] 1 AC 244 (at *eg* 263, 267 (Lord Wilberforce), citing the judgment of the Federal Constitutional Court of the Federal Republic of Germany in *Claim against the Empire of Iran* (1963) 45 ILR 57, 80, that:

> As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity.

16. But Lord Wilberforce added, in a less-often-quoted passage at 272, that 'the purpose … is not decisive but it may throw some light upon the nature of what was done.' It may therefore remain appropriate, if only to that limited extent, for UK courts to consider the ILC's Commentary to draft art 2(2) (emphasis supplied):

> … Defendant States should be given an opportunity to prove that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by *raison d'État*, such as the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area, *or supply medicaments to combat a spreading epidemic*, provided that it is the practice of that State to conclude such contracts or transactions for such public ends. …

17. One final aspect of s 3(1)(c) that is potentially significant in this context is that it covers torts committed by the State (Fox and Webb, *The Law of State Immunity* (3rd revd edn, 2015) 197, citing *Australia and New Zealand Banking Corpn v Australia* (Comm Ct, 21 February 1989); Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019) 482). Given suggestions that some States may have attempted to procure supplies already destined for other buyers, there is the possibility that a claim for procuring a breach of contract, for example, might escape the scope of immunity. That is provided, of course, that the transaction or activity is not legal committed 'in the exercise of sovereign authority'.

Scope of immunity from enforcement

18. Immunity from enforcement arises independently of immunity from adjudication and any exception to it must be established separately. [3] So, even if it is possible to bring a claim against a State and even if that claim is successful, the successful party may still be barred from enforcing the judgment. It is therefore essential at the start of any litigation to consider the scope of state immunity from adjudication and from enforcement, to guard against a hollow victory.

19. The key aspects of immunity from enforcement are provided for by s 13(2):

(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.

20. For the English court to recognize and enforce a foreign judgment of a foreign court against a foreign State (other than the State to which the court belongs), it is also necessary to show that the judgment would have been recognized and enforced in England had it not been given against a state.[4] There are also further limitations where the State is a party to the European Convention.[5]

21. Moreover, an application to recognize and enforce an arbitral award is distinct from applications to secure or enforce against assets once an award is recognised and judgment entered. The former is usually consented to by virtue of the State's agreement to arbitrate,[6]

[3] And s 13(3) of the 1978 Act provides that 'a provision merely submitting to the jurisdiction of the courts is not to be regarded as consent' such as to waive the immunity otherwise conferred by s 13.
[4] S 31(1) of the Civil Jurisdiction and Judgments Act 1982.
[5] Germany being perhaps the most significant of those parties in this context. S 13(4) provides that sub-s (2)(b) applies to such States only where (a)the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) and the State has made a declaration under art. 24 of the Convention or (b) the process is for enforcing an arbitration award. If the judgment is against the United Kingdom, then the requirements of s 18(1) of the 1978 Act apply: that the judgment (a) was 'given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 above' and (b) 'is final, that is to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside'.
[6] S 9 of the 1978 Act. Proceedings for leave to enforce an arbitral award are 'proceedings … which relate to arbitration' (*NML Capital Ltd v Argentina* [2011] 2 AC 495, [89] (Lord Mance)). But the Court of Appeal in *Svenska Petroleum Exploration AB v Lithuania* [2007] QB 886, [117], explained, 'Enforcement by execution on property belonging to the state is another matter, as section 13 makes clear.' And a subsequent

whereas immunity from enforcement applies to the latter. However, there is no automatic waiver where the arbitration agreement is between States.[7]

22. Consent aside, there is a commercial exception to the enforcement immunity set out in s 13(2)(b); but it is narrower than the commercial-transaction exception to the immunity from adjudication discussed above. Section 13(4) notably provides for an exception for 'property … in use or intended for use for commercial purposes', provided the actual or intended use is 'for the time being'.[8] In *Alcom*, Lord Diplock, giving the leading speech, held at 604:

> Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides.

23. But in *Orascom Telecom Holding SAE v Chad* [2008] 2 Lloyd's Rep 396, [20], Stanley Burnton J distinguished *Alcom* and granted the application for enforcement on the basis that, in the case before him the monies against which enforcement was sought were 'not the London assets of a national fund of Chad' but were in London 'because they were required to be channelled through the mechanisms expressly set up … so that Chad's direct oil revenues pursuant to … oil contracts were not simply passed direct to Chad'.

Entities entitled to immunity

24. A final issue to be considered is whether the contractual counterparty qualifies as part of the State, and thereby attracts immunity from adjudication or enforcement. That is likely

Court of Appeal explained, citing this passage of *Svenska*, that the same immunity from enforcement by execution on property extends to freezing orders (*ETI Euro Telecom International NV v Bolivia* [2008] 1 WLR 665, [113] (Lawrence Collins LJ, with whom Stanley Burnton and Tuckey LJJ agreed; see also *Sabah Shipyard* (*Pakistan*) *Ltd v Pakistan* [2002] 2 Lloyd's Rep 571, [23] (Waller LJ, with whom Sir Martin Nourse and Pill LJ agreed)).

[7] S9(2) of the 1978 Act.

[8] Further, though perhaps the most obvious source of funds against which a party may wish to seek enforcement against a State are those of its central bank, s 14(4) provides that '[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 subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.'

to be relevant because contracts are often entered into not by the State's executive as such but by or through a (notionally) private company which may be owned or controlled to varying extents by the State's government.

25. 'State' is defined by s 14(1) of the 1978 Act as

> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
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> (c) any department of that government,
>
> but not … any entity (hereafter referred to as a 'separate entity') which is distinct from the executive organs of the government of the State and capable of suing or being sued.

26. So a 'separate entity'—one other than those enumerated in sub-s (1)(a)–(c)—in general has no entitlement to immunity. And there is a strong presumption that even a State-owned and even State-controlled company is to be regarded as separate, *ie* 'distinct from the executive organs of the government of the State'. In *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2013] 1 All ER 409, [29], ('*Gécamines*') Lord Mance, delivering the Board's judgment, said:[9]

> … Especially where a separate juridical entity is formed by the state for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the state forming it should not have to bear each other's liabilities. It will in the board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the state's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the state were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the state and vice versa. …

[9] *Gécamines* was an appeal from Jersey but the 1978 Act was in issue in *Gécamines* because the State Immunity (Jersey) Order 1985, SI 1985/1642, had extended it to Jersey.

27. If the entity is not separate then it will attract immunity only if it meets the requirements of sub-s (2):

> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a State … would have been so immune.

28. And it follows from the above that an entity engaged, for relevant purposes, in commercial activity—in particular the supply of goods—will not be exercising sovereign authority and so will attract no immunity.

Conclusion

29. As is commonly the case with state immunity, it is likely that it will be easy to overcome the hurdles to establish that jurisdiction as opposed to jurisdiction to take enforcement steps.

30. There are good reasons for thinking that most contracts for the supply of medical equipment would fall within the commercial-transaction exception to immunity from adjudication. Where novel issues may arise is where the supply is of something more akin to parts or the product of a living human, such as the plasma of COVID-19 survivors. And in the context of sale contracts it is likely that questions will arise whether State-owned contractual counterparties fall to be treated as equivalent to the State.

31. Where proceedings against a State are commenced in arbitration, provided it is not State to State arbitration, adjudication jurisdiction to enforce an award should be possible in most cases as a result of the State's consent to arbitration.

32. However, unless the State has specifically waived its immunity from enforcement then it is likely that the biggest hurdle for those seeking to enforce a judgment or award against a State or separate entity will be to identify property that, for the time being, is in use or intended for use for commercial purposes.

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