City Research Online

City St George's, University of London

Citation: Reece Thomas, K. (2015). Enforcing against state assets:the case for restricting private creditor enforcement and how judges in England have used "context" when applying the "commercial purposes" test. Journal of International and Comparative Law, 2(1), pp. 1-26.

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/12152/

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

Enforcing against state assets: The case for restricting private creditor enforcement and how judges in England have used "context" when applying the "commercial purposes" test.

Katherine Reece Thomas*

Abstract: This article focuses on some recent cases involving attempts by private creditors to enforce judgments against state assets. It examines how the international law rules on state immunity which permit enforcement but only against assets used for commercial purposes have been applied in domestic courts. In particular it highlights an emerging trend in English cases where "context" has been used to protect state assets from seizure. It considers enforcement against the wider question of sovereign debt restructuring and concludes that, apart from a few exceptions, courts are protecting state assets despite increased pressure from creditors**.**

Keywords: *State immunity from enforcement; State assets and attachment; judicial measures of constraint against state assets; Sovereign Debt; vulture funds, international insolvency; commercial purposes test for enforcement against state assets; customary international law on state immunity; the International Court of Justice on state immunity; US and European domestic law on enforcement; analysis of recent English cases; SerVaas; AIC; AIG; Orascom.*

I. Introduction

Most jurisdictions no longer recognise absolute sovereign immunity. Immunity essentially extends to the governmental activities and not to the commercial activities of a state. The potential injustice to private litigants of an unfettered application of absolute immunity, the increasing involvement of states in

commerce and a growing number of sovereign defaults has led to the adoption of this restrictive doctrine in respect of suit.[1]

In contrast, possible international political ramifications and ingrained notions of dignity and equality make it less acceptable as a matter of international comity and law to curtail the immunity of a state when its assets are at risk of seizure. As a result, states continue to benefit from virtually absolute immunity from court-supervised execution or measures of constraint. The one, widely accepted, restriction to such immunity is in relation to state assets which are being 'used for commercial purposes'.[2] The scope and application of the commercial purposes test is however uncertain and merits study.

Recent sovereign defaults in Argentina and potential defaults in Europe, in the aftermath of the financial collapse of 2008, have highlighted the limited right to redress in domestic courts afforded to private creditors (traditionally banks and, increasingly, bond holders). As there is no international law establishing an insolvency regime for states unable to pay their debts, states in default cannot go into liquidation, the ultimate escape of the domestic debtor. Creditors of

---

* Associate Professor, The City Law School, City University London.

[1] The restrictive doctrine is based on the concept that if a state chooses to engage in commerce it should be treated in domestic law as a private commercial entity would be. The restrictive doctrine of state immunity is arguably now embedded in customary international law and is reflected in the 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, Annex, UN Doc. A/RES/59/38 (not yet in force). The Convention represents customary law: *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 [2007] 1 A.C. 270 p. 280,289 and 293 (per Lord Bingham).
The European Convention on State Immunity 1972 ("ECSI") and the UK State Immunity Act 1978 ("SIA") adopt the restrictive doctrine. Most common law jurisdictions have followed suit: The US Foreign Sovereign Immunities Act 1977, The Canadian State Immunity Act (as amended) 1982 and the Australian Foreign States Immunities Act (as amended) 1985 are good examples. However not all states subscribe to the restrictive doctrine. Brazil does not and the former Soviet Union did not. China in particular does not accept the restrictive doctrine as evidenced by litigation in Hong Kong in *FG Hemispheres Associates LLC v Democratic Republic of Congo* [2010] 1 HKLRD 410 (CA (HK)).

[2] Referred to here as the "commercial purposes" test. The limits on enforcement jurisdiction have been explored widely notably in the following: Roger O'Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties, A Commentary*, (OUP 2013) ; Xiadong Yang, *State Immunity in International Law,* (CUP 2012); Hersch Lauterpacht, "The problem of jurisdictional immunities of foreign States" *3 Collected Papers* 315 (1951); James Crawford, "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 *AJIL* 820; Georges Delaume, "The State Immunity Act of the United Kingdom" (1979) 73 *AJIL* 185; Hazel Fox, "A "commercial transaction under the State Immunity Act 1978" (1994) *ICLQ* 193; August Reinisch, "European court practice concerning state immunity from enforcement measures' (2006) *EJIL* 803; Cedric Ryngaert, "Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors" (2013) 26 *Leiden Journal of International Law* pp. 73-88; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013); Rosanne van Alebeek, "Domestic Courts as agents of Development of International Immunity Rules" (2013) 26 *Leiden Journal of International Law* pp. 559-578; and Guy Robin, "Enforcement immunities in the domain of international commercial transactions" (2002) *International Business Law Journal*, 3.

states can either join in an orderly international rescheduling effort or pursue a remedy in a domestic court.[3]There are not many examples of successful enforcement actions against state assets partly because most extra-territorial state assets are deposited in central banks which benefit in general from absolute immunity[4] or are held in the name of separate state entities[5]. The wide immunity from judicial enforcement afforded to state assets also explains the relatively few cases. But as states have turned to world markets to fund their development and financial institutions have been keen to lend, instances of sovereign defaults have multiplied and creditors have increasingly sought to recover through domestic courts.[6] Private creditors, who have successfully sued foreign states, have turned their attention to enforcing these judgments against state assets in municipal courts. So-called "professional litigators" have commenced actions around the world highlighting the need for clarity in this

[3]Lee Buchheit and G.Mitu Gulati, "Responsible Sovereign Lending and Borrowing" (2010) 73 *Law and Contemporary Problems* 63; Pablo M. Ros, "The Elliott Acropolis? An Analysis of Individual Creditor Sovereign Debt Enforcement Mechanisms" Harvard Law School Spring 2011 available at http://www.law.harvard.edu/programs/about/pifs/education/llm/2010---2011/ros.pdf, accessed 5 February 2014; Julian Schumacher, Christoph Trebesch and Henrik Enderlein, "Sovereign Defaults in Courts The Rise of Creditor Litigation 1976-2010" (May 6 2014). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997; Jonathan Blackman and Rahul Mukhi, "The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and other Legal Fauna" (2010) 73 *Law and Contemporary Problems* 47; W. Mark C. Weidemaier and Anna Gelpernn, "Injunctions in Sovereign Debt Litigation" (2014) 31 *Yale J. on Reg* 189 ; W. Mark Weidemaier and Miu Gulati, "Sovereign Debt and the "Contracts Matter" Hypothesis", forthcoming in the *Oxford Handbook of Law and Economics* ; W. Mark C. Wedemaier, "Sovereign Immunity and Sovereign Debt" (2014) *U. Ill. L. Rev*. 67.

[4] Central Banks benefit from absolute immunity from enforcement under the UK SIA s 14 (4). William Blair, "The legal effect of Central Bank Investments under English Law" (1998) *Cambridge Law Journal* 374. See *AIG Capital Partners v Republic of Kazakstan* [2005] EWHC 2239 (Comm), [2005] All ER (D) 223 on the meaning of property and the application of s 14(4) of SIA.

[5] Separate entities are not treated as the "state" and have only limited immunity under s 14 of SIA and as a matter of customary international law. In addition their assets cannot be attached to meet the debts of the state or other state entities as recently confirmed in the Privy Council case of *La Generale des Carrieres et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All E.R. 409; [2013] 1 All E.R. (Comm) 753; [2012] 2 Lloyd's Rep. 443; [2012] 2 C.L.C. 709.

[6] The General Assembly has recently resolved to establish an international legal framework for sovereign debt. See the articles on sovereign debt referred to in note 3 above and Tosin Suleiman "Analysis: Decade after debt relief, Africa's rush to borrow stirs concern" *Reuters Business & Financial News*, 18 March 2014 available at http://www.reuters.com/assets accessed 3rd February 2015; Danny Hakim "Investors Are Eager for African Sovereign Debt, Despite Plenty of Risks" New York Times, October 23, 2014 7:42 pm; available at http://dealbook.nytimes.com/2014/10/23/investors-are-eager-for-african-sovereign-debt-despite-plenty-of-risks/?_r=2; accessed 5th February 2015.There may be progress towards a new framework to deal with sovereign defaults. See Elaine Moore, "New Framework for sovereign defaults" *Financial Times*, August 28, 2014 at 6.52pm available at http://www.ft.com/cms/s/0/; accessed 1st September 2014. G.A.Res. 68/304, UN Doc A/RES/68/304 (Sept. 9 2014) discussed in Karen Halverson Cross, "US Supreme Court Denies Certiorari and Affirms Discovery in Bondholder Litigation against Argentina" ASIL Insight, October 15, 2014 available at Http://www.asil.org/insights/volume/18/issue/23/us-supreme-court-denies-certiorari-and-affirms-discovery-bondholder. Last accessed 22 October 2014.

complex area.[7] An example of recent activity is that led by "vulture funds", entities which purchase deeply discounted sovereign debt in the hope of recovering substantial sums against the debtor state and which has resulted, at least in the US courts, in some startling moves to permit enforcement against state assets and limit immunity.[8]

Many commentators in this field have bemoaned the absence of redress for unpaid creditors of sovereign states and highlighted failures to recover by successful litigants. Fewer have written about why it is important for state assets to be protected and why immunity remains a key international mechanism for stability[9]. Is exposing state assets which may be generated by bilateral or international aid (for example) to domestic measures of constraint ultimately the best way forward? Should assets purchased or built with international aid be liable to attachment? Is the "commercial purposes" test the most appropriate in these circumstances? As the test may be difficult to apply in respect of certain types of asset (notably bank accounts) there is a risk that in the wrong hands the test may lead to attachment arguably against international public policy and comity.

It is against this backdrop that this article examines recent domestic decisions which suggest that an interesting trend is emerging whereby the English courts at least take a wide view of the UK immunity legislation by making reference to the "context" in which the litigation takes place which encompasses international policy considerations. Courts are taking account of the wider concerns by interpreting the "commercial purposes" test in English law by reference to the broader international issues at stake which include a traditional deference towards foreign sovereigns. As discussed below, this trend is replicated in France, in Australia and to a certain extent in the United States.

---

[7] Jonathan Blackman and Rahul Mukhi, "The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and other Legal Fauna" (2010) 73 *Law and Contemporary Problems* 47; and Lee Buchheit and G.Mitu Gulati, "Responsible Sovereign Lending and Borrowing" (2010) 73 *Law and Contemporary Problems* 63.

[8] Pablo M. Ros, "The Elliott Acropolis? An Analysis of Individual Creditor Sovereign Debt Enforcement Mechanisms" Harvard Law School Spring 2011 available at http://www.law.harvard.edu/programs/about/pifs/education/llm/2010---2011/ros.pdf, accessed 5 February 2014, provides some background to the attempts by Elliott Management, Aurelius Capital Management and NML Capital Ltd, the so called "hold out" creditors to enforce against Argentinian assets worldwide. In Australia the Court of Appeal of New South Wales has recently upheld the immunity of the Republic of Nauru against attempts to attach bank accounts by a bondholder. See part III A below.

[9] See the articles referred to in note 3 above and David Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors" *OECD Working Papers on International Investment 2010/02*, OECD Publishing. http://dx.doi.org/10.1787/5km91p0ksqs7-en accessed on 14/4/14; Rosalyn Higgins, "Equality of States and Immunity from Suit: A Complex Relationship" (2012) *Netherlands Yearbook of International Law* 43.

In 1984, the English House of Lords decided in *Alcom v The Republic of Colombia*[10] that a Colombian embassy bank account in London could not be attached by a judgment creditor as the state enjoyed immunity from enforcement in respect of accounts not "solely in use for commercial purposes".[11] In 2012, the Supreme Court decided in *SerVaas v Rafidain Bank* that monies in an account in London representing a debt due to the Republic of Iraq could not be attached because the debt was not "currently in use" for commercial purposes.[12] The words "solely" and "currently" are not in the relevant legislation but the courts have arguably "imported" them to give effect to international policy considerations.[13]

Alcom was the first major decision to look at the then recently enacted immunity from enforcement provisions of the UK State Immunity Act 1978. *SerVaas* is the latest. This article will examine how in the years between the two cases the test for enforcement against state assets has raised questions of interpretation which courts have resolved by adopting a "purpose in context" test thus preserving state assets from attachment when it is arguably politically or diplomatically inappropriate to allow seizure. English courts, while formally endorsing a strict approach to the legislation, have used the "context" in which enforcement is sought in much the same way as Lord Wilberforce used "context" in connection with immunity from suit at common law in the crucial case of *I Congreso* in which he looked beyond the commercial nature of the underlying transaction to the political (or non-commercial) motivation for the breach, a test which has become known as the "nature in context" test[14]. Before examining these recent English cases, this article will outline the development of the doctrine of state immunity from enforcement in international customary law and the domestic law of key states where similar trends have emerged.

II. Development of the restrictive doctrine of immunity from enforcement in International Law

[10] [1984] AC 580.
[11] *Ibid.,* 604 D.
[12] [2012] UKSC 40, [2013] 1 A.C. 595.
[13] As discussed in part III C below.
[14] *Playa Larga (Owners of Cargo Lately Laden on Board) Appellants v I Congreso del Partido (Owners) Respondents Marble Islands (Owners of Cargo Lately Laden on Board) Appellants v Same Respondents (*the *I Congreso)* [1983] 1 A.C. 244, [1981] 3 WLR 328. Stephan Wittich discusses the "context test" as a refinement of the nature test in his chapter "Article 2 (1)(c) and (2) and (3)" in Roger O'Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties, A Commentary* (OUP 2013) 69.

A. Distinguishing sovereign from non-sovereign acts

The doctrine of state immunity is justified on the basis of the sovereign equality and independence of states.[15] Both the commercial activity test, used to limit immunity from suit, and the commercial purposes test, used to protect state assets from enforcement, rely on it being possible to distinguish between the sovereign and the non- sovereign acts of states. The distinction is sometimes expressed as one between acts *jure imperii* (of a sovereign nature) and acts *jure gestionis* (of a commercial nature) with immunity from suit being removed from acts *jure gestionis*. In essence one is called upon to decide when a state is acting as a "state" and when it is acting as a commercial entity, the principle being that, when it is acting as a trader, a state does not need to be protected from domestic law and that it forfeits its right to be treated differently from an ordinary man of commerce.[16] As a result, state courts generally look to the "nature" of the relevant activity or transaction to determine if it is commercial or not. By focusing on nature not purpose, domestic courts have allowed suits against states to proceed in respect of contracts entered into (or breached) for an avowedly political or sovereign purpose, the purchase of boots for the army being the paradigm example.[17]

However, enforcement action against state assets is essentially limited to the pursuit of assets in use for commercial purposes not being a sovereign or public purpose. For attachment it does not suffice that an asset has a commercial nature (for example a bank account held in a commercial bank of a type any trader could open): The creditor must also show that the asset is in use for a commercial purpose. In other words, the test for distinguishing state assets capable of attachment, or of being subjected to other methods of constraint[18], from those immune and thus free from judicial interference, revolves around the uses to which the relevant assets are being put. If that use is for a commercial

[15] Sir Michael Wood, "Immunity from Jurisdiction and Immunity from Measures of Constraint", in Roger O'Keefe and Christian Tams, *The United Nations Convention on the Jurisdictional Immunities of States and their Properties, A Commentary* (OUP 2013), p.14; Rosalyn Higgins, "Equality of States and Immunity from Suit: A Complex Relationship" (2012) *Netherlands Yearbook of International Law* 43 and *Jurisdictional Immunities of the State,* ICJ Reports (2012) 99 para 57.

[16] Put graphically by Lord Denning MR in *Trendtex v The Central Bank of Nigeria* [1977] Q.B. 529 [1977] 2 WLR 356.

[17] UK State Immunity Act 1978 section 3 and UNCSI article 2. Lord Denning in *Trendtex* uses this example. *Ibid.,* p. 558 at D.

[18] UNCSI Article 19. Sir Michael Wood in O'Keefe (n.15) p 16.

purpose the asset may be attached.[19] It is, of course, not always clear what use an asset is put to: What for example is the use of a bank account and what is a non- governmental or non-public purpose? At the international level, the "in use for commercial purposes" restriction in respect of enforcement has been problematic and, in many jurisdictions, legislators and contract draftsmen have sought to add specificity to the concept.

B. Immunity from enforcement/measures of constraint in international law

"[I]mmunity from execution has been one of the most contested aspects of State immunity, indeed an 'intractable aspect'"[20] and it has not been possible, until relatively recently, to point to a customary law exception to absolute immunity from domestic enforcement against state assets or the use of "measures of constraint", as the international lawyers describe them. The emerging rule of customary international law is expressed in the UN Convention on the Jurisdictional Immunities of States and their Property 2004 ("UNCSI") (not in force).[21] The starting point is always that there is absolute immunity from enforcement against state assets subject to exceptions. UNCSI distinguishes between attempts by creditors to obtain judicial assistance before obtaining a judgment and those pursued after a favourable judgment has been rendered. It thus refers to pre- and post-judgment forms of attachment. Assets may be subject to attachment pre-judgment only where the state consents or, where the property is earmarked in advance for enforcement.[22] With respect to post-judgment attachment, only an asset which is "specifically in use or intended for use by the State for other than government, non-commercial purposes and is in the territory of the State of the forum" may be attached.[23] Article 21 provides an

[19] States may hold a variety of assets overseas including buildings (for embassies, consulates and cultural institutes), ships, artefacts, and money in deposit or other accounts with commercial banks. UNCSI Article 21 sets out a list of property that is not in use for commercial purposes. Guy Robin, "Enforcement immunities in the domain of international commercial transactions" (2002) *International Business Law Journal*, p. 3 sets out a useful analysis of the types of state asset a creditor may wish to enforce against.

[20] Sir Michael Wood writing in O'Keefe (n. 15) p 15.

[21] 2004 United Nations Convention on the Jurisdictional Immunities of States and their Property, Annex, UN Doc. A/RES/59/38 not yet in force. The US Foreign Sovereign Immunities Act 1977, The Canadian State Immunity Act (as amended) 1982 and the Australian Foreign States Immunities Act (as amended) 1985, The UK State Immunity Act 1978.

[22] UNCSI Art 18.

[23] UNCSI Art 19 (c) further limits enforcement by restricting the asset base to "property that has a connection with the entity against which the proceeding was directed." The treaty also adds a territorial connection (the relevant assets must be within the territory of the state whose court is hearing the application) but does not require there to be a link between the asset and the substantive claim. This was contested in the drafting of

indicative list of categories of property which are deemed to fall outside Article 19 (c) which cannot be enforced against without consent, such as embassy bank accounts, military equipment, central bank property, and property forming part of the cultural heritage of the state.[24] Commentators on UNCSI have concluded that property can be attached if it is used for the purpose of a commercial transaction[25]. The focus is on the purpose not the nature of the asset but determining the commercial purpose of an asset, particularly a bank account, remains difficult.

In 2012, the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy)* considered whether Italy had acted in breach of international law in denying immunity to Germany, in respect of its alleged breaches of international humanitarian law in the Second World War. The court considered whether Italian measures to enforce Greek judgments against Germany were legally permissible. The court recognised that immunity from enforcement "goes further than immunity from suit" [26] and, specified that there exist two regimes in customary international law: one for determining exceptions from the adjudicative jurisdiction of domestic courts and one for immunity from enforcement or measures of constraint.[27]

The court looked at Article 19 of the UNCSI and, while not concluding that it necessarily represented customary law, was clear that enforcement against state assets is permitted if they are "in use for an activity not pursuing government non-commercial purposes".[28]

The court considered the status of the German cultural institute (Villa Vigoni), used for promoting German cultural interests, against which enforcement measures were sought. The court concluded, after looking at German, Swiss, Spanish, South African and English cases, that the institute was "being used for governmental purposes that [are] entirely non-commercial, and hence for purposes falling within Germany's sovereign functions". The court referred to an exchange of notes between Italy and Germany, dating from 1986, which illustrated that Italy was directly involved in the "peculiar bi-national managing

---

the convention but finally accepted in 2003 and is consistent with the practice of most states other than the US. See 1977 US Foreign Sovereign Immunities Act s. 1610(a)(2).

[24] See the discussion in O'Keefe (n. 14), p.322.

[25] *Ibid*., p. 323.

[26] *Jurisdictional Immunities of the State, (Germany v Italy),* ICJ Reports (2012) 99 para 113.

[27] *Ibid.,* para 117.

[28] *Ibid*., para 118.

structures" which applied to the institute. [29] The court did not actually go into any detail in looking at "purpose" and seemed implicitly to accept that cultural activities were essentially governmental activities and not commercial activities. An international court can use international treaty rules flexibly and treaty wording is often deliberately vague to enable such flexibility. The UNCSI test focuses on non-government commercial purposes and is somewhat vaguer than the test in the UK State Immunity Act discussed in part IV below.[30]

III. Development of the restrictive doctrine in relation to enforcement in domestic law

By the late 1970s, the UK, the US and some European states had moved to an acceptance of the restrictive doctrine both in respect of suit and enforcement. What follows is a brief examination of the treatment of the commercial activity and the commercial purposes tests in the laws of a number of important commercial jurisdictions.

A. *Common law jurisdictions: The USA and Australia*

The US Sovereign Immunities Act of 1976 (the FSIA) takes a broadly similar approach to that of the UK SIA in limiting enforcement against assets in use for commercial purposes , does not define "commercial activity"[31] and requires a connection between the asset and the underlying claim, a condition not found in the English statute. Section 1610 of the FSIA provides that : "(a) The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution . . . if –. . . (2) the property is or was used for the commercial activity upon which the claim is based…."

---

[29] *Ibid.,* para 119.

[30] Vienna Convention on the Law of Treaties 1969 article 31 (2). Anthony Aust, *Modern Treaty Law and Practice* Cambridge University Press 2002 pp188-189; Richard Gardiner, "UN Convention on State Immunity: Form and Function" (2006) 55 *International and Comparative Law Quarterly* 407. Note also that Article 21 of UNCSI which lists property which is not to be attached includes property forming part of the cultural heritage of the state. According to *The Guardian* newspaper the Greek government is threatening to attach German property in Greece to compensate victims of the Second World War who have been awarded compensation by a Greek court. Holiday homes of German citizens will apparently be targeted. Obviously as a matter of international law that would be indefensible (they are not state assets apart from anything else) but this recent activity points to the increased interest in attaching assets to meet alleged state liabilities. Accessed on 16th March 20115 at http://www.theguardian.com/world/2015/mar/12/german-anger-over-greek-demand-for-war-reparations. See also Stefan Wagstyl "Greeks find support for German reparations claims — in Germany" *Financial Times* 17 March 2015 at: http://on.ft.com/1O38jnI. Accessed 17 March 2015.

[31] US FSIA 1976; but at the time of enactment there was an established "judicial" view on the meaning of "commercial": see *Republic of Argentina v Weltover* 504 US 607 (1992) 612-613.

A number of cases in the US courts about immunity from suit have dealt with the meaning of "commercial" and their approach has been followed in cases involving immunity from enforcement. The 1992 US Supreme Court case of *Republic of Argentina v Weltover* dwelt on the distinction between the public and private acts of the state, which the courts have used as a focus in deciding if an act is commercial or not.[32] While it is obvious that "any activity of a sovereign is non-commercial in some sense"[33], the Supreme Court in *Weltover* found that issuing bonds was a commercial activity even though they were issued as part of plan to stabilize the Argentinian currency. They were thus issued "in connection with a commercial activity" under Section1605 (a) (2) despite their purpose.[34] The case had an important effect on sovereign debt litigation by removing immunity from suit for public offerings of sovereign debt, distressed or otherwise. More recently the focus has shifted to enforcement decisions.[35]

In enforcement actions, the US courts initially focused on the nature of the property and whether it was of a type to support sovereign functions, an approach fixed on nature rather than purpose. In *Connecticut Bank of Commerce v Republic of Congo*, the Fifth Circuit however stressed the words "used for commercial purposes" in Section 1610(a). Those words led the court to conclude that "[what] matters, under the statute is not how [the foreign state] made its money, it is how it spends it."[36] The focus on "use" was confirmed in *Walker International Holdings Ltd. V Republic of Congo* where, in the event, the absence of any evidence of use at all in the United States prevented enforcement[37]. Subsequent cases have confirmed the narrow focus on use for a commercial activity. Past use can be relevant given the statutory language but, mere fact of acquisition of the asset using commercial means, does not ensure

[32] *Ibid.*, p. 264

[33] Jonathan Blackman and Rahul Mukhi, "The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and other Legal Fauna" (2010) 73 *Law and Contemporary Problems* 47 at p 52.

[34] *Republic of Argentina v Weltover* 504 US 607 (1992). Fox and Webb (n.2) p. 261 where it is stated that the US decision in *Weltover* by shifting the focus from" commercial transaction for profit... to ...conduct in the manner of a private person... brings the restrictive doctrine closer to the civil law criterion".

[35] *Republic of Argentina v Weltover* 504 US 607 (1992). See the discussion in Blackman and Mukhi (n. 33) at pp. 52-54.

[36] *Connecticut Bank of Commerce v Republic of Congo,* 309 F.3d 240 (2002) at 251. See also more recently *Export-Import Bank of the Republic of China v Grenada,* F 3d WL 4773451 C.A.2 (2014) relied on in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360 at para 175 (see n. 46 below).

[37] 395 F.3d 229 (2004) at 336.

that the test is satisfied.[38] The US courts have struggled (as they have in the UK) to apply the legislative language consistently in all situations particularly where the asset may have or have had a number of different uses. The Fifth Circuit in *Alf Cap v Republic of Congo* tried to summarise the correct test as follows: "[U]nder the FSIA foreign property retains its immunity protection where its commercial uses, considered *holistically and in context*, (italics added) are bona fide exceptions to its otherwise non-commercial use".[39] The "holistic" approach and the reference to "context" mirror the approach of English courts discussed below at part IV.

Argentina's default in 2001 led to attempts to enforce against its assets in a number of jurisdictions. In *EM Ltd v Republic of Argentina* creditors sought to block a payment by Argentina's Central Bank to the IMF and to attach Central Bank funds held in the Federal Reserve Bank. This was refused by the Second Circuit in New York on the basis that Argentina itself did not have a proprietary interest in the funds, the Central Bank being a separate entity[40]. The court however further found that monies used to repay the IMF, would not be "used for a commercial activity" for a number of reasons to do with the nature of the relationship between the Republic and the IMF. The court stated that "[b]ecause a nation state's borrowing relationship with the IMF takes place outside of the commercial marketplace, it cannot be considered "commercial" in nature" [41]. Membership of the IMF is limited to sovereign states and the court distinguished *Weltover* principally on the basis that the IMF is an international

[38] See *Aurelius Capital Partners, LP v Republic of Argentina* 584 F.2d 120 (2009) at 131. The case involved an attempt to execute against social security funds.

[39] 383 F 3d 240 (2004) at 369. See also Yang (n.2) pp. 365-6 where he discusses the Af-Cap litigation generally including *Af-Cap v. Chevron*, US, 475 F.3d 1080 (2007) at 1087. Ros, who is pro-creditor, refers to the *Chevron* decision as having "further cabined the scope of attachable property in …, in which it held that tax and royalty obligations could not be attached because they belonged to Chevron who had negotiated for a "prepaid" contract with the Congo and therefore the revenue streams were not for a commercial purpose" of the state itself. Pablo M. Ros, "The Elliott Acropolis? An Analysis of Individual Creditor Sovereign Debt Enforcement Mechanisms" Harvard Law School Spring 2011 available at http://www.law.harvard.edu/programs/about/pifs/education/llm/2010---2011/ros.pdf, accessed 5 February 2015 p30.

[40] 473 F.3d 463 (2007) at B available at http://caselaw.findlaw.com/us-2nd-circuit/1147600.html accessed 15 March 2015.

[41] *Ibid*., at C.

organisation and its relationship with its state borrowers is not governed by domestic law.[42]

The vulture fund (also known as a distressed debt fund) NML Capital Ltd has been a determined litigant. NML acquired Argentinian sovereign bonds in 2000 pursuant to contracts governed by New York law. NML obtained judgment for $284 million in 2006 and has tried to enforce that judgment ever since in different jurisdictions wherever it can locate Argentinian assets. It has also sought court orders injuncting Argentina from paying out pursuant to the restructuring. Argentina has argued that despite the waivers of immunity set out in the original bonds, the US FSIA's enforcement provisions still limit property eligible for execution and what can be subject to discovery. The Supreme Court in 2014 found that FSIA did not limit a court's discretion to order discovery and that the protection for state assets under the statute was limited to assets in the US.[43]

NML's attempts to enforce against Argentinian assets worldwide exemplify why the law in this area needs to be scrutinised and one is left wondering if this approach is sustainable or in the interests of international law and relations.[44] The trend in the US in favour of enforcement measures and away from the careful retention of immunity specified in customary international law demonstrated by these recent cases has not been universally endorsed. Ghanaian and French courts have rejected attempts to enforce against a vessel owned by Argentina and against fiscal and social security debts respectively.[45]

The "holistic" or "contextual" approach to the interpretation of state immunity statutes is echoed in Australia. The New South Wales Court of Appeal in

---

[42] *Ibid*., at C . The court stated that the state's borrowing relationship with the IMF is "not governed by a "garden-variety debt instrument" (citing *Weltover*) but instead by the Republic's treaty obligations to the international organization…".

[43] *Republic of Argentina v. NML Capital, Ltd*., 134 S.Ct.2250 (2014) and *Republic of Argentina v. NML Capital, Ltd*., 134 S. Ct. 2819 (2014).

[44] For a good analysis of the Argentinean litigation in the Supreme Court see Karen Halverson Cross, "US Supreme Court Denies Certiorari and Affirms Discovery in Bondholder Litigation against Argentina" ASIL Insight (Http://www.asil.org/insights/volume/18/issue/23/us-supreme-court-denies-certiorari-and-affirms-discovery-bondholder).

[45] See the decision of the Supreme Court of Ghana granting immunity to an Argentinean tall ship NML sought to attach. Decision No.J5/10/2013 of the Supreme Court of Ghana in the matter of *The Republic v High Court (Comm) Accra ex parte Attorney General* (NML Capital Ltd. and the Republic of Argentina as interested parties). See below for discussion on French decision. The attempt by NML to obtain redress in the English courts turned on issues as to the recognition of foreign judgments: *NML Capital v Argentina*, [2011] UKSC 31; [2011] 2 A.C. 495; [2011] 3 W.L.R. 273; [2011] 4 All E.R. 1191; [2012] 1 All E.R. (Comm) 1081.

Firebird Global Master Fund II Ltd v Republic of Nauru denied attempts by the holders of bearer bonds, guaranteed by Nauru, to recover against assets of the Republic which attempts nearly resulted in the state's default[46]. Garnishee orders made in respect of a Japanese judgment in favour of the bond holders were removed from 30 of Nauru's bank accounts with commercial banks in Australia. The court held that the funds in the accounts were not used for substantially commercial purposes and, therefore, did not satisfy the commercial purposes test in the Australian Foreign States Immunities Act 1985[47]. Because of the speed with which the litigation was brought the evidence was sparse. The certificate of the Consul General under s 41 referred to the accounts being used for a variety of governmental purposes including its nationalised airline and schools. Certificates under the Australian Act are not conclusive and the court had to decide the use to which the funds in each account was to be put. The judges, on appeal, unanimously found that the uses were sovereign not commercial. "Commercial purpose" is not defined in the Australian legislation but Bathurst CJ in discussing the correct approach to interpretation stated that "[a]n analytical approach that focuses on the nature of the legislation to ensure a proper legal characterisation must be conducted."[48]

B. Civil law states

Broadly speaking European states (whether parties to ECSI or not) also distinguish between immunity from suit and enforcement. Most European jurisdictions follow the general international law consensus that assets available for measures of constraint need to be used for non-governmental purposes.[49].

[46] [2014] NSWCA 360 at para 178. The statements about the garnishee orders were strictly obiter as the court concluded following the UK Supreme Court in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31; [2011] 2AC 495 that the registration of the judgment (in this case of a Japanese court) did not concern a commercial transaction for the purpose of the immunity from suit provisions of the Australian legislation.

[47] [2014] NSWCA 360 at para 178.

[48] Ibid., at para 173.The court was very aware of the individual circumstances of Nauru and in determining whether the funds were being used for a commercial purpose the court noted Nauru's remote location and small geographical size and population which "render the provision of many commercial services uncommercial for private entities " *Ibid*., para 176. This is a further indication of the importance of context.

[49] ECSI does not as such remove immunity from enforcement but permits states parties to make declarations allowing for reciprocal enforcement measures to be taken. See article 24 ECSI. See generally August Reinisch, "European court practice concerning state immunity from enforcement measures' (2006) *EJIL* 803 and Fox and Webb, (n. 2) p 485-486. European laws and lawyers tend to speak in terms of non-governmental purposes while common law lawyers and statutes refer to commercial purposes-the two are not necessarily interchangeable but are so treated for the purposes of the argument here about the commercial purposes test.

Germany is the source of two historically significant decisions- *The Empire of Iran Case* 1963 on the meaning of *jure gestionis*[50] and the *Philippine Embassy Bank Account Case* 1977 which looked at execution. The *Philippine* case drew a strict distinction between execution against state property in use for sovereign public purposes and that in use for commercial purposes.[51]

Recent decisions in a number of jurisdictions suggest that the courts struggle with applying the test, just as courts do in common law jurisdictions For example, the French Cour de Cassation, the highest civil court, refused to allow creditors to attach Argentinian assets consisting of fiscal and social security debts, owed to Argentina by branches of French companies, including Air France. The court found that, as these types of assets, which included bank accounts, were not specifically mentioned in the relevant contractual waiver of immunity from enforcement, they remained immune from attachment. The decision confirms the French approach to the removal of immunity from state assets - being that "public assets" remain protected. Public assets are those used or indeed to be used for public ends which rather begs the question when is a governmental use not public? This focus on use mirrors the decisions in US and English courts, but leaves one to question what exactly is the use of a bank account, given that money is fungible. The French court went on to find that the origin of the assets could be material to determining their use - not the approach taken by the English courts as discussed below.[52]

European practice is not uniform and states such as Belgium and Italy, which were at the forefront of the restrictive doctrine in the context of suit, were, despite this, slower to remove immunity from enforcement. Switzerland (and Belgium) have stood apart in favouring restricting immunity from enforcement where immunity from suit has been denied. The Swiss do nonetheless retain

[50] In the *Empire of Iran* case, 45 I.L.R. 57 , 80 it was stated 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. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."

[51] *The Philippine Embassy case*, German Federal Const. Ct, 13 December 1977, 46BverfGE 342; 65 ILR 146.

[52] *La Societe NML Capital v Republique Argentine*, Arrêt n° 395 du 28 mars 2013 (11-10.450) - Cour de cassation - Première chambre civile - ECLI:FR:CCASS:2013:C100395; discussed in Clifford Chance Briefing Note April 2013, "Enforcement Against State Assets: France's Latest Contribution to the Argentinian Saga"; available at http://www.cliffordchance.com/briefings/2013/04/enforcement_againststateassetsfranceslates.html; last accessed on 4 February 2015.

immunity in the case where assets have been "allocated for the performance of acts of sovereignty".[53]

C. *The UK approach to immunity generally*

1. Immunity from suit and enforcement

The absolute doctrine of immunity from suit and enforcement applied in the UK as a rule of common law until the late 1970s when, almost simultaneously, the House of Lords changed the common law rule and Parliament adopted the UK State Immunity Act 1978 (in force 22 November 1978) [54]. The SIA applies in most cases decided today.[55]

SIA 78, which established the statutory basis for restrictive immunity, adopts a very clear "nature" test for removing immunity from suit in contractual, and most other commercial disputes. SIA section 3 sets out the rules for commercial transactions. It removes state immunity in respect of contracts for the sale of goods or services made or to be performed in the UK and other commercial transactions as defined.[56] Sections 13 and 14 deal with measures of enforcement including seizure of state assets and preserve immunity for all but property "for the time being in use or intended for use for commercial purposes"[57]. A commercial purpose means a purpose for which the transactions and activities listed in section 3 (3), as commercial transactions, are carried out.[58]

---

[53] See August Reinisch, "European court practice concerning state immunity from enforcement measures,' (2006) *EJIL* 803, 810 fn 43. Note that Sir John Donaldson in *Alcom v Republic of Colombia* [1980] QB 629 in the Court of Appeal (which found against the state) looked at other end of telescope - "If the state is amenable to the jurisdiction of the English courts in accordance with that provision (section 3(1)) there seems no logical reason why its money should not be attachable in satisfaction of a judgment" p5. See also Yang, (n.2) p. 370-373 and O'Keefe, (n.2) p. 288 and 68-70. See Belgian case of *NML Capital Ltd v Republic of Argentina*, Brussels Court of Appeal, RG No, 2009/AR/3338, 21 June specifically about waiver.

[54] UK State Immunity Act 1978 ("SIA"); State immunity is a preliminary procedural plea but by pleading immunity a state is not deemed to have submitted to the jurisdiction. A court is bound to raise immunity if the parties do not. As soon as immunity is raised proceedings must be halted to give consideration to the plea. This article does not consider issues of waiver-either with respect to suit or enforcement-which may be very significant in litigation today.

[55] Notable exceptions include the activities of foreign troops in the UK - see *Holland v Lampen Wolfe* [2000] 1 WLR 1573; [2000] 3 All.ER 833.

[56] SIA s 3.

[57] SIA s 13(4); the language used in sections 13 and 14 was debated at Bill stage in the House of Lords where there was a general desire to curtail immunity and to allow enforcement. The final draft of the legislation probably did not go as far as some, including Lord Wilberforce and Lord Denning, would have liked and did not restrict the doctrine in relation to injunctions as Lord Denning had done in *Trendtex* itself. *Hansard, HL Vol.389, ser.5, cc 1491-1540* (March 23, 1978).

[58] SIA s 17(1).

Under SIA 78 section 3(3) "commercial transaction" means—

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

Section 3(3) thus covers a wide range of activity but excludes transactions into which a state enters or in which it engages in the exercise of sovereign authority other than sales of goods or services or in respect of a financial obligation.[59]

The argument being made here is that the test for determining the boundaries of enforcement against state assets needs to be re-examined as it can lead to results damaging to international relations. Recent English cases have indicated that, by using "context", judges have come to decisions favouring states when a technical application of the statutory language might have favoured the creditor. This use of "context" is not without precedent and was formulated by the House of Lords in the case which determined the boundaries at common law of the restrictive doctrine in respect of immunity from suit. It is necessary to look closely at that decision.

2. The common law test of immunity from suit

Just as the SIA was entering into force, the House of Lords unanimously endorsed the restrictive doctrine of immunity from suit in *I Congreso del Partido* (decided in 1981 but on pre-SIA facts)[60]. Lord Wilberforce, with whom all their Lordships agreed, defined the common law test as one of determining the nature of the act in the context, permitting a court to look beyond nature alone[61]. The test for immunity from suit under section 3 of the SIA makes no mention of context but Lord Wilberforce expressly incorporated it into the common law test he established in *I Congreso.* The crucial question, then for

[59] SIA s 3(3)

[60] *Playa Larga (Owners of Cargo Lately Laden on Board) Appellants v I Congreso del Partido (Owners) Respondents Marble Islands (Owners of Cargo Lately Laden on Board) Appellants v Same Respondents (*the *I Congreso)*[60] [1983] 1 A.C. 244, [1981] 3 WLR 328. Although Lord Denning had adopted the restrictive doctrine in *Trendtex* this was not consistent with precedent and a House of Lords case was needed to firmly establish the restrictive doctrine as a rule of common law. Only the House of Lords (now Supreme Court) can overturn existing precedent.

[61] His exact formulation of the test is cited below. See n. 63.

Lord Wilberforce, was what was the "act" the context of which would be determinative.

The *I Congreso* case concerned breaches of contract which arose when cargoes of sugar despatched for sale from Cuba by sea were diverted from their Chilean destinations, on the orders of the Cuban government, after the overthrow by General Pinochet of the, democratically elected, Chilean President Allende. The initial purchase and shipment of the sugar were clearly commercial transactions but the breach of contract was driven purely by political motives. Lord Wilberforce believed that the purpose of the breach had to be considered in deciding immunity from suit and hence crafted a test that requires courts to look at the nature of the transaction in the context of the facts which includes the manner of the breach. The House of Lords were unanimous in adopting the test as formulated by Lord Wilberforce and immunity was denied to Cuba, although somewhat ironically Lord Wilberforce dissented in respect of one of the cargoes. [62]

With respect to the then developing doctrine of restrictive immunity in international law, Lord Wilberforce stated : "The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."[63]

In elaborating on the distinction between acts *jure imperii* and those *jure gestionis* Lord Wilberforce approved the first instance judge's formulation (while disagreeing with the result) to the effect that "... it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."[64]

---

[62] *I Congreso* (n.60), p. 257 B-C. and see headnote.
[63] *Ibid.,* p. 267.
[64] *Ibid.*, p. 268, citing Robert Goff J**;** Lord Wilberforce also cites the German *Empire of Iran* case with approval see n. 50.

By relying on the public/private dichotomy more familiar to continental lawyers[65] and heavily on "context", Lord Wilberforce introduced into the common law test an element of purpose omitted from the relevant provisions of the SIA 78. He was unconvinced that his test was any kind of attack on state sovereignty commenting that it was "neither a threat to the dignity of that State, nor any interference with its sovereign functions."[66]

A number of English cases involving immunity from suit, where SIA 78 has not applied, have considered the "nature in context" test. Notable are the judgment of Hoffmann LJ in the Court of Appeal in *Littrell v. United States of America (No. 2)* and the House of Lords decision in *Holland v Lampen-Wolfe*, both cases about adjudicative immunity relating to US forces stationed in the UK.[67] These cases are worth considering as they illustrate how context can be used to favour the state and preserve immunity.

Littrell illustrated how context is to be identified and in doing so highlighted the flexibility of the concept. Hoffmann LJ (as he then was) said:

"The context in which the act took place was the maintenance by the United States of a unit of the United States Air Force in the United Kingdom. This looks about as imperial an activity as could be imagined. But it would be facile to regard this context as determinative of the question. Acts done within that context could range from arrangements concerning the flights of the bombers - plainly *jure imperii* - to ordering milk for the base from a local dairy or careless driving by off-duty airmen on the roads of Suffolk. Both of the latter would seem to me to be *jure gestionis*, fairly within an area of private law activity. I do not think that there is a single test or 'bright line' by which cases on either side can be distinguished. Rather, there are a number of factors which may characterise the act as nearer to or further from the central military activity…

[65] The prevailing view in England at the time was that of Professor Harlow "Because the truth is that the "public/private" classification which we are seeking to encapsulate is wholly irrelevant to the organisation of modern society." Harlow, "Public and Private Law: Definition without a Distinction" (1980) 43 *MLR* 241

[66] *I Congreso* (n.60) p. 262.

[67] *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82, [1994] 4 All E.R. 203 concerned the provision of medical services on a US armed forces base in England and found that the plaintiff could not bring an action for personal injuries against the US Government as it was immune from suit; *Holland v Lampen-Wolfe* [2000] 1 WLR 1573; [2000] 3 All ER 833 involved a libel claim brought by an instructor at a US military base arising out complaints about her teaching set out in a memorandum sent by an education services officer. The court upheld the claim to immunity.

Some acts are wholly military in character, some almost entirely private or commercial and some in between."[68]

In *Holland v Lampen-Wolfe* the Lords followed *Littrell* and Lord Millett in particular cited Hoffmann LJ with approval. In applying the "nature in context" test, Lord Millet upheld immunity from suit in a defamation claim at common law by looking at the context. He also reached the same conclusion in applying SIA section 3 by narrowly interpreting the statutory words "relating to"[69]. This is in part the approach that preserved immunity from enforcement in the *SerVaas* case to be discussed below. [70]

IV. English immunity from enforcement cases decided under the SIA

It will be recalled that, under s 13 of the UK SIA, state assets remain immune from enforcement action unless *(1)* they are "in use or intended for use for commercial purposes" being those purposes referred to in s 3(3) or *(2)* the state consents (by waiver or otherwise). S 13 also prohibits specific enforcement, pre-judgment attachment, injunctions, freezing orders and orders for discovery[71]. Special rules protect a state's central bank (s 14 (4)) and although diplomatic bank accounts are not specifically protected, the statute was interpreted narrowly to preserve the immunity of embassy bank accounts in *Alcom v The Republic of Columbia*[72], the first of the important English cases about enforcement against state assets to be considered here.

A. Alcom v the Republic of Colombia

[68] *Littrell* (n.67) p.95.

[69] *Holland v Lampen-Wolfe* (n. 67), p. 1587. Lord Millett found that the proceedings did not relate to the underlying commercial transaction that was the contract for the supply of educational services. The claim was in defamation made in a separate memorandum. Lord Hope, in agreeing with Lord Millett, stated the test as follows: "it is the nature of the act that determines whether it is to be characterised as jure imperii or jure gestionis. The process of characterisation requires that the act must be considered in its context" at p 1577 C. This approach was cited with approval in *Arab Republic of Egypt v Gamal-Eldin and Another* [1996] I.C.R. 13 where Mummery LJ uses the context test in connection with an employment dispute.

[70] *SerVaas* (n.12) p. 609 where Lord Clarke cites the distinction drawn between "relating to" and "in use for" by the US Judge Garza in *Connecticut Bank of Commerce v Republic of Congo* 309 F 3d 240 (2002) (US Court of Appeals, 5th Cir, Texas).

[71] The position on injunctions in the US courts is somewhat different. See W. Mark C. Weidemaier and Anna Gelpernn, "Injunctions in Sovereign Debt Litigation" (2014) 31 *Yale J. on Reg* 189.

[72] *Alcom* [1984] AC 580 p.580-606.

In *Alcom*, the House of Lords interpreted s13 restrictively and refused to permit a bank account of the Embassy of the Republic Colombia to be attached to meet a judgment debt. While some of the funds in the account were used to pay commercial debts, their use was mixed. The House of Lords concluded that the legislation excluded attachment unless the account was "solely" in use for commercial purposes[73]. The SIA does not include the word "solely" but the decision is consistent with international law[74] . In *Alcom*, Lord Diplock's analysis of the words in the SIA suggests that he was aware of the international sensitivity about the attachment of a foreign state's bank account[75] and arguably indicates that the "commercial use" test in respect of enforcement against state assets is closer to "purpose in context" than mere commercial purpose.

Lord Diplock crucially suggested that a state's bank account used to run an embassy would **not** be "in use for commercial purposes" if one adopted the ordinary meaning of such a phrase. He found, however, that the SIA, in requiring a court to determine "commercial purpose" by looking at the meaning of "commercial transaction" in s 17 (and thus s 3 (3)), could result in a removal of immunity and hence attachment of the account in such an instance. It was only Lord Diplock's adroit interpretation of s 13 (4) in light of the context and the other sections of the act that permitted the introduction of the concept of "solely in use", thus preserving immunity.

It is crucial in these cases to note that s 13(5) of the English statute provides that a Head of Mission's certificate that property is not in use or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved. The certificate of the Head of Mission in *Alcom* was very clear and, to Lord Diplock, conclusive that the bank account fell outside s 13(4). This will of course often be the case as discussed in part IV. B below. It will be hard, even if not impossible to obtain evidence to rebut the Head of Mission's assertion, and so the claimant is greatly disadvantaged in trying to argue in favour of enforcement and against immunity.

On context, however, Lord Diplock continued:

---

[73] *Ibid.,* p. 604 D. (subject to de minimus exceptions)

[74] See Part II B. above on the position in international law. Diplomatic bank accounts are excluded from enforcement under art 21 of UNCSI.

[75] Cedric Ryngaert, "Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors" (2013) 26 *Leiden Journal of International Law* pp. 73-88 and August Reinisch, "European court practice concerning state immunity from enforcement measures" (2006) *EJIL* 803.

"My Lords, the decisive question for your Lordships is whether in the context of the other provisions of the Act to which I have referred, and against the background of its subject matter, public international law, the words "property which is for the time being in use or intended for use for commercial purposes," appearing as an exception to a general immunity to the enforcement jurisdiction of United Kingdom courts accorded by section 13(2) to the property of a foreign state, are apt to describe the debt represented by the balance standing to the credit of a current account kept with a commercial banker for the purpose of meeting the expenditure incurred in the day-to-day running of the diplomatic mission of a foreign state."[76]

He found that the context, and the background, did not so describe such a debt and therefore reached a conclusion which, no doubt seemed just to him, and which, fortunately for the British Government, was diplomatically correct. So was he just doing what was appropriate? It is precisely this use of the wider context or background of international law considerations of comity and sovereign equality that motivated Lord Clarke in *SerVaas*[77] and arguably Aikens J in *AIG Capital Partners v Republic of Kazakstan*[78] and Stanley Burnton LJ in *AIC Ltd v The Federal Government of Nigeria and the Attorney General of the Federation of Nigeria*.[79]There appears to be emerging a "purpose in context" test.

David Lloyd Jones writing at the time about *Alcom* contrasted the focus on nature in s 3 with that on purpose in s 13(4) and suggested that "if the courts are permitted to take a wide view of the purposes to which an asset is in use or intended for use, they may look to the ultimate as opposed to the immediate objective"[80]. It is not exactly clear what he meant but he seems to be warning that it was only because Lord Diplock adopted the "purpose in context" approach outlined above that the right result, in his view, was achieved. Lloyd Jones's point was that the SIA needed to be amended to protect embassy bank accounts. It is argued here that the wider context should inform treatment of a wider class of asset than embassy bank accounts and supports the emerging development of a "purpose in context" test for attachment of assets.

---

[76] *Ibid*., p.603 H.
[77] *SerVaas* (n.12) at 607 E where Lord Clarke quotes Lord Diplock in *Alcom* at length.
[78] [2005] EWHC 2239 (Comm), [2005] All ER (D) 223, [2005] EWHC 2239 (Comm).
[79] [2003] EWHC 1357 (Q.B.), [2003] All ER (D) 190.
[80] David Lloyd Jones, "State Immunity-Execution against Embassy Bank Accounts" (1984) 43 *CLJ* 222, 224.

Cases since *Alcom* will now be analysed before a discussion of how Lord Clarke approached the commercial purposes test in *SerVaas*.

B. Recent immunity cases relating to debt

Immunity from enforcement of a debt owed to a state in the form of a bank account has been discussed in detail in four significant recent cases: *AIC Ltd v The Federal Government of Nigeria*[81]*; AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)*[82]; *Orascom Telecom Holding SAE v Republic of Chad and another (Citibank NA, third party) (International Bank for Reconstruction and Development intervening)*[83]*;* and *SerVaas Inc v Rafidain Bank.*[84]In all but *Orascom* the courts found in favour of immunity and against the creditor. In each case the language of SIA section 13(4) was in dispute and the "use" of the relevant debt in issue.

It is clear that a debt is "property" for the purposes of sections 13 and 14[85] but, what emerges, is just how difficult it is to characterise the purpose of a debt. The test in domestic law has arguably evolved to take a greater account of context consistently with the international law approach, but the problem remains from which perspective context is to be considered: the creditor's or the State's? The recent decisions coming from the US suggest that it is the creditor's while in England the focus has been more on the preservation of immunity from enforcement.

AIC Ltd v The Federal Government of Nigeria and the Attorney General of the Federation of Nigeria[86] concerned, in part, 16 Nigerian state bank accounts with

---

[81] *AIC,* (n.79).
[82] *AIG*, (n.78).
[83] [2008] EWHC 1841 (Comm); [2009] 1 All ER (Comm) 135.
[84] [2012] UKSC 40 and [2013] 1 A.C. 595.
[85] Field J in *Taurus Petroleum Limited v State Oilmarketing Company* [2013] EWHC 4495 at para 64 quoted Lord Diplock on the meaning of property: " In *Alcom Ltd v Republic of Columbia [1984] AC 580* Lord Diplock stated (at 602) that the expression "property" in s. 13 (2) (b) and (3) of the SIA : "is broad enough to include, as being the property of a banker's customer, the debt owed to him by the banker which is represented by the total balance standing to the customer's credit on current account …" and in *AIG Capital Partners* (n. 78) para 47, Aikens J said, having referred to Lord Diplock's observation cited above: "In my view the word "property" must have the same meaning and scope in both sections 13 and 14 of the Act. Moreover, I think it clear from Lord Diplock's statement in *Alcom* …. that the word should be given a broad scope. So, in my view, "property" will include all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held by a State or any "emanation of the State" or central bank or other monetary authority that comes within sections 13 and 14 of the Act."
[86] *AIC* (n.79). See on this point the position under the Australian Foreign States Immunities Act 1986 applied in the Queensland Court of Appeal *in Australian International Islamic College Board Inc. V Kingdom of Saudi Arabia & Anor* [2013] QCA 129.

HSBC which the Nigerian High Commissioner's certificate (under s 13 (5) of SIA) claimed were not "in use" but "dormant", no payments having been made in or out over 18 months. There was evidence of previous use of the accounts to pay for the purchase of books for Nigerian schools- a non-commercial use according to Stanley Burnton J (as he then was). There was also evidence of the accounts being used for scholarships, which was asserted not to be commercial but, without reasons being given. The judge stated that payments to third parties for goods or services supplied to government employees would be commercial but, payments by the government to the employees themselves would not be. No authority was cited[87]. The judge (who later decided with the majority in the Court of Appeal in *SerVaas*) made these fine distinctions and concluded that, even if there were relevant admissible evidence (which he did not accept there was), previous commercial use did not establish present or intended use. He did not give reasons.[88] This reflects the approach used in the US Courts to the effect that the issue is not how the state made the money it is how it spends it.[89]

*AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)*also held that immunity prevented enforcement, in a case concerning ABN AMRO bank accounts held in London beneficially for the state. The ratio of the case was that the funds were actually the property of the state's central bank and therefore immune under s 14(4). Aikens J, *per curiam*, found that the assets were not "in use or intended for use for commercial purposes". He was not prepared to accept that because the funds were traded their "use" was commercial. "The dealings of the securities accounts must, in my view, be set against the background of the purpose of the global custody agreement …The securities accounts contain assets which are part of the national fund. In my view the dealings are all part of the overall exercise of sovereign authority by Kazakhstan."[90] This is an application of the evolving purpose in context test later approved by the Supreme Court in *SerVaas.* It has been criticised for being too favourable to states.[91]

---

[87] *AIC* (n.79) para 57.
[88] *Ibid*., para 58.
[89] *Connecticut Bank of Commerce v Republic of Congo* (n.36)*;* see discussion above at Part III A above.
[90] *AIG* (n. 78) para 92 (4).
[91] David Gaukrodger, "Foreign State Immunity and Foreign Government Controlled Investors" *OECD Working Papers on International Investment 2010/02* OECD Publishing. http://dx.doi.org/10.1787/5km91p0ksqs7-en accessed on 14/4/14. p20-23.

Commentator David Gaukrodger puts the argument for creditors when he states: "The approach in *AIG* would also make the treatment of sovereign debtors and creditors markedly different. A State that raises funds in the sovereign debt market is now generally considered to engage in private activity even if the funds are destined for immediate public purposes. In contrast, under the reasoning in *AIG*, investment activity by an SWF [sovereign wealth fund] would benefit from immunity. Overall, successfully executing against foreign state property remains difficult for private parties. As an evidentiary matter, it can be difficult to obtain information to demonstrate that property is in commercial use. Where property can be located that is in commercial use, it frequently belongs to an SOE that is a different entity than the debtor and execution is rejected on the basis that it is an independent entity. While a unified approach to jurisdiction and execution would seem logical, the reality is that while jurisdiction has been substantially expanded, immunity from execution remains as "the last bastion of State immunity" in private law cases. There are a number of well-known cases where judgment creditors have spent many years in largely fruitless efforts in multiple jurisdictions to obtain satisfaction for judgments or arbitration awards. At the same time, factual data is lacking about the degree to which States evade their obligations; although States may take longer to honour their obligations, it may be the case that all but a few States do so."[92]

Orascom Telecom Holding SAE v Republic of Chad and another (Citibank NA, third party) (International Bank for Reconstruction and Development intervening) is the one case where the court was not prepared to let context determine the outcome. Burton J distinguished the decision of the court in *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* in finding that, because a bank account was being "operated" for the "purpose of a commercial transaction", it did not attract immunity, despite the purpose of the transaction being to benefit the state. The account was set up to give effect to a mechanism required by the World Bank for the channelling of oil revenues to the repayment of sovereign loans. [93] The ratio of Burton J's decision is that the "account was established, and has been operated, for the purposes of a commercial transaction, namely (i) so as to receive the proceeds of a contract for the supply of goods or services; and/or (ii) so as to be part of a

[92] *Ibid.*
[93] *Orascom* (n. 83) para 24.

system specifically established for the purposes of (repayment of) loans by the World Bank to Chad."[94]

He reached this conclusion despite a certificate from the ambassador saying that the funds were not in commercial use on two grounds: 1) the certificate did not effectively cover the accounts in question and 2) that in any event Orascom had disproved the facts stated in the certificate.[95] This case is unique in that the judge found that the certificate of the state as to use was not conclusive in that he accepted that the "contrary had been proved". Evidence which contradicted the certificate was admitted and one could argue that this case is not out of line but simply decided on actual evidence of use not available in the other cases. No evidence as to use was forthcoming in *AIG.* What is significant is Burton J's insistence on looking at the *nature* of the way in which the state had generated these funds and was going to use them. The seemingly sovereign *purpose* of the entire set-up was not decisive. He decided in effect that the use of international aid ultimately to pay for services was not a public/sovereign purpose. His decision is out of line and was criticised in *SerVaas* which is explored below.

C. SerVaas Inc and the "purpose in context" test

In the recent decision of the UK Supreme Court in *SerVaas Inc v Rafidain Bank and others*[96], the commercial purposes test in SIA 78 section 13(4) was used, in relation to an application by the claimant, a judgment creditor of the Republic of Iraq, for a third party debt order ("TPDO") in respect of assets of the Republic held in the defendant bank in London.[97]

The claimant creditor, SerVaas, a company incorporated in Indiana, sought to enforce a foreign default judgment obtained against the Iraqi Ministry of Industry, in connection with a contract for the supply of equipment, machinery and related services for a state-owned factory in Iraq which, by November 2010, amounted to about US $ 35 million.[98]

---

[94] *Ibid,* para 23.
[95] *Ibid.*, para 24.
[96] [2012] UKSC 40; [2013] 1 A.C. 595.
[97] *Ibid.,* p. 609 at para 22 Lord Clarke dismisses SerVaas' attempt to distinguish between the current use of a debt and current use of a bank account. "I would not accept that there is such a distinction. In each case the question is the same, namely whether the relevant property is in use or is intended for use for commercial purposes".
[98] *Ibid.,* p.603 para 5.

SerVaas sought the TPDO against Rafidain Bank, in provisional liquidation in England, in relation to the debt payable by that bank to the Republic of Iraq by way of dividend under a scheme of arrangement relating to Iraq's acquisition of the bank's commercial debts ("the admitted claims"), pursuant to a debt restructuring agreed after the fall of Saddam Hussein. SerVaas did not participate in this scheme.[99] To succeed, SerVaas had to persuade the court to unfreeze Rafidain's assets and stop it paying out any monies in respect of the admitted claims (on which a dividend was due under the restructuring agreement)[100]. The chargé d'affaires and Head of Mission of the Embassy of Iraq in London certified that the admitted claims were not in use, and were not intended for use, for commercial purposes as defined in s 13 (4) and that Iraq intended to pay the dividends to the Development Fund for Iraq (the DFI), established by the United Nations Security Council.

SerVaas agreed that the monies payable to Iraq under the restructuring scheme (which formed part of the admitted claims) were "property" within the meaning of the section; that the onus lay on SerVaas to show a real prospect that it could rebut the presumption created by the certificate; and that the debts were intended for use for sovereign and not commercial purposes. It argued however that "… the current use of the debt (i.e. the right to receive the monies) could only be ascertained from the underlying commercial transaction which would culminate in final payment of the debt. If Section 13(4) is to have any application to the vast majority of commercial debts at all (most of which will

[99] *Ibid.*, p.602 para 4.

[100] Background to TPDOs can be found in Gregory Mitchell and Anthony Dearing ,"State Immunity and enforcement of judgments under English Law" (2010) *BJIBFL* 162,163 . "London is a major financial centre and most states hold monies on deposit – usually through the TARGET (Trans-European Automated Real-time Gross settlement Express Transfer system) or other inter-bank payment system – with commercial banks and their branches in London, for at least a period of a day or two. Such monies are used by states for a number of commercial purposes such as to meet their obligations accruing under financial instruments entered into by the state. Many states finance their obligations by issuing bonds and other financial instruments under which they have an obligation to pay interest and/or repay principal. There is often a continuous cycle of obligations owed to and by states accruing under such instruments. Information concerning many of these instruments – eg offering circulars – is in the public domain. The process of execution against debts owed to a customer by a bank was known as 'a garnishee order' and is now known as a 'third party debt order' under CPR 72. This process gives a proprietary remedy against the debt owed to the judgment debtor. Where a customer has monies on deposit with a bank the true analysis under English law is that the customer has a mere 'chose in action' namely the right to claim payment of the debt as against the bank. A judgment can be enforced by giving the judgment creditor the right to be paid by the bank instead of the judgment debtor…The whole basis of this procedure is that the bank upon whom the order is served is discharged from its obligation to the judgment debtor to pay the debt owed to the judgment debtor. The bank, by paying the judgment creditor, is by order of the court discharged from any legal obligation to pay the judgment debtor."

not have an identified or identifiable use for the proceeds following satisfaction of the debt), it must be possible to describe a debt as being in use for some purpose. The only logical purpose which can be identified is the completion of the commercial transaction which gives rise to the debt itself. The current use of the Admitted Claims cannot be separated from the underlying transactions by which Iraq acquired those claims."[101]

The court was faced with the almost insuperable task of deciding the use of a debt. This had concerned Lord Diplock in *Alcom* when he said:

"To speak of a debt as 'being used or intended for use' for any purposes by the creditor to whom the debt is owed involves employing ordinary English words in what is not their natural sense, even if the phrase 'commercial purposes' is given the ordinary meaning of *jure gestionis* in contrast to *jure imperii* that is generally attributed to it in the context of rights to sovereign immunity in public international law; though it might be permissible to apply the phrase intelligibly to the credit balance in a bank account that was earmarked by the state for exclusive use for transactions into which it entered *jure gestionis*."[102]

Arnold J at first instance, and the majority of the Court of Appeal, in *Servaas* decided that the origin of the debts owed to creditors of the bank (which formed the admitted claims) was irrelevant- the commercial nature of the original debt did not answer the question as to its purpose at the relevant time. [103]

Lord Clarke in his leading judgment in the Supreme Court made the dichotomy very clear in stating that the question:

"...is whether the nature of the origin of the debts is relevant to the question whether the property in question was in use for commercial purposes. In my opinion it is not. This conclusion is based upon the language of section 13(4). It

[101] *SerVaas* (n.96) p. 599.
[102] *Alcom* (n.1) p.602-603 F-D.
[103] Rix LJ dissenting in the Court of Appeal stated that "For the present, however, until the dividend is paid, the claim's obvious use and purpose, I would have thought, was to be the means by which the claim's owner, Iraq, seeks to secure its value by way of a dividend in the scheme of arrangement. That is what the commercial debt was bought for in the first place, and, until the scheme of arrangement (or, in its absence, a liquidation) has been brought to fruition, the owner holds the debt for the purpose of seeking payment of its claim. For these purposes, Iraq is just like the holder of any commercial debt. As purchaser of the debt, it merely stands in the shoes of the merchants and other commercial parties who were the original owners of the debt in question. If those parties were still holders of the debt, it would not be said that they held it for no current purpose. It seems to me to be at least highly arguable that Iraq is in the same position." [2011] EWCA Civ 1256; [2012] 1 All ER (Comm) 527, para 74.

is also informed by the decision of the House of Lords in *Alcom Ltd v Republic of Colombia [1984] AC 580*."[104]

He accepted that "the expression "in use for commercial purposes" should be given its ordinary and natural meaning having regard to *its context* (my italics)". He also admitted that it was not an ordinary construction to conclude that a debt arising from a transaction was "in use" for that transaction.[105] This did not however clarify what the use of a debt was.

As a matter of statutory interpretation (similar to that adopted in *Alcom*), Lord Clarke narrowed the commercial purpose test in s 13(4) by adding the word "currently" to the language of the section. He said the task was to determine whether the bank accounts were "currently in use or intended for use" partly by contrasting that wording with the phrases "relates to" and "connected to" used in sections 3(1) and 10. In other words, the test required the court to determine the present use of the debt-not its origin or its ultimate purpose.

In taking this approach to the commercial purposes test, Lord Clarke relied heavily on *Alcom* but also looked at the recent English cases discussed above, a recent Hong Kong case and US authority.[106] SerVaas had conceded that the claims were intended to be used for sovereign purposes- but argued that their present use was commercial.[107]

In summarising the legal position, Lord Clarke explicitly rejected Rix LJ's dissent, in the Court of Appeal, to the effect that Iraq was simply holding the debt for the purpose of seeking payment of its claim …"like the holder of any commercial debt" and therefore that the matter should proceed to trial as it was arguable that the use was commercial under the statute.[108] Lord Clarke disagreed and concluded as follows: "SerVaas cannot show that the debt is or

[104] *SerVaas*, (n.96) p.606 para 15.
[105] *Ibid.*, p.607 para 16.
[106] Ibid., p. 608 paras 24-30. His Lordship refers to *AIG*, *AIC* and *Orascom.* He notes that in *Connecticut Bank of Commerce v Republic of Congo* (2002) 309 F 3d 240 the US Court of Appeals, 5th Cir, Texas refers to cases on the US Foreign Sovereign Immunities Act 1976 (28 USC, Chapter 97, sections 1602–1611) ("the FSIA") on the source of property versus use. Lord Clarke quotes Judge Garza- "what matters is not how Congo made its money but how it spends it". Lord Clarke also cited *Af-Cap Inc v Republic of Congo* 475 F 3d 1080 (2007) and *EM Ltd v Republic of Argentina* 473 F3d 463 (2007). See the discussion of these cases in Part III A. Lord Clarke also looks at the Hong Kong case of *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2010] HKCA 19 on the meaning of commercial purpose.
[107] *Ibid.,* p.608 para 30. Future use was manifestly not a commercial purpose because the monies were to be paid to the DFI.
[108] [2012] 1 All ER (Comm) 527, para 74.

was earmarked (or in use) for being drawn down upon in order to satisfy commercial liabilities….The determinative feature, in my view, is the absence of any current or future commercial activity on the part of Iraq."[109]

These issues are clearly highly technical and one wonders what would happen in a case where monies generated by commercial transactions were simply going to be transferred back for use by the foreign state. Without the rescheduling dimension would that be use for a "non-commercial purpose" while held in the UK? The problem is whether it is correct to distinguish current use from origin in the absence of real evidence as to current use. The House of Lords in *SerVaas* and the US cases cited in *SerVaas* say so, but Rix LJ dissenting in the Court of Appeal in *SerVaas,* thought it was arguable and Burton J in *Orascom* said it was not.[110]

V. Conclusion

The commercial purposes test used in international law, and in the law of most states, to determine when a state asset may be attached to assist in the enforcement of a judgment may lead to difficult questions of interpretation and application. It is not always clear what the "use" of a state asset is and what state activities have "commercial purposes". The issue is compelling in part because, as immunity from suit has been restricted, private creditors have increasingly sought to enforce against state assets. It has been argued here that, in general, domestic courts have been acutely aware of the need to protect sovereign assets from inappropriate seizure and have interpreted their domestic legislation accordingly. Domestic courts on the whole have been sensitive to the international effects of seizure of sovereign assets and been prepared to interpret statutory language by reference to the international context of the relevant litigation.

---

[109] *Ibid.,* p 612 para 32.

[110] [2011] EWCA Civ 1256; [2012] 1 All ER (Comm) 527, para 74. Lady Fox said in 1994 that " [w]here State property is intended for future use, but is not currently in use, for commercial purposes, the restrictive rule (supported by case law) treats it as immune; this rule was applied to ships constructed for commercial use held idle in dock and to a bank account for future payments of commercial debts. The Australian legislation on State immunity expressly reversed this general rule", Hazel Fox "A "commercial transaction" under the State Immunity Act 1978" (1994) *ICLQ* 193, 200. Lord Cross considered this point in the important common law pre SIA case of *The Philippine Admiral* [1977] AC 373 in which the House of Lords restricted immunity in an action in rem. He left open the point about future use. His concern seemed essentially to do with proof.

This review of recent English cases, against the backdrop of developments in other domestic courts and at the international level, has highlighted how difficult it can be to translate the commercial purposes test at a practical level. It has also questioned whether, in fact, the assets of foreign states should be exposed to seizure on the basis of such fine distinctions. The use of context has been seen to mitigate the legislative language in England, Australia and in the US but one is driven to ask whether the real distinction should be that between those state assets that form part of a restructuring or other sovereign programme (such as those associated with overseas aid projects) and those that do not. The *jure gestionis/jure imperii* dichotomy is hard to avoid and harder to translate into practicable judicial standards. Adding context to the statutory language, as Lords Wilberforce, Diplock and now Clarke have done, has tended to favour immunity and that may be no bad thing ultimately. The attempts by vulture funds to locate and enforce against Argentinian assets is highlighting that international cooperation is required and that a treaty on international insolvency may be the best way forward. The recent pursuit of Nauru in the Australian courts also sounds a warning.

Not all private creditors are vulture funds however and the test for commercial purposes will remain relevant whatever happens at the international level in relation to sovereign debt defaults. The fine line between assets which can be used to meet a state's debts and those that cannot will remain very important if seemingly difficult to draw.

States have been able to depend on domestic judges being prepared to protect state assets by using interpretive techniques such as reliance on a contextual or holistic analysis but the approach taken in 2014 by the US Supreme Court in the NML litigation discussed above and cases such as *Orascom* in England reveal that this may not always be enough. So long as states do not honour their commitments creditors will be driven to attempt to enforce. As immunity from suit becomes even more limited there will be growing pressure to allow attachment of state assets and the time may have arrived for efforts to introduce an international regime for state bankruptcy or liquidation to be widened to encompass another look at the commercial purposes test.