

UNITED KINGDOM

Introduction

1. There are two main sources of law which are relevant in examining UK law and practice on State immunity: legislation and the common law¹. The common law consists of the uncodified principles of the legal system, which are interpreted and developed through the decisions of the courts. Customary international law can be a source of the common law, and the rules of customary international law in relation to State immunity form part of the common law.

2. The rule of *stare decisis*, or binding precedent, is strictly applied in relation to both the common law and to the interpretation of statutes. Thus a decision of a court on a point of law (or precedent) will generally be binding in future cases, unless such future cases can be distinguished in some way or a hierarchically superior court overrules the precedent.

3. The hierarchy of the English civil courts is as follows:

- The Court of first instance in substantial cases is the *High Court* - the High Court is divided into three Divisions:
 - a) The *Queen's Bench Division* (which deals mainly with the law of civil obligations including contract and tort);
 - b) The *Chancery Division* (which deals essentially with property matters, including issues of company law); and
 - c) The *Family Division* (which deals with matters of family law);
- Appeals from the High Court are generally made to the *Court of Appeal*;
- A further appeal may be made to the highest court, the *Supreme Court*. The Supreme Court replaced the *Appellate Committee of the House of Lords* as the highest court in the United Kingdom in October 2009.

4. There are certain specialist tribunals in the English legal system, the most relevant for present purposes being in the field of employment law. Complaints in most employment cases will be made to a specialist *Employment Tribunal* at first instance. A decision of an Employment Tribunal may be appealed to the *Employment Appeal Tribunal (EAT)*. The EAT is made up of a panel of two lay persons presided over by a High Court Judge. A further appeal from the EAT may be permitted to the Court of Appeal.

5. Legislation in the UK takes two forms:

- *Primary legislation* which consists of Acts of Parliament, which pass through full processes of debate and scrutiny in Parliament; and
- *Secondary legislation* consisting of statutory instruments, made by virtue of an enabling power in primary legislation, and passed in Parliament under summary procedures. Secondary legislation is thus most often used to provide detailed regulations within the framework of a piece of primary legislation.

6. By virtue of the constitutional principle of the supremacy of Parliament, in case of conflict between a rule of common law and an Act of Parliament, the latter will be applied.

7. Treaties do not automatically form part of domestic law upon ratification, but rather require to be incorporated by legislation.

The State Immunity Act 1978

8. The State Immunity Act 1978 is based upon the European Convention on State Immunity, though it does not replicate the terms of the Convention exactly. The Act is also intended to be compatible with the 1926 Brussels Convention on the Immunity of State-owned Ships. The Act came into force on 22 November 1978, and establishes a firm foundation for the restrictive doctrine of State immunity in UK law, and consolidates the incremental steps in this direction that had been made in the common law.

9. The Act sets out a general rule of immunity for foreign States in section 1; in sections 2-11 it sets out a number of specific exceptions to this immunity in respect of various private law activities. Sections 12 and 13 deal with procedural privileges, including immunities from execution. Section 14 deals with the definition of the State and the degree to which separate entities of the State are entitled to immunity. Section 15 allows for some fine-tuning of immunities in the case of particular States. Thus it enables secondary legislation to be made, either to reduce the level of immunities granted to a State, where that State would grant a reduced level of immunity to the United Kingdom (on the principle of reciprocity), or to extend immunities to particular States where this is required under a treaty. Section 16 excludes certain matters from the scope of the Act (see below), and section 17 deals with interpretation of particular terms in this part of the Act.

10. The remaining parts of the Act deal with slightly different questions. Sections 18 and 19 deal with recognition of judgments against the UK in accordance with the European Convention scheme. Section 20 deals with the immunities of foreign Heads of State (and provides that they enjoy a similar level of immunities to the head of a diplomatic mission). Finally section 21 deals with the provision of evidence by means of a conclusive certificate of the Executive on certain questions (see below).

11. There has been limited secondary legislation made by virtue of the enabling powers contained in the Act. Statutory Instruments have been passed to extend the provisions of the Act to the UK's Overseas Territories, and to grant immunity to the Austrian Provinces and the German Lander.

12. There is a growing body of caselaw under the State Immunity Act. A sample of this caselaw is included in the List of Materials as indicative of the main trends and areas of

controversy. Particular themes are:

- The definition of a commercial transaction;
- The characterisation of acts of sovereign authority;
- The relationship of immunity from jurisdiction and immunity from execution;
- The extent of immunity from execution;
- The extent of procedural privileges;
- The scope of jurisdictional immunity in employment cases;
- The relationship of diplomatic immunities and State immunity;
- The persons entitled to claim State immunity; and
- The question of immunity in relation to breaches of international law.

13. The landmark decision of the House of Lords in the Pinochet case ([2000] 1 A.C. 147) has not been included for present purposes, given that its focus was on the immunities of a former Head of State in relation to criminal proceedings.

The common law

14. Until the entry into force of the State Immunity Act the common law was the sole source of law on State immunity applied by the English courts. Even now, since the State Immunity Act excludes certain matters from its scope (section 16), those residual matters continue to be governed by the common law. These include the matters of direct taxation, the activities of visiting forces, and criminal proceedings.

15. Traditionally the courts adhered strictly to absolute immunity. However the mid- 1970s saw the courts move towards restrictive immunity, first in relation to actions *in rem* against State-owned trading ships and subsequently in relation to actions *in personam* in respect of commercial transactions of foreign States.

16. The major turning point came in 1977, in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*, when the Court of Appeal found that the common law should reflect the restrictive doctrine of immunity that had emerged in customary international law. That finding was subsequently approved by the House of Lords in the case of *10 Congreso del Partido*, in which it was found that certainly as far back as 1975 the restrictive rule of immunity was part of customary international law. There is little doubt that today the common law adopts the restrictive doctrine.

17. Recent cases before the English courts have involved the immunity granted to heads of state, and the immunities of a foreign State in respect of acts of its visiting forces in the UK (matters excluded from the scope of the State Immunity Act by virtue of section 16(2)). In the former category, the courts have made a distinction between the period in which a head of state holds office and enjoys immunity *ratione personae* extending to all matters whether official or private, and the period after he has ceased to hold office (whether during his lifetime or on death), when he enjoys immunity *ratione materiae* solely for acts which constituted the performance of his official functions during his period of office. In the latter category, the courts have applied the distinction between acts *iure imperii* and acts *iure gestionis*. In doing so they have accepted that in principle the characterisation of an act ought to be made by reference to its nature, rather than its purpose. However the courts have also stressed the importance of considering the act in its context

LIST OF MATERIALS IN RESPECT OF THE UNITED KINGDOM

1. Legislation

The key legislative acts in respect of State immunity are:

A. Primary Legislation

- State Immunity Act 1978 (original text as passed is available [here](#));
- Diplomatic Privileges Act 1964 (original text as passed is available [here](#)).

B. Secondary Legislation

- The State Immunity (Federal States) Order 1979 (S.I. 1979/457) - by which the Austrian Provinces enjoy immunity (original text as passed is available [here](#));
- The State Immunity (Federal States) Order 1993 (S.I. 1993/2809) - by which the German Lander enjoy immunity (original text as passed is available [here](#)).

2. Executive Acts or Statements

The Executive plays a limited role in decisions on State immunity, this being a matter for the Courts. However upon request by the court or by both parties to a dispute, the Executive will provide a certificate on certain matters which are exclusively within its own knowledge or appreciation. Thus under section 21 of the State Immunity Act, provision is made that a certificate of the Secretary of State for Foreign and Commonwealth Affairs shall be conclusive on the following questions:

- a) Whether any country is a State for the purposes of the Act, or similarly whether a territory is a constituent territory of a federal State, or whether a person or persons is to be regarded as the Head of the government of a State;
- b) Whether a State is a party to the 1926 Brussels Convention;
- c) Whether a State is a party to the European Convention on State Immunity;
- d) Whether a document has been served or received in accordance with section 12 of the Act (which provides for the service of the document instituting proceedings and / or any judgment via the Foreign and Commonwealth Office on the Ministry of Foreign Affairs of the respondent State).

Such certificates are made on a case by case basis. No examples are attached.

3. Decisions of National Courts and Tribunals

Details of the following cases are included

below:

A. Decisions under the State Immunity Act

- GB/1. Intro properties (UK) Ltd v Sauvel, CA, 29.3.83, [1983] 2 WLR 908, 64

- GB/2. Alcom Ltd v. Republic of Colombia, HL, 12.4.84, [1984] 2 All ER 6
- GB/3. Maclaine Watson and co. Ltd v. Department of Trade and Industry and others, CA, 27.4.88, [1988] 3 WLR 1033, 80 ILR 49
- GB/4. A. Co. Ltd v. Republic of X, QBD (Commercial Court), 21.12.89, 87 ILR 412
- GB/5. Re Rafidain Bank, Ch D (Companies Court), 9.7.91, 101 ILR 332
- GB/6. Ahmed v. Government of the Kingdom of Saudi Arabia, CA, 6.7.95, [1996] 2 All ER 248
- GB/7. Kuwait Airways Corp. v. Iraqi Airways Corp., HL, 24.7.95, [1995] 1 WLR 1147, 103 ILR 340
- GB/8. Al-Adsani v. Government of Kuwait, CA, 12.3.96, 107 ILR 536
- GB/9. Propend Finance pty and others v. Sing and others, CA, 17.4.97, 111 ILR 611
- GB/10. An International Bank plc v. Republic of Zambia, QBD (Commercial Court), 23.5.97, 118 ILR 602
- GB/11. Banca Carige SpA Cassa di Risparmio di Genova e Imperia v. Banco Nacional de Cuba, Ch.D, 11.4.01, [2001] 3 All ER 923
- GB/12. AIG Capital Partners Inc v. Kazakhstan, QBD, 20.10.05, [2005] EWHC 2239 (Comm); [2006] 1 W.L.R. 1420 (text of judgment available [here](#))
- GB/13. Jones v. Saudi Arabia, HL, 14.06.06, [2006] UKHL 26; [2007] 1 A.C. 270 (text of judgment available [here](#))
- GB/14. Aziz v. Aziz, CA, 11.07.07, [2007] EWCA Civ 712; [2008] 2 All E.R. 501 (text of judgment available [here](#))
- GB/15. KOO Golden East Mongolia v. Bank of Nova Scotia, CA, 19.12.07, [2007] EWCA Civ 1443; [2008] Q.B. 717 (text of judgment available [here](#))
- GB/16. NML Capital Ltd v. Argentina, UKSC, 06.07.11, [2011] UKSC 31; [2011] 2 A.C. 495 (text of judgment available [here](#))
- GB/17. SerVaas Inc v. Rafidain Bank, UKSC, 17.08.12, [2012] UKSC 40; [2013] 1 A.C. 595, (text of judgment available [here](#))
- GB/18. Benkharbouche v. Sudan, EAT, 04.10.13, [2014] 1 C.M.L.R 40; [2014] I.C.R. 169 (text of judgment available [here](#))
- GB/19. London Steam Ship Owners Mutual Insurance Association Ltd v.

Spain (The Prestige), QBD, 22.10.13, [2013] EWHC 3188 (Comm); [2014] 1 Lloyd's Rep 309 (text of judgment available [here](#))

- GB/20. Taurus Petroleum Ltd v. State Oil Marketing Company of the Ministry of Oil, Iraq, QBD, 18.11.13[2013] EWHC 3494 (Comm); [2014] 1 Lloyd's Rep. 432 (text of judgment available [here](#))

B. Decisions at *common law*

- GB/21. Trendtex Ltd v. Central Bank of Nigeria, CA, 13.01.77. [1977] 2WLR 979. 64 ILR 111
- GB/22. Senguptav. Republic of India, EAT, 17.11.82, 64 ILR 352
- GB/23. 1o Congresodel Partido, HL, 16.7.81, [1981] 3 WLR 328
- GB/24. R. v. Inland Revenue Commissioners, ex parte Camacq Corp and another, CA, 3.8.89, [1990] 1 WLR 191
- GB/25. Littrell v. USA (No.2), CA, 12.11.93, [1995] 1 WLR 82
- GB/26. Holland v. Lampen-Wolfe, HL, 20.07.00, [2000] 3 All ER 833
- GB/27. Harb v. Aziz, Ch.D, 09.06.14, [2014] EWHC 1807 (Ch); [2014] H.R.L.R. 16 (text of judgment available [here](#))

UK Treaty Practice

The UK is party to the European Convention on State Immunity; the declarations made at the time of ratification and subsequently are available [here](#). The UK is also a party to the 1926 Brussels Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships; the UK reservation on ratification is available [here](#).