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Sovereign immunity: don't cry for me

Sovereigns cannot claim immunity in England with regard to attempts to enforce against them foreign judgments arising from commercial transactions, according to the Supreme Court. As a result, Argentina has no sovereign immunity in respect of proceedings in England to enforce a New York judgment on a bond issue.

Key Issues

- **Enforcing a foreign judgment does not relate to a commercial transaction**
- **But English courts still have jurisdiction to enforce judgments against sovereign judgment debtors**
- **Sovereigns cannot claim immunity from jurisdiction**
- **But don't forget immunity for assets**

The English courts used to adopt an absolute approach to sovereign immunity such that, until 1978, there was even doubt as to whether a sovereign could submit to the jurisdiction of the English courts in a contract. The theory was that it offended a sovereign's dignity to be arraigned before another sovereign's courts. That offence was not, one might surmise, half as much as the offence caused to a Miss Mighell, who accepted an offer of marriage from one Albert Baker. When Mr Baker reneged on his offer, and Miss Mighell tried to sue him for breach of his promise, his true identity as Abu Bakar, Sultan of Johore, prevented suit because, as the sovereign of a state on the Malay peninsula, he was entitled to absolute immunity from the jurisdiction of the English courts (*Mighell v Sultan of Johore* [1894] 1 QB 149).

Times move on. Not only are claims for breach of promise of marriage of historical interest only, but English law, in the form of the State Immunity Act 1978, now takes a more restrictive approach to sovereign immunity. In short, if sovereigns enter the commercial world, they must play by commercial rules, including as to the resolution of disputes. That does not, however, mean that the courts are not still troubled by questions over the extent of the immunity that remains, as they were in *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31. The Supreme Court nevertheless reached the right answer.

They are illusions…

In 2000, Argentina issued bonds that were governed by New York law and contained a submission to the jurisdiction of the New York courts. When Argentina defaulted, one of the bondholders, C, obtained judgment against Argentina in New York. A New York judgment cannot be enforced directly in England (the US is not a party to any treaties that would allow this), so C commenced a common law action in London on the New York judgment, ie C sued Argentina on the debt created by the New York judgment. In order to pursue this claim, C needed to serve the claim form on Argentina, for which C required the permission of the court. Argentina argued that permission should not have been granted because it was immune from the jurisdiction of the English courts. This raised four issues.

… They are not the solutions they promised to be…

First, under section 3(1) of the State Immunity Act 1978, a sovereign is not immune in proceedings "relating to… a commercial transaction entered into by" the sovereign. The bond issue by Argentina was unquestionably a commercial transaction, but did the action in England on the New York judgment also relate to this commercial transaction? The majority (Lords Mance, Collins and Walker) thought not. Their reasoning was that in 1978, a writ could not be

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served on a defendant outside England if its object was to enforce a foreign judgment (this is no longer the case). As a result, said the majority, Parliament could not have considered that enforcement of a foreign judgment related to the commercial transaction underlying the judgment because there was then no means of serving the process on the sovereign debtor.

This is a narrow interpretation. One of the minority, Lord Clarke, considered that the 1978 legislation should be given an "updated interpretation" in the light of subsequent events. Even without this bold approach to interpreting legislation, it would still have been easy to conclude that the judgment related to the bond issue, rather than to hold that the legislation was constrained by the rules of court in existence when the legislation was passed. The legislation might have pointed to the future rather than being held back by the past.

… The answer was here all the time

The Supreme Court ensured, however, that C got home on the second issue. Section 31 of the Civil Jurisdiction and Judgments Act 1982 provides that a foreign judgment against a state can be enforced in England if two conditions are met: first, the judgment would be enforced if it had not been given against a state; and, secondly, the foreign court would have had jurisdiction over the state if the foreign court had applied rules corresponding to those in the State Immunity Act.

The Supreme Court was clear that this gave a ground for the English courts to take jurisdiction over a sovereign in addition to those set out in the State Immunity Act. It was not necessary for the proceedings also to relate to a commercial transaction (the Supreme Court found the Court of Appeal's decision to that effect "surprising"). The two conditions in section 31 were met in this case, so Argentina could not claim immunity in respect of C's proceedings.

The third point concerned with whether Argentina had submitted to the jurisdiction of the English courts. Argentina had agreed in the terms applicable to the bonds that a judgment given against it "may be enforced… in any… courts to the jurisdiction of which [it] may be subject", and had waived any immunity in respect of enforcement proceedings in those courts. The Supreme Court considered that Argentina was subject to the jurisdiction of the English courts because PD6B, §3.1(10) gives the English courts jurisdiction over a claim to enforce a foreign judgment. Argentina had, therefore, waived any immunity it might otherwise have had.

The final point was whether or not C could take any of the points decided by the Supreme Court in its favour. When C originally applied for permission to serve the claim form on Argentina, C relied on two grounds for asserting that Argentina had no immunity. Subsequently, C accepted that neither of those two grounds was available. So C produced other, ultimately successful, arguments as to why Argentina had no immunity. Argentina argued that C should not have been permitted to produce these additional arguments. The Supreme Court concluded that there was no obstacle to C's doing so.

I kept my promise, Don't keep your distance

So the right result was reached. C might have been characterised by the Supreme Court as a vulture fund, but that was not relevant to Argentina's obligations or to its immunity in the English courts. The ability to claim sums due on a bond issue cannot depend upon whether, at one hypothetical extreme, the bondholder happens to be a charity dependent upon the income from the bonds to feed the starving or, at the other, it is a privateer greedy for profit to spend on yachts and champagne.

However, jurisdiction to determine a claim is not the same as the ability to enforce against a state's assets. Section 13 of the State Immunity Act 1978 only allows enforcement of a judgment against a state's assets if the state has consented or the assets are in use for commercial purposes. Finding assets will not necessarily be easy.

Nevertheless, states will continue to be pursued on their obligations, at least until there is a means for them to go into a sovereign equivalent of Chapter 11 bankruptcy or administration. So far, all attempts aimed at establishing an insolvency regime for states have foundered (though, for very poor countries, the Debt Relief (Developing Countries) Act 2010 has a role to play in the UK). So courts will keep on seeing claims against states. Who will be next in the firing line?