The Law of State Immunity

Third Edition

HAZEL FOX CMG QC

President www.son with the stand with the stand of the st



OXFORD

Great Clarendon Street, Oxford, OX2 6DP, United Kingdom

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and in certain other countries

© Hazel Fox CMG QC and Philippa Webb 2013

The moral rights of the authors have been asserted

First Edition published in 2008 Third Edition published in 2013

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by licence or under terms agreed with the appropriate reprographics rights organization. Enquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above

You must not circulate this work in any other form and you must impose this same condition on any ocquirer

Crown copyright material is reproduced under Class Licence Number C01P0000148 with the permission of OPSI and the Queen's Printer for Scotland

Published in the United States of Amer ca by Oxford University Press 198 Madison Avenue, New York, NY 10016, United States of America

> British Library Cataloguing in Publication Data Data available

Library of Congress Control Number: 2013943483

IS5N 978-0-19-964706-4

Primed and bound in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to thand party websites are provided by Oxford in good faith and for inform, tion only. Oxford disclaims any responsibility for the materials contained in any third party website referenced in this work.

Summary Contents

Fore	eword	v
Prej	face and Acknowledgments	vii
List	of Abbreviations	xvii
Tab	le of Cases	xix
Tab	le of Legislation	xxxix
Tab	le of UNCSI Articles	xlv
	Introduction	1
	PART I GENERAL CONCEPTS	
1.	The Institution of Proceedings and the Nature of the Plea of	
	State Immunity The Three Models of the Concept of State Immunity	11
2.	The Three Models of the Concept of State Immunity	25
3.	The Plea of State Immunity distinguished from Act of	10
	State and Non-justiciability	49
4.	State Immunity and Jurisdiction: Immunity from the Civil and Criminal Jurisdiction of National Courts	73
	ervir and erminiar jurisdiction of reactional courts	75
	PART II THE SOURCES OF THE LAW OF	
	STATE IMMUNITY	
5.	A Review of the Sources: Treaties and Projects for Codification	99
	The Restrictive Doctrine of State Immunity:	
0.	Its recognition in Sta'e Practice	131
7.	English Law: The UK State Immunity Act 1978	165
8.	US Law: The Foreign Sovereign Immunities Act 1976	238
9.	The 2004 UN Convention on Jurisdictional Immunities of	
	States and their Property: General Aspects	284
	PART III THE CURRENT	
	INTERNATIONAL LAW OF STATE IMMUNITY	
10.	The Definition of the Foreign State	335
11.	The Consent of the Foreign State: Waiver and the Arbitration Exception	373
12.	The Concept of Commerciality	395
13.	Immunity from Adjudication: the Proceedings in which Immunity	
	cannot be invoked, the Commercial and Other Exceptions	413

Summary Co	ontents
------------	---------

14. Immunity from Adjudication: The Employment Exception in respect of (1) A Foreign State and (2) An International Organization	435
15. Immunity from Adjudication: The Territorial Tort Exception	463
16. State Immunity from Enforcement: General Aspects	479
17. The Three Exceptions to Immunity from Enforcement and the Five Categories of State Property listed as Immune	509
PART IV OTHER IMMUNITIES	
18. Immunity of Individuals acting on behalf of the State	537
19. International Organizations and Special Regimes	570
PART V CONCLUSIONS	
20. Taking Stock	611
20. Taking Stock Appendix: The United Nations Convention on Jurisdictional Immunities of States and Their Property Select Bibliography Index	615 625
Appendix: The United Nations Convention on Jurisdictional Immunities of States and Their Property Select Bibliography Index	629

х

Contents

Fo	reword by Judge Sir Kenneth Keith	v
Pr	eface and Acknowledgments	vii
Li	st of Abbreviations	xvii
Та	ble of Cases	xix
Та	ble of Legislation	xxxix
	ble of UNCSI Articles	xlv
In	troduction	1
	The plea as one of mixed international and municipal law	1
	The functions which State immunity serves	1
	The sources of the law of State immunity	2
	The recent development of the law of State immunity	3
	The three models on which immunity is based	3
	Structure of the book	5
	State immunity as a case study of the structure of international law	7
	PART I GENERAL CONCEPTS	
1.	The Institution of Proceedings and the Nature of the	
	Plea of State Immunity	11
	The institution of proceedings	11
	Immunity as a rule of international law	13
	The role of national law	17
	Outline of the plea of State immunity Proceedings in court: criminal and civil	18 21
2		
Ζ.	The Three Models of the Concept of State Immunity	25
	The changing role of the independence and equality of the State	25
	The First Model, the absolute doctrine: the independence of the State The inability of the national court to enforce its judgments against a	26
	foreign State	31
	The Second Model: the restrictive doctrine	32
	The distinction into public and private law acts used as legal	
	device in other areas of regulation	34
	The merits and faults of the distinction into public and private law acts	35
	The Third Model: immunity as a procedural exclusionary plea	38
	From bilateralism of rights to a vertical hierarchy?	39
	Assessment of the Third Model	44
3.	The Plea of State Immunity Distinguished from Act of State and	
	Non-justiciability	49
	Proceedings in national courts where a foreign State affects the	
	court's exercise of jurisdiction	49
	Special features of proceedings where the State is party	51
	State Practice relating to pleas of Act of State and Non-justiciability: US law English law	53 59

	Act of a foreign State The plea of non-justiciability Modification where 'a foothold in domestic law' Modification where a procedural right of access Pleas of Act of State, non-justiciability and State immunity compared	60 63 65 68 70
4.	State Immunity and Jurisdiction: Immunity from the Civil and Criminal Jurisdiction of National Courts	73
	The competing principle of sovereign territoriality The extraterritorial extension of the State's jurisdiction Universal jurisdiction The relationship of immunity to jurisdiction The distinction into civil and criminal jurisdiction Additional jurisdictional links in civil proceedings against a State	75 76 81 82 85 87 89
	The exercise of criminal jurisdiction over a foreign State PART II THE SOURCES OF THE LAW	69
	OF STATE IMMUNITY	
5.	A Review of the Sources: Treaties and Projects for Codification	99
	International conventions relating solely to State immunity	99
	The resolutions of international bodies	99
	Decisions of international tribunals Decisions of national courts	100 102
	Treaty practice as a source	102
	The 1926 Brussels Convention and the 1934 Protocol	114
	The 1972 European Convention or State Immunity	116
	Projects for codification by governmental and non-governmental bodies	123
6.	The Restrictive Doctrine of State Immunity: Its Recognition	
	in State Practice	131
	Early development	131
	The formulation of a general rule of immunity of the State	134
	Common law ju. is dictions: UK law	135
	US law Other common law invisdictions	143
	Other common law jurisdictions The development of the restrictive doctrine in civil law countries	146 150
	Russia and other East European Countries	150
	African and Asian States	161
7.	English Law: The UK State Immunity Act 1978	165
	Status	165
	General structure of the UK State Immunity Act 1978	172
	Definition of the foreign State	174
	Waiver	184
	The exceptions to immunity: non-immune commercial activities	189
	English law: immunity from enforcement Recognition and enforcement of foreign judgments given against	209
	Recognition and enforcement of foreign judgments given against foreign States	215
	English law: procedure	213
	The Civil Procedure Rules	222

Proof of the status of a foreign State or government

223

	Contents	xiii
	Commencement of proceedings against a foreign State Service of Process	227 230
	Burden of proof	234
8.	US Law: The Foreign Sovereign Immunities Act 1976	238
	Immunity from adjudication General structure of the Foreign Sovereign Immunities Act	238
	1976 Jurisdiction Definition of the Foreign State	242 249
	Waiver	255
	Exceptions to immunity from adjudication	259
	The Alien Tort Act 1789 and the Torture Victim Protection Act 1991 The Anti-terrorism and Effective Death Penalty Act 1996, the Seventh	271
	Amendment to the FSIA Immunity from execution of the State and its property	278 278
	Amendment of the FSIA relating to execution against State property	278 281
9.	The 2004 UN Convention on Jurisdictional Immunities of	
	States and their Property: General Aspects	284
	Legislative history: the ILC's work and its consideration in the United Nations	285
	Status of the Convention	289
	Interpretation of the Convention	295
	Structure of the Convention	297
	The general rule of immunity in the Convention	303
	Exclusions	310 319
	A general assessment of the Convention Implementation by States which have ratified the Convention	322
	PART III THE CURRENT INTERNATIONAL LAW OF STATE IMMUNITY	
10	. The Definition of the Foreign State	335
	External attributes as an independent and sovereign State	336
	Recognition of a State or government	340
	Internal attributes of the State	345
	Head of State Constituent units and political subdivisions	347 348
	State agencies	352
	Representatives of the State: Individuals	364
	Central banks	369
11	. The Consent of the Foreign State: Waiver and the Arbitration Exception	373
	The nature of consent of a foreign State in proceedings in	272
	national courts Consent under the UN Convention	373 378
	Consent of the State to the exercise of jurisdiction by the court of the	570
	forum State	383
	Consent by choice of jurisdiction as constituting waiver	385
	Counterclaims: matters covered by waiver	387
	Waiver and the arbitration exception UNCSI Article 17 arbitration exception: limitations	388 391
	errournitude 17 aronauton exception, initiations	571

12.	The Concept of Commerciality	395
	The Three requirements for an exception to immunity	396
	Acta jure imperii	399
	Acta jure gestionis	402
	Techniques for determination of the commerciality of the act	404
	Evaluation of the restrictive doctrine	411
13.	Immunity from Adjudication: the Proceedings in which	
	Immunity Cannot be Invoked, the Commercial and Other Exceptions	413
	The exception for commercial transactions	413
	The exception for ownership, possession and use of property	422
	The taking of property in violation of international law	426
	The exception for infringement of intellectual property rights	427
	Participation in companies or other collective bodies	429
	The exception for ships owned or operated by a State	431
14.	Immunity from Adjudication: The Employment Exception in respect of (1) A Foreign State and (2) An International Organization	435
	(1) A foreign State's immunity and the exception for employment	
	contracts	437
	The three Models of employment contracts with a Foreign State	439
	The exception for employment contracts in UNCSL Article 11(2)	443
	Circumstances where the rule of immunity still prevails UNCSI	
	Article 11(2)	446
	(2) An international organization's immunity and the	455
	exception to immunity for employment contracts	455
	Allocation of responsibility in respect of employees of an international organization	460
	Employment contracts of the international organization and of the	400
	foreign State compared	462
15		
15.	Immunity from Adjudication: The Territorial Tort Exception	463
	Part One: UN Corvention Article 12	465
	Legislative history	465 466
	Jurisdictional connection Applicable law to determine cause of action	400 469
	Types of tortious conduct	409
	Exclusions	470
	Part Two: impact of the <i>Jurisdictional Immunities</i> Judgment	475
	Three controversial types of loss	476
16.	State Immunity from Enforcement: General Aspects	479
	The reasons underlying no enforcement against State property	480
	State Practice: the general rule and modifications	482
	Immunity from enforcement in the UN Convention	490
	State immunity from measures of constraint in connection with	
	proceedings before a court	494
	The distinction into pre- and post-judgment	495
	Types of coercive measures	497
	Coercive measures against the State representative	500
	Subject-matter of coercive measures	502

Contents

xiv

Contents	XV	
17. The Three Exceptions to Immunity from Enforcement and the		
Five Categories of State Property listed as Immune	509	
The three exceptions to the General Rule of Immunity from		
enforcement	509	
Consent of the State	510	
Allocation of State property by the State	510	
Use or intended use for commercial purposes	511	
The five categories of State property listed as immune	512	
Diplomatic property	515	
Military property	520	
Central bank property	522	
Cultural heritage of the State	525	
State property forming part of an exhibition	527	
Conclusions with regard to Chapters 16 and 17	530	
PART IV OTHER IMMUNITIES		
18. Immunity of Individuals Acting on Behalf of the State	537	
The head of State	538	
Immunities of other high-ranking officials	558	
Special missions	561	
Immunity <i>ratione materiae</i> of State Officials	564	
19. International Organizations and Special Regimes	570	
International organizations	570	
Diplomats and the diplomatic mission	579	
Consular immunity	592	
Visiting armed forces	593	
Other issues: private military and security companies and policing		
and law enforcement	604	
PART V CONCLUSIONS		
20. Taking Stock	611	
Appendix: The United Nations Convention on Jurisdictional		
Immunities of States and Their Property	615	
Select Bibliography	625	
Index	629	