

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2013/44462

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: ✓

In the application of:

**EAST ASIAN CONSORTIUM, B.V.**

Plaintiff

versus

**MTN GROUP LIMITED**

1<sup>st</sup> Defendant

**MTN INTERNATIONAL (MAURITIUS) LIMITED**

2<sup>nd</sup> Defendant

**MOBILE TELEPHONE NETWORKS HOLDINGS (PTY) LTD**

3<sup>rd</sup> Defendant

**MTN INTERNATIONAL (PTY) LTD**

4<sup>th</sup> Defendant

**NHLEKO, PHUTUMA FREEDOM**

5<sup>th</sup> Defendant

**CHARNLEY, IRENE**

6<sup>th</sup> Defendant

**Coram:** Wepener J

**Date of hearing:** 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> September 2022

**Date of Judgment:** 30 November 2022

This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his secretary. The date of this Order is deemed to be 30 November 2022.

**Summary:**

**Choice of laws:** or determination of the system of law governing the cause of action – conduct alleged to have occurred in both Iran and South Africa leading to delict. The heart of the conduct taking place in Iran. The test to apply is the *lex loci delicti commissi*.

**Jurisdiction:** Party bound by terms of an agreement to subject itself to a particular court's jurisdiction, may be obliged to litigate in that court. Discretion to be exercised when parties agreed to a particular jurisdiction.

**International law:** Act of State Doctrine and State Immunity applicable in instances where conduct of sovereign government alleged to be unlawful. Court will decline to exercise jurisdiction in such instances.

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**JUDGMENT**

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**Wepener, J:**

[1] The plaintiff ('EAC') has instituted action against the defendants claiming damages as a result of the defendants having wrongfully interfered with EAC's contractual rights, alternatively, having unlawfully competed with EAC for those rights. It is common cause that EAC's causes of action are found in delict.

[2] Pursuant to an application by the first, third and fourth defendants,<sup>1</sup> the parties agreed to separate out issues in terms of Rule 33(4)<sup>2</sup> for determination prior to the trial commencing. The issues so agreed upon were made an order of court on 31 January 2022 as follows:

1. 'The following questions arising from the paragraphs of the pleadings between the parties identified in the footnotes<sup>3</sup> to this order (and as amplified by the requests for particulars and the replies thereto) will be decided without the leading of any evidence and in advance of the remaining issues in the action:

1.1 Does Iranian or South African law (or any other legal system) determine whether the allegations made in paragraphs 36 to 60 and 66 of the particulars of claim, both individually and collectively, (read with the corresponding pleas of the defendants thereto) found a claim for damages as the plaintiff contends?

1.2 Which system of law governs:

1.2.1 the tender process, including the tender invitation and regulations

1.2.2 the Turkcell Consortium Agreement,

1.2.3 the interpretation of the Turkcell Consortium Agreement;

1.2.4 whether the Turkcell Consortium Agreement was concluded for the benefit of the plaintiff;

1.2.5 whether the plaintiff accepted any such benefit, and how it did so;

1.2.6 whether the conditions precedent to the Turkcell Consortium Agreement were fulfilled or waived;

1.2.7 whether the plaintiff acquired any rights under the Turkcell Consortium Agreement upon its incorporation;

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<sup>1</sup> I refer to the applicants for separation, who are defendants in the main action as MTN. Fifth and sixth defendants made common cause with MTN and reference to MTN is also a reference to these defendants.

<sup>2</sup> Uniform Rules of Court.

<sup>3</sup> Footnotes omitted.



1.2.8 the effect of the incorporation of the Irancell Telecommunications Services Company and the conclusion of its shareholders' agreement on the Turkcell Consortium Agreement;

1.2.9 whether such incorporation and shareholders' agreement superseded the Turkcell Consortium Agreement and any rights the plaintiff acquired as a member thereof;

1.2.10 whether the plaintiff became a party to the Turkcell Consortium Agreement and can base its claim in the action thereon.

1.3 Does South African or Iranian law (or any other legal system) determine whether the GSM<sup>4</sup> licence agreement, or the certificate read with the draft licence agreement, as alleged in paragraphs 20, 29 and 30 of the Particulars of Claim:

1.3.1 constituted a valid and binding agreement between the Turkcell Consortium, or the Turkcell Consortium acting on its own behalf and for the benefit of the Operating Company to be formed, and the MCIT<sup>5</sup>; or

1.3.2 gave rise to binding and enforceable rights in favour of the Turkcell Consortium, alternatively the Turkcell consortium acting on its own behalf and for the benefit of the Operating Company to be formed; and

1.3.3 Does South African or Iranian law (or any other legal system) determine the terms of the valid and binding agreement, and the content of the binding and enforceable rights?

1.4 Which system of law determines the impact of the Single Article Act and the Irancell Act on the alleged agreement or binding and enforceable rights.

1.5 Which system of law determines the validity of MTN's Third Special Plea, (and, correspondingly, the same choice of law issues which arise in the Fifth Defendants Fifth Special Plea (Res Judicata / Issue Estoppel) and the Sixth Defendants Plea (Abuse of Process)).

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<sup>4</sup> Licence for a global system for mobile communications.

<sup>5</sup> Ministry of Communication and Information Technology of Iran.



1.6 Which system of law determines the validity of MTN's Fourth Special Plea (and, correspondingly, the Sixth Defendants Plea marked "C" (Abuse of Process)).

1.7 Which system of law determines the validity of MTN's Fifth Special Plea; (and, correspondingly, the Fifth Defendant's Sixth Special Plea and the Sixth Defendant's Special Plea marked "D"? (Prescription)).

1.8 The Fifth Defendant's First and Second Special Pleas (and, correspondingly, MTN's Second Special Plea and the Sixth Defendant's Special Pleas, marked as D(1) & (2). ("*The jurisdiction point*" pertaining to the Foreign Act of State Doctrine, State Immunity and the Exclusive Jurisdiction of the Iranian Courts).

2 The choice of law issues in paragraphs 1 to 1.7 above which equally arise on the pleadings as they relate to the Fifth Defendant's and Sixth Defendant's case against the Plaintiff; and the issues for separation in paragraph 1.8 above which equally arise on the pleadings as they relate to the MTN Defendants' and Sixth Defendant's case against the Plaintiff, are included as issues for separation.

3 Each of the First, Third and Fourth Defendants (jointly) and the Fifth and Sixth Defendants shall have an equal and independent opportunity to participate in the hearing of the separated issues.

4 In the event that the applicable law to decide any one or more issue identified in paragraph 1 to 1.7 above cannot be determined without evidence, then the Court will make an order to that effect.

5 In respect of the choice of law issues identified in paragraph 1 to 1.7 above, the court's direction will accordingly be that legal system A, B or C applies to the issues arising in the each of the identified paragraphs in the pleadings, or that the applicable legal system cannot be determined without evidence and the court declines to do so.

6. The costs of this application are costs in the cause.'

### Choice of Laws

[3] Prior to hearing these issues, the parties further agreed that the following legal systems apply to the issues of the order:

- 1.2.1 Iranian law;
- 1.2.2 Swiss law;
- 1.2.3 Swiss law;
- 1.2.4 Swiss law;
- 1.2.6 Swiss law;
- 1.2.8 Swiss law;
- 1.2.9 Swiss law;
- 1.3 Iranian law;
- 1.4 Iranian law;
- 1.5 South African law;
- 1.6 South African law; and
- 1.7 South African law.

[4] Save for the question of the law governing the delict, the three issues contained in para 1.2.5, 1.2.7 and 1.2.10 that were not agreed upon, are closely related. MTN submitted that the law of Switzerland applies and EAC submitted that the law of the Netherlands should govern these three issues.

[5] The only issues contained in the separation order that remain for determination are:

- '4.1 the choice of laws for the issues contained in paras 1.1, 1.2.5, 1.2.7 and 1.2.10; as well as
- 4.2 the special pleas raised in para 1.8.'

[6] The first issue revolves, in the main, around 1.1, ie, whether Iranian or South African law or any other legal system (although no such was argued) should determine the allegations in paras 36 to 60 and paras 66 of the particulars of claim read with the pleas and further particulars, founding a claim in damages. In order to decide this, the contents of paras 36 to 60, and 66 require consideration. In essence, the cause of action and the facts relied upon for it, are set out in these paragraphs. There is no disagreement between the parties that the cause of action is one in delict. There is also no disagreement between the parties that the delict, which is alleged in the alternative, is based on an unlawful interference with contractual rights or alternatively, unlawful competition by inappropriate means.

[7] The approach I take by virtue of the agreed court order, is similar to a stated case: given all the allegations contained in the particulars of claim<sup>6</sup> to be correct, what system of law should apply to the issues based on the pleadings as they stand without reference to any evidence? In the circumstances, the submission on behalf of EAC, that the analysis for determination of the choice of laws should go much wider and include evidence that is referred to, although not contained in the pleadings, or defer the decision to hear what evidence that might be led at the trial, falls foul of the agreed separation order that the issue will be decided without the leading of any evidence and I shall limit the consideration of the EAC argument by the exclusion of references to that which falls outside of the pleadings.

[8] A further aspect relied upon by counsel for EAC is the submission that, in the event of a finding that a foreign law applies, it must be determined if that law passes constitutional muster in this country. However, nothing has been pleaded to show that the Iranian law of delict, or any other foreign law, if applicable, would be repugnant to our constitutional dispensation and I need say no more about that argument.

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<sup>6</sup> A reference to the particulars of claim or pleadings in this context includes a reference to the pleas and further particulars.



[9] Both parties relied on *Forsyth*<sup>7</sup> and a decision of the High Court of the Eastern Cape, *Burchell*,<sup>8</sup> for their respective submissions regarding the choice of laws to be applied. They submitted that the *lex loci delicti commissi* (the law of the place where the delict was committed) is the starting point to determine the issue.

[10] The MTN parties relied on the following legal principles: In *Burchell* it was held the *lex loci delicti commissi* should be applied by default. The test favoured by Forsyth is the *lex loci delicti commissi* but with some flexibility.<sup>9</sup> MTN supported the preferred approach of Forsyth and EAC submitted that the *lex loci delicti commissi* may be displaced by another legal system, which had a more significant relationship with the matter, a test that was also referred to in *Burchell*.

[11] The pleaded facts, and in particular, paras 36 to 60 and 66 to which I was directed, are therefore analysed to determine whether the *lex loci delicti commissi* should be applied or whether to dispose of it with another legal system (the South African system) if the first answer would be the Islamic Republic of Iran (Iran). In my view the pleaded facts heavily favour the place of the commission of the delict to be Iran. The pleadings under consideration refer to a breach of a joint venture-agreement and a breach of the award of a tender and although, not stated, was clearly not something that occurred in South Africa. In particular, the particulars of claim allege<sup>10</sup> that the defendants acted with the intention of inducing the Iranian government and its agencies to exclude EAC from the consequences or benefits of the grant of the licence agreement, and that the government should instead transfer the benefit to MTN. The pleading states that the conduct of MTN was designed to persuade the Iranian government to breach the Iranian government's contractual obligations to EAC. It is this very breach that forms the basis of the delictual claim.

[12] Also, the tender award occurred in Iran. It was regulated by Iranian tender regulations. However, the allegations of a breach of the joint venture-agreement takes

<sup>7</sup> C F Forsyth Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts 5 ed (2012).

<sup>8</sup> *Burchell v Anglin* 2010 (3) SA 48 (ECG).

<sup>9</sup> *Forsyth* pp 363-4.

<sup>10</sup> At paras 47-48.

one back to the allegations regarding the joint venture-agreement in the previous paragraphs of the particulars of claim. The reference to the place thereof is Iran.<sup>11</sup>

[13] The allegations are further that there was a breach of rights arising from the 'award of the tender' – which is common cause, occurred in Iran. In addition, a breach of a licence agreement which formed part of the tender documents, occurred in Iran.

[14] A demand to remedy the breaches was sent to the eight relevant parties and copied to three others, all in Iran. The stepping in of MTN is alleged to have occurred without reference to place, but it could only have been in Iran. Further allegations of the conduct of the breaching parties are referred to as the Iranian shareholders; discussions were held in Iran,<sup>12</sup> loan agreements were entered into in Tehran, Iran;<sup>13</sup> a shareholders agreement was entered into in Iran;<sup>14</sup> the tender was awarded in Iran and the licence was issued by the Iranian government in Tehran.<sup>15</sup> The allegations regarding MTN's conduct to replace EAC could only have occurred in Iran. The alleged action that induced the Iranian government to take the new course, could only have occurred in Tehran. It is alleged that representatives of MTN repeatedly travelled to Iran to visit influential persons and the Iranian government, and that other 'advocacy efforts' over a period of a year occurred in Tehran. Other visits, also by the South African Minister of Defence, were made to Iran which led to meetings and a memorandum of understanding being entered and issued in Iran. A bribe was provided to a minister of state in Tehran, Iran and free gifts provided to him and his family in Tehran. It is alleged that a payment was made to the South African ambassador in Tehran for him to influence the awarding of the licence. The pleading carries on to matters that refer to the Iranian government and to the actions of the Iranian government and the wrongful interference into the contractual relationship of the government of Iran with EAC by MTN. The agreement constitutes a number of documents, one of which is the trade regulations. It provides in art 29 that the regulations are regulated by Iranian law. The rights acquired by the bidders were so acquired under

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<sup>11</sup> Particulars of claim para 332.

<sup>12</sup> Particulars of claim para 40.6.

<sup>13</sup> Particulars of claim para 41.

<sup>14</sup> Particulars of claim para 43.

<sup>15</sup> Particulars of claim para 44.



a process run by the Iranian government in Iran under Iranian law for an Iranian licence. The pleadings refer to significant conduct in Iran.

[15] The references to conduct within the Republic of South Africa are few indeed. They refer to meetings and gifts to foreign dignitaries. Compared to the conduct in Iran, the few references to visits by influential persons to South Africa, and receiving gifts or bribes virtually pale in significance, compared to the conduct relied upon that occurred in Iran. EAC relied on a few occurrences in South Africa which it alleged, in argument, were the planning of the whole conspiracy. In my view, the breach occurred in Iran, and any possible planning for the execution of the breach is ancillary. The conduct complained of, forming the basis of the delict, is conduct that occurred in Iran. That is where the delict, as pleaded, was put into effect. Applying the *lex loci delicti commissi*, the law of Iran would apply to the conduct complained of.

[16] This would be so if the preferred test of *Forsyth* is applied or even whether one approaches the matter on the basis of a more significant relationship. I am of the view that the test proposed by Forsyth is preferable for the reasons offered by the author.<sup>16</sup> Those are that in most cases the *lex loci delicti commissi* will be clear, certain and appropriate; the rule is in accord with the reasonable expectations of most parties; the rule is in accord with Roman-Dutch authority; the rule has been adopted in both Canada and Australia;<sup>17</sup> there have been clear legislative moves in the United Kingdom and in Europe in support of the rule. The acceptance of the rule would

‘ensure broad uniformity with many other influential jurisdictions across the world, including important trading partners. . . .’

[17] This test would lead to a conclusion that the delict, as pleaded, occurred in Iran, or as counsel for EAC submitted, ‘the effect of the delict may well have been felt in Iran. . . .’ In my view, the loss suffered by EAC was both caused and suffered in Iran and that the *lex loci delicti commissi* leads one to the law of Iran. In my view, even if the test of the

<sup>16</sup> Forsyth p 364.

<sup>17</sup> *Tolofson v Jensen* (1995) 120 (DLR) (4<sup>th</sup>) 289 (Supreme Court of Canada) and *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625 (High Court of Australia).



country with a more significant relationship with the delict would be applied, the result would be Iran.

#### Choice of laws: three ancillary issues

[18] Three ancillary issues remain. EAC submitted that the matters referred to in the court order in paras 1.2.5, 1.2.7 and 1.2.10 are governed by the law of the Netherlands. MTN submitted that the Swiss law must apply. If one has regard to the wording of each of those issues, in particular the wording of order 1.2.10, I am asked to determine whether EAC became a party to the Turkcell Consortium Agreement and can base its claim in the action thereon. (my underlining). It immediately becomes clear that the case, being a delictual claim, is based on conduct that occurred in Iran, and that such a claim falls to be brought under the Iranian law. However, the additional portion of the question refers one to the Turkcell Consortium Agreement.<sup>18</sup> All three issues flow from the consortium agreement. That agreement provides<sup>19</sup> that it shall be governed by the laws of Switzerland.<sup>20</sup> If one has regard to the agreed legal system, which is the Swiss law, it is difficult to see, although entirely possible, that there is a distinction between the orders as agreed and the three outstanding matters. EAC submitted that the place where it was incorporated, ie, the Netherlands must be decisive. I do not know if the law of the Netherlands covers the issue. I am not convinced that the issues should be determined by the law of the Netherlands because its law is 'probably codified' and deals with company law. The submission advanced by EAC was not based on the pleadings as per the agreed court order.

[19] I am not satisfied that there is sufficient matter before me, contained in the pleadings, to determine the last three issues in relation to the choice of laws. However, it is a small part of the issues that are to be determined and it can conveniently be finalised at trial proceedings.<sup>21</sup>

<sup>18</sup> The plaintiff in this matter was formerly referred to as Turkcell Iletsim Hizmetleri A.S.

<sup>19</sup> In clause 34.

<sup>20</sup> The parties agreed that the law of Switzerland governs the Turkcell Consortium Agreement – see para 1.2.2 of the order read with para 3, *supra*.

<sup>21</sup> See Court order para 4.

[20] MTN (as defined) has been successful in its separated issue save for the minor ones that were left for the court to determine at the trial. It should be awarded its costs.

#### The Special Pleas or Jurisdictional Issue

[21] MTN pleaded the following three special pleas that are alleged to deprive this court of jurisdiction. They are:

21.1 Exclusive Jurisdiction of the Iranian Courts

21.2 The Foreign Act of State Doctrine

21.3 State immunity<sup>22</sup>

[22] EAC relied on the summary (as contained in *Amler's*<sup>23</sup>) explaining how issues of jurisdiction are approached. The learned author says:

'A court must have jurisdiction for its judgment or order to be valid. If the court does not have jurisdiction, its judgment or order is a nullity. No pronouncement to that effect is required.

Jurisdiction in this context means "the power invested in a court by law to adjudicate upon, determine and dispose of a matter." The time for determining whether a court has jurisdiction is when proceedings commence – that is, when the initiating papers are served on the defendant or respondent. Once jurisdiction is established, it persists to the end of the proceedings even though the ground may have ceased to exist.

*Communication Workers Union v Telkom SA Ltd* [1999] 2 All SA 113 (T), 1999 (2) SA 586 (T)

Jurisdiction is determined with reference to the allegations in the pleadings and not by the substantive merits of the case. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the plaintiff's pleadings are the determining factor since they contain the legal basis of the claim under which the plaintiff has chosen to invoke the court's competence.

<sup>22</sup> Foreign States Immunities Act 87 of 1981 ('the Immunities Act').

<sup>23</sup> Harms *Amler's Precedents of Pleadings* (9Ed) at p 233.



*Gcaba v Minister for Safety and Security* 2010 (1) BCLR 35 (CC), 2010 (1) SA 238 (CC) para 75.<sup>24</sup>

[23] As far as the nullity<sup>25</sup> of the judgment where jurisdiction is absent is concerned, the decision of the Supreme Court of Appeal in *Travelex Limited v Maloney and Another* sets out the law:<sup>26</sup>

‘I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. However, I agree with the view expressed in *Erasmus Superior Court Practice*, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded. That is the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction. Therefore, the usual requirements for a rescission application in terms of the common law or rule 42 do not apply.’

[24] This would be relevant to a plea that a court lacks jurisdiction and where no discretion vests in a court.

[25] The reliance on the pleadings of EAC to determine a court’s jurisdiction is thus settled law.<sup>27</sup> MTN’s argument that a court has to look at the pleadings on both sides in order to determine what the jurisdictional limits are, cannot be sustained, nor can this court have regard to EAC’s argument regarding facts contained in a submission by MTN to the courts of the United States of America. It does not appear in the particulars of claim and is extraneous evidence.

[26] There are different ways in which a court’s jurisdiction can be challenged. These include that the plea can deny that a court has jurisdiction due to a missing allegation in the particulars of claim, or it may add reasons why the court lacks jurisdiction. Based on

<sup>24</sup> On the force and effect of jurisdiction see also *The Master of the High Court v Motala N.O. and Others* 2012 (3) SA 325 (SCA) paras 11-13.

<sup>25</sup> Or rather invalidity of an order – See *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at footnote 156.

<sup>26</sup> 2016 JDR 1776 (SCA) para 16; and see *Seleka v Fast Issuer SPV (RF) Ltd* 2021 JDR 0562 (GP) para 15. This was again confirmed in *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd And Others* 2010 (6) SA 329 (SCA) para 6.

<sup>27</sup> See *Gcaba v Minister for Safety & Security & Others* (2010) 31 ILJ 296 (CC). See also *Chirwa v Transnet Ltd & Others* (2008) 29 ILJ 73 (CC) paras 155 and 169.



these reasons, a court then has to determine whether EAC's pleadings contain a jurisdictional basis for the claim.<sup>28</sup> The pleas of MTN raised objections to this court's jurisdiction pertaining to three distinct legal arguments. The result is, whilst taking note of the content of the pleas, as without it there is no challenge to the court's jurisdiction, the focal point of the enquiry must be the particulars of claim, which particulars include extensive annexures. Although EAC filed a replication to the special pleas in which it is alleged that the three jurisdictional issues raised by MTN are bad in law as they either do not form part of the South African law or they do not apply in instances such as those that EAC relies on in this matter. The replication, in my view, does not widen the enquiry but furnishes reasons why it confirms that this court does have jurisdiction to hear the matter. The enquiry remains whether this court has jurisdiction and EAC's pleadings are the determining factor.

[27] For purposes of considering the special pleas I summarise the allegations contained in the particulars of claim, this time not to determine where the delict occurred, but with emphasis on who the persons are that were involved, in particular the involvement of Iranian government as a sovereign state.

[28] The allegations commence with a tender process communicated by the Iranian Government, who issued an international tender invitation for Iran's first private licence for a global system for mobile communications. It is then alleged that

'In terms of the tender regulations contract (article 1) the purpose of the tender was the selection of an operating company that would be granted the GSM licence for the implementation and operation of a GSM-type cellular phone system public network in Iran',

and that a winning bidder, a subsequent award of the tender 'on behalf of Iran' and the establishment of a binding agreement between EAC<sup>29</sup> and the Iranian government<sup>30</sup>

<sup>28</sup> *Gcaba* *ibid.*

<sup>29</sup> Reference to EAC may be technically incorrect as the pleadings referred to a consortium of which the plaintiff was a member, but nothing turns thereon.

<sup>30</sup> The particulars of claim also refer to MCIT as the party representing the Iranian government. MCIT was the Iranian Ministry of Communication and Information Technology, but all parties accepted, or at least did not argue differently, that its conduct is also the conduct of the Iranian government. For example see s 239 of the Constitution: 'organ of state' means –

(a) 'any department of state or administration in national, provincial or local sphere of government; or  
(b) any other functionary or institution –

would follow. The alternative claim<sup>31</sup> is based on rights of EAC against the Iranian government. These rights included rights to negotiate with the Iranian government with the view of finalising a licence agreement and to enforce against it the obligation not to accept an offer from another party and to enforce the rights and entitlements conferred upon EAC in terms of the tender regulations.

[29] The particulars of claim continue to state under a heading 'The events pursuant to the award of the tender' that the Iranian government issued to EAC a certificate of selection as a provisional licensee and there was a provisional licence agreement signed. This led to a final licence signed between EAC and the government of Iran.<sup>32</sup> This is followed by the allegation that there came into existence a binding agreement<sup>33</sup> between EAC and the Iranian government. The allegation continues<sup>34</sup> that the licence which was issued would not be transferred to a third party without the Iranian government's prior written authorisation. At some stage the Iranian government enforced a change to the relationship by passing the Irancell Act. It is the party that repudiated the relationship with the bidder or provisional licensee. EAC then took steps to do what is required of it in terms of the agreement which it had with the Iranian government. The particulars of claim allege a breach of the joint venture agreement and a breach of the award of the tender<sup>35</sup> by the Iranian government and that it concluded a written addendum to the existing agreement. This written addendum displaced EAC and substituted MTN for it. This forms the basis of what follows and is said to be the unlawful conduct that constituted the delict.

[30] Once this occurred, EAC (in writing) demanded that the Iranian government must remedy the breaches, and despite the demand, it persisted with the breaches. It is therefore clear that the Iranian government is the party who caused the breach upon which EAC relies. The next significant allegation<sup>36</sup> is that the government of Iran issued

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(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or  
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

<sup>31</sup> At para 22.

<sup>32</sup> The licence agreement is Annexure POC 12 to the particulars of claim.

<sup>33</sup> Or the alternative enforceable rights in favour of EAC.

<sup>34</sup> At para 30.2.

<sup>35</sup> At para 34.

<sup>36</sup> At para 44.



a licence to Irancell in which MTN obtained an interest. The replacement by MTN of EAC occurred by MTN acting with the intention of inducing the Iranian government to prevent EAC from receiving the benefits of the licence. The conduct of MTN, as alleged, was directed at the Iranian government, in consequence of which the Iranian government caused the unlawful breach. Fundamental to the cause of action is that the Iranian government allowed and received another bid from MTN. The particulars of claim say:<sup>37</sup>

‘That the defendant therefore had engaged in a second secret tender bidding process after the tender had been awarded. The defendants induced the Iranian government to take such action by the steps set out below. . . .’

The steps set out thereafter referred to bribery and corruption. Such a second secret tender process must of necessity involve the Iranian government. It was the Iranian government that was bribed and corrupted. All the conduct relied on is inextricably linked to the acts of the government of Iran. The particulars of claim<sup>38</sup> allege that the objective was designed to unlawfully prevent, by bribery and corruption, the conclusion of finally binding contractual obligations between the government of Iran and EAC. Thereafter influential officials in the Iranian government were targeted with the aim of exerting influence over these individuals in the Iranian government to achieve the objective. The particulars of claim state that the intended effect of the actions was to induce the Iranian government to breach its contractual obligations to EAC and have it replaced, and that the Iranian government was induced through bribery and corruption to replace EAC.

[31] The allegations are material to the cause of action. The unlawful conduct is equally that of all the actors, including the Iranian government. It is my view, that the conduct of the Iranian government is integral to the case. If it did not act wrongfully, there could never have been a delictual cause of action as all other acts were acts of preparation which could only lead to the final delictual conduct, despite the conduct of MTN on its own alleged to have been wrongful. The finding regarding the unlawful actions of the Iranian government, in my view, is *sine quo non* to establish a delict. Its pivotal role looms large and central in the claim. The trial court will thus be called upon to adjudicate on the

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<sup>37</sup> At para 50.

<sup>38</sup> At para 51.



unlawful conduct of the Iranian government, which conduct occurred within the territory of the Iranian state. I conclude that the constituent elements of causation of the delict took place in Iran.

[32] Approaching the particulars of claim holistically, the Iranian government decided to reform its telecommunications sector and adopt new policy decisions with an increase in private participation described as follows:<sup>39</sup>

A comprehensive reform of the overall telecommunications sector is underway in Iran. This reform aims at:

Fostering competition;

Protecting consumer's interest;

Supervising tariffs and quality of service;

Ensuring fair competition;

Supporting the development of the telecommunications sector;

The objectives of this reform are:

Horizontal expansion: by 2004 the number of fixed lines is expected to double, the number of mobile lines is expected to be increased five fold and the number of internet subscribers is expected to increase ten fold;

Vertical expansion: by 2004 quality of service is expected to increase substantially and new services such as extended roaming, pre-paid cards, SMS and advanced services are expected to be introduced.

Increased private sector participation in the telecommunications sector.

Key components of this reform process are:

A revision of the regulatory framework, including the creation of an independent regulatory framework;

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<sup>39</sup> POC 2 to the particulars of claim: Executive summary.

The restructuring of TCI, the incumbent operator. TCI is expected to be transformed into a holding company that will have different subsidiaries for regional, backbone, data, satellite and mobile services. While the backbone subsidiary will remain 100% owned by TCI holding, other subsidiaries will be partially floated on the Teheran Stock Exchange.

Increased private sector participation in the mobile telecommunications market. This process started with a BOT tender process for the provision of 2 million mobile lines initiated by TCI. The award of a GSM licence is expected to accelerate the trend of private sector participation in this industry.

Based on these and other statements contained in the tender documents, counsel for MTN argued that the tender transaction was a centre piece of the Iranian government's reform of an economic sector, being the introduction of a telecommunications network for the country. A new telecommunications operator would exist that would build, operate and then transfer the network to Iran. It was planning a regulation of the market and not as a private player in it.<sup>40</sup> The environment in which the allocation and operation of the licence were to operate, is one of public law in Iran in which the Regulations, being subordinate legislation, play a pivotal role. The argument has much force. The articles in my view, are inextricably linked to the cause of action.

[33] MTN argued that the determination of EAC's claims will require of this court to enquire into and determine whether or not the conduct of the government of Iran, within the borders of Iran and under Iranian law, was unlawful and that under the foreign state act doctrine it is not permissible and appropriate for this court to embark on and enquire into and make a determination of the lawfulness of the conduct of a foreign state that acted within the borders of its own territory and under its own domestic law. It is through this prism that the particulars of claim should be scrutinized.

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<sup>40</sup> *Alfred Dunhill of London Inc v Cuba* 66 ILR p 212.



### Exclusive Jurisdiction of the Iranian Courts

[34] The argument presented on behalf of MTN relied on article 29<sup>41</sup> of the Iranian tender document, in terms of which the parties, including EAC, were bound as follows:

'Applicable laws and Competent jurisdiction'

These regulations and the call for competitive bids to which they relate, are regulated by Iranian law, notably as regards their validity, interpretation, performance and termination.

Any dispute or litigation relative to these present Regulations, or to the call for competitive bids to which they relate, will be submitted to the competent Iranian courts.'

[35] MTN contended that the reference to 'any dispute relative to these present regulations or the call for competitive bids to which they relate . . .' is wide and encompasses the present litigation and that the words 'relative to the present regulations' do not include any limitation.<sup>42</sup> EAC submitted that the present action falls outside of the regulations as the regulations provided for the competition phase only.

[36] Although the tender document provides for two distinct trajectories for the award of the tender, it was not in dispute that in this matter the bidder or EAC was a consortium to which a specific trajectory applied. That trajectory allowed for the successful bidding consortium an opportunity to create an operating company which would be the recipient of the licence. This provision, and the provisions in general, show that the article 29 provision remained operative beyond the allocation of the tender to a bidder as part of an extended process involving a provisional licence. It is EAC's case that the cause of action is grounded in MTN's conduct and not that of the government of Iran. Although this may be so, the summary of facts shows that the conduct of the government of Iran looms large in the matter and findings of untoward conduct by it will have to be made to sustain the delictual claim. The thrust of MTN's argument was that EAC, as a bidder, is bound by the provisions of art 29 and is thus forced to make its claim in the courts of Iran. This is so due to the fact that the regulations remain binding also beyond the time of the allocation of the bid. This is no doubt so as counsel for MTN demonstrated, one cannot

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<sup>41</sup> Which forms part of the particulars of claim.

<sup>42</sup> See for example articles 10, 11, 13, 20, 21 and 22 which support the BOT principle, build, operate and transfer after 15 years.

compartmentalise the bid and its consequences. Much was still to happen subsequent to the award of the tender, resulting from the provisions of the tender, including art 29, which had a reach and application far beyond the acceptance of the bid. It is the acceptance by EAC of the terms of art 29 that binds it to the terms, also beyond the award of the bid.<sup>43</sup> EAC's contrary argument cannot be sustained and is in conflict with its pleaded case.

[37] In *Johannesburg City Council v Victorien Towers*<sup>44</sup> it was held:

'... the respondent, pointed to the very wide ambit of the phrase "any matter relating to"; the Afrikaans being, "enige aangeleentheid met betrekking tot". (See *Springs Town Council v Soonah*, 1963 (1) SA 659 (AD)). It is, in fact, so wide, this phrase, that it must logically be regarded as vague and without a purely logical limitation. Rather, in my view, one should look at the context and other circumstances to try and determine the lawgiver's intention, for it is obvious that the legislature must have contemplated an ultimate limit to the scope of the phrase.'

Read with the opening word 'any', I am of the view that the claim that EAC seeks to enforce is indeed relative to the Regulations upon which it is found, there being a number of actions or further conduct required after the award of the licence, all regulated by the Regulations.

[38] In *The Eleftheria*<sup>45</sup> Brandon J said:<sup>46</sup>

- '1. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
2. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
3. The burden of proving such strong cause is on the plaintiffs.'

<sup>43</sup> As an example, the Timetable for the Tender Procedure makes this plain.

<sup>44</sup> 1975 (4) 334 (WLD) at 336A.

<sup>45</sup> [1969] 2 All ER 641 (PDA) ([1969] 1 Lloyd's Rep 237 at 645C – E.

<sup>46</sup> G.N. Barrie, *The Eleftheria* (1969) 2 All ER 641 p 96.



or as Slomowitz AJ said: <sup>47</sup>

'As I see it then, the sanctity of contract lies heavy on the scale beam, and much must be placed on the other end of that beam to tip the scale against a stay.'

[39] In *Metallurgical & Commercial Consultants(Pty) Ltd v Metal Sales Co (Pty) Ltd* , <sup>48</sup> Colman J said the following:

'Such an onus is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking . . . the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a "very strong case" for its exercise had been made out . . . '

Being bound by the terms of art 29, EAC is enjoined to submit its dispute to the competent Iranian courts, unless it can show that a court should exercise its discretion otherwise. EAC has not put up facts in support<sup>49</sup> of such an exercise of a discretion.

[40] What happens to the matter if the special plea has merit? *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* <sup>50</sup> held that a court should then exercise a discretion whether or not to enforce the foreign jurisdiction clause. This discretion, in my view, is akin to the discretion to be exercised in arbitration clauses which require compelling reasons to permit a party to avoid its contractual obligations.<sup>51</sup> It is not possible to evaluate each consideration referred to in *Foize* as some of them cannot be determined on the pleadings but, as Leach JA said:<sup>52</sup>

'These are some of the relevant factors which spring readily to mind. The list is certainly not intended to be exhaustive. Of course the discretion to be exercised is fact-specific in

<sup>47</sup> In *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) at 641A.

<sup>48</sup> *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) 388 (W) at 391E-F.

<sup>49</sup> The onus on EAC ' . . . is a heavy onus and not easily discharged, because it is the party trying to avoid its contractual obligation.' See LAWSA: Arbitration (Vol 2 - 3<sup>rd</sup> Ed) DW Butler, Professor of Law, University of Stellenbosch, para 95 and the authorities cited in footnotes 11-17.

<sup>50</sup> 2013 (3) SA 91 (SCA) para 21.

<sup>51</sup> LAWSA: Arbitration (Volume 2 – Third Edition) Author: DW Butler Professor of Law, University of Stellenbosch. Para 96 and the authorities cited in footnotes 1 and 2.

<sup>52</sup> *Foize* para 29.

the sense that each case must be considered in the light of its own discrete facts, with the various relevant factors being afforded whatever weight in the scales is appropriate in the circumstances. Certainly no hard-and-fast rules can be prescribed.'

[41] I am of the view that the discretion should be exercised in favour of a stay for the reasons<sup>53</sup> that follow:

- a) The allegations, save for the preparatory actions, are situated in Iran.
- b) Much of the documentation attached to the particulars of claim is illegible and the original documents must surely be available there.
- c) The law of Iran is to be applied to art 29 and any relevant matter and an Iranian court would not require expert testimony on Iranian law.
- d) Although the defendants are South African, the plaintiff is not and did business in Iran.
- e) Save for argument, there is nothing to suggest that the defendants did not genuinely desire the trial to be conducted in Iran.
- f) There is nothing before me to indicate any prejudice to the plaintiff should it pursue the matter in Iran.
- g) There is nothing before me to justify a case why the plaintiff should not be bound by the terms of art 29.
- h) A multiplicity of actions was not foreseen by any party.
- i) It appears that the claim can be decided within a single action before the Iranian courts.
- j) EAC alleged:

'65. In the alternative to previous paragraph, the conduct of the defendants pleaded above is wrongful and unlawful in terms of Iranian law and entitles the plaintiffs to claim damages under Iranian law, calculated in the manner set out below

66. The plaintiffs rely on their assertions concerning the unlawfulness of the defendants' conduct and the manner of calculation of damages, in the alternative to their reliance on South African law, on the following provisions of Iranian law'

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<sup>53</sup> Foize paras 27-29.



Then follows a set out articles of Iranian law and attached to the particulars of claim are: The Iran Cell Act, articles of Iranian Civil Code, art 1 of the Civil Responsibility Code of Iran, articles of the law promoting the Health of Administrative System and Countering Corruption in Iran, articles of the Act on Aggravated Penalties for Offender of Bribery, Embezzlement and Fraud, articles of the Law on Punishment of Disrupters in the Economic System of the State, articles of the Islamic Criminal Code, articles of the Law on Punishment of Exerting Undue Influence, an article on the Law on Punishment of Collusion in Government Transactions, an article of the Governmental Transactions Regulations, articles of the Law on Prohibition of Intervention by Ministers, Members of Parliament and Government Personnel in Government and Civil Transactions, an article of the Transfer of Property of Others Punishment Act and an article of the Registration of Deeds and Real Properties Act. This leaves one in no doubt that Iranian law will play a central and important role in the matter.

- k) Several of the documents attached to the particulars of claim are in the Iranian vernacular, or so it appears.
- l) A weighty factor is the central involvement of the Iranian Government.
- m) The special plea was raised before the trial or any evidence being led.<sup>54</sup>

[41] As against this, some the factors relied upon by EAC are not factors that are ascertainable from the pleadings. The second is based on the preparatory actions that occurred in South Africa. Against this is the overwhelming conduct in Iran. The third factor, ie that MTN is an incola of South Africa, is at best, neutral. The fourth factor correctly refers to art 29 but concludes that MTN's plea is a device. There is no basis for this conclusion.

[42] In the circumstances, there is no cognisable balance of convenience favouring a retention of the matter in a South African court.

'There is surely nothing illegal or improper in allowing persons who are *sui juris* to agree upon a reference to arbitration as a mode of settling their disputes, and if such an

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<sup>54</sup> See *Polysius* supra at footnote 47.

agreement is not illegal it surely ought to be enforced, if it is in the power of the Court to enforce it.<sup>55</sup>

[43] A further question that arises is whether 'strangers'<sup>56</sup> can rely on the provisions of art 29 as they did not commit themselves to the provisions of art 29. Counsel for MTN submitted that the rights which EAC asserts are not self-standing but are hemmed in by the obligations which were undertaken to obtain the right which is not exigible except in terms of the provisions that hedged it in. If a right arises under the tender law one may only exercise the right, in this case, in the Iranian court. On the basis that art 29 finds application, I shall follow the line of English cases which held that if a party wishes to enjoy the benefit of a derived right it is also to comply with the associated obligation to pursue the right, only in the agreed contractual forum.<sup>57</sup> In this regard Justice Foxton said:

'15. In many cases, the ASI<sup>58</sup> respondent seeks to assert in the non-contractual forum a right derived from a contracting party (e.g., by virtue of direct action statute of the kind which commonly allows the victims of torts or those standing in their stead to proceed directly against the providers of liability insurance to the wrongdoer or by pursuant to a right of subrogation). The granting of ASI relief in these circumstances has been rationalised on a "benefit of burden" basis: the ASI respondent cannot enjoy the benefit of the derived right without complying with the associated obligation to pursue the right only in the contractual forum. For example, in *Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited* [2003] EWHC 3158, [39] Moore-Bick J stated:

"There is a strong presumption that in commercial contracts of this kind parties should be free to make their own bargains and having done so should be held to them. By parity of reasoning those who by agreement or operation of law become entitled to enforce the bargain should equally be bound by all the terms of the contract."

<sup>55</sup> Per Wessels ACJ in *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 369.

<sup>56</sup> In this case the fifth and sixth defendants

<sup>57</sup> *QBE Europe SA/NV & Anor v Generali Espana De Seguros Y Reaseguros* [2022] EWHC 2062 (Comm), para 15. *Schiffahrtsgesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] 2 Lloyd's Rep 279 paras 24 to 25.

<sup>58</sup> Anti-suit injunction which is an application to restrain proceedings in foreign jurisdictions in contravention of a clause agreed to by parties.



The same point is sometimes explained on the basis that the obligation to arbitrate (or to litigate in a particular jurisdiction) is a legal incident of the right asserted: *Schiffahrtsgesellschaft Detlev von Appen v Voest Alpine Intertrading (The Jay Bola)* [1997] Lloyd's Rep 279 and *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co (No 2)* [2005] EWHC 455 (Comm), [24]-[25].

16. In this "derived rights" context, it is now clear (at least to the Court of Appeal level) that an application for ASI relief will be approached by reference to the same decision-making framework as that which applies in a wholly contractual context. In *The Yusuf Cepnioglu*, [32]-[35], Longmore LJ held that the *Angelic Grace* framework applied, and there was no requirement to establish vexatious or oppressive conduct, because the ASI was necessary to protect a contractual right to have the substantive rights arising under the contract in question determined in the contractual forum. Moore-Bick LJ (at [49]-[56] but in particular at [49] and [55]) held that whether the ASI was sought against a party to the arbitration agreement, or against a non-party seeking to exercise a derivative right, "the basis for the court's intervention is the same in each case", namely "enforcement by arbitration alone is an incident of the obligation which the claimant [in the non-contractual forum] seeks to enforce and because the defendant [in that forum] is therefore entitled to have any claim against him pursued in arbitration". At [55], he explained that "there is no distinction in principle between the position of a claimant [in the non-contractual forum] who is an original party to a contract containing an arbitration clause and one who is a remote party . . . [T]he rationale of the decision is *The Angelic Grace* applies equally to both cases".

and at para 19:

'In any event, there is a substantial body of first instance authority which holds that a Non-Contractual Claimant can obtain an ASI in both the scenarios referred to in [16] and [17] above. By way of summary:

- i) In *Sea Premium v Sea Consortium* (11 April 2011), David Steel J held at pp. 22-23 that, because the claim asserted by the respondent was contractual in nature, the respondent was bound by the arbitration clause in so far as it was seeking to assert a contractual claim against the owner of a vessel under time charter (even though the owner was not a party to the time charter which the respondent was seeking to enforce). It is clear that David Steel J accepted that the case before him

was analogous to a conventional derived rights ASI, and that he did not regard the fact that the owner was denying that it was a party to the contract in issue as a distinguishing factor.

- ii) *Jewel Owner Ltd v Sagaan Developments Trading Ltd (the MD Gemini)* [2012] EWHC 2850 (Comm), a case in which a shipowner denied that it was the contracting party under a bunker supply agreement but sought an ASI to prevent proceedings being pursued under that agreement otherwise than in accordance with the English exclusive jurisdiction clause it contained. At [15], Popplewell J observed *obiter* that “generally it would be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contains an exclusive jurisdiction clause in favour of England to seek to enforce the rights under that contract without giving effect to the jurisdiction clause which is part and parcel of that contract notwithstanding that the party being sued maintains that it is not party to that contract”.
- iii) *Dell Emerging Markets (EMEA) v IBMaroc.com SA* [2017] EWHC 2397 (Comm), Teare J followed these decisions stating (at [34]):  
 “In those cases, and in the present case . . . it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in *The Yusuf Cepnioglu* is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be ‘handled through the English courts’ as required by the contract in question.”
- iv) In *Clearlake Shipping Pte Ltd x Xiang Da Marine Ltd* [2019] EWHC 1536 (Comm), [37], Bryan J described an ASI in these circumstances as “protecting the injunction claimant’s equitable rather than legal right not to be vexed by litigation in relation to a contract where the party asserting the claim is not respecting the dispute resolution clause”, and held that *The Angelic Grace* framework applied.

[44] This results in all the defendants being able to rely on the principle that EAC is bound by the terms of its contract with the Iranian Government as set out in art 29, that is that the matter against both the direct and removed defendants should be determined by the Iranian courts.



### The Foreign Act of State Doctrine

[45] The foreign act of state doctrine and the state immunity plea overlap to a large extent, despite being distinct grounds upon which the justiciability of a suit is to be determined.

'In essence, a claim to state immunity if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of state doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it.'<sup>59</sup>

[46] The foreign act of state doctrine was first endorsed as part of South African law in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* as follows:<sup>60</sup>

'The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no-man's land. It would appear that in an appropriate case, as an exercise of the Court's inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign states therein.'

[47] This was approved by the Supreme Court of Appeal in *Van Zyl v Government of the Republic of South Africa and Others*<sup>61</sup> where Harms JA, citing *Swissborough* and the House of Lords decision in *Kuwait Airways Corporation v Iraqi Airways Company*,<sup>62</sup> stated that:

'[c]ourts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states.'

<sup>59</sup> *Saharawi Arab Democratic Republic and Another v Owners and Charterers of The Cherry Blossom and Others (The Cherry Blossom)* 2017 (5) SA 105 (ECP) para 56.

<sup>60</sup> 1999 (2) SA 279 (T) at 334D-F.

<sup>61</sup> 2008 (3) SA 294 (SCA), [2008] 1 All SA 102 (SCA) para 5.

<sup>62</sup> [1995] 3 All E.R. 694 at 715d.

[48] *Underhill v Hernandez*<sup>63</sup> summarised the principle as follows:

'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.'

[49] In *Belhaj and Another v Straw and Others*<sup>64</sup> Lord Neuberger said this:

'In summary terms, the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully. In so far as it is relied on in these proceedings, the Doctrine is purely one of domestic common law, and it has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the centuries.'

[50] The doctrine has subsequently been accepted as being part of South African law in two Full Court decisions: *The Cherry Blossom*,<sup>65</sup> and more recently in *Obiang v Janse van Rensburg and Another*.<sup>66</sup> In *The Cherry Blossom*: Phosphate mined in Western Sahara was on board the NM Cherry Blossom, a ship which had docked in Port Elizabeth to refuel en route to New Zealand. The phosphate had been mined by a Moroccan mining company, pursuant to Moroccan law and a mining licence granted by Morocco. The applicants were the Saharawi Arab Democratic Republic (SADR)— a state recognised by South Africa but regarded by the United Nations as the non-self-governing territory of Western Sahara—and the Polisario Front, a national liberation movement. They applied *ex parte* and were granted an urgent interim interdict restraining the cargo of phosphate from being removed from the jurisdiction of the court, pending a return date. Their claim

<sup>63</sup> 168 U.S. 250 (1897) at 252g.

<sup>64</sup> [2017] UKSC 3 para 118. And see the remarks of Lord Brown – Williamson in *Ex Parte Pinochet* (No. 3) [2000] 1 AC 147, 201; 119 ILR p 152:

'It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state.'

<sup>65</sup> *Cherry Blossom* paras 86 to 88.

<sup>66</sup> 2019 JDR 1518 (WCC) para 66.



was based on the ownership of the phosphate, as a natural resource extracted from Western Sahara, being vested in the people of Western Sahara. On the return date, two Moroccan mining companies, OCP and its subsidiary Phosboucraa (together 'OCP'), opposed the confirmation of the rule nisi. OCP's mining rights in the Western Sahara were granted by Morocco, which claimed that Western Sahara formed part of its territory. OCP raised two principal legal defences to the applicants' claims: that the application indirectly impleaded Morocco and the Court was barred from hearing the case as a result of Morocco's state immunity; that the issues in the application were non-justiciable before any South African court in terms of the act of state doctrine.

[51] In considering the foreign act of state defence, the Full Court found that it was premature to consider whether the doctrine would preclude the applicants' claim to the phosphate. This was so, the court reasoned, because courts that are dealing with interlocutory proceedings where the issues are of particular complexity should only decide such issues as are strictly necessary to be determined at an interlocutory stage. The court found that it was only once the issues had been fully and precisely pleaded at the trial stage that it would be appropriate to consider whether the claim made it necessary for the court to determine the lawfulness of a foreign act of state.<sup>67</sup>

[52] In the course of considering the doctrine, it was not suggested that because Morocco was not a party to the proceedings, the respect for equality of sovereign states and the principle of comity would not apply. Similarly, it was not suggested that OCP (a corporate body) had no locus standi to assert that the matter was not justiciable in a South African court.

[53] The application of the doctrine cannot be avoided by not joining the relevant state. Similarly, it cannot be avoided because another party, not being the relevant state, raises

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<sup>67</sup> *The Cherry Blossom* at paras 90 to 98.

the defence. Such an approach is contrary to authority and would render nugatory the principles underlying the doctrine.

[54] In *Obiang*<sup>68</sup> the Full Bench of the Western Cape relied on *The Cherry Blossom* and followed the decisions in *The Cherry Blossom* and *Kuwait Airways*<sup>69</sup>

‘[70] In the result, I am of the view that it would be prudent for this court to follow the route proposed by the Full Bench in *The Cherry Blossom* and decline to finally determine this dispute through the application of the act of state doctrine at this stage, given that proceedings for attachment are essentially interlocutory in nature. Rather, the parties should be given adequate opportunity to properly articulate the defence and any response thereto in the pleadings to be filed in the proposed action whereafter the trial court, having heard all the evidence and argument, will be best placed to adjudicate thereon.’

[55] This action has been fully pleaded and this court is bound to consider whether the doctrine would prevent it from adjudicating the matter. On the authority of *Gallo Africa*<sup>70</sup>, this jurisdictional challenge entails no more than a factual enquiry, with reference to the particulars of claim to establish the nature of the right that is being asserted in support of the claim.

[56] The history, nature and modern status of the foreign act of state doctrine was traversed in the UK Supreme Court case of *Belhaj v Straw*.<sup>71</sup> There has since *Belhaj* been another Supreme Court decision of the United Kingdom, namely *Deutsche Bank AG London Branch v Receivers Appointed by the Court; Central Bank of Venezuela v Governor and Company of the Bank of England and Others*.<sup>72</sup>

[57] In *Belhaj* the claimants sought to bring claims in tort against the United Kingdom government and certain officials for alleged complicity in their rendition and mistreatment

<sup>68</sup> See paras 63 – 65 and 70 of the *Obiang* judgment.

<sup>69</sup> *Kuwait Airways Corp. v Iraqi Airways* [1995] 3 All ER 694 (HL).

<sup>70</sup> See note 26 above.

<sup>71</sup> See note 64 above.

<sup>72</sup> [2021] UKSC 57 (*Venezuela*)



at the hands of foreign states. These foreign states (Libya, Malaysia, the USA and Thailand) were not parties to the action. The defendants raised the act of state defence. They included natural persons i.e. Mr Jack Straw, Sir Mark Allen, who were the first and second appellants. There was no suggestion that because the foreign states were not parties and the appellants included natural persons, that the doctrine was inapplicable.

[58] In *Venezuela*, the dispute was who had the power to appoint the board of directors of the Central Bank of Venezuela. Both Mr Guaidó and Mr Maduro claimed to have that power as President of Venezuela. As the UK Government recognised Mr Guaidó as the President of Venezuela, his appointments were recognised and not those of the former president, Mr Maduro. This meant that the Guaidó Board could control gold located in the UK - which was held by the Bank of England and by court-appointed receivers.

[59] In *Belhaj*, Lord Neuberger, who spoke for the majority, sought to summarise the doctrine under four rules. These rules are a distillation from a long line of English jurisprudence and pertain to different types of foreign acts of state. Only the first and second rules are of application in this matter.<sup>73</sup>

[60] In both *Belhaj*<sup>74</sup> and *Venezuela*<sup>75</sup>, the first rule was confirmed as follows:

‘The first rule is that the courts of this country will recognise, and will not question, the effects of a foreign state’s legislation or other laws in relation to any acts which take place or take effect within the territory of that state.’

[61] The first rule applies where acts under legislation or laws of the foreign state ‘take place or effect’ in that foreign state. A court will not sit in judgment of the

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<sup>73</sup> The third rule is that a court abstains from adjudicating upon the lawfulness of an act of a foreign state that concerns international relations and foreign affairs. See *Belhaj* para 123. The fourth rule, if it exists, prevents a court from investigating acts if such investigation would embarrass the government of the court seeking to exercise jurisdiction. In England, the fourth rule is in practice engaged by a letter from the foreign office, presumably to the court, stating the potential for such embarrassment. In other words, the fourth rule is attentive to political sensitivities to which the executive might draw the court’s attention. That is also the reason for its controversial status: courts do not on the whole like what may appear as political interference from the executive.

<sup>74</sup> *Belhaj* para 121.

<sup>75</sup> *Venezuela* para 172.

legislature of another state or acts undertaken thereunder, provided those acts are carried out in that state.

[62] The rule is more than just about the non-justiciability of the laws of the foreign state. It is also about the conduct undertaken under those laws in that foreign state. The reason being that the foreign state is sovereign within its territory the laws of its legislature are accordingly unimpeachable in the courts of other countries.

[63] In *Belhaj* the second rule was described as set out below:<sup>76</sup>

'The second rule is that the courts of this country will recognise, and will not question, the effects of an act of a foreign state executive in relation to any acts which take place or take effect within the territory of that state.'

[64] In *Venezuela*, Lord Lloyd-Jones, speaking for the unanimous court, described Lord Sumption's judgment in *Belhaj* on the issue with apparent approval<sup>77</sup>, analysed the authorities, and came to the following conclusions:

'It appears therefore that a substantial body of authority, not all of which is obiter, lends powerful support for the existence of a rule that courts in this jurisdiction will not adjudicate or sit in judgment on the lawfulness or validity under its own law of an executive act of a foreign state, performed within the territory of that state. The rule also has a sound basis in principle. It is founded on the respect due to the sovereignty and independence of foreign states and is intended to promote comity in inter-state relations. While the same rationale underpins state immunity, the rule is distinct from state immunity and is not required by international law. It is not founded on the personal immunity of a party directly or indirectly impleaded but upon the subject matter of the proceedings. The rule does not turn on a conventional application of choice of law rules in private international law nor does it depend on the lawfulness of the conduct under the law of the state in question. On the contrary it is an exclusionary rule, limiting the power of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the

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<sup>76</sup> *Belhaj* para 122.

<sup>77</sup> At para 121.



conduct which forms the subject matter of the proceedings. In the words of Lord Cottenham, it applies "whether it be according to law or not according to law". I can, therefore, see no good reason to distinguish in this regard between legislative acts, in respect of which such a rule is clearly established (see paras 171-179 below), and executive acts. The fact that executive acts may lack any legal basis does not prevent the application of the rule. In my view, we should now acknowledge the existence of such a rule.'

[65] In *Venezuela*, the Supreme Court considered an argument that if rule 2 existed, it was limited to cases of executive acts affecting property, and therefore had no application to conduct such as the making of appointments to the Bank's board.<sup>78</sup> This argument was rejected. Reliance was placed on *Dobree v Napier* and *Duke of Brunswick* – which involved appointments over property. It was held that there was no principled reason to distinguish between direct appointments of that kind and appointments over a legal entity which owned or controlled property.<sup>79</sup> Also, in *Venezuela*, Lord Lloyd-Jones JSC held:<sup>80</sup>

'139 I am, nevertheless, not persuaded that we should accept that Rule 2 can have no application to conduct such as the exercise of a power of appointment in issue here. First, there is no support in the pre-*Belhaj v Straw* case law in the United Kingdom for limiting the operation of Rule 2 in this way to cases of expropriation of property and it is inconsistent with the much broader statements of principle in cases such as *Duke of Brunswick* and *Princess Paley Olga*. Moreover, *Hatch v Baez* (1876) 7 Hun 596 and *Underhill v Hernandez*, early examples of the application of the act of state doctrine in the United States were cases concerning imprisonment and personal torts.

140 Secondly, there is no identifiable reason of principle why the rule should be limited to seizures of property. As Lord Sumption JSC observed in *Belhaj v Straw* [2017] AC 964, para 231, there is no rational reason to distinguish in this regard between seizures of property and injury to other interests equally protected by the municipal law of the place

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<sup>78</sup> *Venezuela* para 38.

<sup>79</sup> *Venezuela* paras 140 - 146.

<sup>80</sup> At paras 139 -143.

where they occurred (see also the observations of Teare J in present proceedings at para 69).

141 Thirdly, while there is undoubtedly a “serious practical argument” identified by Lord Neuberger PSC (paras 142, 160) in favour of the application of Rule 2 to unlawful executive acts in so far as they relate to interference with property and property rights, referred to at para 119 above, it may be thought that corresponding practical advantages may arise from the application of Rule 2 to the exercise of a power of appointment to the board of a public body functioning within the territory of the foreign state.

142 Fourthly, the specific question of the application of Rule 2 to the exercise of a power of appointment by the executive did not arise for consideration in *Belhaj v Straw*. The Guaidó Board is, however, able to point to other decisions in this field which touch on the point. In *Dobree v Napier* (1836) 2 Bing NC 781 Sir Charles Napier, a British subject, had been appointed an admiral in the navy of Queen Donna Maria of Portugal. In that capacity he captured a British steamship, “Lord of Isles”, while it was trying to run a blockade of the Portuguese coast. The ship was forfeited as prize by a Portuguese prize court. On his return to England Napier was sued for trespass in the Court of King’s Bench. Tindal CJ dismissed the action on the ground that the decree of the prize court was conclusive. However, he also rejected an argument that Napier was prevented from relying on the authority of the Queen of Portugal because he had entered her service in breach of the Foreign Enlistment Act. Tindal CJ held that that breach of English law could not make the acts of the Portuguese state justiciable:

“Again no one can dispute the right of the Queen of Portugal, to appoint in her own dominions, the defendant or any other person she may think proper to select, as her officer of servant, to seize a vessel which is afterwards condemned as a prize . . .” (At p 796.)

The decision on this point was approved by Earl of Halsbury LC in *Carr v Francis Times & Co* [1902] AC 176, 179-80 (see also *Belhaj v Straw*, para 204, per Lord Sumption JSC).

143 *Duke of Brunswick* (1848) 2 HL Cas 1 itself is a case concerning the exercise of a power of appointment. Charles, the deposed Duke of Brunswick, sought, inter alia, to challenge the validity of the appointment of a guardian over his property. As we have seen, the House of Lords held that, notwithstanding the allegations that the instrument was



contrary to the laws of Hanover and Brunswick, "still if it is a sovereign act, then whether it be according to law or not according to law, we cannot inquire into it" (p. 21 per Lord Cottenham LC).'

[66] Although *Venezuela* dealt with an act of state, I can see no reason why the principle should not apply to state immunity.<sup>81</sup>

[67] In regard to both the first and second rules, fundamental principles of public policy or serious violations of international law would be a basis for not applying them.<sup>82</sup> However, in *Venezuela*, the Supreme Court made it clear that the limitation was not such as to neutralise the applicability of rule 2 merely because an executive or sovereign act may have extra-territorial effect:

'However, this cannot provide a basis for an unprincipled extension of the limitation simply on the ground that effects of the relevant conduct, whether intended or not, are felt extra-territorially. Sovereign acts legitimately performed within the territory of a state will not fall outside the ambit of Lord Neuberger's Rule 2 simply because they may have extra-territorial effect.'<sup>83</sup>

[68] The justification for the foreign act of state doctrine is best described in the following dictum by Lord Sumption in *Belhaj*:

'239 The foreign act of state doctrine has commonly been described as a principle of non-justiciability. The label is unavoidable, but it is fundamentally unhelpful because it is applied to a number of quite different concepts which rest on different principles. One, comparatively rare, case in which an issue may be non-justiciable is that although it is legally relevant, the courts are incompetent to pronounce upon it or disabled by some rule of law from doing so. Leaving aside cases in which the issue is assigned to the executive or the legislature under our conception of the separation of powers, most cases of this kind involve issues which are not susceptible to the application of legal standards. The most famous example is *Buttes Gas*, where Lord Wilberforce declined to resolve the issue

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<sup>81</sup> See *Belhaj* para 199.

<sup>82</sup> *Belhaj* paras 141 & 156.

<sup>83</sup> Para 148.

because there were no 'judicial or manageable standards' by which to do so. The court was therefore incompetent to adjudicate upon it at all. As this court pointed out in *Shergill v Khaira* [2015] AC 359 at para 40, this was because the issue was political. But there is another sense in which an issue may be non-justiciable, which is also illustrated by the facts of *Buttes Gas*. It may be non-justiciable because the English court ought not to adjudicate upon it even though it can, because it is not a matter which can properly be resolved by reference to the domestic law of the state. Occidental's contention in *Buttes Gas* was that the mixture of diplomacy and power politics by which the four states involved had eventually resolved the border dispute in a manner unsatisfactory to them, **could be characterised as an unlawful conspiracy for the purposes of domestic law. An unlawful conspiracy is in itself justiciable. It is a recognised cause of action in English law. But an English court could not adjudicate upon it because it was parasitic upon a finding that the foreign states involved had acted in breach of international law, being the only law relevant to their acts.** This too can fairly be called a principle of non-justiciability, because its effect is that it is not the proper function of the English courts to resolve the issue. But *Buttes Gas* has been widely misunderstood as suggesting that an absence of judicial or manageable standards is the juridical basis of the foreign act of state doctrine in all cases where it is applied to the transactions of sovereign states. It is not. The absence of judicial or manageable standards was simply the reason why the House declined to review the particular facts alleged in that case.'

[own emphasis]

[69] The oft-quoted *ratio i.e.* that there are no manageable judicial standards by which to judge the acts of a foreign state, seems, as Lord Sumption said, not to justify any of the rules on its own. For example, if a foreign act of another state is illegal in South Africa, then a South African court has manageable judicial standards by which to adjudicate that conduct. Nevertheless, the rules as formulated by Lord Neuberger would have the South African court disclaim jurisdiction. But that is not because there are no manageable legal standards by which to judge the foreign acts of states. After all, anti-bribery laws are rules of South African law and provide for manageable standards.



[70] Lord Sumption's opinion gives a coherent explanation of the doctrine and it is apparent that his reasoning has been unanimously endorsed by the Supreme Court in *Venezuela*.<sup>84</sup>

[71] It follows that the real *ratio* is that even where judicial standards exist because the cause is framed as one recognised under law, the courts will nevertheless refuse to assume jurisdiction where it would be parasitic upon another finding that the domestic court should not make. An alleged unlawful conspiracy<sup>85</sup> should not be adjudicated on in South Africa, as it is parasitic upon a finding that the award of the tender in Iran involved a breach of the tender regulations, being the only law relevant to the award of the tender.

[72] It was not suggested that the facts of this matter do not relate to a foreign state as defined.<sup>86</sup> The determination that is required is whether the doctrine only applies where the foreign state is a party to the litigation or whether this court's jurisdiction is also ousted if the conduct of the foreign state falls to be investigated and determined. The phrase that a foreign state is immune from the jurisdiction calls for a determination of what 'jurisdiction' entails. In his discussion of foreign sovereigns, *Forsyth*<sup>87</sup> says that at

'common law it was clear that, in principle, foreign sovereigns and their property were immune from suit in South African courts.'

[73] At common law it was held that the principle applied so that a court will not make such a sovereign party to their legal proceedings, whether the proceedings involve process against his person or seeks to recover from him specific property or damages.

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<sup>84</sup> At paras 121 and 135.

<sup>85</sup> Or secret tender, as is alleged in para 50 of the particulars of claim.

<sup>86</sup> Foreign States Immunities Act No. 87 OF 1981 s 1(2) 'Any reference in this Act to a foreign state shall in relation to any particular foreign state be construed as including a reference to—

(a) the head of state of that foreign state, in his capacity as such head of state;

(b) the government of that foreign state; and

(c) any department of that government, but not as including a reference to—

(i) any entity which is distinct from the executive organs of the government of that foreign state and capable of suing or being sued; or

(ii) any territory forming a constituent part of a federal foreign state.'

<sup>87</sup> At p 180.

'The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control.'<sup>88</sup>

[74] In this matter, there are no proceedings against a foreign state, nor any claim against its assets.<sup>89</sup> But, as MTN argued, the principle should be extended to a matter such as this where the conduct of the foreign state falls to be examined and determined. In *Dynasty Company for Oil and Gas Trading v Kurdistan Regional Government of Iraq and Another*,<sup>90</sup> Justice Butcher said:

'105 The issue of whether the relevant acts were done in the exercise of sovereign authority arises at two stages of the analysis. Given that the KRG is a "separate entity" within section 14 of the SIA, it will not have immunity unless the proceedings "relate to anything done by it in the exercise of sovereign authority" (section 14(2)(a)). In addition it will not be immune unless the circumstances are such that a State would have been so immune (section 14(2)(b)) which itself entails that the exception in s 3 is not applicable. As was recognised by *Dynasty*, however, in cases such as the present in which only the commercial exception within s 3 would potentially be applicable in relation to the immunity of a state, the two tests under section 14(2) and (b) can be conflated.

106 The question of whether or not proceedings "relate to anything done in the exercise of sovereign authority" requires the court to consider:

"whether the acts performed by [the separate entity] to which the proceedings relate were performed in the exercise of sovereign authority, which here means *acta juri imperii* (in the sense in which that expression has been adopted by English law from public international law)" (per Lord Goff in *Kuwait Airways Corporation v Iraqi Airways Co* [1995] 1 WLR 1147 at 1156 F/G).

107 The question to be addressed in deciding whether an act is *jure imperii* was formulated by Lord Wilberforce in *Playa Larga (Owners of Cargo laden on board) v I Congreso del Partido* [1983] 1 AC 244 (at common law), as follows:

<sup>88</sup> See *Parkin v Government of the Republique Democratique du Congo and Another* 1971 (1) SA 259 at 261C.

<sup>89</sup> In *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T), Nicholas J held that the courts will not by their process make a foreign state a party to legal proceedings against its will.

<sup>90</sup> [2021] EWHC 952 (Comm) paras 105-108.



"When . . . a claim is brought against a state . . . and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act 'jure gestionis' or is it an act 'jure imperii': is it . . . a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of an act of a private law character such as a private citizen might have entered into?" (at p 262E-G),

and:

"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'" (at p267B-C).

108 In *Kuwait Airways* Lord Goff, having quoted from Lord Wilberforce's speech in *Congreso* said (at p 1160A):

"It is apparent from Lord Wilberforce's statement of principle that the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.",

and:<sup>91</sup>

'Relatively few cases have been decided in this jurisdiction relating to the exploration of state-owned natural resources. The issue was considered, albeit briefly, and without a concluded view being expressed, in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886. At para 133 Moore-Bick LJ said:

"As the judge pointed out, the agreement contains many of the hallmarks of a commercial transaction, but the fact that it relates to the exploration of oil reserves within the territory of the state suggests that it involved an exercise by the state of its sovereign authority in

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<sup>91</sup> At para 112.

relation to its natural resources and so falls outside the realm of activities which a private person might enter into.”,

and:<sup>92</sup>

‘In *IAMAW v OPEC* 477 F. Supp 553 (CC.D.CAL., 1979) it was said (at p 567-8) that:

“The control over a nation’s natural resources stems from the nature of sovereignty . . . The defendant’s control over their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations’ people.”

Similarly, in *In re Sedco Inc* (1982) 543 F Supp 561, it was said in the context of conduct of Pemex, a Mexican state-owned oil company (at p 566) that

“A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.”

In *Jones v Petty Ray Geophysical Geosource Inc* (1989) 722 F Supp 343 the *In re Sedco Inc* approach was followed, and it was held that a petroleum production sharing agreement between Sudan and an energy company was not a “commercial activity”. More recently, in *RSM Production Corp v Fridman* (2009) 643 F Supp 2d 282, it was found that the Deputy Prime Minister of Granada, in denying the EAC’s application for a licence to conduct oil and gas exploration off the coast of Granada, had “exercised a right that is ‘peculiar to sovereigns’”, because “ ‘licencing the exploration of natural resources is a sovereign activity.’ ”<sup>93</sup>,

and:<sup>94</sup>

‘In my judgment, the entry into by the KRG of the PSC’s were “sovereign public acts” , or acts jure imperii, and not “private acts”. They concerned the exploration of the natural resources of the KRI. There is no doubt that those resources were publicly, and not privately, owned, whatever the precise meaning which is given to article 111 of the Constitution; and only a government, acting on behalf of the public, could enter into contracts such as these in relation to the exploration of such resources. They were entered into pursuant to powers which, as I have found, were allocated to the KRG under the

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<sup>92</sup> At para 115.

<sup>93</sup> At p 399.

<sup>94</sup> At para 116.



Constitution, and under the KROGL, which was enacted to give effect to those powers. Moreover, the terms of those contracts contain a number of provisions which it is apparent that no private person could make, including promises in relation to such matters as compulsory purchase, planning consents, customs, tax exemptions and pipeline rights. . .

and:<sup>95</sup>

'Dynasty contends, however, that even of the entry into of the PSC's was a sovereign act, the same does not apply to decisions to sanction, or not sanction or consent to, a transfer of control of the contracting entities. I do not consider that this is correct. A decision as to whether or not a new party should be permitted to become a replacement party to a long-term contract for the exploration of natural resources which, as I have said, contains a series of stipulations by the KRG which a private citizen could not make, would seem to me to partake of the same sovereign nature as the making of the contract at the outset. Consent to whether there can be a change of control over a contracting entity is the functional equivalent to consent to novation of the contract because in relation to arrangements of the present kind, the expertise, integrity and financial position of those standing behind the contracting entity will be of great importance.'

[75] The question therefore is whether the acts complained of were acts of the sovereign authority of the State of Iran in relation to its national territorial infrastructure. I have already made this finding in the summary of facts. The concessions, rights and powers which were to be accorded in the licence, could not have been done by a private entity. These include tax conversions, rights bestowed to enter onto private property and provisions for the licence to provide facilities necessary to comply with the requirements of national defence and public security and the prerogatives of the judiciary and other duly empowered Iranian authorities. All of these arrangements are only imposable by the State.<sup>96</sup> The issue and awarding of the tender in my view, falls within the ambit of the public law: the government officials exercised a public function in the public interest.<sup>97</sup> It

<sup>95</sup> At para 117.

<sup>96</sup> Having regard to the purpose of the conduct, it shows that the nature of which was done being *jure imperii*. See *I Congreso* at 272.

<sup>97</sup> *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* (2006) 27 ILJ 555 (E) para 53.

formed part of the implementation of government policy.<sup>98</sup> This was also the approach of McLaren J in *Ramburan*<sup>99</sup> who said:<sup>100</sup>

'It is clear from the evidence that the CDB was at all material times, in its dealings with the applicant, implementing government policy. These dealings culminated in the allocation to the applicant of the shop and the flat. The applicant had no choice in the matter, except to refuse the allocation to him of the shop. Furthermore, the applicant was simply advised of the rental and the other terms of the agreements. In my view the evidence establishes that, at all material times, the applicant had every reason to believe that, if the CDB decided to sell the shop and the flat, he would be afforded an opportunity to buy them. Any sale of an immovable property by the CDB could, in terms of s 15(2)(b)(iii), only be effected for the purpose of achieving the objects of the CDB. In this sense such a sale would amount to a step in the implementation of the government policy.

The Board was established by s 2 of the Housing Development Act (House of Delegates) 4 of 1987. Section 10 of Act 4 of 1987 sets out the objects and general powers of the Board. These are similar to the objects and general powers of the CDB, but are exercised in areas which are

'referred to in para 5(2) of Schedule 1 of the Republic of South Africa Constitution Act 110 of 1983, which (have) been declared for the use of population groups of which members of the House of Delegates are members'.

By virtue of Government Notice 657 dated 27 March 1987, the rights and obligations of the CDB vested in the Board from 1 April 1987 and, therefore, it became the lessor of the shop and the flat with effect from 1 April 1987.

In terms of s 10(1)(c) of Act 4 of 1987 the Board has the power to assist natural persons to purchase or hire immovable property in a declared area.

For the purpose of achieving its objects the Board has the power, in terms of s 10(2)(a)(ii) of Act 4 of 1987, in respect of immovable property in a declared area

<sup>98</sup> See the cases referred to by G. Quinot: *State Commercial Activity : A Legal Framework* (2009) at p 107 footnote 401.

<sup>99</sup> *Ramburan v Minister of Housing (House of Delegates) and Others* 1995 (1) SA 353 (D).

<sup>100</sup> At p 361-362.



'which belongs to or vests in the Board, to sell, hypothecate or otherwise dispose of it . . . and to let it to any person . . . or to deal therewith in any manner as the Board may deem fit'.

Section 10(2)(b)(v) of Act 4 of 1987 empowers the Board, for the purpose of achieving its objects, and with the approval of the first respondent, 'to sell or otherwise dispose of land which belongs to or vests in' it. I will not attempt to reconcile these two subsections of s 10(2). Suffice it to say that the property belongs to the Board and that at its meeting held on 7 June 1991 the Board resolved to sell the property 'to the tenants at a fair market related price of R200 000'. On 13 December 1991 the Board resolved to sell the property to the third respondent only.

It is clear that the Board of the fifth respondent only has the power to sell and let immovable property for the purpose of achieving its objects and that, at all relevant times, it was implementing government policy.

In my view, the decisions by the Board to sell the property constituted steps in the implementation of government policy which, at that time, embraced the concept of 'privatisation', ie the disposal of assets owned by the State.'

[76] *Belhaj* referred to *Noor Khan*<sup>101</sup> where Moses LJ said:

"It is necessary to explain why the courts would not even consider, let alone resolve, the question of the legality of United States' drone strikes. The principle was expressed by Fuller CJ in the United States Supreme Court in *Underhill v Hernandez* (1897) 168 US 250, 252: 'Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves' (cited with approval in *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888, 933, and *R v Jones (Margaret)* [2007] 1 AC 136, 163).

The principle that the courts will not sit in judgment on the sovereign acts of a foreign state includes a prohibition against adjudication on the legality, validity or acceptability of such acts, either under domestic law or international law: *Kuwait*

<sup>101</sup> *R (Noor Khan) v Secretary of State of Foreign Affairs* [2014] 1 WLR 872.

*Airways Corp v Iraqi Airways Co* (Nos 4 and 5) [2002] 2 AC 883, 1080, para 24. The rationale for this principle, is, in part, founded on the proposition that the attitude and approach of one country to the acts and conduct of another is a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers. To examine and sit in judgment on the conduct of another state would imperil relations between the states: *Buttes Gas* case [1982] AC 888, 933.”

[77] Lord Sumption concluded:<sup>102</sup>

‘225. The English decisions have rarely tried to articulate the policy on which the foreign act of state doctrine is based and have never done so comprehensively. But it is I think possible to discern two main considerations underlying the doctrine. There is, first and foremost, what is commonly called “comity” but I would prefer to call an awareness that the courts of the United Kingdom are an organ of the United Kingdom. In the eyes of other states, the United Kingdom is a unitary body. International law, as Lord Hoffmann observed in *R v Lyons* [2003] 1 AC 976 at para 40, “does not normally take account of the internal distribution of powers within a state.” Like any other organ of the United Kingdom, the courts must respect the sovereignty and autonomy of other states. This marks the adoption by the common law of the same policy which underlies the doctrine of state immunity. Secondly, the act of state doctrine is influenced by the constitutional separation of powers, which assigns the conduct of foreign affairs to the executive. This is why the court does not conduct its own examination of the sovereign status of a foreign state or government but treats the Secretary of State’s certificate as conclusive: *Government of the Republic of Spain v SS “Arantzazu Mendi”* [1939] AC 256, 264 (Lord Atkin). It is why Lord Templeman graphically described the submissions of the claimants in the Tin Council case as involving “a breach of the British constitution and an invasion by the judiciary of the functions of the Government and of Parliament”: see p 476. To that extent the rationale of the foreign act of state doctrine is similar to that of the corresponding doctrine applicable to acts of the Crown, as Elias LJ observed in *Al-Jedda v Secretary of State for Defence* [2011] QB 773, paras 209-212.

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<sup>102</sup> At paras 225 – 230.



226. When one turns to the ambit of the doctrine, the first point to be made is that there are many cases involving the sovereign acts of states, whether British or foreign, in which the action fails, not on account of any immunity of the subject matter from judicial scrutiny, but because the acts in question are legally irrelevant. They give rise to no rights as a matter of private law and no reviewable questions of public law. It is on this ground that the court will not entertain an action to determine that Her Majesty's government is acting or proposes to act in breach of international law in circumstances where no private law status, right or obligation depends on it: *R (Campaign for Nuclear Disarmament) v Prime Minister* [2001] EWHC 1777 (Admin); *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin). Unlike Mr Khan, who contended that his father had been killed as a result of breaches of English domestic law, the claimants had, as Cranston J put it in the latter case, at para 60, no "domestic foothold"; cf *Shergill v Khaira* [2015] AC 359 at para 43. By comparison Mr Khan did have a domestic foothold. He had standing to apply for judicial review, and he contended that his father had been killed because of a breach by British officials of English law, but the court declined to treat the matter as governed by ordinary principles of English law because of its subject-matter. The same is true of the present cases. They are concerned with the effect of a foreign act of state in a case where private law rights are engaged, because the claimants rely on the acts of the relevant states as ordinary torts under the municipal law of the countries in which they were committed. The question that we have to decide on this appeal is whether they can do so consistently with the law relating to foreign acts of state.

227. As Lord Wilberforce observed in *Buttes Gas*, at p 930F-G, the main difficulty in identifying a principle underlying that law arises from the "indiscriminate use of 'act of state' to cover situations which are quite distinct and different in law." It is always possible to break down the cases into different factual categories, and deconstruct the law into a fissiparous bundle of distinct rules. But the process is apt to make it look more arbitrary and incoherent than it really is. I think that it is more productive to distinguish between the decisions according to the underlying principle that the court is applying. The essential distinction which Lord Wilberforce was making in *Buttes Gas* was between (i) "those cases which are concerned with the applicability of foreign municipal legislation within its own territory and with the examinability of such legislation" (p 931A-B), and (ii) cases concerning "the transactions of sovereign states" (p 931G-H). This distinction is supported by the case-law extending over more than three centuries which I have reviewed above.

It is possible to extract two related principles from it. The first is concerned with the application to a state of its own municipal law, and the second with the application of international law to that State's dealing with other states.

#### Municipal law act of state

228. The first principle can conveniently be called "municipal law act of state". It comprises the two varieties of foreign act of state identified in the judgment of Lord Mance at paras 11(iii)(a) and (b) of his judgment, although he would limit it to legislative or executive acts against property. The principle is that the English courts will not adjudicate on the lawfulness or validity of a state's sovereign acts under its own law. Municipal courts, as Lord Sumner put it in *Johnstone v Pedlar* [1921] 2 AC 262, 290, "do not control the acts of a foreign State done within its own territory, in the execution of sovereign powers, so as to criticise their legality or to require their justification." In *Yukos Capital Sarl v OJSC Rosneft Oil Co* (No 2), *supra*, at para 110, Rix LJ formulated the principle as involving a distinction

"between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to inquire into them for the purpose of adjudicating upon their legal effectiveness, including for these purposes their legal effectiveness as recognised in the country of the forum. It is the difference between citing a foreign statute (an act of state) for what it says (or even for what it is disputed as saying) on the one hand, something which of course happens all the time, and on the other hand challenging the effectiveness of that statute on the ground, for instance, that it was not properly enacted, or had been procured by corruption, or should not be recognised because it was unfair or expropriatory or discriminatory."

229. Municipal law act of state is by definition confined to sovereign acts done within the territory of the state concerned, since as a general rule neither public nor private international law recognises the application of a state's municipal law beyond its own territory. It has commonly been applied to legislative acts expropriating property: examples include *Carr v Francis Times*, *Luther v Sagor* and the general principle which served as the starting point of the *House of Lords in Kuwait Airways Corp v Iraqi Airways Co* (Nos 4 and 5) [2002] 2 AC 883 (see paras 257-258 below). In these cases, title will have passed under the *lex situs* and the expropriation will be recognised in England on ordinary choice



of law grounds unless, exceptionally, its recognition would be contrary to public policy. In this context, it is difficult to see that anything is added by calling the expropriation an act of state. However, the fact that the act of state doctrine and ordinary choice of law principles lead to the same result in the case of the legislative expropriations of property, does not entitle one to press the analogy any further. In particular, it cannot follow that municipal law act of state is limited to legislative acts expropriating property. Property is of course special for some purposes. It is likely to be under the exclusive jurisdiction of the state where it is located. It is marketable and may be tradeable internationally. It gives rise to policies favouring certainty of title. Considerations like these go some way to explaining why the *lex situs* of property is generally regarded as the law with the closest connection to an issue about title, and is for that reason designated as the proper law. But it is difficult to see that they have any bearing on the very different problems with which the act of state doctrine is concerned. The rules governing the choice of law are concerned with the law to be applied in determining an issue assumed to be justiciable, while the act of state doctrine in all its forms is concerned with the proper limits of the English court's right to determine certain kinds of issue at all.

230. Thus it is well established that municipal law act of state applies not just to legislative expropriations of property, but to expropriations by executive acts with no legal basis at all. Examples include *Duke of Brunswick v King of Hanover* and *Princess Paley Olga v Weisz*, and the United States decisions in *Hatch v Baez*, *Underhill v Hernandez*, and *Oetjen v Central Leather Co*. These transactions are recognised in England not because they are valid by the relevant foreign law, but because they are acts of state which an English court cannot question. Strictly speaking, on the footing that the decree authorising the seizure of Princess Paley Olga's palace did not extend to her chattels, the acts of the revolutionary authorities in seizing them were Russian law torts. But once the revolutionary government was recognised by the United Kingdom, it would have been contrary to principle for an English court to say so.'

[78] The English law thus does not limit the sovereign state acts to property and the conduct of the Iranian government, in my view, would be classified as a municipal act of state.

[79] Finally, Lord Sumption said:<sup>103</sup>

'240. The act of state doctrine does not apply, in either form, simply by reason of the fact that the subject-matter may incidentally disclose that a state has acted unlawfully. It applies only where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it. . . .'

[80] The doctrine applies equally to matters unrelated to property.<sup>104</sup>

[81] The implementation of government policy, places the entire transaction within the public law sphere. The fact that officials or government departments acted on behalf of the government, does not alter the matter. Schutz JA said that the adjudication of a tender by an organ of state constituted administrative action.<sup>105</sup> Cameron JA said:<sup>106</sup>

'[10] The case is thus not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness. On the contrary: the case establishes the proposition that a public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority deriving from its public position, does not amount to an exercise of public power.

[11] In the present case, it is evident that the province itself dictated the tender conditions, which McLaren J held constituted a contract once the tenderers had agreed to them. The province was thus undoubtedly, in the words of Streicher JA in *Cape Metropolitan*, "acting from a position of superiority or authority by virtue of its being a public authority" in specifying those terms. The province was therefore burdened with its public duties of fairness in exercising the powers it derived from the terms of the contract.'

[82] The superior position of the government of Iran can be seen at the outset of the tender regulations where it said in the introduction:

<sup>103</sup> Belhaj para 240.

<sup>104</sup> *Venezuela* para 140.

<sup>105</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). Also see *Quinot* at p 226.

<sup>106</sup> In *Logbro Properties CC v Bedderson* NO 2003 (2) SA 460 (SCA) paras 10-11.



'It is hereby noted that the Ministry reserves the right to modify or cancel this process of competitive bidding at any time and without prior notice, without any right of compensation resulting to Applicants, Bidders or any Shareholders of such Applicants or Bidders. Further, the Government and Ministry are under no obligation to provide explanations to any Applicant as a result of rejecting or accepting any particular Qualification Application or Bid.'

[83] The finding that the conduct complained of occurred in Iran, is supported by the *Playa Larga* case<sup>107</sup> where the question was asked whether acts of state are limited to action taken by a sovereign State within its own territory.<sup>108</sup> The answer furnished by Ackner LJ was as follows:

'We consider the view he expressed he was right and finds support in the speech of Lord Wilberforce in *Buttes Gas & Oil Co. v Hammer* [1981] 2 W.L.R. 787. He accepts, at p. 806H that "Act of State" in its normal meaning is action taken by a foreign sovereign state within its own territory and he cites *Duke of Brunswick v King of Hanover* (1844) 6 Beav. 1, where the acts in question were performed within the territory of the sovereign concerned. He also cites the American case of *Underhill v Hernandez*, (1893) 65 Fed. Rep. 577, and the much quoted words of Chief Justice Fuller at p. 252, where he said:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

He also quoted with approval a letter from the legal advisor to the department of state to the United States Attorney-General which was attached to an amicus curiae brief filed by the United States in 1978 when the claim by Occidental Petroleum Corporation went to the 5<sup>th</sup> Circuit Court of Appeal in 1978. This describes the Act of State doctrine as –

... traditionally limited to governmental actions within the territory of the respective States.

The point did not have to be decided in *Buttes'* case, which had much of the character of a boundary dispute between States. To attack the decree of 1969/70 extending the Arab Emirates of Sharjah's territorial waters upon the ground that the decree was extra-

<sup>107</sup> *Empresa Importadora de Azúcar v Industria Azucarera Nacional SA (The 'Playa Larga' and 'Marble Islands')* [1983] 2 Lloyd's Rep. 171 Court of Appeal.

<sup>108</sup> *Playa Larga* at 194.

territorial, would have been to beg the question. Where, however, it is clear that the acts relied on were carried out outside the sovereign's own territory there seems no compelling reason for judicial restraint or abstention. In this case, although the plan may have been made in Cuba, it was carried into effect outside. Accordingly the defence of Act of State would not apply.'

[84] I find that, based on the pleadings, a South African court is required to inquire into the conduct, and in this case unlawful conduct, of the government of Iran. It is also the distinguishing feature of the cases referred to above and the *Kirkpatrick and Co Inc et al v Environmental Tectonics Corp, International*<sup>109</sup> case on which EAC relied. When I say prohibited, it is meant in the sense as set out by Joffe J in *Swissborough* as approved in *Cherry Blossom*.<sup>110</sup> EAC argued that the allegations contained in the particulars of claim which underlie the unlawful conduct of the Iranian government are 'not necessary' allegations. I disagree. As long as the allegations, as summarised earlier, form the basis of the claim, they are not to be wished away and the conduct of the Iranian government is to be scrutinised and judged as they are legally relevant to the plaintiff's cause of action.

[85] In the circumstances, I am of the view that I should decline to exercise jurisdiction in the matter. The result is that the claim falls to be dismissed.<sup>111</sup>

### State Immunity

[85] The scheme of the Immunities Act provides immunity to all foreign states from the South African court. Section 2 provides:

'(1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.

(2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings in question.

<sup>109</sup> 29 ILM 182 (1990). In this matter the learned judge concluded that he did not have to rule on the conduct of the government.

<sup>110</sup> Para 46 supra.

<sup>111</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 paras 16 and 18. 'Such dismissal without determining the merits "leaves intact the claimant's legal rights and any relevant defences, which remain available for example, to be adjudicated upon in the courts of the state itself."



(3) The provisions of this Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic.'

[86] The principle is applied in South African law in circumstances as follows:<sup>112</sup>

'This immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent. This is known as immunity *ratione materiae* (immunity attaching to official acts). In addition, heads of state and certain other high officials of state enjoy immunity *ratione personae* (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits or is removed from office. The country concerned may waive either form of immunity.'

[87] In *East Timor (Portugal v Australia)*<sup>113</sup> it was held that:

'Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.'

[88] In the matter under consideration the acts relied upon were carried out in Iran by the government of Iran. The *East Timor* judgment continues:

*'Were the arbitrators and/or Commercial Judge being asked to sit in judgment on the acts of the Cuban government done its sovereign or governmental capacity?*

We think there are two answers to this question. Firstly, to establish the claims, Iansa did not have to prove anything against the Cuban government. Iansa relied entirely upon Cubazucar having acted in a certain manner. Cubazucar's defence was: We did not so act. Cubazucar was not believed. The facts, as found by the arbitrators, that the decisions implemented by Cubazucar were joint decisions of Cubazucar and the Cuban government does not involve the English Court sitting in judgment on the Cuban government. Iansa

<sup>112</sup> *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 66.

<sup>113</sup> [1995] ICJ Rep 90 para 29.

never impugned the validity of any of the Cuban government's acts – except Law 1256, said to be confiscatory and discriminatory – and accordingly the Court was not in a judicial no-man's land (see the speech of Lord Wilberforce in *Butte's* case at p. 810 F).

The second answer is that if the Courts were being asked to sit in judgment on the conduct of the Cuban government, then that conduct was not immune from the Jurisdiction of the English Courts since its activity was a trading rather than a governmental activity. What the Cuban government did was to induce breaches of contract by Cubazucar. It is the nature of the act that matters, not the motive behind it. That motive cannot alter the nature of the act. Thus, in *Trentex Corporation Ltd v Central Bank of Nigeria* [1977] 1 Lloyd's Rep. 581; [1977] Q.B. 529, which related to Nigerian cement purchases, the relevant act was simply a breach of a commercial contract and was treated as such, though committed by a state, or a department of state, for reasons of government. The purpose for which the breach was committed could not alter its clear character, (per Lord Wilberforce in the *I Congreso* case, at pp 373 and 337.)

The case of *Alfred Dunhill of London Inc. v The Republic of Cuba*, (1976) 426 U.S. 682, was a case on the United States' doctrine of Act of State. The view of four of the five Judges, who held that no Act Of State had occurred, was approved by Lord Wilberforce in his speech in the *I Congreso* case, and had been quoted on a number of previous occasions in the Court of Appeal (see the judgment of Lord Denning, M.R., in the *I Congreso* case in the Court of Appeal, [1980] 1 Lloyd's Rep. 23, at p. 31 and the *Trendtex* case (cit sup. At pp. 593 and 556)). The Court decided that immunity should be granted only with respect to causes of action arising out of a foreign state's public or governmental action and not with respect to those arising out of its commercial or private action. This "restrictive theory" to the principle of immunity is dealt with in detail by Lord Wilberforce in the *I Congreso* case.'

[89] The immunity is to be given effect also in matters where the foreign state does not appear. In the matter under consideration, the State of Iran was not cited to appear, but the Act declares that a foreign state is immune from the jurisdiction of our courts. In my view the clear wording of the Act is such that it applies even if a party before this court does not raise it by way of a plea. A court is required to apply the Act regardless of what a defendant may plead. If the matter falls within the provisions of the Act, a court is enjoined to apply it. The word 'appear' in my view, does not include cite and appear.



[90] In *The Cherry Blossom*<sup>114</sup> the court cited *Belhaj* and endorsed the use of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention).<sup>115</sup> This convention provides:

'Article 6 (2) provides:

"A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

*The Cherry Blossom* reasoned that one looks to the decisions of international courts for guidance and thus applied the Convention as it was applied, inter alia, in *Belhaj*. In this regard, the words of Lord Mance<sup>116</sup> are apposite:

'Even so, concerns were expressed at the drafting stage by both Australia and the United States about the potential width of article 6(2)(b): see the Report of the Secretary General of the United Nations A/47/326 of 4 August 1992. But academic commentators have concluded that any uncertainty in its scope should be addressed by recognising that "interests" should be limited to a claim for which there is some legal foundation and not merely to some political or moral concern of the State in the proceedings": Fox and Webb, *The Law of State Immunity*, 3<sup>rd</sup> ed (2015 revision), p 307; and O'Keefe, Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property* (2013), pp 110-111, indicating that some specifically legal effect should be required as distinct from social, economic or political effect.'

[91] *The Cherry Blossom* concluded that although the state of Morocco was not impleaded, if the claim would have had an effect on Morocco's legal rights and interests, state immunity would preclude the claim.<sup>117</sup>

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<sup>114</sup> At para 78.

<sup>115</sup> Both parties before me accepted that the Convention is a relevant interpretation aid.

<sup>116</sup> *Belhaj* para 26. See also Lord Sumption's remarks at para 196. And see *The Cherry Blossom* para 80.

<sup>117</sup> *The Cherry Blossom* paras 82-85.

[92] EAC argued that the facts show that the government of Iran was involved in a commercial transaction and that the commercial exception applies. The onus is on EAC to establish that an exception to the immunity applies.<sup>118</sup> Despite the argument of behalf of EAC, the conduct of the Iranian Government falls squarely into the category of *acta jure imperii* and can, on the pleadings, not be described as falling into any of the exceptions contained in the Immunities Act. I have found that the conduct of the Iranian government fell into the public law arena. Based on the allegations in the pleadings, it was not a commercial exception as the character of the rights which Iran granted was not of the kind that any private citizen would offer. Its indirect impleading results in the fact that its interests would be adversely affected by findings of the nature that a court would be required to make regarding its unlawful conduct. In this regard *Dynasty* held:<sup>119</sup>

[116] In my judgment, the entry into by the KRG of the PSC's were "sovereign or public acts", or acts *jure imperii*, and not "private acts". There is no doubt that those resources were publicly, and not privately, owned, whatever the precise meaning which is given to Article 111 of the Constitution; and only a government, acting on behalf of the public, could enter into contracts such as these in relation to the exploitation of such resources. They were entered into pursuant to powers which, as I have found, were allocated to the KRG under the Constitution, and under the KROGL, which was enacted to give effect to those powers. Moreover, the terms of those contracts contain a number of provisions which it is apparent that no private person could make, including promises in relation to such matters as compulsory purchase, planning consents, customs, tax exemptions and pipeline rights. The parties to those agreements also considered it expedient to include a waiver of the KRG's sovereign immunity. Consistently with the decision of Burton J in relation to the "Heads of Agreement" with which he was faced in *Pearl Petroleum v KRG*, I conclude that the entry into of the PSC's was in the exercise of sovereign authority.

[117] *Dynasty* contends, however that even of the entry into of the PSC's was a sovereign act, the same does not apply to decisions to sanction, or not sanction or consent to, a transfer of control of the contracting entities. I do not consider that this is correct. A decision as to whether or not a new party should be permitted to become a replacement

<sup>118</sup> Malcolm N. Shaw: *International Law* 9<sup>th</sup> Ed pp 649-650.

<sup>119</sup> *Dynasty Company for Oil and Gas Trading Limited v The Kurdish Regional Government of Iraq, Dr Ashti Hawrami* [2021] EWHC 952 (Comm) para 105 to 117.



party to a long-term contract for the exploitation of natural resources which, as I have said, contains a series of stipulations by the KRG which a private citizen could not make, would seem to me to partake of the sovereign nature as the making of the contract at the outset. Consent to whether there can be a change of control over a contracting entity is the functional equivalent to consent to novation of the contract because in relation to arrangements of the present kind, the exercise, integrity and financial position of those standing behind the contracting entity will be of great importance.'

In the absence of the foreign state, the Act applies as it would have if it appeared in the matter. The Iranian government being absent, ie not appearing, has no limiting effect on the immunity provided for in s 2(1). The question that arises is whether the unlawful conduct of the Iranian government is equally protected as was said in *Empresa Importadora*.<sup>120</sup> The respect goes to '

'the independence of every other sovereign State, and the court of one country will not sit in judgment on the acts of the government of another done with its own territory.'

[93] In this matter, the court will be required to make adverse findings regarding the unlawful acts of Iran as a finding will affect the interests or activities of Iran. In my view the provisions of the Immunities Act result in this court having no jurisdiction to entertain the matter as pleaded by EAC and the special plea is to be upheld.

### Costs

[94] There was some argument before me regarding a delay of two days during the hearing of the separated issues. The defendants produced additional heads of argument and a file containing documents that were taken from the existing documents and improved or re-typed to be more legible. But in so far as the illegible documents emanated from EAC, it too is responsible for the delay that occurred. I am of the view that no special order regarding the costs of those two days should not be made and that costs should follow the award to the successful party.

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<sup>120</sup> *Empresa Importadora de Azucar v Industria Azucarera Nacional SA (The 'Playa Larga' and 'Marble Islands')* [1983] 2 Lloyd's Rep. 171 Court of Appeal.

[95] Although I make orders in relation to costs of the hearing, the separation order provides that the costs of 'this application are costs in the cause'. The parties did not address me as to whether that costs are costs in the present application or in the trial. I asked all the parties to advise me of their views and EAC submitted that these proceedings form that cause, and the remainder of the parties submitted that the main trial would be the place where the costs are to be dealt with. I am, however, of the view that current proceedings are well suited to deal with the costs of the application to separate issues out.

[96] Different orders follow upon the jurisdictional issues. As far as the first jurisdictional issue (exclusive jurisdiction of the Iranian Courts) is concerned, a stay of proceedings is the appropriate order.<sup>121</sup>

#### Order in relation to the choice of laws

[97] The following order is issued:

1. The law of Iran applies to the delict as alleged in paras 1.1 of the separation order.
2. The law applicable to the issues contained in paras 1.2.5, 1.2.7 and 1.2.10 is uncertain at this stage and I decline to issue any order.
3. EAC is to pay the costs of the application of MTN (as defined) in relation to the choice of laws including the costs of three counsel, where so employed.

#### Order in relation to the exclusive jurisdiction point

4. The special plea that the Iranian courts have jurisdiction to hear this matter, is upheld.
5. The proceedings in this court are stayed pending a decision by an Iranian court.

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<sup>121</sup> *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013 (3) SA 91 (SCA) para 21.



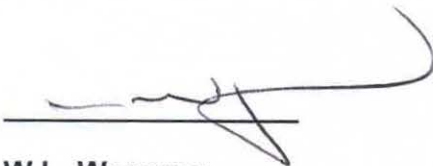
6. EAC is ordered to pay the costs of the special plea including the costs of three counsel where so employed.

Order in relation to State Immunity

7. The special plea that the court lacks jurisdiction to hear the matter is upheld.
8. EAC's action is dismissed.
9. EAC is to pay the costs of the action including the costs of three counsel where so employed.

Order in relation to the Act of State Doctrine

10. The court declines to exercise jurisdiction due to the involvement of the State of Iran.
11. EAC's claim is dismissed.
12. EAC is to pay the costs of the action including the costs of three counsel where so employed.



**W.L. Wepener**

Judge of the High Court of South Africa

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