



# Immunity from execution and State enterprises

# Outline



**The questions**



**Central Banks**



**Agencies and  
instrumentalities**

1.

# THE QUESTIONS

# Mission statement

## ▷ Generic questions

- Achieving consistency through consensus?
- Clarity/predictability?
- Differences immunity from jurisdiction / enforcement?

## ▷ Specific questions

- Difference States / 'Entities'?
- Differences among entities?

2.

# CENTRAL BANKS

**(and monetary authorities)**

## Towards a *lex specialis*?

- ▷ Adoption of specific statutory regimes in many countries - protecting assets central banks / monetary authorities
- ▷ Goal : maintain attractiveness as international financial center → competition among States

# Towards a *lex specialis*?

## ▷ Specific legislation – *e.g.*

- Australia (sect. 35(1) SFI Act 1985)
- UK (sect.14(4) SIA)
- France (art. L-152-1 Code monétaire)
- Belgium (art. 1412*quater* CJ)
- Canada (sect. 12(4) SIA)
- ...

# Towards a *lex specialis*?

▷ UN level : Art. 21, § 1 (c)  
2004 Convention

*“property of the central bank  
or other monetary authority  
of the State”*



# Towards a *lex specialis*?

## ▷ Common features

- Central banks *and* monetary authorities
- No absolute character –  
Narrow exceptions
  - If commercial activity  
(exception : UN  
Convention)
  - Waiver

# Questions

- ▷ Differences statutory regime/court practice?
- ▷ Assets held
  - *for its own account* (sect. 12(4) SIA Canada; § 1611(b)(1) FSIA)
  - or also *for third parties* (BEL)
- ▷ Exception : assets used/intended
  - “exclusively” (BEL) or
  - predominantly (FR) for commercial activity?

3.

# 'AGENCIES OR INSTRUMENTALITIES'

**Which scope?**

# Scope

- ▷(emerging) consensus on restrictive approach to immunity from enforcement (assets used by State “for other than government non-commercial purposes”)
- ▷Need to define SO-CE’s /agencies/instrumentalities and subject them to different regime?



*The distinction between immunity *ratione personae* and *ratione materiae* has lost most of its importance since the general acceptance of the restrictive approach to immunity (M. Kohen 2006)*

# Scope

▷ Scope issue remains relevant:

- National and int'l law include definitions of scope (what is a 'State'?)
- Different regimes for State and SO-CE's (principle + details)
- Addressing scope issue → preempting borderline cases

# Relevant factors to identify 'agency or instrumentality' ?

## **Status / structure**

- Is entity distinct from State?
- Legal personality?

## **Relationship entity/state**

Nature of link between entity & State

## **Core functions**

Activities of entity

# Scope

- ▷ **1<sup>st</sup> element** : status/structure – e.g. legal personality
  - France (*Sonatrach*) :  
“personnalisés ou non, distincts de l’Etat étranger”
  - § 1603 (b) FSIA : separate legal person
  - Art. 27 ECSI / sect. 14(1) SIA UK :  
Entity “distinct” from State
  - UN Convention : silent



# Scope

- ▷ **2<sup>nd</sup> element** : relationship with foreign state?
- *Broadly defined* – US FSIA (organ, majority of shares, other ownership interest)
  - *Loosely defined* :
    - France : “organismes publics” (Supreme Court, *Sonatrach* -1985)
    - Sect. 3(1) Australian Act : “agency or instrumentality of foreign State... [but] not department or organ of the exec. gvt of foreign State”

# Scope

▷ **3<sup>rd</sup> element** : function?

▷ Contrast

- US : not relevant
- Art. 2 UN Convention : only if
  - *Status* : To the extent that they are entitled to perform (law of State of origin)
  - *Performance* : *and* are actually performing acts in the exercise of sovereign authority of the State (forum law)

# How to approach the issue?

- ▷ No real consensus on paper – but application could lead to similar results
- ▷ Function : if included, could be duplicative of commercial activity analysis
- ▷ Need for an open approach – diversity of situations – *e.g.* SWF
  - Either separate, state-owned entity
  - Structure part of the State, no legal personality

# Questions

- ▷ Tiered entity (entity indirectly controlled by State through various levels of corporate structure)?
- ▷ Instrumentality owned by two States?  
Pooling interests?
- ▷ Time for assessment : time the claim arose and/or time proceedings initiated?

4.

# 'AGENCIES OR INSTRUMENTALITIES'

**Which regime?**

# Regime

- ▷ Principle for ‘agencies, instrumentalities, etc.’?
  - (presumptive) immunity as a rule?
  - Immunity as exception?

# A divided picture

## **Immunity as exception**

*e.g.* France : assets of agencies etc. are not subject to immunity, save if ...

*e.g.* Canada : ... property of an agency of a foreign state is not immune from attachment and execution... save if...

## **Extension**

*e.g.* US, UK, Australia : assets of agencies etc. benefit *prima facie* from immunity, but exceptions

*e.g.* UN Convention (protection against pre-judgment and post-judgment measures), but exceptions

# Different outcomes?

- ▷ In practice, result may be identical
  - **Extension** : limited to certain entities
    - *e.g.* UN Convention : only if status + performance of “acts in the exercise of sovereign authority of the State”
  - If **no extension** : immunity still available if *e.g.*
    - Canada : if proceedings for which agency enjoys immunity from jurisdiction
    - France : if assets earmarked for public purposes



# Different outcomes?

- ▷ Main difference : burden of proof shifted
  - Extension : once entity considered part of the State, creditor bears burden of proof (in relation with exceptions)
  - If no extension : agency etc. bears burden of proof that assets are earmarked for public purposes

# Regime

## ▷ Exceptions to immunity

- No substantial difference between States and 'agencies' etc.
- *e.g.* waiver, property in use for commercial purposes, etc/

# Regime

## ▷ Minor differences

- Service of process – special rules (*e.g.* § 1608(b) FSIA; sect. 9(3) Canadian SIA)
- Punitive damages (*e.g.* § 1606 FSIA : no immunity for agency/instrumentality)
- No link between property and original claim - US (§ 1610(b)(2) FSIA) & France

Thanks!

**Any questions?**

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