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’?

<table>
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<th>Status / structure</th>
<th>Relationship entity/state</th>
<th>Core functions</th>
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<td>- Is entity distinct from State?</td>
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<td>- Legal personality?</td>
<td>Nature of link between entity &amp; State</td>
<td>Activities of entity</td>
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1st 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

2nd element : relationship with foreign state?

- **Broader 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

- **3rd 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**

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

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

**Extension**

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

*Example*: 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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