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LEGAL POSSIBILITIES OF USING RUSSIAN CENTRAL BANK ASSETS TO ENFORCE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS

Annex: Applicable Laws in England and Wales

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224 West 57th Street
New York, NY 10019
P. +1 212-548-0600

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This country study is an annex to the report *Legal Possibilities of Using Russian Central Bank Assets to Enforce European Court of Human Rights Judgments* and contains the full analysis of applicable laws in England and Wales, referred to in this report as the United Kingdom/the UK.[1]

A. ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UK

Foreign judgments can be, and often are, enforced in the UK. A foreign judgment has no direct operation in the UK and cannot be directly enforced by way of execution. Instead, it needs to go through the process of recognition first.

I. The distinction between recognition and enforcement

Under UK law, there is a distinction between the recognition (also termed registration or formal recognition)[2] and the enforcement of foreign judgments. This is confirmed, for example, in recognition and enforcement being governed by separate rules under the Civil Procedure Rules.[3] Recognition and enforcement are both processes that relate to foreign judgments, but they are different in application and effect.

Recognition refers to an action by a party to a foreign judgment which seeks to have that judgment recognized as valid in the UK in order to restrain the opposing party from initiating further litigation. Recognition is therefore an acknowledgement of foreign competence and the settling of the dispute, known as res judicata: "In such a case the situation indeed is that a party to English proceedings is relying directly upon a foreign judgment, but is doing so merely to establish a negative proposition and seeks that *recognition* alone be accorded to that judgment."[4] Recognition will generally involve a formal procedure consisting of an application made to the relevant court for registration of the judgment, or the issuing of new proceedings and obtaining judgment.

Enforcement, on the other hand, follows from the recognition of a judgment as final and binding, and is required to execute the judgment. It is the practical process of compelling the losing party to comply with the terms of a foreign judgment. Enforcement can only be achieved once recognition is established. Recognition of a foreign judgment must always come first: "The logic of the law is that recognition is the necessary primary concern."[5]

Once recognized, the foreign judgments can be enforced in the same way as an English judgment.[6] Thus, after recognition the successful party may seek to have the judgment enforced as if it were a domestic judgment.[7] Therefore, all foreign judgments enforced by English courts are recognized, but not all recognized judgments are enforced.[8] Civil Procedures Rules (CPR) 70 to 73 contain the general rules about enforcement of judgments and orders in general civil matters.[9]

II. Rules for Recognition and Enforcement of Foreign Judgments

Under the UK procedure for recognition of foreign judgments, the claimant must first apply for a summary judgment[10] before executing the award:

A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. It must bring an action on the foreign judgment. But **it can apply for summary judgment** under what is now Pt 24 of the Civil Procedure Rules 1998, previously Order 14 of the Rules of the Supreme Court, on the ground that the defendant has no real prospect of successfully defending the claim; and if the application is successful, the defendant will not be allowed to defend at all. The speed and simplicity of this procedure, coupled with the tendency of English judges narrowly to circumscribe the defences that may be pleaded to a claim on a foreign judgment, mean that foreign judgments are in practice enforceable at common law much more easily than they are in many foreign countries.[11] (emphasis added)

Although, internationally, enforcing courts regularly recognize and enforce foreign decisions, this state practice "is not considered specific enough to create binding rules of customary international law mandating enforcement or recognition."[12] In the UK, therefore, whether a judgment is recognized as enforceable will depend on the applicable regime, which in turn depends on the country of origin of the judgment. A claimant must either rely on (i) rules contained in a UK statute or an international convention to which the UK is party; or (ii) the rules applicable under the English common law regime.

Statutory / conventional rules

The table in appendix A sets out the procedure for recognition of foreign judgments, depending on their country of origin, where the issue is governed by statute/convention. For instance, judgments obtained in EU member state courts and with proceedings commenced before December 31, 2020, fall within the Recast Brussels Regulation and are automatically recognized.[13]

The enforcement of judgments from a country not specified in the table is subject to the common law regime, touched upon below. This procedure must be followed before a judgment can be enforced, unless the provisions of convention or statute permit enforcement under common law, on an optional basis.[14]

Common law regime

Where the judgment originates from a country that is not party to an applicable treaty with the UK, no UK statute nor convention is applicable, or where the regime under the statute and/or convention is optional, the recognition and enforcement process is governed by common law. Therefore, common law rules governing the enforcement of judgments will govern the enforcement of judgments from, for example, Brazil, China, Russia, and the US.

(1) The requirements for recognition broadly relate to

(2) the nature of the judgment,

(3) the jurisdiction of the foreign court, and/or

the existence of factors that render the judgment impeachable (i.e., fraud, breach of a jurisdiction agreement, or a public policy reason).

Once the requirements from the first two points are satisfied, the foreign judgment is prima facie enforceable.[15]

Nature of the judgment

To be recognized under common law, the judgments must be on the merits and be final and conclusive in their jurisdiction of origin.[16] If the only way to contest the judgment in the original jurisdiction would be to appeal it to a higher court, the judgment will be considered final and conclusive.[17] This excludes from recognition default judgments and ex parte awards. In *The Sennar* (No 2), Lord Diplock clarified the requirement that the judgment be "on the merits":

> What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction.[18]

In some cases, foreign judgments are only recognized when they are monetary, such that injunctions and declaratory judgments are often not enforceable.[19] The foreign judgment must also be civil; thus, judgments on a foreign tax or penalty will not be recognized.[20]

Jurisdiction of the foreign court

A foreign judgment will only be enforceable if the English courts are satisfied that the foreign court had competent jurisdiction according to the rules that English law applies in such cases.[21] According to Dicey (and as affirmed by the UK Supreme Court):[22]

> [A] court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
>
> Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
>
> Third Case—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
>
> Fourth Case—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.[23]

Grounds rendering foreign judgment impeachable

A defendant might challenge an application for summary judgment to recognize the foreign judgment on the grounds that they have a real prospect of successfully defending the claim at trial because of the existence of any of the limited grounds of defense.[24] The main defenses are among others:

- The judgment was obtained by fraud.[25]
- Incompatibility with public policy, under which the court may refuse "to recognise or enforce judgments which offend universal principles of morality."[26] This can include the "finality principle," according to which an earlier judgment cannot be enforced if the final decision is found in a later judgment.[27]
- Inconsistency with a prior judgment on the same subject matter between the same parties.

- Denial of natural justice (due process, opportunity to be heard).
- The judgment is for multiple damages (an amount arrived at by doubling, tripling, or otherwise multiplying a sum assessed as compensation for the loss of damage sustained by the person in whose favor the judgment is given).

Where rules of exclusive jurisdiction apply under the Civil Jurisdiction and Judgments Act 1982[28] (see below), or where the exclusionary rule in *Mocambique* applies.[29]

Civil Jurisdiction and Judgments Act 1982

A party seeking to recognize and enforce a judgment of a foreign court against **another state** in the UK must also consider section 31 of the Civil Jurisdiction and Judgments Act 1982, which provides as follows:

> (1) A judgement given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if—
>
> (a) it would be so recognised and enforced if it had not been given against a state; and
>
> (b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom **in accordance with sections 2 to 11 of the State Immunity Act 1978**. (emphasis added)

Thus, UK Courts will not have jurisdiction to recognize and enforce a judgment of a foreign court, unless it can be shown that, in respect of that state, the criteria for one of the exceptions to state immunity had been met. The issue of state immunity is discussed in detail below.

B. ENFORCEMENT OF ECTHR JUDGMENTS IN THE UK

In the UK, the Ministry of Justice coordinates with the Committee of Ministers of the Council of Europe on the execution of judgements issued against the UK, and has liaised with the Department for the Execution of Judgments on best practices regarding submission of action plans and reports, along with avenues to improve cooperation.[30] From the past practice, it is clear that the UK has consistently enforced ECtHR judgments where the UK is the respondent state.[31]

At the time of writing this report, there is no domestic practice in favor of the enforcement of an ECtHR ruling on a foreign state. However, the UK's customary treatment of ECtHR judgments can at least show that the UK has accepted the authority of the ECtHR judgments, which is shown in its undertaking to abide by the jurisprudence of the ECtHR when it ratified the ECHR in the first place.[32]

I. Application of foreign judgment rules to ECtHR judgments

It is unclear whether the above common law rules on recognition and enforcement applicable to foreign judgments are equally applicable to judgments of the ECtHR. There is no practice on this point so far.

Common law rules on recognition must be applied unless there is a basis in domestic law, in particular in statute, stipulating otherwise. It appears that there is no such statutory basis for ECtHR judgments. In this situation, it might be possible that the UK courts would fall back on the common law rules of recognition. However, as there is no case law on this point so far, it cannot be ruled out that the UK courts would not apply common law rules. This report thus will examine both possibilities, that is, a procedure where common law rules are not applied (scenario 1) and one where they are (scenario 2).

II. Scenario 1: Rules for foreign judgments do not apply

If ECtHR judgments are subject to their own rules of recognition (i.e., such that common law rules for foreign judgments do not apply), it could be argued that a claimant would need only to establish a legal basis for recognition and enforcement.

In the decision in *Socobel v. Greece*[33] where a Belgian firm sought to attach funds of the Greek Government in Belgium in reliance on a decision of the Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice (ICJ). The PCIJ had declared certain earlier arbitral awards in favor of that company as

obligatory. The Belgian court found that the recognition of the PCIJ judgment (which is achieved in Belgium through an exequatur procedure) was required since the judgment came from a "non-national jurisdiction," and it could not be considered self-executory because it was an international judgment.

Based on this decision, it could be argued before UK courts that there is a possibility that an international judicial award may be the basis of a "municipal law proceeding brought by the successful state against the state which has not carried out the award"[34] and that "in that case, there would seem to be good reasons for the national court to recognize the international award merely on the basis of an appropriate certification of authenticity without imposing any additional requirements."[35] This line of argumentation has not been tested before in the UK and it would remain to be seen if UK courts would accept this approach. Should the courts refuse to accept this argument, it is possible that ECtHR judgments could not be recognized and consequently would not be enforced.

Procedurally, a claimant will likely still need to institute fresh proceedings[36] against the judgment debtor (i.e., Russia) and attach the ECtHR judgment as evidence of the claim. The claimant should then apply for summary judgment of the claim.

Legal basis for recognition and enforcement of an international judgment

The recognition and enforcement of an international judgment through national courts in the UK could be based on the following principles or doctrines.

Principle of international comity

The principle of international comity has its roots in (and has frequently been used as a means of) showing respect for foreign judgments, such that it can be regarded as an established common law mechanism for recognition. The principle relies on courts believing "that the law of nations required the courts of one country to assist those of any other" and fearing "that if foreign judgments were not enforced in England, English judgments would not be enforced abroad."[37]

This principle was used for the purposes of recognition (i.e., the prerequisite for enforcement) in proceedings concerning an international arbitral award in *Dallal v Bank Mellat*,[38] where the claimant sought to recognize the decision of the Iran–US Claims Tribunal. Hobhouse J relied on the principle of international comity in justifying the possibility of recognition of the award:

> These decisions clearly illustrate that competence can be derived from international law and that international comity requires that the courts of England should recognise the validity of the decisions of foreign tribunals whose competence is so derived.[39]

Whilst this dictum relates to the recognition of an arbitral award, there is no reason why the principles underlying it should not equally apply to the recognition of international judgments, particularly where both states parties to the judgment have consented to the jurisdiction of the international court. This conclusion could, therefore, be taken to establish that the principle of comity as applied to the judgments of domestic courts of equal jurisdiction also applies to judgments of international courts, particularly where the UK was a state party to the treaty establishing the international body.

Doctrine of obligation

The principle of comity was later replaced with the doctrine of obligation:[40] the idea that the judgment of foreign courts (of competent jurisdiction) over a defendant imposes a duty on the defendant to pay the sum for which judgment was given, which UK courts are bound to enforce (on the defendant), and consequently that anything which forms a legal excuse for not performing it is a defense to the action.[41] In *Adams v. Cape Industries Plc*, Scott J. accepted the obligation doctrine as being the basis on which English courts would recognize and enforce judgments in personam.[42]

Given that the doctrine of obligation rests on the proposition that a UK court has an obligation to recognize and enforce a foreign court's judgment and the duty to compensate against a defendant, it could apply to a potential ECtHR ruling against Russia (so long as the ECtHR is found to have exercised competent jurisdiction).

Acquired rights

There exists a further possible justification for the recognition and enforcement of foreign judgments that "relates to respect for the parties' expectations and the idea of acquired rights."[43] The idea is that a judgment has created specific expectations for parties who may, in good faith, have relied on it. The parties' expectations are formed by reading the foreign judgment—such that its content is "essential." The acquisition of rights would be the consequence of the application of the rule of law to the facts of the case by the foreign judge.[44]

This basis could also be used to support the recognition and enforcement of an ECtHR judgment against Russia, on the argument that a (individual) claimant has an expectation, and potentially a right, to see an ECtHR judgment enforced.

III. Scenario 2: Rules for foreign judgments apply

If the common law rules applicable to foreign judgments were to apply to international judgments, the judgment which the claimant seeks to enforce must fulfil certain requirements as set out above. These include the following:

(1) The judgment must be for monetary compensation only (in most cases), rather than ordering Russia to act/ordering Russia to cease action.[45]

(2) The judgment must be on the merits, final, and conclusive (judgments for procedural measures are not eligible for enforcement).

(3) It must be shown that the court had sufficient jurisdiction.

These requirements appear to be less problematic for ECtHR judgments as (1) the just satisfaction they award are monetary in nature, (2) the ECtHR only makes such awards after a decision on merits and its finality can be easily determined, (3) in its judgments the ECtHR makes pronouncement on its jurisdictions.

In addition, when a judgment is against another state, as in the case of an ECtHR decisions, additional requirements in section 31 of the Civil Jurisdiction and Judgments Act 1982 mentioned above would need to be met. A party seeking to enforce a judgment of a foreign court must consider this provision according to which the judgment would be recognized if (1) it would be so recognized and enforced if it were not against a state and (2) the court would have had jurisdiction in the matter if it had applied rules on state immunity corresponding to those applicable to such matters in the UK. It is unclear how this applies to international judgments.

There exists no commentary suggesting that section 31 will apply to the enforcement of an international judgment, and it is difficult to see how section 31 would operate if it were to apply. Since there is no explicit framework for the procedure of recognition and enforcement of international judgments against states in the first place, the first requirement (that the judgment would be recognized if it were not against a state), will be difficult to prove unless it may be satisfied by the claimant establishing that the international judgment is (i) for monetary compensation, (ii) final and conclusive, and (iii) given by a court of competent jurisdiction. As set out above, all these three conditions would likely be met by an ECtHR judgments. On the second requirement, the question of state immunity is discussed below.

C. STATE IMMUNITY

In both scenarios set out above attempting to enforce an ECtHR judgment against a foreign state will raise the question of state immunity.

In the UK, immunity from jurisdiction under the UK State Immunity Act (UKSIA)[46] relies on the view that the state should not be put in a position where it must appear to defend its interests.[47] The immunity arises prior to there being an adjudication, and, if found, bars any judicial consideration of the issues before the court. In contrast, immunity from enforcement has been described as the last bastion of state immunity—it necessarily arises after there has been an adjudication[48] and assumes that liability has been established.

According to Section 13 UKSIA:

> (2) Subject to subsections (3) and (4) below—
>
> (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process **with the written consent of the State concerned**; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being **in use or intended for use for commercial purposes**. (emphasis added)

For clarity, though the UN Convention on Jurisdictional Immunities of States and Their Property (UNSCI—adopted in 2004 but not yet in force) draws a distinction between state immunity from (i) pre-judgment measures of constraint and (ii) post-judgment measures of constraint[49] (which in either case, constitutes immunity from enforcement), the UKSIA does not adopt such an explicit distinction. Whilst there is a difference between the prohibited measures under sections 13(2)(a) and (b) UKSIA reference to "immunity from enforcement" in this report will only refer to immunity from post-judgment measures of constraint, such as court-ordered execution via sale.

I. Immunity from jurisdiction

Immunity from jurisdiction may raise an issue in proceedings relating to the recognition of international judgments (at the initial adjudication, rather than enforcement, phase).A foreign state may invoke its immunity from jurisdiction to prevent the judgment of an international court from being recognized.

In *Jurisdictional Immunities of the State*, the ICJ reasoned that under Article 6 UNCSI, "the court seised of an application for *exequatur* of a foreign judgment rendered against a third State has to ask whether the respondent State enjoys immunity from jurisdiction—having regard to the nature of the case in which that judgment was given—before the courts of the State in which *exequatur* proceedings have been instituted."[50] This is because

[w]here a court is seised, as in the present case, of an application for *exequatur* [i.e. recognition] of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of exequatur proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.[51]

Exceptions to immunity from jurisdiction

To succeed at the recognition phase, the claimant will be required to show that an exception to sovereign immunity from jurisdiction listed in sections 2-11 UKSIA or existing under customary international law applies. Whilst it is not immediately clear which exception would apply to ECtHR judgments due to the lack of case law, there are several options.

Exceptions under UKSIA

Section 2 UKSIA: Consent to jurisdiction

The strongest argument would be to rely on section 2 UKSIA, which establishes an exception to sovereign immunity where a state has waived its immunity and consented to the exercise of jurisdiction by English courts. This point could be extended to argue that, having become a party to the ECHR, Russia undertook to comply with the ECtHR's judgments, such that it has waived its immunity in subsequent recognition proceedings.

Section 2 UKSIA provides the following:

> (2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
>
> (3) A State is deemed to have submitted—
>
> (a) if it has instituted the proceedings; or
>
> (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
>
> (4) Subsection (3)*(b)* above does not apply to intervention or any step taken for the purpose only of—
>
> (a) claiming immunity; or
>
> (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.
>
> (5) Subsection (3)*(b)* above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

Section 9 UKSIA: Analogy to arbitration proceedings

Another option would be to expand the arbitration exception to a state's sovereign immunity, found in section 9 of the UKSIA. Where a state has agreed to arbitration, UK law prevents it from invoking immunity against an English court's adjudicative jurisdiction, on the basis that consent to arbitration is treated as waiver. Section 9 UKSIA provides as follows:

(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

It is worth noting the similarities between the principle underlying section 9 UKSIA, and the idea of consensual adjudication by international tribunals such as the ICJ or ECtHR, in light of the state parties having consented to the international court's jurisdiction. See, for example, the Court of Appeal's finding on the consensual nature of arbitration in *Svenska Petroleum*:

> Arbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective.[52]

There might be an argument that similar considerations apply to international judgments rendered by tribunals created by international agreement, such that immunity from adjudication ought not to apply in proceedings for recognition. It remains to be seen if UK courts would accept this line of argument, as they have not yet made any pronouncements on this question. Significantly, however, under Section 9 UKSIA, inter-state arbitration is excluded from the exception's application, which could bar its analogous application to ECtHR judgments in inter-state cases, such as those pending between Ukraine and Russia.[53]

Exceptions under customary international law

Another option would be for the claimant to argue that, under customary international law, there exists an exception to a state's immunity for violations of jus cogens norms (which in this case would consist of the prohibition of aggression). Based on the current law, the claimant would need to successfully argue that the UK courts ought to adopt a progressive interpretation of customary international law. Though some states have adopted this exception in case law, the UK has not yet accepted the status of such an exception in customary international law, and it is very unlikely to do so.

It is worth noting, however, that in the *Corfu Channel* case cited below, the UK sought an attachment of the Albanian share in monetary gold, and though this could not be carried out for technical reasons, immunity from jurisdiction was not mentioned.[54]

II. Immunity from enforcement

Immunity from enforcement against the property of a foreign state is a procedural bar which "concerns immunity from the imposition without its consent of forcible measures against the person of the State or against the property of a foreign State by the judicial or administrative authorities of another State."[55] This may include, but is not limited to, immunity for state property from execution by means of arrest (i.e., taking possession) and sale.[56]

Immunity from enforcement, like immunity from jurisdiction which is a separate hurdle under UK law, stems from sovereign equality.[57] If measures of constraint are enforced upon a state, they may infringe the exercise of sovereign functions and the authority of that state.[58] However, unlike immunity from jurisdiction, the importance of immunity from enforcement is reflected in its practically absolute nature—it continues to bar "to a very large extent" the enforcement of judgments given by forum courts against foreign states.[59]

In the UK, immunity from enforcement is governed by section 13(2)(b) UKSIA which prevents a party from enforcing any judgment or arbitration award against the property of a state. Judicial reference is sometimes made to the UNCSI,[60] and the European Convention on State Immunity 1972 (ECSI),[61] on which the UKSIA is largely, but not completely, based.[62]

Scope of protection under section 13 UKSIA

The definition of "property" under the UKSIA is broad, and it can include "all real and personal property and will embrace any right or interest in legal, equitable or contractual in assets that might be held by a state or by any 'emanation of the state.'"[63]

Central banks (interpreted by English courts as a body "set up by the State with the duty of being the guardian and regulator of the monetary system and currency of that State both internally and internationally"[64]) enjoy immunity from jurisdiction in the usual way.[65] With respect to enforcement, the UKSIA deems central bank assets to be immune from enforcement, regardless of whether they are separate entities or whether assets are held for commercial purposes.[66] This includes post-judgment measures of constraint, or other measures such as winding-up.[67] The immunity of central banks applies to interim orders as well as final judgments.[68]

Courts will not inquire into the capacity in which a central bank holds property, but may question whether the central bank has a proprietary interest.[69] "The term 'property' is to be construed broadly, and includes, as regards the central bank, any right or interest, whether legal, equitable, or contractual, in assets, including those in which other parties also have rights."[70] For example, in *Taurus Petroleum*, the English Court of Appeal held that where the central bank has a contractual right to require the repayment of debts, this is not enough to give a proprietary interest in the debt in the conventional sense, such that immunity cannot extend to it.[71] However, a bank account in the name of a central bank is the property of the central bank for the purposes of the UKSIA, even if the bank is only named as nominee.[72]

For immunity from enforcement to apply, the assets against which enforcement is sought must belong to the state.[73] Possession or control is irrelevant—"[i]f all that the State has is mere possession or control without any proprietary interest (such as provided by a lien), enforcement will simply fail for want of any proprietary or legal interest on the part of the State against which to enforce."[74] To prove ownership, a foreign state must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a defective title.[75]

Exceptions to immunity from enforcement

As with jurisdictional immunity, the claimant would have to argue an exception to state immunity to enforce ECtHR judgments in the UK.

Exceptions under UKSIA

Immunity from enforcement does not constitute "blanket state immunity."[76] Section 13 UKSIA identifies two concrete exceptions to state immunity from enforcement: (i) a state can provide written consent (e.g., by agreement or treaty), to the giving of any relief or the issue of any process;[77] and (ii) judgments or awards may be enforced against property that is for the time being in use or intended for use for commercial purposes.[78]

Section 13(3): Consent to enforcement

Consent to any relief or the issue of any process may be given by the head of a state's diplomatic mission in the UK (or the person performing their functions).[79] Consent may also be given in a prior written agreement (e.g., a treaty). Whether a state has consented to enforcement is to be considered *separately* from whether it has consented to jurisdiction—submitting to the jurisdiction of the court for the purposes of adjudication will not necessarily simultaneously constitute waiver of the state's immunity from enforcement.[80]

Consent of the state for the purposes of enforcement must be specific. For example, an undertaking from a state not to appeal a costs order does not imply submission to the enforcement jurisdiction of a foreign state.[81] Written consent usually refers expressly to consent to both pre-judgment *and* post-judgment measures of enforcement.[82]

English courts apply a strict interpretation of a state's consent to enforcement. Thus, for separate entities and central banks, immunity is lost "if and only if that entity gives its written consent."[83] Like waiver by a state, a separate entity's waiver will be construed strictly,[84] but may be "expressed so as to apply to a limited extent or generally."[85] In light of this, it might be difficult to argue that Russia implicitly consented to enforcement by becoming a state party to the ECHR.

However, an interesting possibility, if litigation and arbitration are considered similar under UK law, the claimant might make the argument that, when a state consents to arbitration and waived its immunity from jurisdiction, it also waives its immunity from enforcement.[86] In the context of ECtHR judgments, this point would be argued to suggest that, when a state consented to the ECHR waiving its immunity from jurisdiction according to section 2 of the UKSIA as argued above on jurisdictional immunity, it also waived its immunity from subsequent enforcement proceedings. However, it should be noted that the ICJ has ruled that for foreign national judgments, "any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory."[87]

Section 13(4): State property in use or intended use for commercial purposes

Immunity from enforcement applies to property of the foreign state in use for public purposes.[88] State-owned property will only fall within the commercial purposes exception if it is used or intended to be used "solely" for commercial purposes.[89] For central bank assets, section 14(4) UKSIA stipulates that property of a state's central bank or other monetary authority shall not be regarded as in use or intended for use for commercial purposes. The exception to enforcement immunity for property used/intended for use for commercial purposes thus will not apply.[90]

Exceptions under customary international law

Possible exceptions could be argued under customary international law.

Exception for supra-national judgments

In the context of the PCIJ[91] / ICJ judgments, both in the UK and in other jurisdictions, there is no practice by which a state has successfully prevented the enforcement of a judgment of either the ICJ or PCIJ against its property through the invocation of state immunity.[92] This may be due to the vertical nature of international adjudication. In the two cases in which attempts have been made to enforce judgments of either the ICJ or PCIJ, the immunity of state property has not prevented enforcement.[93]

For the purposes of this report only one example is relevant for UK law. In 1949, the ICJ awarded £844,000 compensation to the UK against Albania in the *Corfu Channel* case for damage to warships and the loss of life, occurring from explosions in Albanian waters.[94] Albania refused to pay, and the UK attempted to enforce the judgment debt against Albanian property, first by seizing Albanian property, but Albania had no property in the UK.[95] The UK then sought an attachment of the Albanian share in monetary gold, which had been looted by the Nazis from Italy during the Second World War, and was in control of US, France, and the UK. These states agreed that any interest that Albania had in the gold was to be transferred to the UK in satisfaction of the ICJ judgment debt.

The legal adviser to the UK, Sir Gerald Fitzmaurice, explained why the transfer would be justified when an international judgment had been disregarded:

> [A]ll countries are, if not bound, at any rate entitled to take all such reasonable and legitimate steps as may be open to them to prevent such an occurrence, and either individually or by common action to do what they can to ensure that judgments, particularly of [the ICJ], are duly implemented and carried out—at any rate, so long as the rights of third countries are respected.[96]

It is noteworthy that Albania did not have any property in the UK, but the Hansard records of the House of Commons debates reveal no concern that Albanian property would have been immune from enforcement jurisdiction, if there were to be any present in the UK.[97]

Whilst the UK did not succeed in enforcing the judgment against the monetary gold for technical reasons because it became a matter of dispute whether Albania had any interest in the gold, it has been argued that

> [these principles] should apply not only to the execution of a judgment of the International Court, but equally to the carrying out of any other obligatory decision of an international judicial or arbitral tribunal. It also may be inferred from these principles that the **right of the third state to attach assets to satisfy a judgment which is binding in international law prevails over the sovereign immunity that the debtor state may possess in respect of the assets in question**.
>
> It can also be argued that, even where countries do not have the exception to state immunity based on acts *iure gestonis*, an exception to immunity should be made in proceedings to enforce a binding judgment of the International Court or even of an international arbitral tribunal. As we have seen, the United States, France and the United Kingdom have already recognized in the Monetary Gold affair that they would have the right to take enforcement measures against the assets of the debtor state in order to satisfy a Court judgment. If that is acceptable under international law, then there would seem to be no reason why the same rule should not apply to proceedings by the creditor state in the courts of a third state.[98] (emphasis added)

From this analysis, a two-step reasoning can be derived:[99] At first instance, the UK's attempt at enforcement against Albanian assets provides state practice in support of the notion that states *may* take enforcement measures against a debtor state to satisfy a disregarded judgment of an international court, including through domestic court proceedings. Secondly, whilst immunity from enforcement may restrict this right, immunity will not necessarily always apply, as obligations taken to carry out judgments of international tribunals (such as the ECtHR) ought to prevail over sovereign immunity rules.

This could similarly apply to judgments of the ECtHR, particularly as it is a tribunal established by a multilateral agreement, and could apply to judgments of the ECtHR up to September 16, 2022, when the ECtHR's jurisdiction over Russia ceased (following the cessation of its membership in the Council of Europe).[100] This argument would be bolstered by the suggestion that, since the principle of sovereign immunity exists to prevent states from sitting in judgment on the property of another (protecting *horizontal* equality between states), this principle is not applicable on a *vertical* bases where an international entity is ordering the enforcement against sovereign assets of a state—an international court will not breach sovereign equality if it adjudicates a dispute between two states. On this basis, it may be that there is an exception to state immunity for the purpose of enforcing international judgments.

A 2022 research paper on the potential use of frozen Russian assets makes a similar point about the potential need for a further exception to state immunity in the context of a state that remains unwilling to abide by international judgments:

> At the international level, awards against Russia may be issued by the ICJ, ECtHR, arbitral tribunals seized of investment treaty disputes against Russia, or bespoke institutions that may be created in the future, such as claims commissions. The enforcement of their decisions would require the abrogation of the immunity from enforcement that accrues to Russian state assets. To the extent that some of these judgments may involve private claims against Russia, the practical challenges of ensuring the fairness, orderliness and consistency with Ukraine's public needs arise, as discussed above. There may, therefore, be an argument in favour of only lifting Russia's immunity from execution as relates to judgments or awards issued in litigation brought by the Ukrainian state and/or judgments rendered by Ukrainian courts in cases related to personal injury or damage to property, but excluding judgments obtained in private litigation against Russia in non-Ukrainian courts.[101] (footnote in quote omitted)

Exception for executive acts

Immunity from enforcement, as it is generally understood, applies to judicial acts. In light of Russia's aggression against Ukraine, much of the debate has focused on whether immunity from enforcement applies to executive action taken against a foreign state's assets (e.g., attachment of frozen central bank assets). The overarching view appears to be that immunity from enforcement will not apply to executive acts taken against state property.[102]

This view relies in part on the ICJ, UNCSI, and UKSIA each referring to immunity from the jurisdiction of the courts of another state.[103] For example, in the *Jurisdictional Immunities* case the ICJ referred to the fact that a "State against which judgment has been given can[not] be subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question."[104] It is also noteworthy that, in Jurisdictional Immunities, the Greek claimants, pursuant to a decision by the Court of Appeal of Florence, registered with the provincial office of the Italian Land Registry (an executive body), a "legal charge over Villa Vigoni, a property of the German State near Lake Como.[105] The court did not discuss, however, whether an action by the Land Registry may itself violate sovereign immunity.

C. JUSTICIABILITY

In addition to the issues discussed above, the question of justiciability might arise. Whilst, historically, various mechanisms have been used to enforce foreign judgments, such as international nonjudicial institutions, diplomatic negotiations, or self-help,[106] it is clear that international law did not contemplate direct enforcement of international courts judgments by domestic courts.[107] Rather, it contemplated enforcement through diplomatic means. International law separates the adjudicative and post-adjudicative phase, such that enforcement has the quality of an entirely new dispute to be regulated by "political means" rather than judicial procedure. For example, a power-orientated enforcement mechanism between states is unproblematic.[108] However, at present, there does not exist a single robust mechanism in place to enforce international judgments at the national level for individuals litigating before an international court.

Under UK law, the Foreign Act of State doctrine operates to render certain issues non-justiciable in English courts as a matter of judicial restraint and mutual respect for the sovereignty of foreign nations. In 2017, Lord Neuberger found the following:

> [E]ach component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states.[109]

This rule could apply to prevent domestic courts from enforcing a judgment of the ECtHR, on the basis that it would be inappropriate for domestic courts to do so, and such measures should be reserved for executive diplomatic channels. However, this rule applies to a "high level arrangement," requiring a large part of state involvement that would render the domestic court incompetent to adjudicate. It is not clear that this would be the case in proceedings to enforce an ECtHR judgment.

Moreover, English Courts have previously held that proceedings on the recognition and enforcement of foreign judgments are justiciable in the UK. See, for example, the passage from Rix J in Yukos:

> An English court, subject to the requirements of any treaty or convention must, we think, always be entitled to ask and adjudicate on the issue whether a foreign court decision should or should not be recognised or enforced. Subject to treaty or convention, that is the proper business of the courts and they are armed and completely familiar with judicial standards by which to judge what are ultimately issues about judicial standards. Of course, comity demands that such inquiries are

> conducted with that proper respect which is owed in the international sphere to the courts of friendly foreign nations. That is why the English courts will require cogent grounds for any allegation that a foreign court decision should not be recognised on the grounds of a failure of substantial justice. However, that is a matter of evidence and argument, not a matter of any immunity or doctrine of non-justiciability.[110]

Also, the Foreign Act of State doctrine is subject to a public policy exception that would operate to prevent Russia from relying on it to avoid enforcement of a judgment given by the ECtHR.111 The UK Supreme Court held that whether a public policy exception to the doctrine exists is a matter of domestic public law, but in an international context, English public policy is informed by relevant norms of international law which are binding on the UK, such as jus cogens norms, which can be equated with fundamental principles of justice and are therefore of particular relevance in the context of the identification of domestic public policy.[112] The prohibition of aggression is a jus cogens norm,[113] such that the Foreign Act of State doctrine ought not prevent the enforcement of a judgment of the ECtHR which condemns Russia for its violation of that obligation.

APPENDIX A: STATUTORY PROCEDURES FOR RECOGNITION OF FOREIGN JUDGMENTS

ORIGIN COUNTRY	APPLICABLE STATUTE/CONVENTION
Scotland or Northern Ireland	The procedure is set out in • Civil Procedure Rules (CPR) 74.14 to 74.18 and • sections 18, 19 and schedules 6 to 7 to the Civil Jurisdiction and Judgments Act 1982. In short, the judgments must be registered in England in order to be enforceable. Registration in the UK is the equivalent of a declaration of enforceability (i.e., recognition) and is rather straightforward. The judgment creditor must first apply to the court where the judgment was given for a certificate to enable judgment to be enforced in other parts of the UK (the form of this application will depend on the manner prescribed by the original court). The judgment creditor can then apply to the High Court (within six months of the date of issue of the certificate) for the registration of the judgment, accompanying the application with a certified copy of the original judgment and certificate. A defendant can have registration set aside if, upon an application, the court is satisfied that the formalities of the registration procedure have not been complied with; or subject to the court's discretion, the matter in dispute in the proceedings in which the judgment in question was given had previously been the subject of a judgment by another court or tribunal having jurisdiction in the matter.
Judgments from other EU and EFTA countries	Depending on the jurisdiction of the judgments and the date on which the underlying claim was commenced, the rules governing the recognition and enforcement of EU and EFTA judgments are contained in The 2005 Hague Convention on Choice Court Agreements. The Hague Convention was implemented into English law by an amendment to the CJJA 1982 and applies to civil and commercial matters where there is an exclusive choice of court agreement in place.

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APPENDIX A: STATUTORY PROCEDURES FOR RECOGNITION OF FOREIGN JUDGMENTS (CONTINUED)

ORIGIN COUNTRY	APPLICABLE STATUTE/CONVENTION
Judgments from other EU and EFTA countries	The Hague Convention was re-acceded by the UK on 01 January 2021, and applies to judgments from • EU member states (including Denmark as a separate contracting party) • Mexico • Singapore • Montenegro Only judgments in civil and commercial matters are covered by it, and there are considerable areas that are excluded (i.e., family law, wills and succession, insolvency and arbitration, consumer, employment and insurance matters, rights in rem, and company law matters). Pursuant to the Hague Convention, the definition of "judgment" means "any decision on the merits given by a court. Default judgments are covered as well as costs determination and non-money judgments, but interim protective measures or procedural rulings are not." As such, foreign judgments given in any of the states that are a party to the convention can be enforced in England if the judgments relate to decisions on merits, costs determinations, and nonmoney judgments. Note that prior to Brexit, the (Recast) Brussels I Regulation governed enforcement of judgments within the EU with a relatively simple process—recognition of judgments was automatic. The Lugano Convention (no longer applicable) had a similar effect. Under the current procedure, all judgments must be registered prior to enforcement. The procedure for registration is set out in CPR 74.3 to 74.10.

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APPENDIX A: STATUTORY PROCEDURES FOR RECOGNITION OF FOREIGN JUDGMENTS (CONTINUED)

ORIGIN COUNTRY	APPLICABLE STATUTE/CONVENTION
Judgments from other EU and EFTA countries	An application for the registration of a foreign judgment under the Hague Convention must be made to the high court and be supported by written evidence, consisting of a) a complete and certified copy of the judgment; b) the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence; c) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party; d) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin; e) in the case referred to in Article 12, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin. In addition, the application must state whether interest is recoverable on the judgment under the law of the state of origin, and where the judgment is not in English, it must be supported by a translation either certified by a notary public or other qualified person or accompanied by written evidence confirming that the translation is accurate. The Hague Convention does not apply to arbitration awards.

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APPENDIX A: STATUTORY PROCEDURES FOR RECOGNITION OF FOREIGN JUDGMENTS (CONTINUED)

ORIGIN COUNTRY	APPLICABLE STATUTE/CONVENTION
Commonwealth Countries	Depending on the jurisdiction, the rules governing the recognition and enforcement of judgments from Commonwealth countries are contained in the Administration of Justice Act 1920 (AJA 1920) or the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933). The judgments must be registered in England in order to be enforceable. A defendant can apply to set aside registration under the AJA 1920, and the registration shall be set aside if the court is satisfied that • the original court acted without jurisdiction; or • the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or • the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agree to submit to the jurisdiction of that court; or • the judgment was obtained by fraud; or • the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or • the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

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APPENDIX A: STATUTORY PROCEDURES FOR RECOGNITION OF FOREIGN JUDGMENTS (CONTINUED)

ORIGIN COUNTRY	APPLICABLE STATUTE/CONVENTION
Commonwealth Countries	The defendant can also apply to set aside registration under the FJA 1933, and the registration shall be set aside if the court is satisfied that • the judgment is not a judgment to which the FJA 1933 applies or was registered in contravention of the provisions of the FJA 1933; or • the courts of the country of the original court had no jurisdiction in the circumstances of the case; or • the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or • the judgment was obtained by fraud; or • the enforcement of the judgment would be contrary to public policy in the country of the registering court; or • the rights under the judgment are not vested in the person by whom the application for registration was made; or • the matter in dispute in the proceedings in the original court had prior to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.

ENDNOTES

1 Where this report refers to the United Kingdom, it refers to the law of England and Wales, not including Scotland and Northern Ireland, where the law might differ.

2 See e.g. High Court of Justice, *Hulley Enterprises Limited, Yukos Universal Limited, Veteran Petroleum Limited v. Russia*, [2023] EWHC 2704 (Comm) (November 1, 2023), <https://www.italaw.com/sites/default/files/case-documents/180457.pdf>.

3 Enforcement is governed by Rule 74.9, and recognition is being separately dealt with under Rule 74.10; see also Lord Rodger's remark on Scottish law in House of Lords, *Clarke v. Fennoscandia Limited and others*, [2007] UKHL 56 (December 12, 2007), para. 18, <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/clarke-1.htm>: "I note that the division into recognition and enforcement is already reflected, of course, in the heading to Chapter 62 of the Court of Session Rules, 'Recognition, Registration and Enforcement of Foreign Judgments etc.'"

4 Dicey, Morris, and Collins, *Conflict of Laws*, 16th ed. (Sweet & Maxwell, 2022), para. 14-004.

5 House of Lords, Clarke v. Fennoscandia Limited and others, [2007] UKHL 56 (December 12, 2007) para. 21, <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/clarke-1.htm> (per Lord Rodger).

6 CMS, "Recognition and Enforcement of Foreign Judgments in England and Wales," <https://cms.law/en/int/expert-guides/cms-expert-guide-to-recognition-and-enforcement-of-judgements/england-and-wales>, accessed November 29, 2024.

7 Clifford Chance, "How to Enforce a Foreign Judgment in England" July 2021, <https://www.cliffordchance.com/content/dam/clifford-chance/briefings/2021/07/how-to-enforce-a-foreign-judgment-in-england.pdf>.

8 A. Pertoldi and G. Horlock, "Enforcement of Foreign Judgments Comparative Guide" (Herbert Smith Freehills, 2022), <https://www.mondaq.com/uk/litigation-mediation-arbitration/854344/enforcement-of-foreign-judgments-comparative-guide>.

9 CMS, "Recognition and Enforcement of Foreign Judgments in England and Wales." Note that specific rules apply for special civil law matters. For example, Civil Procedures Rules 75, 81, and 83 respectively contain special provisions for enforcement in relation to traffic matters, orders, or undertakings to do or abstain from doing an act, and writs and warrants. Note also that the recognition and enforcement of foreign commercial and civil arbitral awards is a separate matter, governed by the New York Convention.

10 Summary judgment is a special, expedited procedure whereby the English court can dispose of all the issues in a case without a trial on the basis that the defendant has no reasonable prospect of defending the claim. Summary judgment applications are normally dealt with without the need for oral evidence; CMS, "Recognition and Enforcement of Foreign Judgments in England and Wales."

11 Dicey, Morris, and Collins, *Conflict of Laws*, para. 14R-054.

12 D. Stamboulakis, *Comparative Recognition and Enforcement* (Cambridge University Press, 2022), 1.

13 Pertoldi and Horlock, "Enforcement of Foreign Judgments Comparative Guide." .

14 E.g. Enforcement under the Administration of Justice Act 1920, Part II, <https://www.legislation.gov.uk/ukpga/Geo5/10-11/81/contents>, is optional—the judgment creditor can choose to either rely on the act or on the common law (although if the judgment creditor relies on the common law, they may not be able to recover the costs of enforcement—see section 9(5) of the 1920 act). The Foreign Judgments (Reciprocal Enforcement) Act 1933, <https://www.legislation.gov.uk/ukpga/Geo5/23-24/13/contents>, applies on an exclusive basis, which means that where it applies an action under the common law is not possible (see section 6 of the 1933 act).

15 O. Browne and G. Blears, "Enforcement of Foreign Judgments—United Kingdom—Q&A Guide" (Lexis+UK, 2022), <https://plus.lexis.com/uk/document/?pdmfid=1001073&crid=0d5d1b57-9edc-4f64-93b3-7599b862b897&pddocfullpath=%2Fshared%2Fdocument%2Fpractical-guidance-uk%2Furn%3AcontentItem-%3A621K-GKT3-GXFD-84PS-00000-00&pdcontentcomponentid=128510&pddocumentnumber=2&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&prid=418e04c3-1615-4882-a2bc-fe8beb854f99&ecomp=ft5k&earg=sr1.&federationidp=6HJN8259144&cbc=0#>.

16 Note that in High Court of Justice, Commercial Court, *Midtown Acquisitions LP v. Essar Global Fund Limited*, [2017] EWHC 519 (March 17, 2017), paras. 54–55 <https://vlex.co.uk/vid/midtown-acquisitions-lp-v-793071065>, the court found that a foreign (New York) judgment could be final and binding, notwithstanding there being a motion to vacate. A motion to vacate is a formal proposal, either to vacate the decision in a matter that had previously been formally ruled upon or decided, or to replace the holder of a presiding position.

17 Court of Appeal, *Joint Stock Company "Aeroflot-Russian Airlines" v. Berezovsky & Anor*, [2014] EWCA Civ 20 (January 16, 2014), para. 2 <https://vlex.co.uk/vid/joint-stock-company-aeroflot-805977581>.

18 House of Lords, *DSV Silo- und Verwaltungsgesellschaft MBH v. Owners of the Sennar and 13 Other Ships* (The Sennar No. 2), [1985] 1 WLR 490 (March 21, 1985), 493–4.

19 A. Briggs, *Civil Jurisdiction and Judgments*, 6th ed. (Sweet & Maxwell, 2015), ch. 7.

20 Pinsent Masons, "Enforcing Foreign Judgments in England & Wales," August 5, 2011, <https://www.pinsentmasons.com/out-law/guides/enforcing-foreign-judgments-in-england-and-wales>.

21 For example, in Court of Appeal, *Lenkor Energy Trading DMCC v. Mr Irfan Iqbal Puri*, [2021] EWCA Civ 770 (May 21, 2021), <https://vlex.co.uk/vid/lenkor-energy-trading-dmcc-868321762>, the English Court of Appeal rendered a positive decision for international businesses seeking to enforce foreign judgments in England pursuant to the common law mechanism. In its judgment, the Court of Appeal stressed, among other things, that in this case the question related to enforcing a judgment given by a foreign court of competent jurisdiction, and not to simply enforcing a contract. See also Courts of Exchequer and Exchequer Chamber, *Williams v. Jones*, [1845] 13 M. & W. (January 22, 1845) 628, 633; *Godard v. Gray*, [1870] L.R. 6 Q.B. 139, 147; *Schibsby v Westenholz* [1870] L.R. 6 Q.B. 155, 159.

22 UK Supreme Court, *Rubin and another v. Eurofinance SA and others*, [2012] UKSC 46 (October 24, 2012), para. 7, <https://www.supremecourt.uk/cases/docs/uksc-2010-0184-judgment.pdf>.

23 Dicey, Morris, and Collins, *Conflict of Laws*, para. 14R-054; UK Supreme Court, *Rubin and another v. Eurofinance SA and others*, [2012] UKSC 46 (October 24, 2012), para. 10, <https://www.supremecourt.uk/cases/docs/uksc-2010-0184-judgment.pdf>.

24 Court of Appeal, Joint *Stock Company "Aeroflot-Russian Airlines" v. Berezovsky & Anor*, [2014] EWCA Civ 20 (January 16, 2014), para. 2, <https://vlex.co.uk/vid/joint-stock-company-aeroflot-805977581>.

25 Court of Appeal, *Gelley and others v. Shepherd and another*, [2013] EWCA Civ 1172 (October 7, 2013), <https://vlex.co.uk/vid/robert-gelley-and-others-793531109>.

26 High Court, *JSC VTB Bank v. Shurikhin and others*, [2014] EWHC 271 (February 13, 2014), paras. 30–31, <https://www.oeclaw.co.uk/images/uploads/judgments/JSC_VTB_Bank_v_Skurikhin_2014_EWHC_271_(Comm).pdf>.

27 Court of Appeal, *Joint Stock Company "Aeroflot-Russian Airlines" v. Berezovsky & Anor*, [2014] EWCA Civ 20 (January 16, 2014), para. 2, <https://vlex.co.uk/vid/joint-stock-company-aeroflot-805977581>.

28 Sections 15B and 15C of the Civil Jurisdiction and Judgments Act 1982, <https://www.legislation.gov.uk/ukpga/1982/27/contents>.

29 House of Lords, *British South Africa Companz v. Companhia de Moçambique and Others*, [1893] AC 602 (September 8, 1893), <https://www.uniset.ca/other/cs6/1893AC602.html>.

30 Council of Europe Committee of Ministers, *16th Annual Report of Committee of Ministers* (Council of Europe, 2022) 50, <https://rm.coe.int/annual-report-2022/1680aad12f>.

31 Reports by the Department for the Execution of Judgments have addressed general and individual measures ordered against the UK that can be "put into effect" by competent domestic courts in the UK. For instance, in UK v. Steel and Morris, the general measures regarding freedom of expression were to be put into effect by domestic UK courts (see Council of Europe Committee of Ministers, *1st Annual Report of Committee of Ministers* [Council of Europe, 2007], 167, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680592ac3).

32 ECHR, Article 46.

33 Brussels Civil Tribunal, *Société commerciale de Belgique (SOCOBEL) v. Etat hellénique et Banque de Grèce*, 1953 Recueil Sirey Jurisprudence I, IV, 1 (May 29, 1951), <http://www.cahdidatabases.coe.int/Contribution/Details/316>.

34 O. Schachter, "The Enforcement of International Judicial and Arbitral Decisions," *American Journal of International Law* 54, no. 1 (1960): 12.

35 Ibid.

36 Court of Appeal, *Dallal v. Bank Mellat* [1986] 1 QB 441 (HC) (June 27, 1985), <https://newyorkconvention1958.org/doc_num_data.php?explnum_id=1929>; High Court, *Re The Bumbesti* ([1999] EWJC B6 (Admlty) (June 22, 1999), <https://www.casemine.com/judgement/uk/5a8ff7b860d03e7f57eb1795>: obligation to pay a valid arbitral award creates a fresh cause of action; High Court, *Diag Human SE v. Czech Republic* [2014] EWHC 1639 (Comm) (May 22, 2014), paras. 10–11, <https://www.casemine.com/judgement/uk/5a8ff75d60d03e7f57eabc39>; High Court, *Carpatsky Petroleum Corporation v. PJSC Ukrnafta* [2020] EWHC 769 (Comm) (March 31, 2020), para. 39, <https://www.judiciary.uk/wp-content/uploads/2020/03/Carpatsky-Petroleum-Corporation-v.-PJSC-Ukrnafta-Judgment_.pdf>.

37 Dicey, Morris, and Collins, *Conflict of Laws*, 14-007.

38 Court of Appeal, *Dallal v. Bank Mellat* [1986] 1 QB 441 (HC) (June 27, 1985), <https://newyorkconvention1958.org/doc_num_data.php?explnum_id=1929>.

39 Ibid, 460–2.

40 While comity has been superseded by the doctrine of obligations and, therefore, no longer plays an important role in the field of foreign judgments, it plays a role in other fields of private international law. In the field of injunctions or ascertaining the territorial scope of British statutes, comity is often used to self-impose limitations on prescriptive and enforcement jurisdiction. It is also of some relevance in relation to public policy.

41 Dicey, Morris, and Collins, *Conflict of Laws*, paras. 14-002 to 14-006.

42 Court of Appeal, *Jimmy Wayne Adams & Ors. v. Cape Industries Plc & Capasco Ltd.* [1990] Ch. 433 (July 27, 1989), 552, <https://vlex.co.uk/vid/adams-v-cape-industries-793394005>. Note, however, that the court did also express the view that some notion of comity lay behind the recognition of judgments.

43 G. Cuniberti, The *Basis for the Effect of Foreign Judgments*, Pocket Books of The Hague Academy of International Law (Brill, 2019), 111 (translated).

44 Cuniberti, *Basis for the Effect of Foreign Judgments*, 115–6.

45 Note that this requirement is widely considered unsatisfactory, and Canadian case law has evolved on this point as a result of courts' abandonment of the doctrine of obligation in favor of the theory of comity. Commonwealth courts have found that the Canadian decision remains relevant in the English context and, noting the long-standing case law of the Court of Chancery (where non-monetary judgments were previously enforced), have accepted that foreign non-monetary judgments may now be considered enforceable. See Cuniberti, '*Basis for the Effect of Foreign Judgments* 89.

46 State Immunity Act 1978, <https://www.legislation.gov.uk/ukpga/1978/33?view=plain> (hereinafter UKSIA).

47 UK Supreme Court, *Belhaj v. Straw* [2017] UKSC 3 (January 17, 2017), para. 15, <https://www.supremecourt.uk/cases/uksc-2014-0264.html>.

48 See e.g. High Court, *General Dynamics United Kingdom Ltd v. State of Libya* [2022] EWHC 501 (Comm) (March 11, 2022), para. 34, <https://jusmundi.com/en/document/decision/en-general-dynamics-united-kingdom-ltd-v-the-state-of-libya-judgment-of-the-high-court-of-justice-of-england-and-wales-2022-ewhc-501-friday-11th-march-2022#decision_21146>: finding that it would be premature to consider enforcement immunity when seeking recognition and enforcement of an arbitration award under section 101 of the Arbitration Act.

49 Article 18 and Article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, December 2, 2004, <https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf> (hereinafter UNCSI).

50 International Court of Justice (ICJ), *Jurisdictional Immunities of the State, Germany v. Italy*, para 130.

51 Ibid., para. 128.

52 Court of Appeal, *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania AB Geonafta*, [2006] EWCA Civ 1529 (November 13, 2006), para. 117, <https://www.casemine.com/judgement/uk/5a8ff71b60d03e7f57ea79e6>.

53 Webb in "Enforcement of International Judgments and Awards against State Property" (on file with authors) argues that the UKSIA could be amended to expand the scope of the arbitration exception to interstate proceedings and potentially also to proceedings relating to ECtHR/ICJ judgments.

54 Ibid.

55 Fox and Webb, *The Law of State Immunity*, 3rd ed. (Oxford University Press, 2015), 491.

56 Fox and Webb, *The Law of State Immunity*, 488.

57 UK Supreme Court, *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22, [2022] AC 318 (June 25, 2021), para. 59, <https://www.supremecourt.uk/cases/docs/uksc-2019-0166-judgment.pdf> (per Lord Lloyd-Jones JSC).

58 J.-M. Thouvenin and V. Grandaubert,"The Material Scope of State Immunity from Execution," in T. Ruys, N. Angelet, and L. Ferro, *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), 245–265.

59 Fox and Webb, The Law of State Immunity, 486.

60 Since the UNCSI only has 28 signatories and 23 state parties (having ratified or acceded as of July 2023), the UN Convention is not yet in force, requiring another seven states to ratify or accede to it before it can become binding. However, in the case before the High Court, *AIG Capital Partners Inc v. Republic of Kazakhstan*, [2006] 1 WLR 1420 (October 20, 2005), para. 80, <https://www.casemine.com/judgement/uk/5a8ff7b060d03e7f57eb13ef>, Aikens J held that the convention "powerfully demonstrates international thinking." See also House of Lords, *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia & Ors.* [2006] UKHL 26 and [2006] 2 WLR 1424 (June 14, 2006), para. 8, <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf>.

61 European Convention on State Immunity, Basle, 16.V.1972 (1972), <https://rm.coe.int/16800730b1> (hereinafter ECSI).

62 In Court of Appeal of Jersey, *Boru Hatlari Ile Petrol Tasima AS and others (also known as Botas Petroleum Pipeline Corp) v. Tepe Insaat Sanayii AS* [2018] UKPC 31 (October 22, 2018), para. 25, <https://uksupremecourt.co.uk/uploads/jcpc_2016_0104_judgment_c616f85b48.pdf>, Lord Mance found that the ECSI (as opposed to the UNCSI) is the international instrument to which the UKSIA does "owe some allegiance," since it was aimed at giving broad effect to the ECSI.

63 High Court, *AIG Capital Partners Inc v. Republic of Kazakhstan*, [2006] 1 WLR 1420 (October 20, 2005), para. 45, <https://www.casemine.com/judgement/uk/5a8ff7b060d03e7f57eb13ef>.

64 Ibid. "Central bank" is not defined in the UKSIA.

65 If the central bank is an executive of the government, it will be immune from suit, subject to exceptions listed in Sections 2 to 11. If a central bank is a separate entity as defined in Section 14(1) it will only have immunity where proceedings relate to anything done by it in exercise of sovereign authority, and where the state would otherwise be immune. See UKSIA, Section 14.

66 UKSIA, Section 14(4).

67 Court of Appeal, *Banco Nacional de Cuba v. Cosmos Trading Corp* [1999] EWCA Civ 1047, [2000] BCC 910 (CA) (March 22, 1999).

68 For example, in High Court, *Koo Golden East Mongolia (A Body Corporate) v. Bank of Nova Scotia & Ors*, [2008] EWHC 1120 (QB) (May 20, 2008), <https://www.casemine.com/judgement/uk/5a8ff77160d03e7f57eac7d6>, the court refused to grant a Norwich Pharmacal order for disclosure against the central bank of Mongolia.

69 High Court, *AIG Capital Partners Inc v. Republic of Kazakhstan*, [2006] 1 WLR 1420 (October 20, 2005), <https://www.casemine.com/judgement/uk/5a8ff7b060d03e7f57eb13ef>.

70 High Court, *Thai-Lao Lignite (Thailand) Co. Ltd v. Laos and Hongsa Lignite (Lao PDR) Co. Ltd v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) (August 8, 2013), para. 23, <https://www.oeclaw.co.uk/images/uploads/judgments/Thai-Lao_Lignite_(Thailand)_Co_Ltd_v_Laos_2013_EWHC_2466.pdf>; High Court, AIG Capital Partners Inc v. Republic of Kazakhstan, [2006] 1 WLR 1420 (October 20, 2005), para. 45, <https://www.casemine.com/judgement/uk/5a8ff7b060d03e7f57eb13ef>.

71 Court of Appeal, *Taurus Petroleum Ltd v. State Oil Company Co of the Ministry of Oil*, Republic Iraq [2015] EWCA Civ 835 (July 28, 2015), para. 52, <https://www.casemine.com/judgement/uk/5a8ff6fd60d03e7f57ea5512>.

72 High Court, *Thai-Lao Lignite (Thailand) Co. Ltd v. Laos and Hongsa Lignite (Lao PDR) Co. Ltd v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) (August 8, 2913), paras. 23 and 25(2), <https://www.oeclaw.co.uk/images/uploads/judgments/Thai-Lao_Lignite_(Thailand)_Co_Ltd_v_Laos_2013_EWHC_2466.pdf>. At paragraph 25(2), the High Court held that property protected by immunity under S. 13(2)(b) "would be accounts in which, whatever the extent or nature of the Government's interest, the Central Bank would have at least a contractual interest as the account holder."

73 UKSIA, Section 13(4); Court of Appeal of Jersey, *Boru Hatlari Ile Petrol Tasima AS and others (also known as Botas Petroleum Pipeline Corp) v. Tepe Insaat Sanayii* AS [2018] UKPC 31 (October 22, 2018), para. 20, <https://uksupremecourt.co.uk/uploads/jcpc_2016_0104_judgment_c616f85b48.pdf>.

74 Court of Appeal of Jersey, *Boru Hatlari Ile Petrol Tasima AS and others (also known as Botas Petroleum Pipeline Corp) v. Tepe Insaat Sanayii AS* [2018] UKPC 31 (October 22, 2018), para. 20, <https://uksupremecourt.co.uk/uploads/jcpc_2016_0104_judgment_c616f85b48.pdf>.

75 Appeal Court of Hong Kong, *Juan Ysmael & Company Incorporated v. Government of the Republic of Indonesia and another (Consolidated Appeals)* [1954] 3 WLR 531 (October 7, 1954), <https://www.casemine.com/judgement/uk/5b2897dd2c94e06b9e19c80e>; High Court, Congreso del Partido [1977] 3 WLR 778 (January 28, 1977), <https://www.uniset.ca/other/cs2/1978QB500.html>; R. Higgins DBE QC, Themes & Theories (Oxford University Press, 2009), 356.

76 England and Wales High Court, *Continental Tranfert Technique Ltd v. Nigeria & Ors* [2010] EWHC 780 (Comm) (March 30, 2010), para. 12, <https://www.casemine.com/judgement/uk/5a8ff72660d03e7f57ea89b9>.

77 UKSIA, Section 13(3).

78 UKSIA, Section 13(4).

79 UKSIA, Section 13(5).

80 UKSIA, Section 13(3); ICJ, *Jurisdictional Immunities of the State, Germany v. Italy*, para. 113.

81 House of Lords, *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia & Ors.* [2006] UKHL 26 and [2006] 2 WLR 1424 (June 14, 2006), <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf>.

82 Fox and Webb, *The Law of State Immunity*, 214.

83 High Court, *Thai-Lao Lignite (Thailand) Co. Ltd v. Laos and Hongsa Lignite (Lao PDR) Co. Ltd v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm) (August 8, 2013), para. 22, <https://www.oeclaw.co.uk/images/uploads/judgments/Thai-Lao_Lignite_(Thailand)_Co_Ltd_v_Laos_2013_EWHC_2466.pdf> (emphasis retained).

84 England and Wales High Court, *Pearl Petroleum v. The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm) (November 20, 2015), para. 42, <https://www.casemine.com/judgement/uk/5a8ff7d460d03e7f57eb25c6>.

85 UKSIA, Section 14(3) and 13(3).

86 See, for example, the argument of S. Wordsworth KC in relation to arbitration agreements in Wordsworth, "Challenges, Finality and Enforcement," in *International Commercial Arbitration*, 3rd ed., ed. M. J. Mustill and S. C. Boyd (LexisNexis Butterworths, 2024), ch. 20.

87 International Court of Justice, February 3, 2012, Jurisdictional immunities of the state (*Germany v. Italy*, Greece intervening), https://icj-cij.org/case/143, para. 113.

88 As far back as Court of Appeal, *The Parlement Belge* [1880] 5 PD 197 (February 27, 1880), the Court of Appeal referred to the "absolute independence of every sovereign authority" and spoke of immunity of "the public property of any state which is destined to public use"; see Higgins DBE QC, *Themes & Theories*.

89 House of Lords, *Alcom Ltd v. Republic of Colombia* [1984] AC 580 (April 12, 1984), 630, <https://vlex.co.uk/vid/alcom-ltd-v-republic-792878269>.

90 UKSIA, Section 14(4); Higgins DBE QC, *Themes & Theories* 406.

91 The PCIJ is the predecessor to the ICJ.

92 Webb, "Enforcement of International Judgments and Awards."

93 Ibid.

94 International Court of Justice, *Corfu Channel (UK v. Albania)* (Compensation) [1949] ICJ Rep 244 (December 15, 1949), <https://icj-cij.org/sites/default/files/case-related/1/001-19491215-JUD-01-00-EN.pdf>.

95 Webb, "Enforcement of International Judgments and Awards"); M. N. Shaw QC, *Rosenne's Law and Practice of the International Court: 1920--2015*, 5th ed. (Brill, 2016), para. 1.49.

96 International Court of Justice, Case of the Monetary Gold Removed from Rome in 1943 (*Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), Pleadings, Oral Arguments, Documents (June 15, 1954), 126, 131, <https://www.icj-cij.org/sites/default/files/case-related/19/019-19540510-ORA-01-00-BI.pdf>.

97 UK Parliament, Hansard: "Albania (British Claim), Volume 484: debated on Thursday 1 March 1951" (March 1, 1951), <https://hansard.parliament.uk/Commons/1951-03-01/debates/0c06e-6be-f802-4ebb-83b3-e27fb1eddc0a/Albania(BritishClaim)>; UK Parliament, Hansard: "Albania (British Claim), Volume 488: debated on Wednesday 6 June 1951" (June 6, 1951), <https://hansard.parliament.uk/Commons/1951-06-06/debates/90a6bf85-f263-4548-807f-6a38cb0ff3eb/Albania(BritishClaim)>; UK Parliament, Hansard: "Albania (British Claim), Volume 504> debated on Monday 28 July 1952" (July 28, 1952), <https://hansard.parliament.uk/Commons/1952-07-28/debates/25eb7c4b-7284-4a38-8b98-b4af95e0c29b/Albania(BritishClaim)>.

98 Schachter, "The Enforcement of International Judicial and Arbitral Decisions," 10, 11–12, 13–14.

99 Webb, "Enforcement of International Judgments and Awards against State Property."

100 Council of Europe Committee of Ministers, "Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe," CM/Res(2022)3 (March 23, 2022), <https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f>.

101 World Refugee and Migration Council, "Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options," research paper, July 2022, 33, <https://www.wrmcouncil.org/wp-content/uploads/2022/07/Frozen-Russian-Assets-Ukraine-Legal-Options-Report-WRMC-July2022.pdf>.

102 See e.g. A. Moiseienko, "Trading with a Friend's Enemy," 116 *American Journal of International Law* 116, no. 4 (2022): 726; Ceasefire, "Reparations for Ukraine: An International Route Map," June 2022, <https://www.ceasefire.org/wp-content/uploads/2022/06/CFR_Ukraine_EN_Jun22_3.pdf>; World Refugee and Migration Council, "Frozen Russian Assets and the Reconstruction of Ukraine," 15–16, 25–26 . Note the opposing argument mentioned on p. 16—that if a state cannot freeze another state's property in pursuance of a court order, it also cannot do so in the absence of such an order, based on the executive branch's decision alone.

103 T. Ruys, "Immunity, Inviolability and Countermeasures—A Closer Look at Non-UN Targeted Sanctions," in *The Cambridge Handbook of Immunities and International Law*, ed. T. Ruys, N. Angelet, and L. Ferro (Cambridge University Press, 2019), 670–710, arguing that certain measures taken by administrative/executive powers can engage state immunity if they are taken *"in relation to a judicial proceeding"*; and I. Wuerth, "Immunity from Execution of Central Bank Assets," in *The Cambridge Handbook of Immunities and International Law*, ed. T. Ruys, N. Angelet, and L. Ferro (Cambridge University Press, 2019), 267, defining immunity from execution as "a broad term that includes immunity from the *enforcement of judgments*, or, using other terminology, 'post-judgment measures of constraint'."

104 ICJ, Jurisdictional Immunities of the State, *Germany v. Italy*, para. 113.

105 ICJ, Jurisdictional Immunities of the State, *Germany v. Italy*, para. 109.

106 R. Frimpong Oppong and L. C. Niro, "Enforcing Judgments of International Courts in National Courts," *Journal of International Dispute Settlement* 5, no. 2 (2014) 344.

107 Ibid.

108 Ibid., 346.

109 UK Supreme Court, *Belhaj v. Straw* [2017] UKSC 3 (January 17, 2017), paras. 123 and 147, per Lord Neuberger, <https://www.supremecourt.uk/cases/uksc-2014-0264.html.

110 *Yukos Capital Sarl v. OJSC Rosneft Oil Co* (No 2) [2012] EWCA Civ 855 (June 27, 2012), para. 125, <https://www.casemine.com/judgement/uk/5a8ff7b760d03e7f57eb171f>.

111 UK Supreme Court, *Belhaj v. Straw* [2017] UKSC 3 (January 17, 2017), para. 257, per Lord Sumption, <https://www.supremecourt.uk/cases/uksc-2014-0264.html>.

112 UK Supreme Court, *Belhaj v. Straw* [2017] UKSC 3 (January 17, 2017), para. 257, per Lord Sumption, <https://www.supremecourt.uk/cases/uksc-2014-0264.html>.

113 International Law Commission, "Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens)," in *Yearbook of the International Law Commission Vol. II*, Part Two (United Nations, 2022), conc. 23, <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf>.

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