allowing assignment with the consent of the debtor insurer clearly comes within Article 12(2). So too does the issue whether the assignee has to join the assignor to the action to enforce the original contract, as this is also a matter of invoking the assignment against the debtor. Also, it would be nonsensical to answer the question which of two apparently effective assignments should take priority by the application of any law other than the law governing the original contract. This is a strictly "proprietary" question, but if the effect of each assignment on the debtor is to be determined by the law governing the original contract, the solution of which assignment takes priority must follow. Let us hope that this rule will take root and mature nicely. The contrary decision of the Dutch Supreme Court in *Brandsma qq* v. *Hansa Chemie AG* (1997) (noted by Struycken [1998] LMCLQ 345) that the issue of the effect of the assignment on the debtor should be answered by Article 12(1) (*i.e.* by the law governing the assignment) must be allowed to wither and die.

PIPPA ROGERSON

STATE IMMUNITY OUTSIDE THE STATE IMMUNITY ACT

Is the State Immunity Act 1978 the sole basis for deciding on State immunity? It is and it is not. This seemingly self-contradictory reply is due to the fact that, on the one hand, any proceedings directly or indirectly against a foreign State must be brought under the 1978 Act while, on the other, certain provisions of that Act might paradoxically render the Act itself inapplicable and therefore entail recourse to rules outside the Act for settling the issue of State immunity. This is amply illustrated by the decision of the House of Lords in *Holland* v. *Lampen-Wolfe* [2000] 1 W.L.R. 1573, which involved a claim for defamation brought by a US university professor teaching international relations at a US military base in England as part of an education programme provided by her university under a commercial agreement with the US Government. The claim was brought against the education services officer at the base, who had written a memorandum listing serious complaints about the plaintiff's performance and questioning her professional competence. The US Government claimed immunity on the defendant's behalf.

Part I of the 1978 Act incorporates a general rule of State immunity with a number of specific exceptions. However, section 16(2) of that Act provides that Part I "does not apply to

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proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom ...". The first step, naturally, was to interpret this provision, for if its requirements were met, then the case would fall outside the scope of the Act. Lord Hope thus proclaimed that State immunity in English law was "the subject of two separate regimes", namely the 1978 Act and the common law, which applied "to all cases that fall outside the scope of Part I of the Act".

1. Section 16 (2)

This "somewhat curious provision" (*per* Lord Millett at p. 1584) gives effect to Article 31 of the European Convention on State Immunity 1972, which provides that "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces ...". Whereas Article 31 is a saving clause that keeps State immunity with regard to armed forces unaffected by the provisions of the Convention, section 16(2) disapplies both the immunity and the exceptions, leaving the position of foreign armed forces in the UK outside the 1978 Act and to be governed by the common law. Lord Millett took the view that this might not have been Parliament's intention but instead might have been the result of mistakenly employing the drafting technique of Article 31. Parliament might even have assumed that any proceedings falling within section 16(2) would necessarily be covered by immunity at common law.

The central concepts to be interpreted were "by or in relation to" and "armed forces". As for the characterisation of the acts of writing and publishing the memorandum by the defendant in his capacity as education services officer at the base, Lord Hope considered them as either done "by or in relation to" or "in relation to" the US armed forces. For Lord Clyde, though it was not unreasonable to hold those acts as done "by" the armed forces, it was preferable to take a broad approach and to regard them as done "in relation to" the armed forces. Lord Millett, while declaring his inclination to hold the acts as done "by" the armed forces, said that it was unnecessary to decide this because he was satisfied that the acts had been done "in relation to" the US armed forces, since the memorandum had been concerned with the quality of educational services supplied to members of the armed forces and had been written and published by the defendant in the course of his official duties to supervise and monitor the supply of those services.

The term "armed forces" was defined as not limited to military personnel but including the civilian component. It was a matter for

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each State to decide how best to organise its own armed forces and related services. For an overseas military base to be as self-contained as possible, the State might need to provide services that were not strictly military in character.

Such a broad interpretation seems to suggest that the phrases "by or in relation to" and "armed forces" are not restrictive terms of art. Therefore it is only a matter of appreciation to look for some minimum connection between the disputed acts and the foreign armed forces so as to build a *prima facie* case that the proceedings fall outside the 1978 Act and are to be resolved at common law.

2. The common law

English courts maintained a doctrine of absolute immunity until the landmark cases of *The Philippine Admiral* [1977] A.C. 373 and *Trendtex* [1977] Q.B. 529, which adopted a restrictive doctrine of immunity, whereby a foreign State enjoys immunity for governmental or sovereign activity (*acta iure imperii*) but not for private or commercial activity (*acta iure gestionis*). In making such a distinction, Lord Wilberforce held in *I Congreso del Partido* [1983] 1 A.C. 244 that the commercial nature rather than the sovereign purpose of the relevant act was decisive and that, in order to identify the relevant act, the whole context of the claim must be considered.

Their Lordships expressly declared that they would follow this nature-context principle. In the present case, the overall context was held to be that of the provision of educational services to military personnel and their families at the military base, the maintenance of which was plainly a sovereign activity. Though the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university, or the educational programme itself for that matter, hardly seemed an act *iure imperii*, the provision of education, which was designed to strengthen the quality and efficiency of the armed forces or to ease their transition to civilian life on retirement from active service, was part of the process of maintaining forces and associated civilians on the base to serve the needs of the US military authorities, and this was enough to make the disputed acts sovereign.

Therefore the standard of education that the US afforded its servicemen and their families was a matter within its own sovereign authority, and so accordingly was the act of writing the memorandum in the course of the supervision of the education programme. This reasoning is similar to that in *Littrell* v. *USA*

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(No. 2) [1995] 1 W.L.R. 82, where the Court of Appeal held that the operation of a military hospital, although no doubt requiring much the same skills as the operation of a civilian hospital, was a recognised military activity. The standard of medical care that the US afforded its own servicemen was thus a matter within its own sovereign authority.

In other words, because the provision of education served a military/sovereign purpose, it and related acts assumed a sovereign character. Thus, despite their declared intention that only the *nature* of the activity in question should be considered, their Lordships actually adopted in essence a *purpose* test. In this the decision very much resembles a similar holding by the Canadian Supreme Court in *USA* v. *Public Service Alliance of Canada* (1992) 91 D.L.R. (4th) 449, where the purpose test was explicitly adopted.

3. The European Convention on Human Rights

The plaintiff also argued that a denial of jurisdiction would infringe her right of access to court for the determination of civil rights as required by Article 6 of the European Convention on Human Rights 1950. On this their Lordships held that Article 6 did not preclude a State from granting immunity to a foreign State as required by international law. Article 6 should be applied within the framework of municipal judicial systems but did not otherwise confer on contracting States adjudicative powers that they did not possess.

On the whole the case contains no surprises. It confirms the holding in *Littrell* v. *USA (No. 2)* and closely follows *I Congreso's iure imperii/iure gestionis* distinction. Yet it is the first decision by the House of Lords to apply the common law as a separate basis for dealing with post-1978 Act situations. The case throws much light on the complicated problem of the *iure imperii/iure gestionis* distinction. In particular, it shows that it is sometimes difficult to decide upon the *nature* of a particular activity without reference to its *purpose*. Moreover, in pinpointing the relevant act for decision, the House encountered the same perplexing issue that it had in *Kuwait Airways Corporation* v. *Iraqi Airways Co.* [1995] 1 W.L.R. 1147.

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