ment the reasons for and evidence underlying the non-return order made under Article 13 of the 1980 Hague Convention.[67] It has previously been noted that the automatic recognition of return orders may give rise to problems in practice, however, it must be pointed out that 'fast tracking' extends only to recognition, enforcement remains a matter for national law[68] and as has sometimes happened in Hague Convention proceedings a return order may be made but then not enforced either because of the objections of the children or the harm which might result to them by being sent back.[69]

PETER MCELEAVY*

II. ENFORCING ANTI-SUIT INJUNCTIONS AGAINST SOVEREIGN STATES[1]

The Court of Appeal (Pill and Waller LJJ and Sir Martin Nourse) has considered interesting jurisdiction issues arising out of a projects dispute between a Pakistani company ('Sabah') and the Government of Pakistan (the 'GOP'). The Court gave welcome guidance on the principles underlying the grant of anti-suit injunctions in cases where the parties have agreed to the non-exclusive jurisdiction of the English courts. However, questions of how an anti-suit injunction obtained against a State may be enforced largely remain unanswered.

A. The Facts

Sabah was incorporated by its Malaysian parent for the sole purpose of entering into certain agreements with the GOP and a State-owned corporation, the Karachi Electrics Supply Corporation Limited. As part of the arrangements, the GOP also entered into a guarantee in favour of Sabah. The guarantee contained a waiver of sovereign immunity clause and a jurisdiction clause in favour of the courts of England.

Disputes arose and Sabah made a demand under the guarantee. The GOP refused to pay and issued proceedings in Pakistan obtaining an injunction preventing Sabah from commencing proceedings in England. The case was adjourned in Pakistan until a specified date. Sabah asserted that the anti-suit injunction ceased to have effect after that date whilst the GOP asserted that it remained effective. In any event, Sabah made an application to the English court and David Steel J (who did not feel it necessary to resolve what had happened in the Pakistani proceedings) granted an anti-suit injunction restraining proceedings in Pakistan.

B. The Jurisdiction Clause

On appeal, Lord Justice Waller, who gave the leading judgment, held that on its true

[67] Art 42(2)(c).
[68] Art 47(1).
[69] See *Re B (Children) (Abduction: New Evidence)* [2001] 2 FCR 531 and the subsequent report in *The Times*, 18 May 2001.

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[1] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] All ER (D) 201 (Nov), [2002] EWCA Civ 1643. Also reported at [2003] 2 Lloyd's Rep 571.

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construction the jurisdiction clause was not an exclusive jurisdiction clause in the sense of making it a breach of contract for either party to commence proceedings in a jurisdiction other than England. Nevertheless even though the jurisdiction clause was non-exclusive his Lordship found that in the circumstances '[i]t was . . . clearly a breach of contract to seek to prevent Sabah commencing proceedings in the agreed jurisdiction'[2] and that the judge had been right to grant an anti-suit injunction.

His Lordship concluded:

> The proceedings were commenced, it is plain, as a pre-emptive strike, and in the hope of preventing Sabah starting proceedings in the country to which both parties had agreed. The only basis for suggesting that the proceedings should be allowed to continue is that Pakistan is a convenient forum. It simply cannot have been contemplated that if proceedings were commenced in the forum each had agreed as convenient, parallel proceedings would still take place in Pakistan.[3]

C. State Immunity

The application of State immunity in English courts was governed by the common law until 1978 when the European Convention on State Immunity was incorporated into English law by the State Immunity Act 1978 (the 'Act').[4] Section 13 of the Act provides that relief shall not be given against a State by way of injunction unless the State consents. In *Sabah Shipyard* the Court of Appeal held that the waiver of immunity clause in the guarantee should be construed so as to include a consent by the GOP to have an interim injunction granted against it. Lord Justice Waller stated that support for this approach was found in the decision in *A Company v Republic of X* [5] where Saville J (as he then was) rejected an argument that in some way a restrictive operation should be adopted to clauses dealing with waiver of sovereign immunity.

D. Enforcement of the Anti-Suit Injunction

It is sometimes said that equity never acts in vain,[6] however in determining whether the court should exercise its discretion to grant an injunction the Court of Appeal appeared not to consider the effectiveness of any anti-suit injunction the court might make. The question arises as to how the anti-suit injunction is to have the intended effect of preventing parallel proceedings in Pakistan?

As the court readily accepted, '*the Court's order is not intended in any way to be an interference with the jurisdiction of the courts of Pakistan*'[7] and cannot bind the Pakistan court into staying proceedings within its jurisdiction. As with any anti-suit injunction, the order acts *in personam* against the respondent. Under normal circumstances, should a respondent continue with foreign proceedings, then that respondent would be in contempt. Where the respondent is an individual he or she would be

[2] At para 38. [3] At para 43.

[4] For commentary on State immunity and the State Immunity Act 1978 see CJ Lewis *State and Diplomatic Immunity* (3rd edn London Lloyds of London Press 1990) and P Wood *Project Finance, Subordinated Debt and State Loans* (London Sweet & Maxwell 1995).

[5] [1990] 2 Lloyd's Rep 521.

[6] '[T]his court will not make any order in vain' per Kindersley V-C *New Brunswick and Canada Ry and Land Co v Muggeridge* (1859) 4 Drew 686.

[7] Pill LJ, at para 54.

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subject to committal proceedings. In the case of a body corporate the directors or officers of the company may face committal proceedings and the body corporate itself would be subject to sequestration proceedings (a fine). Here though, the respondent is a sovereign State. Can an anti-suit injunction be policed in the same manner—either in contempt proceedings directly against the State or in proceedings against those officers or employees of the State who by their actions caused the State to breach the injunction?

E. Actions Against the State

There are no reported cases of contempt proceedings being brought directly against a sovereign State and the only reference to contempt proceedings in the Act is at section 13(1):

> No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.[8]

However, the Act is silent as to penalties for breach of any other type of order (including anti-suit injunctions) and accordingly it must be presumed that it was Parliament's intention[9] that penalties by way of committal or fine may be imposed for failure to comply with orders other than the types specified in Section 13(1). Granted, section 1 of the Act confers upon States a general immunity from jurisdiction of the courts of the United Kingdom, but that is subject to a number of exceptions including proceedings in respect of which the State has submitted to the jurisdiction of the courts of the United Kingdom[10] and proceedings relating to commercial transactions entered into by the State.[11] In *Sabah Shipyard* both exceptions apply. Section 13(2)(b) of the Act also provides that the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award, but that is subject to section 13(3) which provides that relief can be ordered if the State has provided prior consent to enforcement proceedings (as indeed the GOP had in its guarantee). It is therefore at least arguable the State could be subject to proceedings for contempt.

In practice though, there would be significant obstacles preventing contempt proceedings being brought against a State. Section 16(4) of the Act provides that the relevant parts of the Act do not apply to criminal proceedings and although breach of a court order amounts to a civil rather than a criminal contempt it is not clear to what extent such proceedings are truly civil. Contempt proceedings are often regarded as being quasi-criminal in nature[12] and certainly proceedings for contempt are considered to be criminal for the purposes of the Human Rights Act 1998.[13] Arguably therefore the Act has no application to proceedings for contempt, in which case the courts must look

[8] Mirroring Art 18 of the European Convention on State Immunity.
[9] And the intention of the framers of the European Convention on State Immunity.
[10] Ibid, s 2.
[11] Ibid, s 3.
[12] See D Eady and ATH Smith *Arlidge, Eady & Smith on Contempt* (2nd edn London Sweet & Maxwell 1999), at 3–4.
[13] See *Benham v United Kingdom* (1996) 22 EHRR 293, *The Times*, 24 June 1996 and *Newman v Modern Bookbinders Ltd* [2000] 1 WLR 2559, [2000] 2 All ER 814 CA.

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to the common law which provides States with absolute immunity against criminal proceedings.[14]

Even if the State itself were to be subject to contempt proceedings, what sanction would the court have? It is difficult to imagine an English court making a sequestration order against a foreign State, still less taking steps to enforce it. However, even if there was no sanction, it does not necessarily mean that the court would view contempt proceedings against a State as being pointless. In *M v Home Office*,[15] a case against the then Home Secretary Kenneth Baker, it was held that ministers of the Crown were amenable to the court's contempt jurisdiction when acting in discharge or purported discharge of their official duties (even though the Crown itself enjoys absolute immunity). Lord Woolf who gave the leading judgment stated:

> it would clearly not be appropriate to fine or sequestrate the assets of the Crown or a government department or an officer of the Crown acting in his official capacity… this does not mean that a finding of contempt against a government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt.[16]

Presumably a similar finding of contempt against a foreign State would equally vindicate the requirements of justice and an order for costs (which would be payable to the applicant and not the Crown) would presumably cause no more jurisdictional difficulties than any order for costs made against a State in civil proceedings. An action against a State seeking only a declaration of contempt but no substantive remedy is unlikely to be viewed as criminal as opposed to civil in nature.[17]

F. Actions Against Agents or Employees of the State

There are few reported cases involving or relating to contempt proceedings against employees or agents of sovereign States. Servants or agents of an injuncted party who cause or assist the injuncted party to breach a court order are themselves in contempt of court. Paradoxically an action for contempt against an agent or servant of an injuncted party is criminal in nature[18] and servants or agents are treated as not being a party to the order but rather 'they stand in no different position from a complete stranger who knowingly sets out to assist the defendant in committing a breach'.[19]

[14] Save for certain exceptions such as the commission or authoriztion of torture, see *R v Bow Street Metropolitan Stipendiary Magistrates and others ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 HL.

[15] [1994] 1 AC 377.

[16] Ibid 424–5.

[17] Although there may be doubts as to whether the court would entertain a contempt action which only seeks a declaration, RSC O.45.5 (incorporated into the CPR by r50.1) provides that a judgment or order may be enforced by writ of sequestration or order of committal. There is no reference to any procedure to seek a declaration of contempt, although arguably a declaration could be sought pursuant to CPR r25.1 which provides: 'The court may grant the following interim remedies . . . (b) an interim declaration.'

[18] Compared with a contempt action against the injuncted party itself which is civil in nature (at least nominally).

[19] Per Lord Uthwatt, *Marengo v Daily Sketch and Sunday Graphic Ltd* [1948]1 All ER 406 HL, at 407.

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In *Propend Finance Pty Ltd and Others v Sing and Another*[20] the claimant brought committal proceedings against a police officer in the Australian Federal Police force (who was also a diplomat in the Australian High Commission) for contempt in that he breached an undertaking not to remove certain documents from the jurisdiction. Proceedings were also taken against the Commissioner of the Australian Federal Police on the basis that he was vicariously liable for the police officer's actions. However, the Court of Appeal decided that the first defendant was entitled to rely on diplomatic immunity as a defence to the contempt claim, that both defendants were entitled to rely on State immunity as a defence and that in the circumstances of the case such diplomatic and State immunity had not been waived.

As is clear in *Propend Finance Pty Ltd* there are practical obstacles to bringing proceedings against agents of a foreign State. Agents of the foreign State within the jurisdiction are likely to be diplomatic or consular staff. The Diplomatic Privileges Act 1964[21] or the Consular Relations Act 1968,[22] would prevent any committal proceedings being taken against those individuals. Any waiver of State immunity provided by the foreign State in a prior contractual agreement is unlikely to extend to waive diplomatic or consular immunity for the purposes of a criminal contempt action against the State's agents or employees.

In *Soleh Boneh International Ltd v Republic of Uganda*[23] an order for security for costs at first instance was endorsed with a penal notice directed at the High Commissioner of Uganda in the United Kingdom personally. The purpose of a penal notice is to put the recipient on notice that he will be in contempt if he disobeys the order. It would therefore be incorrect to endorse a penal notice on an order addressed to someone immune from contempt proceedings. In the event, the Court of Appeal did not need to consider the State or diplomatic immunity point since it held that a simple order for security for costs was not an injunction. It did not therefore need to consider whether it was appropriate for an order to be endorsed with such a penal notice.

In respect of a contempt committed outside the jurisdiction by alien agents of the foreign State, the English court will not have jurisdiction over that individual (who, as has been stated, is treated as a stranger to the injunction for the purposes of the proceedings) unless the individual himself has submitted to the jurisdiction. Submission to the jurisdiction by the State would not be a submission on behalf of its agents or employees.

Unsurprisingly, there are few reported examples of injunctions (of any type) being granted against sovereign States. In *A Company Ltd v Republic of X*[24] a freezing injunction was obtained against the defendant, a foreign State. On appeal, Saville J upheld the order for an injunction finding that the defendant had waived sovereign immunity and that the intention of the parties was to put the State on the same footing as a private individual. Again there was no consideration of how effective court sanctions would be if the State disobeyed the freezing injunction.

However, regardless of its effectiveness against the defendant, the real power of a freezing injunction is its effect on third parties. Third parties within the jurisdiction

[20] *The Times* 2 May 1997.
[21] Incorporating the Diplomatic Privileges Act 1964.
[22] Incorporating the Vienna Convention on Consular Relations 1963.
[23] [1993] 2 Lloyd's Rep 208.
[24] [1990] 2 Lloyd's Rep 521.

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with notice of the freezing injunction are themselves in contempt should they assist a third party to dissipate assets. Accordingly a claimant will give notice of the freezing order to banks holding assets of the defendant in order to freeze those assets and therefore there is utility in obtaining such an injunction even where it is known that the respondent himself will not comply.

G. The Utility of Granting an Anti-Suit Injunction Against a State

In practice it may be the case that there are no effective sanctions against the GOP should it chose to ignore the anti-suit injunction. Arguably, this is a factor which should have been taken into account by the Court when considering whether to grant the anti-suit injunction. However, it would be wrong to conclude that the granting of an anti-suit injunction in these circumstances would be in vain.

1. As with a freezing injunction it is a criminal contempt for third parties subject to the jurisdiction of the English Court and with notice of any injunction to assist a party in breaching such an injunction. An anti-suit injunction would therefore, for example, prevent English solicitors from assisting the GOP in taking steps in proceedings in Pakistan, including for example in providing expert evidence as to English Law.

2. Although the anti-suit injunction would not bind the Pakistan court it may be a factor taken into account by it when considering whether to stay proceedings there. Certainly an English Court would take into account a foreign anti-suit injunction when considering whether to stay proceedings in England.[25]

3. The existence of parallel proceedings in England and Pakistan could lead to conflicting judgments. Assuming Sabah was successful in England, Sabah might seek to enforce the English judgment overseas. Faced with conflicting English and Pakistani judgments, a foreign court may be more likely to give effect to an English judgment (than it otherwise would have been) where an anti-suit injunction has been in place against proceedings in Pakistan.

Should the GOP choose both to litigate in Pakistan (contrary to the anti-suit injunction) and actively defend proceedings in England then the English Court would have sanctions available against the GOP in England. For example under rule 3.4(2)(c) of the Civil Procedure Rules 1998, the court may strike out a statement of case (eg, the GOP's defence) if it appears to the court that there has been a failure to comply with a rule, practice direction, or court order.

The GOP may in any event choose to abide by the anti-suit injunction granted by the English Court, perhaps to avoid the ignominy of a declaration that it is in contempt of the court of a contractually chosen jurisdiction and to preserve the State's reputation as a 'fair dealing' contracting party amongst the international business community. In the case of States subject to the European Convention on State Immunity, those States are bound by treaty[26] to give effect to the orders of foreign courts.

[25] *Sabah Shipyard v Pakistan* [2002] All ER (D) 201, at para 41.

[26] See Art 20, '*A Contracting State shall give effect to a judgment given against it by a court of another Contracting State.*' However, Art 20(2) also provides that a Contracting State is not obliged to give effect to a judgment where proceedings are pending before a court of that (or another) Contracting State where those proceedings were the first to be instituted.

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H. Conclusion

The Court of Appeal's decision in this case is to be welcomed. Where sovereign States chose to enter into commercial contracts, it is desirable that other parties should not be disadvantaged in subsequent litigation by questions of State immunity. Although difficulties will necessarily arise in the English Court exercising jurisdiction over sovereign States, the Court should wherever possible proceed on the basis that States are treated in a similar manner to private entities. Although sanctions against a State for breach of an anti-suit injunction may be limited, the anti-suit injunction can be enforced indirectly and does have utility. Nevertheless, anti-suit injunctions are a discretionary equitable remedy and in cases where the merits of granting such an injunction are finely balanced the unavailability of direct sanctions against a defaulting State may be a factor which the court should take into account.

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