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Appeal No: CA-2022-002210
Case No: CL-2021-000075

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Sir Ross Cranston, sitting as a deputy judge of the High Court
[2022] EWHC 1655 (Comm); [2022] 1 WLR 4856

Royal Courts of Justice
Strand
London WC2A 2LL
20/12/2023

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

B E T W E E N:

(1) UK P&I CLUB N.V.
(2) UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION LIMITED (FORMERLY UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (EUROPE) LIMITED)

Claimants/Appellants

- and -

REPÚBLICA BOLIVARIANA DE VENEZUELA

Defendant/Respondent

David Lewis KC, Alexander Thompson and **Courtney Grafton** (instructed by **Kennedys Law LLP**) for the **Claimants/Appellants** (the Clubs)

The Defendant did not appear, but attended the hearing by its solicitors, **Roose and Partners** (Venezuela)

Hearing dates: 6-8 December 2023

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by e-mail and by release to the National Archives. The date and time for hand-down is deemed to be 10.00am on 20 December 2023

SIR GEOFFREY VOS, MASTER OF THE ROLLS:

Introduction

1. Section 13(2)(a) of the State Immunity Act 1978 (the SIA) provides that "relief shall not be given against a State by way of injunction". Article 6(1) of the European Convention on Human Rights (the ECHR) provides that "[i]n the determination of his civil rights and obligations …, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

2. Moreover, it is well established, as Sir Ross Cranston (the judge) said in effect at [97], that article 6(1) is not an absolute right. A domestic court may, in general terms, make orders that limit its effect provided that the order made: (a) does not impair the very essence of the claimant's right to a fair trial, (b) is made in pursuit of a legitimate aim, and (c) is proportionate to achieving that legitimate aim (see *Ashingdane v. United Kingdom* (1985) 7 EHRR 528 at [57], *Z and others v. United Kingdom* (2002) 34 EHRR 3 at [93], *Alassini v. Telecom Italia SpA* (Joined Cases C-317/08, C-301/08, C-319/08 and C-320/08) [2010] 3 CMLR 17 at [63], and *Churchill v. Merthyr Tydfil* [2023] EWCA Civ 1416 at [54]).

3. Against that background, the essential question in this case is whether the judge was right to refuse to grant the Clubs a permanent anti-suit injunction restraining Venezuela (a sovereign state) from pursuing proceedings against them in Venezuela and Dutch Curaçao. His main ground for refusing the injunction was that article 6(1) was satisfied because section 13(2)(a) lay "within the range of possible rules consistent with current international standards" [116].

4. In this context, it is perhaps important to understand at the outset what the judge decided. The judge dealt with Venezuela's defence of state immunity after he had considered the evidence and the nature of the proceedings brought by Venezuela in Venezuela and Dutch Curaçao. He decided first that Venezuela did not have immunity from the English Court's adjudicative jurisdiction under section 1 of the SIA, because the commercial exception in section 3(1)(a) of the SIA[1] applied. Moreover, Venezuela was to be treated as having agreed in writing to submit the relevant disputes to arbitration in London within the meaning of section 9 of the SIA.

5. At [89], the judge recited the Clubs' submission as being that section 13(2)(a) could not be justified as pursuing a legitimate object by proportionate means because it exceeded the requirements of customary international law as found in the restrictive doctrine of state immunity applied by the Supreme Court in *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2019] AC 777 (*Benkharbouche*). The judge decided at [91] that, given what Lord Diplock had said in *Alcom Ltd v. Republic of Colombia* [1984] AC 750 (*Alcom*) at 600F: "any submission that section 13(2) [was] not about enforcement immunity [was] untenable". He held at [96] that article 6 was engaged, and moved to consider whether section 13(2)(a) could be justified as an interference with article 6 on the principles I have already mentioned.

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[1] Which provides that "(1) A State is not immune as respects proceedings relating to—(a) a commercial transaction entered into by the State…".

6. At [106], the judge concluded that the restrictive doctrine of state immunity applied in *Benkharbouche* related to bars on the adjudicative jurisdiction of the court, but was not "determinative in the separate area of enforcement immunity" under section 13(2)(a).

7. The judge then decided at [107]-[116] that there was no widespread, representative and consistent practice of states which was accepted by them on the footing that it was a legal obligation, regarding injunctions and orders for specific performance as part of the restrictive doctrine. In other words, different states adopted different practices as to whether they regarded injunctions as part of their adjudicative jurisdiction or part of their enforcement jurisdiction. The judge held at [116] that in enacting section 13(2)(a), the UK was certainly not an outlier.

8. The judge then held at [117]-[118] that section 13(2)(a) could be justified also by legitimate domestic policy, if pursued by proportionate means (relying on what Lord Sumption said at [68] in *Benkharbouche* and *General Dynamics United Kingdom Ltd v. Libya* [2021] UKSC 22, [2022] AC 318 at [57]-[62] and [76(5)] (*General Dynamics*)).

9. At [120]-[124], the judge held that section 13(2)(a) pursued legitimate domestic objectives by proportionate means and did not impair the essence of the article 6 right. His four reasons were: (i) the Lord Chancellor's rationale to Parliament to the effect that personal remedies like injunctions and specific performance were not appropriate against states, because the processes for punishing contempt could not be used; (ii) injunctions were even more internationally sensitive than the service issue in *General Dynamics*: the fact was that "many jurisdictions and writers do not countenance orders, especially coercive orders against states, in particular the anti-suit injunction"; (iii) considerations of comity, procedural propriety and international law were even more important in a state's enforcement jurisdiction (see *General Dynamics* at [59], [62] and [84]); and (iv) the lack of an injunction did not render worthless the Clubs' declared right to have Venezuela's claims determined by way of London arbitration. Compensation for breach of the arbitration agreement and declaratory relief in the arbitration could be relied upon to resist enforcement of judgments obtained by Venezuela in its proceedings.

10. Finally, the judge said at [125]-[128] that if he were wrong in concluding that section 13(2)(a) stands intact from the article 6 attack, it could not be "read down" under section 3 of the Human Rights Act 1998 (the HRA) to remove the alleged incompatibility with article 6.

11. The Clubs have challenged the judge's judgment on four grounds. First, they say that the judge was wrong to conclude that an infringement of article 6 could be justified if section 13(2)(a) fell "within the range of possible rules consistent with international practices". The test, they argued, was whether the domestic rule was required by customary international law, or possibly reflected a tenable view of what it required. Secondly, the judge was wrong to hold that anti-suit injunctions were part of the court's enforcement jurisdiction. They were part of its adjudicative jurisdiction, and immunity from them in international law was governed by the restrictive doctrine. Thirdly, the judge ought to have held that the infringement of article 6 was not justifiable as a proportionate restriction by legitimate domestic policy and impaired the essence of the

Clubs' article 6 right. Fourthly, section 13(2)(a) ought to have been read down so as to remove its incompatibility with article 6.

12. I have decided that the judge was right broadly for the reasons he gave. I will explain why I have reached that conclusion under the following heads: (i) the outline factual background, (ii) *Benkharbouche*, (iii) whether the judge was wrong to say that an infringement of article 6 could be justified if section 13(2)(a) fell "within the range of possible rules consistent with international practices", (iv) whether the judge was wrong to hold that anti-suit injunctions were part of the court's enforcement jurisdiction, (v) whether the judge ought to have held that the infringement of article 6 was not justifiable as a proportionate restriction by legitimate domestic policy and impaired the essence of the Clubs' article 6 right, and (vi) whether, if section 13(2)(a) would otherwise be incompatible with article 6, it ought to have been read down so as to remove the incompatibility.

Outline factual background

13. I take the factual background from [1]-[29] of the judge's judgment.

14. On 30 March 2020, a Venezuelan navy patrol vessel, the BVL Naiguatá GC-23 (the Naiguatá), sank as a result of a collision with the RCGS Resolute (the Resolute), an ice-classed cruise liner. The collision occurred after the Naiguatá had been sent to intercept the Resolute, and an altercation had taken place. There is no agreement as to the events which followed or whether they occurred in territorial or international waters. After the collision, the Resolute sailed to nearby Curaçao, where it arrived on 31 March 2020. The Resolute was insured by the first claimant, UK P&I Club NV, a subsidiary of the second claimant, United Kingdom Mutual Steam Ship Assurance Association Limited.

15. Venezuela has brought claims in Dutch Curaçao for some €125 million and in Venezuela for some €300 million against the Resolute, its owners and head managers, and the Clubs as the Resolute's P&I insurer.

16. The relevant Curaçaoan proceedings for damages were begun on 28 May 2020. The Clubs have not participated in any of the preliminary hearings. Venezuela accepted before the judge that it was bound to arbitrate its Curaçaoan claims. The judge concentrated on Venezuela's claims in Venezuela, saying that its consequences for the proceedings in Curaçao followed.

17. The Venezuelan proceedings were begun on 14 April 2020 before a court with civil, commercial, transit, banking and maritime jurisdiction in Caracas for damages in tort against the Resolute, the master and owners. The proceedings were amended on 9 September 2020 to add the insurer and the head managers. The amended proceedings have not been served on the Clubs, and they have not participated in them. It appears that both the Curaçaoan and the Venezuelan claims have been stayed against the Clubs at least.

18. On 11 March 2021, HH Judge Pelling QC, sitting as a High Court judge, ([2021] EWHC 595 (Comm)) granted a without notice anti-suit injunction against Venezuela. He held that Venezuela was not immune from these proceedings, and made orders in relation to service out. The Clubs claim on the basis that Venezuela's proceedings seek to enforce the terms of the contract of insurance between the first claimant as insurer

and its members, including the owners, as assureds (see *Through Transport Mutual Insurance Association (Eurasia) Ltd v. New India Assurance Co (The Hari Bhum) (No. 1)* [2004] 1 Lloyd's Rep 206, [2005] 1 Lloyd's Rep 67). The Clubs claim, therefore, that Venezuela was bound by the London arbitration and English law clauses in the insurance contract, and was only able to pursue its claims in London arbitration. The insurance contract on which the Clubs rely was subject to the 2020 Club Rules, providing under rule 40D that "[n]o Owner … shall be entitled to maintain any action, suit or other legal proceedings against [the first claimant] … unless and until such difference or dispute shall have been referred to arbitration … and the Award in such reference shall have been published…".

19. In November 2021, Venezuela filed an Acknowledgment of Service in these proceedings indicating an intention to contest jurisdiction and to defend the claims. Venezuela contends that it has a direct claim against the Clubs in Venezuelan law, which is independent of the contract of insurance, so that no anti-suit injunction should lie.

20. The judge was asked to decide on Venezuela's objection to the jurisdiction, its immunity claims and whether HHJ Pelling's injunction should be made final. The Clubs did not claim that Venezuela had waived immunity or submitted to the jurisdiction.

21. On 14 May 2021, the Clubs served notice of arbitration on Venezuela seeking declarations of non-liability and equitable compensation for losses suffered in the Curaçaoan and the Venezuelan proceedings. In December 2021, Venezuela served notices on the Clubs appointing its arbitrator in each of the references, without prejudice to its jurisdictional objections. The parties agreed a stay of the arbitration.

22. On 5 August 2022, the judge: (i) dismissed all Venezuela's applications save the claim to immunity under section 13(2)(a), (ii) ordered that the English Court had territorial jurisdiction in respect of the injunction applications and that Venezuela had no immunity from suit under section 1 of the SIA, (iii) declared that Venezuela's claims against the Clubs in Curaçao and in Venezuela were subject to London arbitration, (iv) set aside the interim anti-suit injunction and dismissed the Clubs' injunction claims, and (v) granted the Clubs a leap-frog certificate to the Supreme Court, and permission to appeal in the alternative to this court. On 28 October 2022, the Supreme Court refused permission to appeal saying that the grounds of appeal raised no arguable point of law.

23. Before the hearing in this court, the solicitors for Venezuela applied to come off the record, but their application was not finally resolved before the start of the hearing. Accordingly, although they did not instruct counsel to attend the hearing on behalf of Venezuela, they attended in person. Whilst the solicitors did not make substantive submissions, we have been referred in detail to the skeleton argument that counsel had drafted for Venezuela before the current situation developed.

Benkharbouche

24. The Clubs relied heavily on *Benkharbouche* before the judge and before us. They contend that *Benkharbouche* leads to the conclusion that, where the legitimate purpose relied on to justify the infringement of article 6 is compliance with customary international law, anything that went beyond what international law actually required

was necessarily disproportionate (see Lord Sumption at [34]). The judge was, therefore, wrong to say that, if there were no binding and applicable rule of customary international law, a rule of domestic public policy could be relied upon as a legitimate purpose for the purposes of justifying an infringement of article 6 (in reliance on *Fogarty v. United Kingdom* (2002) 34 EHRR 12 (*Fogarty*) at [37], referred to by Lord Sumption in *Benkharbouche* at [24]), provided that the rule did not fall outside "any currently accepted international standards". Such an approach was incoherent as a matter of principle, and inconsistent with what had been decided by the Court of Appeal in *Benkharbouche* and what was argued by the Secretary of State in the Supreme Court.

25. In *Benkharbouche*, the claimants brought employment claims against foreign embassies in London. The embassies claimed state immunity under section 1 of the SIA. The Supreme Court had to decide whether two sections of the SIA were compatible with article 6. Section 4(1) provided that a state was not immune from employment proceedings where the employment was made in the UK or was to be wholly performed there. Section 4(2)(b) disapplied section 4(1) where the employee was neither a UK national nor habitually resident in the UK. Section 16(1) extended state immunity to the claims of employees of a diplomatic mission.

26. The Supreme Court decided in *Benkharbouche* that sections 4(2)(b) and 16(1) were incompatible with article 6. The employer states were, therefore, not immune to the claimants' claims. This decision was made on the basis that neither section was justified by any binding principle of international law, the UK had jurisdiction over the employer states in respect of the claims as a matter of international law, and article 6 was engaged by the UK's refusal to exercise that jurisdiction. The relevant established principle of customary international law was the restrictive doctrine, which limited state immunity to acts in the exercise of sovereign authority, as opposed to acts of a private law nature.

27. The Clubs have, however, as I have said, relied on Lord Sumption's judgment in *Benkharbouche* as supporting a wider principle that, in effect, only either a binding and applicable rule of customary international law as to state immunity, or possibly a tenable view that such a principle existed, could amount to a legitimate purpose for the purposes of justifying an infringement of article 6.

28. I do not intend to recite very extensively from the reports of the decisions of the Court of Appeal and the Supreme Court. Reference must be made to those decisions for the arguments advanced and their full context. It is sufficient to recite the main paragraphs from Lord Sumption's reasoning, which explain why I believe the Clubs' argument to go beyond what can be drawn from *Benkharbouche*.

29. At [22], Lord Sumption cited *Al-Adsani v. United Kingdom* (2001) 34 EHRR 11 (*Al-Adsani*), which explained at [54] that "the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty", and at [55] that in assessing whether the restriction was proportionate to the aim pursued, it had to be understood that the ECHR had "to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that article 31(3)(c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'". The ECHR "should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of state

immunity". It followed at [56] that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1)".

30. At [24], Lord Sumption set out [37] from *Fogarty* as follows:

> on the material before it, there appears to be a trend in international and comparative law towards limiting state immunity in respect of employment-related disputes. However, where the proceedings relate to employment in a foreign mission or embassy, international practice is divided on the question whether state immunity continues to apply and, if it does so apply, whether it covers disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it cannot be said that the United Kingdom is alone in holding that immunity attaches to suits by employees at diplomatic missions or that, in affording such immunity, the United Kingdom falls outside any currently accepted international standards.

31. Lord Sumption then referred to the European Court of Human Rights' (ECtHR) conclusion at [39] in *Fogarty* that:

> in conferring immunity on the United States in the present case by virtue of the provisions of the [SIA], the United Kingdom cannot be said to have exceeded the margin of appreciation allowed to states in limiting an individual's access to court.

32. He concluded at [24] that "[t]hese observations are consistent with the view that in the absence of a recognised rule of customary international law, article 6 is satisfied if the rule applied by a Convention state lies within the range of possible rules consistent with "current international standards"".

33. Lord Sumption reached his conclusions on the principles to be applied at [33]-[36]. The nub is at [34] as follows:

> It is therefore necessary to ask what is the relevant rule of international law by reference to which article 6 must be interpreted. The relevant rule is that, if the foreign state is immune, then, as the International Court of Justice has confirmed in *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* [2012] ICJ Rep 99 [*Jurisdictional Immunities*], the forum state is not just entitled but bound to give effect to that immunity. If the foreign state is not immune, there is no relevant rule of international law at all. What justifies the denial of access to a court is the international law obligation of the forum state to give effect to a justified assertion of immunity. A mere liberty to treat the foreign state as immune could not have that effect, because in that case the denial of access would be a discretionary choice on the part of the forum state … To put the same point another way, if the legitimate purpose said to justify denying access to a court is compliance with international law, anything that goes further in that direction than international law requires is necessarily disproportionate. I conclude that unless international law requires the United Kingdom to treat Libya and Sudan as immune as regards the claims of Ms Janah and Ms Benkharbouche, the denial to them of access to the courts to adjudicate on their claim violates article 6 …

34. Having dealt with the question of whether a "tenable view" of international law could suffice, Lord Sumption said this at [35]-[36]:

> 35. … In the present cases, the law requires us to measure sections 4(2)(b) and 16(1)(a) of the [SIA] against the requirements of customary international law, something that we cannot do without deciding what those requirements are.
>
> 36. I do not read the Strasbourg court as having said anything very different in [*Fogarty*]. The court considered, at para 37, that, although there had been a "trend" in favour of the restrictive doctrine of state immunity, there was too much diversity of state practice in the specific area of embassy staff to enable them to say that the restrictive doctrine applied to them. In those circumstances they thought it sufficient that the United Kingdom had acted on a view of international law which, although not the only possible one, was within "currently accepted international standards". But this is not the same point as the one made by the Secretary of State, for it applies only if there is no relevant and identifiable rule of international law. If there is such a rule, the court must identify it and determine whether it justifies the application of state immunity …

35. At [68], Lord Sumption rejected the argument that section 4(2)(b) was "justifiable as an application of purely domestic policy, on the ground that the United Kingdom's interest in asserting the jurisdiction of its own courts over the employment of the local labour force does not extend to nationals or residents of third countries". He said that "[o]n the footing that international law does not require a state to be given immunity, I do not see how the absence of British nationality or residence at the time of the contract can be a proper ground for denying an employee access to the courts in respect of their employment in the United Kingdom".

Was the judge wrong to say that an interference with article 6 rights could be justified if section 13(2)(a) fell "within the range of possible rules consistent with international practices"?

36. I accept that the views expressed by Lord Sumption at [24] and [36] were not, as the Clubs submitted, part of the main reasoning of the Supreme Court. Nonetheless, it seems to me that it would be a remarkable departure if this court were to ignore both *Fogarty* and the views of the Supreme Court.

37. In *Benkharbouche*, the argument was over whether there was a binding and applicable rule of customary international law. The Supreme Court held that there was such a rule. That rule was the restrictive doctrine that provided that private acts of a sovereign state (such as employing embassy staff in that case) did not attract state immunity. The question of whether the restrictive doctrine has any relevance to section 13(2)(a) will be decided under issue 2. There, as I have said, the Clubs argue that anti-suit injunctions are part of the adjudicative jurisdiction of the court, so as to be covered by the restrictive doctrine of state immunity. It is common ground, however, that if anti-suit injunctions are part of the enforcement jurisdiction of the court, they are not covered by the restrictive doctrine.

38. Accordingly, on that assumption, this question must be considered on the basis that there is no relevant and applicable rule of customary international law. That makes Lord Sumption's statement in [24] directly applicable to this case. I make no apology for repeating what he said, namely that "in the absence of a recognised rule of customary

international law, article 6 is satisfied if the rule applied … lies within the range of possible rules consistent with "current international standards"". The Clubs submitted that in using the phrase "consistent with the view that" in [24] Lord Sumption was merely summarising what was said in *Fogarty* without indorsing it. That is not a tenable reading of [24], especially in the light of what was said at [36], which made clear his view that this was the appropriate question where there is "no relevant and identifiable rule of international law".

39. The Clubs urge us to reject this view on the basis that: (i) it is principled to justify a derogation from article 6 by compliance with international law (or even perhaps a tenable view of that law), but not by making a discretionary choice from a range of possible rules; (ii) it is incoherent because the SIA cannot overstep a rule of international law, but grant greater immunity if there is no rule by choosing what to do from a range of possibilities. That is a lower test even than the tenable position approach; (iii) *Fogarty* is inconsistent with what Lord Sumption had said at [33]-[34] (see [33] above), and was decided in 2001 before the development of the ECtHR's jurisprudence on state immunity (see, for example *Buttet v. United Kingdom* (2022) 75 EHRR SE4, at [51], [58], [61] and [62], mirroring the language of Lord Sumption at [33]-[34]); and (iv) this court is not bound by *Fogarty* (see section 2 of the HRA).

40. I accept, of course, that both the ECtHR's jurisprudence concerning state immunity, and the international position have moved on since *Fogarty*. Indeed, the Clubs showed us a range of cases and treaties that demonstrate (subject to issue 2) that there is no widespread, representative and consistent practice of states accepted by them as law in relation to state immunity from the grant of injunctions. I shall mention some of that jurisprudence under issue 2 below.

41. The essential question for us under this issue, however, is whether the judge was wrong to say that an interference with article 6 rights can be justified if section 13(2)(a) fell within the range of possible rules consistent with international practices. It is accepted that section 13(2)(a) has been replicated in a number of other states. The arguments advanced by the Clubs revolve around *Benkharbouche*, but the reality is that *Benkharbouche* was a case where there **was** an established rule of customary international law that states were not immune (as articulated at [37]: "The rule of customary international law is that a state is entitled to immunity only in respect of acts done in the exercise of sovereign authority"). This is a case (subject to issue 2) where there is no such rule.

42. In such a case (i.e. where there is no established rule of international law), it seems to me that the approach indicated by *Fogarty* and [24] and [36] of *Benkharbouche* is legally correct and entirely appropriate. Comity and the promotion of good relations between states are important. On the assumption that injunctions (or at least anti-suit injunctions) are part of the enforcement jurisdiction of the courts of England and Wales, it would, I think, be surprising if legislation that prevented such injunctions being granted against sovereign states were ineffective, where such legislation was consistent with one of a range of international practices. Article 6 is, as I have said, not an absolute right. I will deal with the question of whether the judge correctly balanced the importance of article 6 against the domestic policy reflected in section 13(2)(a) under issue 3 below.

43. In my judgment, the judge was right to hold that an interference with article 6 rights could be justified if section 13(2)(a) fell "within the range of possible rules consistent with international practices".

Issue 2: Was the judge wrong to hold that anti-suit injunctions were part of the court's enforcement jurisdiction?

44. The Clubs' submission is that, as a matter of customary international law, a state's immunity from enforcement measures concerns only the property of the state. Since an anti-suit injunction is an order against the person of the state and does not concern its property, it should have been held to be part of the adjudicatory jurisdiction of the court to which the restrictive doctrine applied. On that basis, since the Clubs seek anti-suit injunctions in relation to purely commercial acts of Venezuela, the relevant rule of customary international law would be the restrictive doctrine that does not allow immunity. Section 13(2)(a) would, therefore, be "necessarily disproportionate" as going beyond what international law requires (see Lord Sumption at [34] in *Benkharbouche* at [33] above).

45. The Clubs relied on a number of authorities as showing that the enforcement immunity in international law related to the state's property (see, for example, *Jurisdictional Immunities* at [113], *The Philippine Embassy Bank Account Case* (1977) 65 ILR 146 at pages 150, 167-177, and 181-184 (German Federal Constitutional Court), *The Cristina* [1938] AC 485 at pages 490-491, *The Philippine Admiral* [1977] AC 373 at pages 395-396, articles 23 and 26 of the European Convention on State Immunity 1972, articles 18, 19 and 24 of the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 (UNCJISP), and articles 22(3) and 31(3) of the Vienna Convention on Diplomatic Relations 1961).

46. The Clubs then sought to distinguish between injunctions in general and anti-suit injunctions in particular to show that customary international law did not regard them as enforcement. They compared a final determination that an injunction should lie with a determination that damages should be paid.

47. In my judgment, the Clubs' argument was doomed to fail. As the judge explained at [115]-[116]:

> There is no clear and settled view in customary international law regarding orders for injunctions and specific performance against states in proceedings relating to their non-sovereign activity or otherwise. The restrictive doctrine is not in play in this area. Anti-suit injunctions are generally eschewed by civilian jurisdictions. There would seem to be a substantial uniformity that if a court does order a coercive measure against a state, any criminal or financial penalties attached are of no effect. In taking an independent line, Australia expressly allows injunctions and specific performance, but the legislation qualifies this since they cannot be backed by sanctions. An anti-suit injunction not backed by sanctions may have a utility when it comes to the enforcement of judgments obtained in breach of it. United States courts have issued injunctions and orders for specific performance against states, with sanctions for non-compliance, but as in other matters of international law that country is an outlier.

> 116. In taking the position it has in section 13 …, in particular section 13(2)(a), the UK is certainly not an outlier. Its approach has been adopted in commercially important jurisdictions like Canada and Singapore, as well as other countries, and it is the law in important commercial centres in the UK's overseas territories. Article 6 ECHR is satisfied since section 13(2)(a) lies within the range of possible rules consistent with current international standards.

48. The key point is that there is no widespread, representative and consistent practice of states, accepted as a legal obligation, regarding injunctions, such as to constitute a rule of international law. Specifically, there is no rule of customary international law that classifies injunctions or anti-suit injunctions as part of a state's adjudicative jurisdiction. That means that there is no rule of customary international law to the effect that states are not immune to injunctions. Different states have different approaches as the judge explained. The UK is not an outlier in adopting section 13(2)(a). Moreover, an anti-suit injunction is not such a special a type of injunction that puts it into any special category such as to place it within the restrictive doctrine.

49. In these circumstances, the judge did not need to rely (as he did at [90]) on what Lord Diplock had said in *Alcom* to the effect that section 13(2) dealt with the court's enforcement jurisdiction. But Lord Diplock's analysis supports the conclusion he reached.

50. Before leaving this point, I would mention that, in my judgment, despite the authorities we have been shown (e.g. articles 19 and 24 of the UNCJISP), an injunction granted by a court in England and Wales is indeed a coercive order. It threatens potential criminal and financial penalties for non-compliance. That is so whether or not the order is accompanied by a warning in the form of a penal notice. No sensible injunction could be granted if the order were to make clear that there would be **no** criminal or financial consequences for non-compliance. That demonstrates why an anti-suit injunction is indeed coercive unlike an order for damages. An order for damages has no coercive effect until an enforcement process is initiated. An injunction has a coercive effect immediately it is ordered, because it says to the defendant that it will incur penalties if it takes any step in contravention of it.

51. In my view, the judge was right to hold that there is no rule of customary international law making injunctions or anti-suit injunctions part of the court's enforcement jurisdiction.

Issue 3: Ought the judge to have held that the interference with article 6 rights was not justifiable as a proportionate restriction by legitimate domestic policy and impaired the essence of the Clubs' article 6 right?

52. The Clubs argue that the judge wrongly held that section 13(2)(a)'s interference with article 6 rights could be justified as a legitimate domestic policy on the grounds of comity and procedural propriety. He failed, they submit, to balance the relevant factors in determining the proportionality of the restriction. They say that there is no sound domestic policy reason for prohibiting anti-suit injunctions against states in relation to their commercial acts. States should, the Clubs submit, be amenable to orders requiring them to adhere to contract terms just like any other private litigant: "[r]eliance on comity here is superficial, outmoded and unprincipled".

53. I can say at once that I disagree with these submissions. They rely, in effect, on the same arguments as the Clubs advanced under issue 2 above. The Clubs said expressly that the error that the judge made was inextricably to connect injunctions with their enforcement. Once that link was severed, criminal and financial sanctions were no longer in play. As I have already explained, however, injunctions are inextricably connected with enforcement and with the threat of criminal and financial sanctions. It is true that some jurisdictions make the distinction that the Clubs make, but that does not deprive the UK's legislature of legitimate policy grounds for wanting to allow states immunity against the grant of injunctions.

54. Moreover, it is not correct, as the Clubs submit, that the judge failed to make a proper assessment of the competing factors to determine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. I have already summarised the four main points upon which he relied at [9] above. I agree with those points. Once it is understood that an anti-suit injunction is a coercive remedy which is part of the court's enforcement jurisdiction, it can be seen that the policy of making states immune to them is justified and rendered proportionate by: (i) the international sensitivity and comity mentioned by Lord Lloyd-Jones at [84] in *General Dynamics*, (ii) the policy of not wanting to threaten states with coercive action and the potential of criminal and financial sanctions, and (iii) the ability to declare that those seeking an anti-suit injunction were contractually entitled to have their dispute determined (as in this case) by arbitration.

55. It is true that article 6 reflects the importance of the principles of access to the court, access to justice, and, even perhaps, of upholding contractual agreements (see the minority's judgments in *General Dynamics* at [109], [239] and [243]). But the Clubs have not been able to point to any real advantage of the grant of an anti-suit injunction that cannot be backed up by criminal and financial penalties. Whilst I would say nothing to condone Venezuela's violation of its contractual obligations, we are concerned in this case only with determining whether the UK's domestic policy of not granting injunctions against states, even in commercial matters, is justified and proportionate as a derogation from article 6. Granting an injunction as opposed to declaring the parties' legal rights or even awarding damages for breach of contract would not add materially to the Clubs' ability to access the courts or justice.

56. The judge was, in my judgment, right to hold that the interference with article 6 rights was justifiable. Section 13(2)(a) is a proportionate restriction on the Clubs' article 6 rights justified by the UK's legitimate domestic policy. It does not impair the essence of the Club's article 6 rights for the reasons I have given.

Issue 4: if section 13(2)(a) would otherwise be incompatible with article 6, ought it to have been read down so as to remove the incompatibility?

57. On the judge's conclusions, with which I agree, this point does not arise. Nevertheless I will address it. On the footing that section 13(2)(a) would otherwise be incompatible with article 6, the Clubs submit that it should be read down under section 3 of the HRA. They propose two carve-outs at the end of section 13(2)(a) in the alternative:

    i) save for anti-suit injunctive relief relating to foreign court proceedings which are commercial activity and not the exercise of sovereign authority, or

ii) unless the injunction is unrelated to the property of a state and is made in respect of a transaction or activity otherwise than in the exercise of sovereign authority.

58. The judge explained the test for reading down a provision under section 3 of the HRA at [127] as follows:

> it must not be incompatible with the underlying thrust of the legislation - as has been expressed in the authorities, that it would not go against the grain of the legislation, would not call for legislative deliberation or change the substance of the provision completely, would not remove its pith and substance, or would not violate one of its cardinal principles: *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [32], per Lord Nicholls, [110]-[112], per Lord Rodger; *General Dynamics*, at [99], per Lady Arden.

59. The judge concluded that it was "not within the competence of this court to recraft section 13(2)(a) in the manner the Clubs suggest". I agree. The substance of section 13(2)(a) is the policy of the UK in giving states immunity against the grant of injunctions by way of enforcement of legal rights, whether in commercial affairs or not. It would be contrary to that substance to read the section down in the way the Clubs seek. The qualifications that the Clubs seek would not make section 13 more coherent. They would create distinctions that the legislature had not considered. Those distinctions would themselves make the domestic policy that drove the immunity in section 13(2)(a) incoherent and illogical. Moreover the qualifications would not make the section significantly more compliant with article 6 for the reasons already given under issues 2 and 3.

60. The judge was, I think, right to hold that section 13(2)(a) should not be read down under section 3 of the HRA even if that provision was incompatible with article 6.

Conclusion

61. I would dismiss this appeal.

Lord Justice Popplewell:

62. I agree.

Lord Justice Phillips:

63. I also agree.