# The Naiguatá: High Court upholds prohibition on injunctions against states

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On 28 June 2022 the High Court found injunctive relief was unavailable against the Bolivarian Republic of Venezuela on the basis of s.13(2)(a) of the State Immunity Act 1978 (**"SIA"**) which provides that *"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."*

The underlying proceedings arose out of the total loss of a Venezuelan navy patrol vessel, the BVL Naiguatá GC-23, in early 2020, following a collision with the RCGS Resolute, an ice-classed cruise liner, which engaged in tourism to Antarctica. Following the collision, Venezuela brought civil proceedings against the owners of the Resolute and the party believed to be vessel's insurers, the UK P&I Club, in both Venezuela and Curacao. The relevant contract of insurance included a "pay to be paid clause" and an arbitration agreement in favour of London arbitration.

In March 2021, HHJ Pelling QC sitting in the High Court granted an *ex parte* anti-suit injunction against Venezuela on the grounds that: (a) Venezuela was bound to arbitrate its claims against the insurers named in the foreign proceedings, applying the conditional benefit analysis (b) there was no immunity from jurisdiction pursuant to the SIA and (c) s.13 SIA, which would otherwise preclude the granting of injunctive relief, fell to be read down pursuant to s.3 of the Human Rights Act 1998, following the approach in ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** [2017] UKSC 62, as the proceedings related to a commercial transaction and not a sovereign act by Venezuela.

By way of his judgment dated 28 June 2022, Sir Ross Cranston agreed with HHJ Pelling QC that Venezuela was bound to arbitrate its claims against the clubs and that Venezuela had no immunity from the court's adjudicative jurisdiction on the basis of ss.3 and/or 9 SIA. However, the Judge rejected the contention that s.13(2)(a) SIA fell to read-down and accepted Venezuela's arguments, thereby upholding the total prohibition on injunctive relief against states. In particular, the Judge found that:

(a) Domestic and international law distinguishes between the immunity from jurisdiction and the immunity from enforcement. Section 13(2)(a) SIA relates to the latter ([90-92]).

(b) Article 6 ECHR is engaged by s.13(2)(a) SIA such that the relevant question is whether s.13(2)(a) SIA pursues a legitimate objective by proportionate means and does not impair the essence of the right in question ([93-97]).

(c) The test to be applied was as follows ([104]):

  (1) Restrictions on article 6(1) ECHR rights are only justified if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right;

  (2) Both customary international law and domestic policy may offer a justification: ***Benkharbouche***, [34], [68];

  (3) In the absence of a recognised rule of customary international law, the domestic rule is compatible with article 6(1) if it is within the range of possible rules consistent with current international practices: ***Fogarty v United Kingdom,*** [36]-[39]; ***Benkharbouche***, [24];

  (4) The restrictive doctrine in customary international law is based historically on the idea that governmental acts of one state are not matters upon which the courts of other states will adjudicate: ***Benkharbouche***, at [52], citing Lord Wilberforce in ***The I Congreso***;

  (5) There is an international consensus as to the scope of state immunity in favour of the restrictive doctrine: ***Benkharbouche***, [52]. However, that is in the context of the immunity from adjudication, rather than the immunity from enforcement ([106]).

(d) In so finding the Judge rejected the Club's contention that the judgment in ***Benkharbouche*** required Venezuela to show either a binding rule of customary international law that confers immunity from anti-suit injunctive relief or a tenable view that customary international law mandates immunity from such relief ([98] and [105]).

(e) 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 activities or otherwise, but the restrictive doctrine of state immunity is not in play in this area. There seems 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 ([107]-[115]).

(f) Section 13(2)(a) SIA therefore satisfied Article 6 ECHR since section 13(2)(a) lies within the range of possible rules consistent with current international standards ([116]).

(g) In any event, Article 6 ECHR would be justified on grounds of domestic policy, as it was legitimate to consider that remedies of a personal nature such as injunctions and orders for specific performance were not appropriate against state, it is an area of considerable international sensitivity, there are issues of comity and procedural propriety, and the injunction applicant may well have other remedies available ([117-124]).

(h) In any event, it was not possible to read down s.13(2)(a) SIA without crossing the line into legislating, which would go beyond the interpretive exercise allowed by s. 3 of the Human Rights Act 1998 ([125-128]).

The judgment provides important guidance regarding the SIA. In particular:

(a) Subject to any appeals in this case, it follows from the decision that the English Courts will not grant injunctive relief against states.

(b) The Supreme Court's decision in ***Benkharbouche*** does not require state parties to prove customary international law mandates immunity be afforded. It remains possible to justify the privileges and restrictions in the SIA on the basis of domestic policy considerations and, if customary international law is unclear in the area in question, it suffices to show that rule is within the range of possible rules consistent with current international practices.

(c) The comments of Lord Sumption in ***Benkharbouche*** to the effect that the restrictive doctrine of state immunity is a settled principle of customary international law were in the context of considering the immunity from adjudication and not other aspects of state immunity and the SIA, such as those concerning enforcement, service, procedural privileges etc. Parties litigating against states will therefore have to consider carefully whether the provision of the SIA in question is within the scope of the settled principles described by Lord Sumption in ***Benkharbouche*** and, in any event and in all cases, parties will have to consider whether there are other domestic policy considerations which justify the restriction in question.

Poonam Melwani QC and Jamie Hamblen acted for the Bolivarian Republic of Venezuela, instructed by Rasmita Shah of Roose + Partners.

## Poonam Melwani QC

*"She brings a high level of energy to her work and drives things through. She leaves no stone unturned. She is very good on strategy and coming up with killer points."* (Legal 500, 2022)

Poonam Melwani QC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories and was shortlisted for Shipping Silk of the Year at the Chambers & Partners UK Bar Awards 2020.

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*"He is a calm and composed advocate who probes every fact and distils the issues methodically. He is very approachable and a pleasure to work with in a team."* (Chambers UK, 2022)

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