Trinity Term
[2011] UKSC 31
On appeal from: [2010] EWCA Civ 41

JUDGMENT

NML Capital Limited (Appellant) *v* Republic of Argentina (Respondent)

before

Lord Phillips, President
Lord Walker
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT GIVEN ON

6 July 2011

Heard on 29 and 30 March 2011

Appellant
Jonathan Sumption QC
Peter Ratcliffe
Sandy Phipps
(Instructed by Dechert LLP)

Respondent
Mark Howard QC
Benjamin John
Ciaran Keller
(Instructed by Travers Smith LLP)

LORD PHILLIPS

Introduction

1. The appellant ("NML") is a Cayman Island Company. It is an affiliate of a New York based hedge fund of a type sometimes described as a "vulture fund". Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it. This appeal relates to bonds issued by the Republic of Argentina in respect of which, together with all its other debt, Argentina declared a moratorium in December 2001. Between June 2001 and September 2003 affiliates of NML purchased, at a little over half their face value, bonds with a principal value of US$ 172,153,000 ("the bonds"). On 11 May 2006, NML, as beneficial owner, obtained summary judgment on the bonds for a total, including interest, of US$ 284,184,632.30, in a Federal Court in New York. NML brought a common law action on that judgment in this jurisdiction, and succeeded before Blair J in the Commercial Court. That judgment was reversed by the Court of Appeal, which held that Argentina is protected by state immunity. The question raised by this appeal is whether that finding was correct.

The bonds and the New York Judgment

2. The bonds were issued by Argentina in February and July 2000 pursuant to a Fiscal Agency Agreement between Argentina and Bankers Trust Company. The terms applicable to the bonds were contained in the Agreement and the bonds themselves, both of which were expressly governed by the law of New York. In November 2003, having declared events of default under the Fiscal Agency Agreement, relying on the moratorium and Argentina's subsequent failure to pay interest on the bonds, NML commenced proceedings against Argentina in the United States District Court, Southern District of New York, to recover principal and interest due under the bonds. Jurisdiction was founded on an express submission to New York jurisdiction in the Fiscal Agency Agreement. Argentina appeared and defended the proceedings. Judge Thomas P Griesa granted NML's motion for summary judgment. Argentina does not, in these proceedings, challenge that judgment.

The proceedings in this jurisdiction

3. In order to serve a foreign sovereign state it is necessary to obtain the permission of the court to serve the claim form out of the jurisdiction. On 14 March 2008 NML applied ex parte for this permission. The witness statement supporting this application, and the draft particulars of claim exhibited to it, alleged two reasons why Argentina was not entitled to state immunity. The first was that under clause 22 of the Fiscal Agency Agreement Argentina had waived, and agreed not to plead, any claim that it might have to state immunity. The second was that NML's claim was founded on the Fiscal Agency Agreement and the bonds, and consequently constituted "proceedings relating to a commercial transaction" for the purposes of the State Immunity Act 1978 ("the 1978 Act").

4. On 2 April 2008, David Steel J granted NML permission to serve Argentina out of the jurisdiction, and service was duly effected. On 5 September 2008 Argentina applied under CPR 11(1) to set the order for service aside on the ground that Argentina enjoyed state immunity from the jurisdiction of the English courts. At the hearing of this application before Blair J NML conceded that it could rely, at first instance, on neither of the grounds for alleging that Argentina did not enjoy immunity that had been advanced in support of the application to serve out. Instead NML sought to rely first on the provisions of section 31 of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") and secondly on alternative provisions as to waiver and jurisdiction in the bonds themselves. I shall follow the example of Aikens LJ in annexing in Appendix 1 the relevant provisions of section 31, in Appendix 2 Article 20 of the European Convention on State Immunity ("ECSI"), to which I shall refer in due course, and in Appendix 3 the relevant terms of the bonds.

5. Argentina contended that it was not open to NML to invoke alternative grounds for contending that immunity did not apply when these had not been relied on in the original *ex parte* application. NML's proper course was to make a fresh application for permission to serve Argentina out of the jurisdiction.

6. Blair J rejected this procedural objection and found in favour of NML on both the new substantive points [2009] EWHC 110 (Comm); [2009] QB 579. The Court of Appeal reversed Blair J on all three issues [2010] EWCA Civ 41; [2011] 1 QB 8. Aikens LJ gave the only reasoned judgment, with which Mummery and Elias LJJ agreed.

The issues

7. The following issues are raised by this appeal:

(1) Whether the present proceedings for the recognition and enforcement of the New York court's judgment are 'proceedings relating to a commercial transaction' within the meaning of section 3 of the State Immunity Act 1978. (As I shall explain, this issue was not open to NML in the courts below).

(2) Whether Argentina is prevented from claiming state immunity in respect of the present proceedings by Section 31 of the Civil Jurisdiction and Judgments Act 1982.

(3) Whether the bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the State Immunity Act 1978.

(4) Whether NML was entitled to raise at the inter partes hearing the two new points not previously relied on in the ex parte application for permission to serve Argentina out of the jurisdiction.

(5) Whether, having regard to the answers to the above questions, Argentina is entitled to claim state immunity in respect of these proceedings.

The resolution of the first two issues turns on statutory interpretation. This must be carried out in the context of simultaneous developments in the law of sovereign immunity and of the recognition of foreign judgments.

State immunity

8. At the beginning of the 20th century state immunity was a doctrine of customary international law, applied in England as part of the common law. Under this doctrine a state enjoyed absolute immunity from suit in the court of another state. The property of the state was also immune from execution. Because a state could not be sued, there was no procedural provision in this jurisdiction for service of process on a foreign state. The Court of Appeal had, however, occasion to

consider the law of state immunity when proceedings in rem were served on a mail packet owned by Belgium which had been involved in a collision in the case of *The Parlement Belge* (1880) LR 5 PD 197. The Court held that the vessel, being the property of a foreign sovereign state, was immune from legal process. Giving the judgment of the court Brett LJ explained the reason for this immunity, at pp 207-208 and 220:

> "From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity – that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.
>
> It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the state which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such an owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity."

9. In *Mighell v Sultan of Johore* [1894] 1 QB 149 leave to effect substituted service on the Sultan of Johore in an action in personam was set aside on the ground that he enjoyed sovereign immunity. To an argument that he had waived this immunity, the court held that the only way that a sovereign could waive immunity was by submitting to jurisdiction in the face of the court as, for example, by appearance to a writ. If the sovereign ignored the issue of the writ, the court was under a duty of its own motion to recognise his immunity from suit.

10. In *Compania Naviera Vascongado v Steamship "Cristina"* [1938] AC 485 the House of Lords confirmed that a state-owned ship that was used for public purposes could not be made the subject of proceedings in rem. Lord Atkin started his judgment with the following definition of state immunity, at p 490:

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

Three members of the House questioned, however, whether state immunity would protect a vessel that was used for the purposes of commercial trade. This reflected a growing recognition around the world of the "restrictive doctrine" of state immunity under which immunity related to governmental acts in the exercise of sovereign authority (*acta jure imperii*) but not to commercial activities carried on by the state (*acta jure gestionis*).

11. The absolute doctrine of state immunity could pose a disincentive to contracting with a state and some states attempted to avoid this disadvantage by including in contracts an agreement not to assert state immunity. The English courts held, however, that such a purported waiver was ineffective. Immunity could only be lost by a submission to the jurisdiction when it was invoked, and not earlier – see *Duff Development Co v Kelantan Government* [1924] AC 797 and *Kahan v Pakistan Federation* [1951] 2 KB 1003.

12. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 422 Lord Denning expressed, obiter, the view that judicial immunity should not apply to commercial transactions, but the other members of the House expressly dissociated themselves from this view, because the point had not been argued. It was not until nearly

twenty years later that Lord Denning MR was able to carry the rest of the Court of Appeal with him in applying the restrictive doctrine of state immunity in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529. This decision was approved by the House of Lords in *I Congreso del Partido* [1983] 1 AC 244.

13. I shall deal with the intervention of Parliament in the form of the 1978 and 1982 Acts when I deal specifically with the first two issues.

Enforcement of foreign judgments

14. Prior to the 1982 Act the common law provided two alternative remedies to a plaintiff who had obtained a judgment against a debtor in a foreign jurisdiction. He could bring a claim on the judgment or he could bring a claim on the cause of action in respect of which he had obtained the judgment. The former did not merge in the latter.

15. In order to establish jurisdiction to sue on the judgment the plaintiff had to serve a writ in personam in accordance with the normal procedure. The existence of a foreign judgment was not a ground upon which permission could be obtained to serve a writ out of the jurisdiction. The plaintiff had to establish that a number of conditions were satisfied in order to claim successfully on the foreign judgment. In particular, he had to establish that the foreign court had had jurisdiction over the defendant in accordance with the English rules of private international law and the judgment had to be final and conclusive on the merits.

16. Part II of the Administration of Justice Act 1920 ("the 1920 Act") provides an alternative means of enforcing, in the United Kingdom, the judgment of a superior court in another part of "His Majesty's dominions". Section 9 of that Act provides that, subject to the conditions there specified, the High Court may, "if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom" order the judgment to be registered. The conditions include a requirement that the foreign court should have had jurisdiction and preclude registration where the judgment is "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". These conditions plainly preclude the registration of a judgment against a defendant who, under English law, is subject to state immunity. Prior to 1978 there is no record, so far as I am aware, of any plaintiff having attempted to register such a judgment.

17. The Foreign Judgments (Reciprocal Enforcement) Act 1933 was passed to make provision for the enforcement in the United Kingdom of judgments given in

foreign countries that accord reciprocal treatment to judgments given in the United Kingdom. Section 2 of this Act provides for registration of such judgments on specified conditions, subject to the right of the judgment debtor to apply to have the judgment set aside. The section provides that for the purposes of execution a registered judgment is to be treated as if it were a judgment of the registering court. Section 4 makes provision for an application to set aside a registered judgment. The section includes a provision that the judgment shall be set aside if the registering court is satisfied that the foreign court had no jurisdiction in the circumstances of the case. The section further provides by subsection (3)(c) that the foreign court shall not be deemed to have had jurisdiction

> "if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court. "

18. This last provision is significant in the present context in that it implicitly provides for the registration of a judgment against a state, a state entity or an individual who was subject to state immunity in the foreign country if there has been a submission to the foreign jurisdiction. The 1933 Act contains no provision, however, that permits enforcement of such a judgment against property owned by a state. Furthermore section 2(1)(b) of the Act precludes recognition of a judgment that cannot be enforced by execution in the country of the original court, and section 4(1)(a)(v) requires the registration of a judgment to be set aside if enforcement would be contrary to the public policy of the registering court. So long as the absolute doctrine of state immunity prevailed in the United Kingdom it is hard to envisage registration of a foreign judgment against a judgment debtor who had been entitled to state immunity, but who had submitted to the foreign jurisdiction, except perhaps a diplomat in respect of whom his state had waived diplomatic immunity. There does not seem to be any recorded instance of such a case.

Issue 1: are the present proceedings "proceedings relating to a commercial transaction" within the meaning of the State Immunity Act 1978?

19. The 1978 Act had its origin in the need to give effect to the ECSI, but as the Bill passed through Parliament the scope of the legislation was widened so as to make provisions in relation to state immunity having effect on all states, and not just those party to the Convention. Fox on *The Law of State Immunity* 2nd ed (2008), at p 241 and following, describes the genesis of the Act.

20. Section 3(1) of the 1978 Act provides: "A State is not immune as respects proceedings relating to – (a) a commercial transaction entered into by the state". Section 3(3)(b) defines "commercial transaction" as including "any loan or other transaction for the provision of finance…". In view of this definition it is not surprising that it is common ground that the action in respect of which NML obtained judgment in New York was a "proceeding relating to a commercial transaction" within the meaning of section 3(1)(a). Permission to effect service on Argentina out of the jurisdiction was obtained from David Steel J on the basis of an averment that the common law action that was to be brought in England on the New York judgment was also a "proceeding relating to a commercial transaction". However before Blair J and the Court of Appeal NML conceded that this averment was not open to them short of the Supreme Court. This was because of two reasoned decisions, one in the High Court and one in the Court of Appeal which, albeit that the latter was obiter, constrained NML to accept that, for the purposes of section 3(1)(a), the action that NML was seeking to bring was a proceeding "relating to" the New York judgment and not to the transaction to which that judgment related. Before this Court Mr Sumption QC has challenged these authorities. Issue 1 turns on the question of whether they were rightly decided.

21. The first of these cases is *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB). AIC registered under the 1920 Act a judgment that they had obtained in Nigeria against the Nigerian Government in relation to what AIC alleged to be a commercial transaction. The Nigerian Government applied to have the registration set aside on the ground that registration was an adjudicative act and that Nigeria was protected by state immunity by reason of section 1 of the 1978 Act. AIC argued that their application to register the judgment was a "proceeding relating to a commercial transaction" within section 3(1)(a). Stanley Burnton J rejected this submission. His reasoning appears in the following short passage in para 24 of his judgment

> "In my judgment, the proceedings resulting from an application to register a judgment under the 1920 Act relate not to the transaction or transactions underlying the original judgment but to that judgment. The issues in such proceedings are concerned essentially with the question whether the original judgment was regular or not."

22. Stanley Burnton J held that this conclusion was supported by two matters. The first was that section 9 of the 1978 Act excludes immunity "as respects proceedings … which relate to [an] arbitration" where the state has entered into a written arbitration agreement. As most arbitrations relate to commercial transactions, section 9 would be unnecessary if a claim in respect of an arbitration constituted a "proceeding relating to the commercial transaction" to which the arbitration related, for that would fall within 3(1)(a). The second matter was that it would be illogical to exempt from immunity the enforcement of a judgment in

relation to a commercial transaction, but not the enforcement of a judgment in relation to any of the other matters in respect of which the 1978 Act provided exceptions to immunity under sections 3 to 11 of the Act.

23. Stanley Burnton J remarked at para 30 that it was unsurprising that the defendants were immune from proceedings for the registration of the Nigerian judgment:

> "the underlying principle of the State Immunity Act is that a state is not immune from the jurisdiction of the courts of the United Kingdom if it enters into commercial transactions or undertakes certain activities having some connection with this jurisdiction. Purely domestic activities of a foreign state are not the subject of any exception to immunity. Sections 3(1)(b), 4, 5, 6, 7, 8 and 11 all contain territorial qualifications to the exceptions to immunity to which they relate. Section 3(1)(a) does not include any such qualification, but even there the claimant wishing to bring proceedings must establish a basis for jurisdiction under CPR Part 6.20, normally under paragraphs (5) or (6), relating to contractual claims."

24. Stanley Burnton J went on to observe that Lord Denning MR when advancing the restrictive doctrine of state immunity in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 422, in *Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 WLR 1485, 1491 and in *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529, 558 had emphasised the significance not merely of the fact that the proceedings related to a commercial transaction, but that the transaction was connected with the United Kingdom.

25. A similar issue to that considered by Stanley Burnton J arose in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm); [2006] 1 Lloyd's Rep 181. There the relevant issue was whether a claim to enforce an arbitration award constituted "proceedings relating to" the transaction that gave rise to the award for the purposes of section 3(1)(a). Gloster J followed Stanley Burnton J's reasoning in holding that it did not. Her decision on the point was obiter, but it received reasoned approval, also obiter, when the case reached the Court of Appeal [2006] EWCA Civ 1529; [2007] QB 886. The court held at para 137:

> "In our view the expression 'relating to' is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one

> of a group of sections dealing with the courts' adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves rather than the source of the legal relationship which has given rise to them. To construe section 3 in this way does not give rise to any conflict with section 9, which is concerned with arbitration as the parties' chosen means of resolving disputes rather than with the underlying transaction. In our view *AIC Ltd v Federal Government of Nigeria* was correctly decided and Gloster J was right to follow it in the present case."

26. I agree with the Court of Appeal that the expression "relating to" is capable of bearing a broader or narrower meaning as the context requires. I disagree, however, with their conclusion as to the relevant context. Sections 1 to 11 of the 1978 Act are a comprehensive statement of the scope of state immunity under the law of the United Kingdom. Section 3(1)(a) makes it plain that the United Kingdom applies the restrictive doctrine of state immunity. The context in which the question of the meaning of "relating to" has arisen in this case is the issue of whether Argentina is or is not protected by state immunity against the proceedings that NML seek to bring. The object of bringing these proceedings is to enforce the New York judgment. Argentina has not suggested that (subject to the issue of immunity) these proceedings did not fall within CPR 6.20(9), which provides for service out of the jurisdiction "if a claim is made to enforce any judgment or arbitral award". The only issue is whether Argentina is immune from the claim. Whether a state is immune from such a claim should, under the restrictive doctrine of state immunity, depend upon the nature of the underlying transaction that has given rise to the claim, not upon the nature of the process by which the claimant is seeking to enforce the claim. When considering whether a state is entitled to immunity in respect of a claim to enforce a foreign judgment the question "does the claim constitute proceedings relating to a commercial transaction?" can only be given a meaning that is sensible if "relating to" is given a broad, rather than a narrow, meaning. The proceedings relate both to the foreign judgment and to the transaction underlying that judgment, but in the context of restrictive state immunity it only makes sense to focus on the latter.

27. The argument to the contrary accepted by Stanley Burnton J in *AIC* proceeds as follows. There is a distinction between the adjudicative and the executionary stages of these proceedings. First NML has to establish liability in this jurisdiction and then proceed to attempt to levy execution. The question is whether Argentina enjoys immunity from the adjudicative stage. That stage involves the conversion of the New York judgment into an English judgment. The proceedings to effect this conversion do not turn on the nature of the underlying transaction, but on whether the judgment in respect of that transaction was

regularly obtained. Thus those proceedings do not relate to the underlying transaction.

28. The fallacy in this argument is that the issue raised in the present proceedings is not the regularity of the New York judgment but whether Argentina is immune to an action on that judgment. Mr Howard QC put the matter more accurately at para 15 of his written case:

> "It is important to bear in mind that the issue in these proceedings is not whether the English court had jurisdiction to entertain proceedings on the bonds. It is common ground that it did not. Rather, the issue is whether the present proceedings for the recognition and enforcement of the New York judgment are proceedings 'relating to' that judgment, or are, instead, proceedings 'relating to' a 'commercial transaction entered into by' Argentina within the meaning of section 3(1)(a) on the grounds that the New York proceedings on which the New York judgment was based were proceedings 'relating to' a commercial transaction entered into by Argentina (ie 'relating to' the bonds)."

29. The issue that Mr Howard identifies has to be answered in order to determine whether, under English law, Argentina enjoys state immunity in relation to these proceedings. That question ought to be answered in the light of the restrictive doctrine of state immunity under international law. There is no principle of international law under which state A is immune from proceedings brought in state B in order to enforce a judgment given against it by the courts of state C, where state A did not enjoy immunity in respect of the proceedings that gave rise to that judgment. Under international law the question of whether Argentina enjoys immunity in these proceedings depends upon whether Argentina's liability arises out of *acta jure imperii* or *acta jure gestionis*. This involves consideration of the nature of the underlying transaction that gave rise to the New York judgment. The fact that NML is seeking to enforce that judgment in this jurisdiction by means of an action on the judgment does not bear on the question of immunity. This leads to the conclusion that the context in which the issue of the meaning of the words "relating to" arises in this case requires one to look behind the New York judgment at the underlying transaction.

30. I must deal with the matters that Stanley Burnton J considered supported the narrower interpretation of "relating to" in *AIC Ltd v Federal Government of Nigeria*. The first is that section 9 would not be needed if section 3(1)(a) applies to proceedings to enforce an arbitration award. It is true, if "relating to" is given the wider meaning, that the circumstances covered by section 9 of the 1978 Act will often overlap with the circumstances covered by section 3(1)(a), but this will not

always be the case. Not all arbitrations relate to commercial transactions. Furthermore, as Mr Sumption pointed out, section 9 relates not only to proceedings to enforce an award, but to all proceedings relating to an arbitration to which a state is party, and establishes jurisdiction of the English court in relation to all such proceedings.

31. In order to deal with the second matter to which Stanley Burnton J referred, it is necessary to quote the point that he made in his own words at para 26:

> "Furthermore, if Parliament had intended the State Immunity Act to include an exception from immunity relating to the registration of foreign judgments, it would have been illogical to limit it to commercial transactions entered into by the state (which is the consequence of AIC's contentions), with no provision for the registration of foreign judgments where the exception to immunity before the original court was the equivalent of one of the other exceptions to immunity in that Act."

32. In argument this point was, I believe, misunderstood. It was assumed that Stanley Burnton J was suggesting that if a foreign judgment relating to a commercial transaction were enforceable here, so logically should a foreign judgment dealing with one of the other matters specifically exempted from immunity under the 1978 Act. Thus, for instance, if in New York a judgment were given against Argentina in respect of personal injury caused to the claimant in the United Kingdom, one would expect that judgment to be enforceable here – see section 5 of the 1978 Act.

33. Mr Sumption's answer was that the judgment would in fact be enforceable here. An action on the New York judgment would be an action "in respect of" the personal injury caused in the United Kingdom.

34. I believe that we all misunderstood Stanley Burnton J's point. It was not that it would be logical to be able to enforce here a New York judgment dealing with a personal injury caused in the United Kingdom, but a New York judgment where there was an exemption from immunity *equivalent to* that provided by section 5 – ie a New York judgment in respect of a personal injury caused *in New York*. As to that point, I agree with Stanley Burnton J. It was illogical that the 1978 Act did not make provision for the enforcement in this country of such a judgment. This was because the draftsman of the 1978 Act did not deal generally with foreign judgments. That omission was made good by section 31 of the 1982 Act, as I shall show.

35. The other matter that impressed Stanley Burnton J was the desirability of giving section 3(1)(a) an interpretation which would have the effect of requiring a link between the defendant state's commercial transaction and the United Kingdom jurisdiction. He drew attention to the existence of such a link in the other exemptions to state immunity in the 1978 Act and to dicta of Lord Denning. It is true that the need for such a link receives support from dicta of Lord Denning in the judgments prior to 1978 in which he sought to introduce the restrictive doctrine of state immunity into English law. Thus in *Thai-Europe Tapioca Service v Government of Pakistan* he said, [1975] 1 WLR 1485, 1491-1492:

> …a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts…By this I do not mean merely that it can be brought within the rule for service out of the jurisdiction under RSC Ord, 11, r 1. I mean that the dispute should be concerned with property actually situate within the jurisdiction of our courts or with commercial transactions having a most close connection with England, such that, by the presence of parties or the nature of the dispute, it is more properly cognisable here than elsewhere.

36. Fox on *The Law of State Immunity* at p 269 describes the academic criticism of what was alleged to be confusion by Lord Denning of the doctrine of state immunity with principles of extra territorial jurisdiction.

37. When Parliament enacted the 1978 Act the exemption from immunity under section 3(1)(a) in respect of proceedings relating to a commercial transaction entered into by the state was not qualified by any requirement for a link between the transaction and the United Kingdom. This was not accidental. The United Kingdom ratified the ECSI on the same day that the 1978 Act came into force, and the Act was designed to give effect to the Convention. The original Bill followed closely the structure of the ECSI. Its scope was, however, significantly enlarged by amendment. The ECSI only applies as between contracting states. The 1978 Act was expanded so as to apply to all states. The ECSI does not give effect to the restrictive doctrine of sovereign immunity. Article 24 provides, however, that any state may declare that

> …its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii).*

38. The United Kingdom made such a declaration at the time of ratification of the Convention. In *Kuwait Airways Corporation v Iraqi Airways Corporation* [1995] 1 WLR 1147, 1158 Lord Goff, with whom the rest of the Committee agreed, observed that the declaration:

> "must have been intended to recognise the inapplicability in English law of the principle of sovereign immunity in cases in which the sovereign was not acting jure imperii, as had by then been recognised both in *The Philippine Admiral* [1977] AC 373 and in the *Trendtex* case [1977] QB 529, though the authoritative statement of the law by Lord Wilberforce in *I Congreso del Partido* [1983] 1 AC 244, 262, was not then available. At all events, the consequential exception included in section 3 of the Act of 1978 related to commercial transactions, though in section 3(3) the expression 'commercial transactions' is very broadly defined."

39. I can see no justification for giving section 3(1)(a) a narrow interpretation on the basis that it is desirable to restrict the circumstances in which it operates to those where the commercial transaction has a link with the United Kingdom. The restrictive doctrine of sovereign immunity does not restrict the exemption from immunity to commercial transactions that are in some way linked to the jurisdiction of the forum.

40. For these reasons I have concluded that Stanley Burnton J's decision on this point in *AIC* and the Court of Appeal's approval of it in *Svenska* was erroneous. By reason of section 3(1)(a) of the 1978 Act Argentina is not immune from the proceedings that NML have commenced in this jurisdiction. My conclusion accords with the decisions on the identical points of the Quebec Court of Appeal and the Supreme Court of Canada in *Kuwait Airways Corporation v Republic of Iraq* [2009] QCCA 728; [2010] SCC 40, [2010] 2 SCR 571. Mr Howard relied upon the approaches taken in *Holland v Lampen-Wolfe* [2001] 1 WLR 1573, 1587, per Lord Millett, in *Australian Competition and Consumer Commission v P T Garuda Indonesia Ltd* (2010) 269 ALR 98, paras 105-137 and *Bouzari et al v Attorney General of Canada et al (Bouzari v Iran (Islamic Republic))* [2004] 243 DLR (4^{th}) 406, para 51. None of these cases concerned, however, the meaning of "relating to" in the context of an action on a foreign judgment. Such an action is sui generis and I did not find the authorities in question of assistance.

41. For these reasons I differ from the Court of Appeal on the answer to the first issue. My conclusion is that the present proceedings are "proceedings relating to a commercial transaction" within the meaning of section 3 of the 1978 Act.

42. The conclusion that I have reached resolves an issue that may not have occurred to the draftsman of the 1978 Act or to Parliament when enacting it. While section 9 of the Act makes express provision for arbitration awards, the Act makes no mention of proceedings in relation to foreign judgments against states, other than Part II, which deals with judgments against the United Kingdom in the courts of other states party to the ECSI; there have been, in fact, only 8 ratifications of that Convention. Prior to 1978 there had been no attempts to enforce in the United Kingdom foreign judgments against states. As I have explained the 1920 and the 1933 Acts gave little scope for registering foreign judgments against states and there is no recorded instance of an attempt to do this before 1978. In 1978 the Rules of Court made no provision for impleading a foreign sovereign, no doubt reflecting the previous absolute doctrine of state immunity. Section 12(1) of the 1978 Act made provision for service on a state and section 12(7) made it plain that such service required permission, which could only be granted in accordance with the rules of court governing service out of the jurisdiction. There was no provision in 1978 for service out of the jurisdiction of a claim to enforce a judgment. In these circumstances it is perhaps not surprising that the Act made no express provision in relation to proceedings to enforce foreign judgments, other than judgments against the United Kingdom covered by the ECSI.

43. My decision on the first issue may make the other three issues academic, but they were fully argued and I propose to deal with them, not least because other members of the Court may not agree with me on the first issue.

Issue 2: Is Argentina prevented from claiming state immunity in respect of the present proceedings by section 31 of the Civil Jurisdiction and Judgments Act 1982?

44. The primary object of the 1982 Act was to give effect to the Brussels Convention of 1968. This Convention made provision for the reciprocal recognition and enforcement of judgments. The application of section 31 was not, however, restricted to the states who were parties to that Convention. The following are the most significant provisions of that section:

> "(1) A judgment 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.

(4) Sections 12, 13 and 14(3) and (4) of the State Immunity Act 1978 (service of process and procedural privileges) shall apply to proceedings for the recognition or enforcement in the United Kingdom of a judgment given by the court of an overseas country (whether or not that judgment is within subsection (1) of this section) as they apply to other proceedings."

45. It is NML's case that section 31 provides comprehensively for the recognition and enforcement of the foreign judgments to which it applies. If this is correct the first issue ceases to be of relevance but for the possible impact of the fourth issue. My conclusion in relation to the first issue is, however, entirely in harmony with NML's case on the second issue. Blair J found in favour of NML on this issue, but his decision was reversed by the Court of Appeal.

46. If NML's interpretation of section 31 is correct, it effected an addition to the categories of exemption from state immunity set out in the 1978 Act. Aikens LJ could not accept that an extension would have been effected in this way, without any express amendment to the 1978 Act. He interpreted section 31 as imposing an additional requirement to exemption from immunity where an action was brought to enforce a foreign judgment. The claimant would first have to show that section 31 of the 1982 Act was satisfied and then that the proceedings fell within one of the exemptions from immunity set out in sections 2 to 11 of the 1978 Act.

47. I do not believe that Aikens LJ's analysis is correct. Section 31 provides for recognition of a foreign judgment against a state where there exists a connection between the subject matter of that judgment and the forum state that is equivalent to one that would give rise to an exception to immunity in this jurisdiction. Thus, so far as foreign judgments are concerned, section 31 both reflects and, in part, replaces the exemptions from immunity contained in the 1978 Act. The words "if, and only if" in section 31 are important. Let me revert to the example that I gave in para 32 above. Section 31 provides for the recognition and enforcement of a New York judgment against a state in respect of a personal injury caused in New York. Conversely it would not permit recognition of a New York judgment against a state in respect of a personal injury caused by the state in the United Kingdom unless, as in reality would be likely to be the case, there was an alternative basis for recognition that satisfied section 31, such as submission to New York jurisdiction by the foreign state. In short, far from providing an additional hurdle

that the claimant has to cross before enforcing a foreign judgment against a state, section 31 provides an alternative scheme for restricting state immunity in the case of foreign judgments.

48. If Aikens LJ were correct, section 31 would be largely nugatory. Even though, according to the British view of state immunity, the state against which the foreign judgment was given would have had no entitlement to immunity, this country would be prevented from recognising or enforcing the foreign judgment unless the case also fell within one of the exceptions in the 1978 Act. If I am right on the first issue, one exception which would in practice be capable of application would be section 3(1)(a). None of the other exceptions would be likely to be capable of application, with the exception of section 2.

49. Both the wording of section 31(1) and the scheme to which it gives effect appear to me to be clear. State immunity cannot be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognised in this jurisdiction, the state against whom the judgment was given was not entitled to immunity in respect of the claim. There is, however, one complication.

50. The complication is as to the effect of section 31(4) of the 1982 Act. The first problem that I have is reconciling the words in parenthesis in the subsection - "whether or not that judgment is within" section 31(1) - with the provision in section 31(1) that a foreign judgment shall be enforced "if, and only if" the requirements of the subsection are satisfied. The second is as to how to make sense of the provisions of section 14(3) in the context of proceedings to enforce a foreign judgment. Mr Howard QC for Argentina submitted that, with the aid of the application of a wet towel to the head, it was possible to determine that the provisions of section 14(3) were only consistent with Argentina's case on the construction of section 31(1). This argument was considered by Aikens LJ at paras 80 to 86 of his judgment. He concluded that the reference in section 31(4) of the 1982 Act to section 14(3), and so to 14(2) of the 1978 Act "tends to support" Argentina's case on the construction of section 31.

51. I agree with this conclusion. It is not easy to reconcile the reference in section 14(3) to the submission by a separate entity "to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity" with a scheme where any relevant submission to jurisdiction will be in a foreign forum. Sections 14(2) and 14(3) are part of a particularly complex part of the 1978 Act. It is not easy to make sense of all their provisions in the context of the 1978 Act itself, let alone section 31 of the 1982 Act. Their general object is, however, clear, which is to provide the same protection for a separate entity acting in the exercise of sovereign authority as is accorded to a state, including the protection against

enforcement in section 13. I do not consider that it would be right to abandon an interpretation of section 31 which I find clear and compelling in order to attempt to give a coherent role to section 14(3) of the 1978 Act, as applied by section 31(4) of the later Act.

52. Section 31(4) made section 12 of the 1978 Act applicable to proceedings for the recognition or enforcement of a foreign judgment and thereby made such proceedings subject to the rules of court governing service out of the jurisdiction. These rules were significantly amended in consequence of the passing of the 1982 Act by Rules of the Supreme Court (Amendment No 2) 1983 (SI 1983/1181). In particular the following new provision was introduced into RSC, Ord 11, r (1)(1):

> "…service of a writ out of the jurisdiction is permissible with the leave of the court if in the action begun by the writ- …(m) the claim is brought to enforce any judgment or arbitral award."

53. It thus became possible to obtain leave to serve out of the jurisdiction proceedings in respect of an action on a foreign judgment in circumstances where this was not governed by any Convention. No question appears to have been raised as to the fact that this opened the door to enforcement proceedings in this country of overseas judgments given against states.

54. For these reasons, in agreement with Blair J at para 26 of his judgment, and disagreement with Aikens LJ, I conclude that the effect of section 31 of the 1982 Act, together with the addition to RSC, Order 11 was accurately summarised by *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed (2006), vol 1, para 14-095, as follows:

> "The effect of [section 31] is that a foreign judgment against a state, other than the United Kingdom or the state to which the court which pronounced the judgment belongs, is to be recognised and enforced in the United Kingdom if [the judgment] would be so recognised and enforced if it had not been given against a state and the foreign 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 [1978 Act].
>
> … A foreign judgment against a state will be capable of enforcement in England if both of the following conditions are fulfilled: first, that the foreign court would have had jurisdiction if it had applied the United Kingdom rules on sovereign immunity set out in sections 2 to

> 11 of the [1978 Act], the effect of which is that a state is not immune (inter alia) where it submits to the jurisdiction or where the proceedings relate to a commercial transaction; second, that under United Kingdom law the state is not immune from the processes of execution. Section 31(4) of the 1982 Act gives to judgments against foreign states the benefit of (inter alia) the immunities from execution contained in sections 13 and 14(3), (4) of the 1978 Act; their effect is that there can be no execution against sovereign property without the written consent of the foreign state unless the property is in use or intended for use for commercial purposes. ”

Issue 3: Do the Bonds contain a submission to the jurisdiction of the English court in respect of these proceedings within the meaning of section 2 of the 1978 Act?

55. Section 2(2) of the 1978 Act varied the law of what was capable of amounting to a submission by a state to the jurisdiction of the English court, as I have described it at paras 9 and 11 above, in that it provided that a state could submit to the jurisdiction by a written agreement prior to any dispute arising. The issue on this appeal is simply whether, on the true construction of the relevant provisions of the bonds, Argentina submitted to the jurisdiction of the English court. The bonds were governed by New York law and that law applies a narrow construction in favour of the state to the construction of a term which is alleged to waive state immunity.

56. The relevant provisions of the bonds are set out in appendix 3 in two paragraphs. Blair J at paras 32 to 38 of his judgment concluded that the first paragraph contained a submission to the jurisdiction of the English court. Before Aikens LJ, NML relied on the second paragraph as supporting the conclusion that Blair J had drawn from the first. They were, however, unsuccessful, for Aikens LJ ruled that, even when the two paragraphs were read together, they did not constitute a submission to the jurisdiction of the English court.

57. There was and is a degree of common ground. It is accepted that the judgment of the New York court is a “related judgment”, that is a judgment in “related proceedings”. The issue in relation to the provisions of the first paragraph is whether the following provision constitutes a submission to the jurisdiction of the English court:

> “…the related judgment shall be conclusive and binding upon [Argentina] and may be enforced in any specified court or in any other courts to the jurisdiction of which the republic is or may be subject (the ‘other courts’) by a suit upon such judgment…”

58. Blair J considered at para 38 that this provision constituted a submission to the jurisdiction of the English court inasmuch as

> "Argentina unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment."

59. Aikens LJ did not agree. He held at para 101 that the agreement that the New York judgment could be enforced in any courts to the jurisdiction "of which Argentina is or may be subject by a suit upon such judgment" was neither a waiver of jurisdiction nor a submission to the jurisdiction of the English court. I do not follow this reasoning. It seems to rob the provision of all effect. Blair J held that this agreement was more than a mere waiver, and I agree. If a state waives immunity it does no more than place itself on the same footing as any other person. A waiver of immunity does not confer jurisdiction where, in the case of another defendant, it would not exist. If, however, state immunity is the only bar to jurisdiction, an agreement to waive immunity is tantamount to a submission to the jurisdiction. In this case Argentina agreed that the New York judgment could be enforced by a suit upon the judgment in any court to the jurisdiction of which, absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction. England is such a country, by reason of what, at the material time, was CPR 6.20(9). The provision in the first paragraph constituted a submission to the jurisdiction of the English courts.

60. If consideration of the first paragraph alone left any doubt that the terms of the bonds included a submission to this jurisdiction, this would be dispelled by the second paragraph. Omitting immaterial words, this reads:

> "To the extent that the republic … shall be entitled, in any jurisdiction … in which any … other court is located in which any suit, action or proceeding *may at any time be brought* solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court … from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction … solely for the purpose of enabling … a holder of securities of this series to enforce or execute a related judgment."

61. The words “may at any time be brought” which I have emphasised once again constitute Argentina’s agreement that the waiver of immunity applies in respect of any country where, immunity apart, there is jurisdiction to bring a suit for the purposes of enforcing a judgment on the bonds. England is such a jurisdiction. Thus the second paragraph constitutes an independent submission to English jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English (no doubt among other) courts.

62. This conclusion does not involve a departure from the narrow approach to construction required by the law of New York. It gives the provisions as to immunity in the bonds the only meaning that they can sensibly bear. Neither Aikens LJ nor Mr Howard suggested any alternative meaning for the words. The reality is that Argentina agreed that the bonds should bear words that provided for the widest possible submission to jurisdiction for the purposes of enforcement, short of conferring jurisdiction on any country whose domestic laws would not, absent any question of immunity, permit an action to enforce a New York judgment. No doubt those responsible were anxious to make the bonds as attractive as possible.

63. Aikens LJ held at para 103 that because, in the present proceedings, NML had to bring an action in this jurisdiction to obtain recognition of the New York judgment, the proceedings here were not “brought solely for the purpose of enforcing or executing any related judgment”. This was to confuse the means with the ends. Obtaining recognition of the New York judgment is no more than an essential stepping stone to attempting to enforce it. No suggestion has been made that there is any other purpose in bringing these proceedings.

64. For this reason I would reverse the decision of the Court of Appeal on the third issue also.

Issue 4: Were NML entitled to raise at the inter partes hearing the two new points not relied on in the ex parte application to serve Argentina out of the jurisdiction?

65. This issue has been described as the “gateway issue”. It involves consideration of the effect of what I shall describe as the rule in *Parker v Schuller* (1901) 17 TLR 299.

66. A claimant has always been required by rules of court to include in the application for permission to serve proceedings out of the jurisdiction a statement of the ground for doing so. This requirement is currently to be found in CPR 6.37

(1)(a), which expressly requires an application for permission to serve a claim form out of the jurisdiction to set out which of the grounds for service out (now contained in paragraph 3.1 of Practice Direction B) is relied on.

67. CPR 6.37 (3) provides:

> "The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

68. In *Parker v Schuller* the plaintiffs obtained leave to serve a writ out of the jurisdiction under Order 11, r 1(e) of the RSC on the ground that the claim was for breach of a contract within the jurisdiction. The breach alleged was of a CIF contract, and the allegation was that the contract was broken by reason of a failure to deliver in Liverpool the goods that were the subject of the contract. Leave was given ex parte and upheld inter partes. In the Court of Appeal the plaintiffs conceded that the way that their claim had been advanced had been misconceived in that a CIF contract involves an obligation to deliver documents, not the goods to which the documents relate. The plaintiffs sought to persuade the Court of Appeal to uphold the leave given to serve out on the basis of substituting for the original claim a claim for failure to deliver the relevant documents in Liverpool. The Court of Appeal refused to permit this. At p 300 A L Smith MR is reported as saying:

> "It was not until the case came into this Court that the plaintiff set up another cause of action. That could not be allowed. "

Romer LJ added:

> "…an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turned out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the judge upon the original application."

It should be noted that in this case the plaintiffs sought to rely upon different facts and not merely upon a different cause of action.

69. *Parker v Schuller* was soon lost from sight until it was applied with obvious reluctance by Sir Nicolas Browne-Wilkinson V-C in *Re Jogia (A Bankrupt)* [1988] 1 WLR 484. Since then it has been referred to or applied in a significant number of decisions at first instance or in the Court of Appeal. The most significant of these, for it expanded the scope of the original decision, was *Metall und Rohstoff A G v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. The facts of that case are complex, but it suffices to record the response, at p 436, of Slade LJ, giving the judgment of the court, to one of the submissions of counsel for the plaintiffs:

> "One of Mr Waller's responses to this contention has been to refer us to the general observations made by Lord Denning MR in *In re Vandervell's Trusts (No 2)* [1974] Ch 269, 231, as to the modern practice concerning pleadings:
>
> > "It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated."
>
> We respectfully agree with this statement as a general proposition. However, it was not made in the context of a pleading intended to be served out of the jurisdiction, to which we think rather different considerations apply. In our judgment, if the draftsman of a pleading intended to be served out of the jurisdiction under Ord 11, r 1(1)(*f*) (or indeed under any other sub-paragraph) can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his application under Ord 11, r 1(1)(*f*), be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which it was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he is in our judgment limited to what he had pleaded, for the purpose of an Order 11 application. To permit him to take a different course would be to encourage circumvention of the Order 11 procedure, which is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the ex parte application, and the defendant is likewise apprised as to the nature of the claim which he has to meet, if and when he seeks to discharge an order for service out of the jurisdiction. "

70. No rule of court requires a claimant, when seeking to serve a state out of the jurisdiction, to make clear, in the application for permission, the basis upon which it is alleged that the state does not enjoy immunity from suit. The Practice Note at CPR para 6.37.24, repeating what at the material time was 6.21.24, states that the claimant "must show distinctly (a) why the prospective defendant is not absolutely immune from suit."

71. It is Argentina's case that if the grounds relied upon in the application for permission for contending that the defendant state is not immune from suit prove to be unfounded, the rule in *Parker v Schuller* precludes the subsequent grant of permission to the claimant to rely on alternative valid grounds. Blair J did not accept this submission. He held that it involved an extension of the rule in *Parker v Schuller,* which he declined to make. He held at para 48 that where permission to serve out is given on the basis of a mistaken legal analysis of the absence of state immunity, but on a correct legal analysis the state is not in fact immune from the jurisdiction, the court has a discretion whether or not to set aside the order giving permission to serve out. He exercised that discretion in favour of NML because this involved no prejudice to Argentina, and to require NML to start proceedings afresh would be pointless and involve a waste of costs – para 49.

72. Aikens LJ reversed this decision. He held at para 61:

> "…the order of Steel J was made upon an incorrect basis of the court having jurisdiction in respect of the proposed claim against Argentina. Logically therefore, that order has to be set aside for want of jurisdiction, just as it must when a claimant has relied on an incorrect cause of action or an incorrect ground for permission to serve out of the jurisdiction. There can be no question of exercising a discretion to correct the error (in the absence of a new application on a different basis) because the lack of jurisdiction is fatal".

He added at para 66

> "…if NML incorrectly identified the basis on which it asserted that Argentina was subject to the 'adjudicative jurisdiction' of the English court, then the basis for the exercise of the jurisdiction was incorrect. It is not a mere procedural error, because it goes to the very basis for invoking the jurisdiction against a sovereign state. It is, qualitatively speaking, in the same position as a failure to identify the correct cause of action or the correct ground for obtaining permission to serve out of the jurisdiction".

73. Strictly, Aikens LJ's decision involves an extension of the rule in *Parker v Schuller*, inasmuch as the requirement to identify the reason why a state is not immune when seeking permission to serve out is not found in the rules, but only in a Practice Note. But I think that Aikens LJ was correct to find that there was no difference in principle between the two situations. Mr Sumption sought to persuade the Court to distinguish *Parker v Schuller*, but at the same time he invited this Court to hold that there is no longer any justification for following that decision, if indeed there ever was.

74. I believe that Mr Sumption is correct. Procedural rules should be the servant not the master of the rule of law. Lord Woolf, by his Reports on Access to Justice, brought about a sea change in the attitude of the court to such rules. This included the adoption of the "overriding objective" with which the new CPR begins. CPR 1.1 states that the overriding objective of the Rules is to enable the court to deal with cases justly, and that this involves saving expense and ensuring that cases are dealt with expeditiously.

75. Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an appropriate order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger. I can see no reason in principle why similar considerations should not apply where an application is made for permission to serve process out of the jurisdiction. It is, of course, highly desirable that care should be taken before serving process on a person who is not within the jurisdiction. But if this is done on a false basis in circumstances where there is a valid basis for subjecting him to the jurisdiction, it is not obvious why it should be mandatory for the claimant to be required to start all over again rather than that the court should have a discretion as to the order that will best serve the overriding objective.

76. Before *Parker v Schuller* there had been a relevant decision of a powerful Court of Appeal, of which A L Smith LJ was a member, which was not referred to and does not seem to have been cited in the later case. In *Holland v Leslie* [1894] 2 QB 450 leave to serve out of the jurisdiction had been granted in relation to a bill of exchange which had been erroneously described in the statement of claim indorsed on the writ. The Court of Appeal upheld an order giving leave to amend the writ. In doing so Lord Esher MR said this at p 451:

> "Leave was given for the issue of the writ so indorsed, and service of notice of it out of the jurisdiction; such notice was duly served upon the defendant abroad; and the defendant has in due course appeared in this country. It is argued that, under these circumstances, the writ

> cannot be amended. Why not? The rules with regard to amendments appear in terms to apply to such a case. It is contended, nevertheless that there cannot be an amendment, because the writ was for service, and has been served, out of the jurisdiction. But the defendant has now appeared in this country; and I can see no reason why an amendment such as this should not be made, just as in the case of a writ served within the jurisdiction. We were pressed with the possibility that, if such a writ could be amended, it might be amended so as to introduce a cause of action in respect of which leave could not have been originally given for service out of the jurisdiction. That is not the present case. When that case arises, there may be good reason for refusing to allow the amendment."

The other two members of the Court agreed. It is not easy to reconcile the approach in this decision with *Parker v Schuller*. Certainly it is good reason to confine the latter decision to its particular facts.

77. There are a number of authorities which follow the approach of Lord Esher in suggesting that there is, in principle, no objection to amending a pleading which has been served out of the jurisdiction unless the effect will be to add a claim in respect of which leave could not, or would not, have been given to serve out: *Waterhouse v Reid* [1938] 1 KB 743, 747, 749; *Beck v Value Capital Ltd (No 2)* [1975] 1 WLR 6,15; *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] CLC 1902, 1907; *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749. *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2008] EWCA Civ 625; [2009] QB 503, para 74. While most of these cases involved proceedings which had progressed beyond the initial leave stage, I can see no reason for adopting a less generous approach to amendment at the earlier stage. While amending to add a cause of action is not the same as amending to substitute one, in either case the amendment involves subjecting the overseas party to a claim other than the one that he entered an appearance to meet, and similar principles should apply in each case.

78. For all these reasons I would hold that the rule in *Parker v Schuller* should no longer be applied. The same approach should be taken to an application to amend a pleading that has been served out of the jurisdiction as is adopted to any other application to amend a pleading.

79. If this conclusion is not shared by the majority, I would confine the rule in *Parker v Schuller* and not extend it to cover the different facts of the present case. There is no question here of relying on a different cause of action to that in respect of which leave was obtained to serve out. Nor is there any question of relying on facts that were not before David Steel J when he gave permission to serve

Argentina out of the jurisdiction. Nor is there any failure to comply with a rule of court.

80. It follows that I consider that the application to rely on alternative reasons why Argentina has no immunity was one to be determined by Blair J in the exercise of his discretion. There are no valid grounds for challenging his decision. It has not been suggested that Argentina will be any better off if NML is required to start proceedings afresh. To require them to do so would be a waste of time and money. Argentina agreed when the bonds were issued to a wide ranging waiver of immunity and submission to jurisdiction. The court had an independent obligation to satisfy itself that Argentina is not entitled to immunity. It had before it all the relevant material. Any initial mistake on the part of NML in identifying the correct reason why Argentina enjoys no immunity should not preclude NML from proceeding with its action.

81. For these reasons, I would reverse the Court of Appeal on the fourth issue also.

Issue 5: Is Argentina entitled to claim state immunity in respect of these proceedings?

82. My answer is no. I would allow this appeal.

LORD MANCE

83. Lord Phillips has set out the facts and, in para 7 identified the five issues to which they give rise. I agree with his judgment on the second and third issues; that is, the effect of section 31 of the Civil Jurisdiction and Judgments Act 1978 and whether the bonds contain a submission to the English jurisdiction. I also agree that NML was entitled to raise these two new issues, not having relied upon them on the ex parte application for permission to serve the Republic of Argentina out of the jurisdiction. For reasons which Lord Collins has given, I do not think that the rule in *Parker v Schuller* (1901) 17 TLR 299 should be treated as extending to the present case, but I also agree that it should, in any event, no longer be followed. In the result, I also agree with Lord Phillips' answer to the fifth issue, namely that the Republic is not entitled to claim state immunity in the present proceedings to enforce against it the judgment obtained in New York proceedings. But I do so by a different route to his primary route.

84. This is because I am unable to agree with Lord Phillips on the first issue: the scope of section 3 of the State Immunity Act 1978. This represents his preferred basis for his answer to the fifth issue. I do not consider that the drafters of that Act or Parliament contemplated that section 3(1)(a) of the 1978 Act had in mind that it would or should apply to a foreign judgment against a foreign state. I understand Lord Phillips effectively to accept that (para 42), but, nonetheless, he and Lord Clarke treat the words as wide enough to cover such a judgment. I do not consider this to be justified.

85. The pursuit of a cause of action without the benefit of a foreign judgment is one thing; a suit based on a foreign judgment given in respect of a cause of action is another. In the present case, the only issue arising happens to be the issue of state immunity with which the Supreme Court is concerned. But a claim on a cause of action commonly gives rise to quite different issues from those which arise from a claim based on a judgment given in respect of a cause of action. A claim on a cause of action normally involves establishing the facts constituting the cause of action. A suit based on a foreign judgment normally precludes re-investigation of the facts and law thereby decided. But it not infrequently directs attention to quite different matters, such as the foreign court's competence in English eyes to give the judgment, public policy, fraud or the observance of natural justice in the obtaining of the judgment. These are matters discussed in rules 42 to 45 of Dicey, Morris & Collins, The Conflict of Laws 14th ed (2009) vol 1. A recent example of their potential relevance is, in a Privy Council context, *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, paras 48 and 109 to 121.

86. The exceptions from immunity provided by sections 2 to 11 of the 1978 Act focus on specific conduct (submission) in the domestic UK proceedings or on specific transactions, contexts or interests in relation to which causes of action may arise. The recognition and enforcement of foreign judgments has long been recognised as a special area of private international law. Careful statutory attention was given to it in the Administration of Judgments Act 1920 (judgments of courts from other parts of Her Majesty's dominions) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (judgments from certain other countries) in terms which (as Lord Phillips points out in paras 16 to 18) respect the existence of state immunity, as well as in Part II of the 1978 Act itself (judgments against the United Kingdom in other states party to the European Convention on State Immunity, now Regulation EC44/2001) in terms specifically addressing state immunity. In this context, it stretches language beyond the admissible to read "proceedings relating to … a commercial transaction" as covering proceedings relating to a judgment which itself relates to a commercial transaction. The improbability of so extended a construction is underlined by the extreme care that the drafters of the Act took to define in s.3, in the widest terms, the concept of "commercial transactions".

87. I do not however agree with the view (expressed by Stanley Burnton J in *AIC Ltd v The Federal Government of Nigeria* [2003] EWHC 1357 (QB), paras 30-32) that the improbability can be supported on the basis of an implied limitation of section 3(1)(a) of the 1978 Act to commercial transactions with a domestic nexus. That view ignores the clear contrast between the wording of section 3(1)(a) and (b). If there were any doubt about the point (which there is not), it would be dispelled by the Parliamentary history. In the original bill, clause 3(1), the precursor to section 3(1)(a), was territorially limited to commercial activity by a State "through an office, agency or establishment maintained by it for that purpose in the United Kingdom". Following strong criticism of this limitation by Lords Wilberforce and Denning (Hansard HL Deb 17 January 1978 vol 388 cc51-78), the Lord Chancellor moved an amendment inserting a clause in the form which became section 3(1), making expressly clear that this was to ensure that "No qualifications, no jurisdictional links with the United Kingdom are to be required" under sub-clause (a) as distinct from sub-clause (b): Hansard HL Deb 16 March 1978 vol 389 cc1491-540.

88. Even before the enactment of section 34 of the Civil Jurisdiction and Judgments Act 1982, it is extremely doubtful whether the principle that a cause of action did not merge in a foreign judgment survived in English law: *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853, 966 per Lord Wilberforce. This, to my mind, also makes unconvincing a reading of "proceedings relating to (a) a commercial transaction" which covers proceedings to enforce a judgment based on a cause of action arising from a commercial transaction.

89. Where a state has agreed in writing to submit a dispute to arbitration, section 9 of the 1978 Act provides that the state is not immune as respects proceedings in United Kingdom courts which relate to the arbitration. This subsection addresses the consequences of submission, and leaves it to the court to determine whether such has occurred. The subsection also covers ancillary or interlocutory applications relating to arbitration, and is not limited to arbitration relating to commercial transactions. But very many arbitrations are commercial; and a major purpose of section 9 must on any view have been to lift state immunity in respect of the enforcement of arbitration awards against states, including foreign arbitration awards since the subsection is in general terms (see further on this last point para 90 below). Section 9 thus reversed the effect of the House of Lords reasoning in *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 on the concept of submission as understood in *Kahan v Federation of Pakistan* [1951] 2 KB 1003, although section 13(2) to (4) restricts the issue of process against state property (principally, to property for the time being in or intended for use for commercial purposes). I would endorse on these aspects what is said in paragraphs 117 to 122 of the judgment of the Court of Appeal handed down by Moore-Bick LJ in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886. In case there were any room for

doubt, paras 119 and 120 set out extracts from Hansard (HL Debs16 March 1978 vol 389 cc1516-1517 and 28 June 1978 c316), where the Lord Chancellor confirmed expressly the intention to remove state immunity in respect of the enforcement of arbitration awards. On NML's case, there is, as a result, an unlikely dichotomy between the express treatment of arbitration in Part I of the 1978 Act and the suggested tacit, but nonetheless (if achieved) very important, removal of state immunity in respect of judgments relating to commercial transactions.

90. At the time of the 1978 Act, the rules of court provided no basis for obtaining leave to serve out of the jurisdiction in respect of a claim to enforce any judgment or arbitral award. Such a basis was only introduced, as what was then RSC O.11 r.1(1)(m), from 1 January 1984. Section 12(7) of the 1978 Act maintained the need for leave to serve out of the jurisdiction where required by the rules of court. The lifting by section 9 of the 1978 Act of state immunity in respect of arbitration awards had obvious relevance in a case, like *Duff Development Co Ltd v Government of Kelantan* itself, where a foreign state had by an English arbitration agreement undertaken to submit to the English jurisdiction in respect of an application to enforce any award as a judgment. Indeed, as appears from the original bill and from the passages in Hansard quoted in the *Svenska Petroleum Exploration* case at paras 119 and 120, the clause in the original bill which became section 9 in the 1978 Act was confined to "arbitration in or according to the law of the United Kingdom", and this phrase was only deleted in the House of Commons. In relation to foreign judgments there was, however, no equivalent problem to that raised by the *Duff Development* and *Kahan* cases, and the absence when the 1978 Act was passed of any basis for obtaining leave to serve out in respect of a foreign judgment or award also points, I think, against a construction stretching the wording of section 3(1) to cover suits to enforce such judgments.

91. It is true that the 1978 Act adopted the restrictive theory of state immunity, but the question before the Supreme Court now is: how far and in respect of what transactions. It is true that it is now well-recognised that no principle of international law renders state A immune from proceedings brought in state B to enforce a judgment given against it in state C. But the question is how far the drafters of the 1978 Act appreciated or covered the full possibilities allowed by international law, or, putting the same point in a different way, how far these were only covered a little later by section 31 of the 1982 Act. As Lord Phillips records at para 12, English common law was at the time itself in development and not finally settled, on the point that states were not immune in respect of commercial transactions, until the House of Lords decision in *I Congreso del Partido* [1983] AC 244, some years after the 1978 Act. The question whether a claim to enforce a judgment "constitute[s] proceedings relating to a commercial transaction" simply does not arise, unless one assumes that the wording of section 3(1)(a) of the 1978

Act covers proceedings on judgments. But that is the very issue which is before the Supreme Court.

92. On NML's case, which Lord Phillips favours, Parliament by section 3(1) of the 1978 Act achieved a partial and oddly imbalanced lifting of state immunity in respect of foreign judgments against foreign states. First, it omitted to introduce any analogue of a most obvious situation in which a foreign judgment might be rendered against a state. Under section 2, a state is not immune as respects proceedings in respect of which it has submitted to United Kingdom courts; but nothing in the 1978 Act lifts state immunity in the United Kingdom in respect of a foreign judgment on the basis of its submission in proceedings abroad.

93. Secondly, the Act either fails to lift immunity or, if it lifts immunity at all, does so in a partial and illogical way, in situations paralleling those covered by sections 4 to 11 of the Act. To this, Mr Sumption QC responds on behalf of NML that, if "relating to a commercial transaction" can be read widely enough to cover "relating to a foreign judgment relating to a commercial transaction", then phrases in other sub-sections such as "in respect of death or personal injury" (section 5(a)) can be read widely enough to mean "in respect of a foreign judgment in respect of death or personal injury" caused by an act or omission in the United Kingdom.

94. However, as Mr Mark Howard QC points out on behalf of the Republic, even if this persistent stretching of words were to be accepted, it does not remove the anomalies which flow from NML's case. It does not, in particular, address the cases of a foreign judgment against a state where the contract of employment was *not* made in the United Kingdom or the work was *not* wholly or to be performed here (cf section 4); or in respect of death or personal injury or damage or loss of tangible property caused by an act or omission *not* occurring in the United Kingdom (cf section 5); or relating to immovable property *not* in the United Kingdom (cf section 6); or relating to any patent *not* registered in the United Kingdom (cf section 7); or relating to membership of any body corporate *not* incorporated or constituted under United Kingdom law (cf section 8). Lord Phillips acknowledges the illogicality (para 34). The territorial limits involved in these sections are understandable in proceedings actually relating to such contexts or interests. But they make no real sense as a basis for distinguishing between foreign judgments in respect of which state immunity is and is not said to exist.

95. On NML's analysis, section 3 of the 1978 Act therefore gave a very partial and haphazard mandate for enforcement of foreign judgments, while section 31 of the 1982 Act was necessary, though only necessary, to restore the comprehensive harmony which in that respect the 1978 Act had singularly failed to achieve. There is however no trace of that in the 1982 Act itself. On the contrary, section 31(1)(b) refers to sections 2 to 11 of the 1978 Act without discrimination and evidently

without recognising that (on NML's analysis) the legislator must, by reason of the words "if and only if", have been replacing a partial scheme of enforcement of foreign judgments under the 1978 Act with a new scheme provided by section 31(1) of the 1982 Act.

96. Further, section 31(1) makes clear that the scheme it introduces is to apply to judgments by a foreign court "against a state other than the United Kingdom or the state to which that court belongs". Mr Sumption submits that this would, in consequence of the words "if and only if", supersede section 3(1) as regards judgments "against the state to which that court belongs". If that were so, then the 1982 Act would for some unexplained reason be cutting down what is, on Mr Sumption's case, the width of section 3(1). But I do not think that Mr Sumption's submission is correct. All that the words "if and only if" achieve is the exclusion of judgments "against the state to which that court belongs" from the scheme of section 31. They do not overrule or affect any provision of section 3(1) which, on NML's case, already covered such judgments. The patchwork provision of the two statutes, which arises on NML's case, and which Lord Phillips and Lord Clarke are minded to accept, becomes even less probable as a matter of imputed Parliamentary intention.

97. I see no basis for giving the phrase "relating to" in section 3(1)(a) what is described as an "updated" meaning. What constitutes a family or cruel or inhuman treatment or a "true and fair view" (to take three well-known examples) may vary, and has varied, with social or professional attitudes from time to time. But a connecting factor like "relating to" is most unlikely to have this elasticity, and it is implausible to suggest that Parliament intended that its meaning or application in or under section 3(1)(a) could, over time, expand to remove immunity in respect of judgments. This would amount to altering the scope of the Act in a way not falling within the principles originally envisaged, contrary to the rule stated in Bennion on Statutory Interpretation (5th ed) section 288, para (6). Further, even if (contrary to my view) any expansion were theoretically possible, no legal, social or other developments have been identified justifying it in this case. On the contrary: the enactment of section 31(1) of the 1982 Act argues strongly against any such expansion of the ambit of "relating to" in section 3(1)(a) of the 1978 Act; and the only effect of expanding the scope of section 3(1)(a) would be partially to create an overlap with that section and/or the illogical patch-work effect referred to in preceding paragraphs.

98. It is for these reasons that I am unable to follow Lord Phillips' and Lord Clarke's answer to the first issue. In my view, section 31 is the means by which the United Kingdom legislator achieved, for the first time, a comprehensive and coherent treatment of the issue of state immunity in respect of foreign judgments, and it enables the enforcement of the New York judgment in this case. But the bonds also contain a comprehensive submission to the English jurisdiction in

respect of the enforcement of the New York judgment, and this leads to the same result. I would, on this basis, therefore allow the appeal.

LORD COLLINS (with whom Lord Walker agrees)

99. I agree with Lord Phillips that the appeal should be allowed, but, in agreement with Lord Mance, I would rest my conclusion on section 31 of the 1982 Act and on Argentina's submission and waiver of immunity, and not on section 3 of the 1978 Act. Although I agree with Lord Phillips' observations on the so-called rule in *Parker v Schuller* (1901) 17 TLR 299, in my judgment the point does not, and did not, arise in these proceedings because there has never been a rule (as distinct from good practice) that the grounds for absence of immunity must be set out once and for all at the stage when an application for permission to serve the foreign State is made; and there is no analogy between the rules for applications for service out of the jurisdiction in general and good practice in relation to service on foreign States.

Introduction

100. The first widespread defaults on sovereign debt occurred in the early 19th century. The newly independent former Spanish American colonies "besieged London for loans" in the years 1822-1825 and the proceeds were "quickly expended on armaments, or otherwise wastefully dissipated, with little regard to the quite different purposes for which, in many instances, the loan had been ostensibly raised:" see Borchard, *State Insolvency and Foreign Bondholders*, Vol 1 (1951), pp xx-xxi, quoting Wynne (1935) 42 J Can. Bankers' Assn 472. The Province of Buenos Aires defaulted in 1827 on loans raised for it by Baring Brothers: see Ferns, *Britain and Argentina in the Nineteenth Century* (1960), pp 141 et seq; Marichal, *A Century of Debt Crises in Latin America* (1989), p 59.

101. National courts of the debtor state and of the creditors were unable to secure the rights of unpaid bondholders. In *Twycross v Dreyfus* (1877) LR 5 Ch D 605, a case concerning Peruvian bonds, Sir George Jessel MR said (at 616):

> "… [T]he municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable

> before the ordinary tribunals of any foreign government… without the consent of the government of that country."

102. By the beginning of the 20th century only a few countries (including Belgium and Italy) had adopted a restrictive theory of sovereign immunity, but only with regard to jurisdiction, and not to execution: see Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p 307. The only remedy for countries whose citizens were affected by sovereign default was force, and in response to the blockade of Venezuelan ports by the United States, Italy, Germany and Britain, the Minister of Foreign Affairs of Argentina, Dr Drago, enunciated in 1902 what became known as the Drago doctrine, namely that "the public debt [of an American nation] cannot occasion armed intervention … by a European power": Hackworth, *Digest of International Law*, vol 5 (1927), p 625. Venezuelan bond claims were subsequently submitted to mixed claims commissions: Borchard, op cit, pp 322-325.

103. But law and practice was revolutionised in the second half of the 20th century by the widespread (but by no means uniform) adoption of the restrictive theory of sovereign immunity, and the modern law now depends on the application of the restrictive theory of immunity and on the almost invariable use in international loan agreements and bond issues since the 1970s of clauses providing for submission to national jurisdiction and waivers of immunity.

104. NML is one of several bondholders who have obtained judgments in the New York Federal District Court against Argentina on the bonds: see also *Lightwater Corp v Republic of Argentina*, 2003 WL 1878420 (SDNY 2003); *NW Global Strategy v Republic of Argentina*, 2011 WL 1237538 (SDNY 2011). The idea behind "vulture funds" is not new. Borchard *State Insolvency and Foreign Bondholders*, Vol 1 (1951), pp.xx-xxi, quotes Wynne, op cit, in relation to the early South American defaults:

> "Meanwhile, however, the bonds had largely passed out of the hands of the original purchasers into the possession of speculators who bought them up at next to nothing and, in due time, reaped a handsome profit."

105. So also in the famous Greek bond cases in England in the 1960s and 1970s, the bondholders were speculators who had bought cheaply bonds issued by the Greek Government in the 1920s and unpaid since 1941: see eg *National Bank of Greece SA v Westminster Bank Executor and Trustee Co (Channel Islands) Ltd* [1971] AC 945; *UGS Finance Ltd v National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep 446.

106. So-called vulture funds have given rise to at least two problems. First, the ability of investors to acquire defaulted debt can be abused: see, eg, the *Barcelona Traction* case (*Belgium v Spain*), 1970 ICJ Rep 3; *Highberry Ltd v Colt Telecom Group plc (No 1)* [2002] EWHC 2503 (Ch), [2003] 1 BCLC 290; *(No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324.

107. Second, particular attention has focussed on the ability of vulture funds to thwart loan re-structuring by "highly indebted poor countries": see Lumina, Report to the UN Human Rights Council on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights, April 29, 2010 (A/HRC/14/21); *Donegal International Ltd v Republic of Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397; and the Debt Relief (Developing Countries) Act 2010.

108. Argentina declared a sovereign debt moratorium in December 2001 and has restructured much of its debt through debt exchange, but that has no effect on these proceedings because (a) there is no international insolvency regime for States; and (b) the bonds are governed by New York law and are unaffected by any Argentine moratorium.

Issue 1: "proceedings relating to a commercial transaction" and the State Immunity Act 1978, section 3

109. The proceedings in the present appeal are proceedings at common law for the enforcement of the New York judgment. None of the statutory methods of enforcement is available for judgments rendered in the United States. On this part of the appeal the only relevant question is whether the proceedings in England at common law on the New York judgment are "proceedings relating to … a commercial transaction entered into by the State," where "commercial transaction" includes "any loan or other transaction for the provision of finance…": section 3(1)(a); section 3(3)(b). Whether the New York proceedings were themselves "proceedings relating to a commercial transaction" is not the relevant question.

110. The question on this issue is whether the expression "relating to" is to be given the meaning ascribed to it (in proceedings different from the present ones) by Stanley Burnton J in *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB) (registration of a Nigerian judgment under the Administration of Justice Act 1920) and by Gloster J and the Court of Appeal in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm), [2006] 1 Lloyd's Rep 181, [2006] EWCA Civ 1529; [2007] QB

886 (enforcement of Danish arbitral award under Arbitration Act 1996, section 101).

111. The question, to what do the proceedings for enforcement of the New York judgment "relate," can be given a narrow or a wide answer. The narrow meaning would result in a conclusion that they "relate" to the enforceability of the New York judgment, which would involve such matters (not likely to be the subject of dispute in a case such as the present one) as whether the New York court had *in personam* jurisdiction (here there was a clear submission to the jurisdiction of the New York courts) or whether enforcement could be resisted on any of the traditional grounds (such as want of natural justice, fraud, or public policy), none of which has any arguable application. The wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3.

112. My conclusion that the narrower meaning is the one which must be ascribed to Parliament rests on considerations somewhat different from the reasons articulated by Stanley Burnton J in *AIC*. I do not consider that a potential overlap with the arbitration provision in section 9 supports a narrow interpretation of section 3. The overlap would not be complete, and it would be artificial and over-technical to use the potential overlap to cut down the scope of section 3. Nor do I consider that the narrow construction is supported by an argument that section 3(1)(a) should be interpreted so as to require a link with the territorial jurisdiction of the United Kingdom. No such link is required in the 1978 Act in relation to the head of commercial transactions covered by section 3(3)(b).

113. Both the Quebec Court of Appeal and the Supreme Court of Canada in *Kuwait Airways Corporation v Republic of Iraq* [2009] QCCA 728; revd [2010] SCC 40, [2010] 2 SCR 571, although reaching different conclusions on the facts, decided that, in an action to enforce an English judgment, the question whether the proceedings in Canada "relate[d] to any commercial activity of the foreign state" (State Immunity Act RSC 1985, c-18, section 5) depended on the nature of the underlying proceedings in England. But neither judgment articulates the reasons for that conclusion, and they are therefore unhelpful on this appeal.

114. What is not likely to be in doubt is that at the time the 1978 Act was enacted it would not have been envisaged that section 3 would have applied to the enforcement at common law of a foreign judgment against a foreign State based on a commercial transaction. That was because until RSC Order 11, r 1(1)(m) (now CPR PD6B, para 3.1(10)) was enacted in 1982 (and came into force on January 1, 1984) a defendant outside the jurisdiction could not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment (and consequently no freezing injunction could be made in relation to

those assets: *Perry v Zissis* [1977] 1 Lloyd's Rep 607). Nor is it likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form that it was enacted if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.

115. I accept that neither of those points is conclusive as to the meaning of section 3. There is no impediment in public international law to the institution of proceedings to enforce a foreign judgment based on commercial transactions. It is now possible to serve a foreign sovereign out of the jurisdiction in such proceedings, and the 1978 Act could be construed in the light of present circumstances: *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, 49; *Yemshaw v Hounslow London Borough Council (Secretary of State for Communities and Local Government intervening)* [2011] UKSC 3, [2011] 1 WLR 433, paras 5-27.

116. But for section 31 of the 1982 Act, and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. There would, however, be no principled basis on which to found such a conclusion. The proceedings in England relate to the New York judgment and not to the debt obligations on which the New York proceedings were based.

Issue 2: section 31 of the Civil Jurisdiction and Judgments Act 1982

117. This is a very short point. If the Court of Appeal was right to accept Argentina's argument, the section has such limited effect that it would not have been worth enacting, and certainly would not have justified the attention that it was given in the Parliamentary process: see Fox (2009) 125 LQR 544, at 547-548 for some of the history.

118. The natural meaning of section 31(1) is that it requires recognition and enforcement of a foreign judgment against a foreign State (other than the United Kingdom or the State in which the foreign proceedings were brought) if (a) the normal conditions for recognition and enforcement of judgments are fulfilled, and (b) *mutatis mutandis* the foreign State would not have been immune if the foreign proceedings had been brought in the United Kingdom. That meaning is the one which text writers have propounded since the section was enacted: Collins, *Civil Jurisdiction and Judgments Act 1982* (1983), p 140; Dicey & Morris, *Conflict of Laws* 11th ed (1987), pp 454-455 (now Dicey, Morris & Collins, 14th ed (2006), para 14-095); Cheshire, North & Fawcett, *Private International Law*, 14th ed (2008), pp 588-589.

119. It is true that there are some drafting infelicities, including the reference to "such matters" in section 31(1)(b), and the words in parentheses in section 31(4), but they give no support to the Court of Appeal's surprising conclusion that, in the absence of an express amendment to the 1978 Act, section 31 does not affect the law of immunity, and therefore has no discernible purpose.

Issue 3: submission

120. As late as 1957 Delaume, *Jurisdiction of Courts and International Loans* (1957) 6 Am J Comp L 189, 203, said "there was no consensus of opinion as to whether contractual waivers of immunities are valid and binding upon a foreign sovereign or as to what acts are necessary to constitute such a waiver." In 1965 the Restatement Second, *Foreign Relations Law of the United States*, section 70(1) stated that a foreign State might waive its immunity by agreement with a private party, including an agreement made before the institution of proceedings. The Reporters' Note accepted that there had been no judicial decision to this effect, but that it was believed that United States courts would apply a waiver rule. As indicated above (para 103), it was only in the 1970s that it became almost invariable practice for syndicated bank loans to States and international bonds issued by States to contain wide submissions to the jurisdiction of national courts and express waivers of immunity.

121. The position in English law prior to the enactment of the 1978 Act was that it was thought that a prior contractual submission to the jurisdiction of the court was ineffective to amount to a waiver of immunity and that nothing less than an appearance in the face of the court would suffice: *Duff Development Co v Government of Kelantan* [1924] AC 797 and *Kahan v Federation of Pakistan* [1951] 2 KB 200, relying on *Mighell v Sultan of Johore* [1894] 1 QB 149, 159, 160.

122. In *Mighell v Sultan of Johore* [1894] 1 QB 149 the argument for the unfortunate Miss Mighell was that the Sultan had waived his immunity by coming to England as Albert Baker and making contracts as a private individual. That argument was rejected. Submission had to be "when the Court is about or is being asked to exercise jurisdiction over him and not any previous time" (Lord Esher MR at 159); "the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the court, as, for example, by appearance to a writ" (Lopes LJ at 161); or "unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction" (Kay LJ at 164).

123. In *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 the question was whether the Government had waived immunity in relation to an

application to the court to enforce an arbitration award by agreeing to the arbitration clause in the deed of concession and by applying to the court to set aside the award. The effect of the decision was that a submission to arbitration was not a submission to enforcement. Only Viscount Cave and Lord Sumner relied on the approach in *Mighell.* Cf Lord Dunedin at 821.

124. In *Kahan v Federation of Pakistan* [1951] 2 KB 1003, in a contract for the supply of Sherman tanks Pakistan agreed "to submit for the purposes of this agreement to the jurisdiction of the English courts" and agreed a method of service within the jurisdiction. Relying on three of the speeches in *Duff Development* and the decision in *Mighell*, the Court of Appeal held that there was no submission in the absence of an undertaking given to the court at the time when the other party asked the court to exercise jurisdiction over it.

125. As Dr F A Mann said, "the proposition that a waiver or submission had to be declared in the face of the court was a peculiar (and unjustifiable) rule of English law": (1991) 107 LQR 362, at 364. In a classic article (Cohn, *Waiver of Immunity* (1958) 34 BYIL 260) Dr E J Cohn showed that from the 19th century civil law countries had accepted that sovereign immunity could be waived by a contractual provision, and that the speeches in *Duff Development* on the point were obiter (and did not constitute a majority) and that both *Duff Development* and *Kahan v Federation of Pakistan* had overlooked the fact that submission in the face of the court was not the only form of valid submission since the introduction in 1920 in RSC Ord 11, r 2A (reversing the effect of *British Wagon Co Ltd v Gray* [1896] 1 QB 35) of a rule that the English court would have jurisdiction to entertain an action where there was a contractual submission. In particular, in *Duff Development* Lord Sumner had overlooked the fact that *British Wagon Co v Gray* was no longer good law.

126. The principle enunciated in *Kahan v Federation of Pakistan* was reversed by section 2(2) of the 1978 Act, which provided that a State could submit to the jurisdiction "by a prior written agreement." This is consistent with international practice: United States Foreign Sovereign Immunities Act 1976, section 1605(a)(1) (State not immune if it has "waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver ..."); European Convention on State Immunity 1972, Art 2(b) (no immunity if "it has undertaken to submit to the jurisdiction of [the] court … by an express term contained in a contract in writing"); UN Convention on Jurisdictional Immunities of States and their Property 2004, Art 7(1)(b) (no immunity if the State has "expressly consented to the exercise of jurisdiction by the court with regard to the matter or case … in a written contract").

127. The "Waiver and Jurisdiction Clause" in the bonds provided that a related judgment:

> "…shall be conclusive and binding upon [Argentina] and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the 'Other Courts') by a suit upon such judgment."

128. The New York judgment was on any view a "related judgment." Argentina agreed that it could be enforced in any other courts "to the jurisdiction of which the Republic is or may be subject." This was the clearest possible waiver of immunity because Argentina was or might be subject to the jurisdiction of the English court since the English court had a discretion to exercise jurisdiction in an action on the New York judgment by virtue of CPR 6.20(9) (now CPR PD6B, para 3.1(10)).

129. The waiver is confirmed by the second paragraph of the clause, which provides:

> "To the extent that the Republic… shall be entitled, in any jurisdiction…in which any…Other Court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any Related Judgment, to any immunity from suit, from the jurisdiction of any such court…from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the Republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction …solely for the purpose of enabling the Fiscal Agent or a holder of Securities of this Series to enforce or execute a Related Judgment."

130. Again England is a jurisdiction in which an action "may … be brought" to enforce the New York judgment and Argentina agreed not to claim any immunity in that jurisdiction. The contrary conclusion of the Court of Appeal is not readily explicable.

Issue 4: The Parker v Schuller point

131. As I have said, in my judgment the point in *Parker v Schuller* (1901) 17 TLR 299 does not arise. As Lord Walker said in *Roberts v Gill & Co* [2010]

UKSC 22, [2011] 1 AC 240, at [94], the law of procedure and practice has traditionally been regarded as the province of the Court of Appeal rather than the House of Lords (or, now, the Supreme Court), and this court should be especially hesitant to decide points of procedure in appeals in which they do not even arise.

132. The reason why the point does not arise is as follows. The current CPR 6.37(1)(a) provides that an application for permission to serve a claim form out of the jurisdiction must set out which ground in paragraph 3.1 of Practice Direction 6B is relied on. There was substantially the same rule under the RSC, where Order 11, r 4(1) provided that an application for the grant of leave to serve a writ out of the jurisdiction had to be supported by an affidavit stating the "grounds on which the application is made". If there is such a rule as the so-called rule in *Parker v Schuller* (1901) 17 TLR 299 it is a rule that the court must decide an application for permission to serve out of the jurisdiction on the basis of the cause or causes of action expressly mentioned in the pleadings and the claimant will not be allowed to rely on an alternative cause of action which he seeks to spell out of the facts pleaded if it has not been mentioned: see now Civil Procedure 2011, vol 1, para 6.37.15.1 (or under the RSC, Supreme Court Practice 1999, para 11/1/10).

133. But there is no analogous rule relating to the exceptions to State immunity. There is simply a note in Civil Procedure, vol 1 (now para 6.37.24, and formerly, eg at Supreme Court Practice 1999, Vol 1, para 11/1/17) indicating that the practitioner should note that an application for permission to serve the foreign State should show distinctly why the prospective defendant is not absolutely immune from suit. This is neither a rule nor a Practice Direction nor has it ever been. There is no analogy between the specific rule for service out of the jurisdiction and the good practice note and therefore no basis for the conclusion of the Court of Appeal that because the basis for absence of immunity was incorrectly identified the English court had no jurisdiction. That is why the point simply does not arise.

134. If it had arisen, I would have agreed with the general approach of Lord Phillips. It is to be noted in particular that in *Parker v Schuller* itself Romer LJ (at 300) based his decision on the ground very close to that of non-disclosure. He said

> "…an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turned out to be unfounded, the plaintiff ought not to be allowed, when an application was made by the defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the judge on the original application."

135. It was on the representation that the defendants were bound to deliver the goods in England that leave had originally been granted.

136. In cases of non-disclosure, the court has a discretion (a) to set aside the order for service and require a fresh application; or (b) to treat the claim form as validly served, and deal with the non-disclosure if necessary by a costs order: *Macaulay (Tweeds) Ltd v Independent Harris Tweed Producers Ltd* [1961] RPC 184; *Kuwait Oil Co (KSC) v Idemitsu Tankers KK, The Hida Maru* [1981] 2 Lloyd's Rep 510.

137. By analogy, where the so-called rule in *Parker v Schuller* (1901) 17 TLR 299 might apply in a case where the ground for service out has been incorrectly identified, the court would also have power to grant permission to serve out on a fresh basis and dispense with re-service.

LORD CLARKE

138. I agree that the appeal should be allowed for the reasons given by Lord Phillips. I add a short judgment of my own because of the difference of opinion between Lord Phillips and Lord Mance, Lord Collins and Lord Walker on the first issue. As to the fourth issue, I agree with Lord Collins that the point does not arise but, if it does, like him I agree with Lord Phillips' observations on the so-called rule in *Parker v Schuller* (1901) 17 TLR 299.

139. The question raised by the first issue is whether these proceedings are "proceedings relating to … a commercial transaction entered into by the state" of Argentina within the meaning of section 3(1)(a) of the State Immunity Act 1978 ("the 1978 Act"). The Court of Appeal held that they are not. As Lord Phillips observes at para 20, it is common ground that the New York proceedings in which NML obtained judgment against Argentina were such proceedings. The contrary would have been unarguable because they were brought in order to establish Argentina's liability under the bonds described by Lord Phillips. NML's argument is that, if the New York proceedings related to a commercial transaction, it is but a short step to hold that these proceedings, which were brought in order to enforce a judgment in respect of a liability under the bonds, are also proceedings "relating to a commercial transaction". I agree. As ever, all depends upon the context, but it seems to me to follow naturally from the conclusion that the New York proceedings were such proceedings that the same is true of these. Both have the same purpose, namely to enforce Argentina's liabilities under commercial bonds. There is nothing in the language of section 3(1) to lead to any other conclusion.

140. The Court of Appeal reached its conclusion in the light of the decision of Stanley Burnton J in *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB) and in the light of dicta in the Court of Appeal in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, [2007] QB 886. Lord Phillips has set out the relevant parts of the judgments in those cases at paras 21 and 23 and para 25 respectively. In *Svenska* the judgment of the court was given by Moore-Bick LJ. Scott Baker LJ and I were the other two members of the court. I have now reached the conclusion that the decision in *AIC* and the dicta in para 137 of *Svenska* (to which I was a party) were wrong, essentially for the reasons given by Lord Phillips at paras 26 to 41 which I adopt without repeating.

141. Lord Mance has reached a different view. He notes in para 84 that in para 42 Lord Phillips recognises that the conclusion that he has reached may not have occurred to the draftsman of the 1978 Act or to Parliament. Lord Mance concludes that Lord Phillips' approach and conclusions are not justified. He does so principally by looking at circumstances as they existed at the time the 1978 Act was enacted. However, in my opinion, that is to approach the construction of section 3(1)(a) of the Act too narrowly.

142. It is stated in *Bennion on Statutory Interpretation*, 5th ed (2008) at section 288 that, unless a contrary intention appears, an enactment is intended to develop in meaning with developing circumstances and should be given what *Bennion* calls an updating construction to allow for changes since the Act was initially framed. *Bennion* distinguishes that case, which he calls the usual case, from the comparatively rare case of the Act which is intended to be of unchanging effect. The commentary to section 288 states that the court must, in interpreting an Act, make allowances for the fact that the surrounding legal conditions prevailing on the date of its passing have changed.

143. That approach seems to me to be entirely consistent with that of Lady Hale in *Yemshaw v Hounslow London Borough Council (Secretary of State for Communiteis and Local Government intervening)* [2011] UKSC 3, [2011] 1 WLR 433, paras 25 to 28, where she was considering whether words such as "violence" in a statute could be given an updated meaning. She concluded that the question was whether an updated meaning was consistent with the statutory purpose. See also *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, per Lord Clyde at 49-50, where he said in the context of the meaning of "family" in the Rent Acts:

> "The judges in *Helby v. Rafferty* [1979] 1 WLR 13 had difficulty in accepting that a word which had been repeated throughout the successive Rent Acts could change its meaning from time to time.

> But as a matter of construction I see no grounds for treating the provisions with which we are concerned as being in the relatively rare category of cases where Parliament intended the language to be fixed at the time when the original Act was passed. The rule of contemporary exposition should be applied only in relation to very old statutes (*Governors of Campbell College, Belfast v Commissioner Northern Ireland Valuation* [1964] 2 All ER 705). The general presumption is that an updating construction is to be applied (*Bennion on Statutory Interpretation*, 3rd ed p 686). Such an approach was recently adopted by this House in *Reg v Ireland* [1988] AC 147."

144. In my opinion it is appropriate and consistent with the statutory purpose of the 1978 Act to give it an updated meaning. The question is whether, viewed at the time the question arises, particular proceedings for the enforcement of a particular foreign judgment are proceedings "relating to a commercial transaction". At the time the 1978 Act was enacted there was no machinery for seeking permission to serve proceedings out of the jurisdiction in respect of a claim to enforce either an arbitration award or a foreign judgment. It could thus be said with force that at that time it was not contemplated that proceedings could be brought in England on a foreign judgment, at any rate unless the defendant accepted service of them.

145. I note that section 12(6) of the 1978 Act permits a state to accept service of proceedings against it in a particular manner, including no doubt proceedings to enforce a foreign judgment. As Lord Phillips says at para 42, prior to 1978 there had been no attempts to enforce in the United Kingdom judgments against states. However, he adds that section 12(7) makes it plain that service on a sovereign state requires permission, which could only be granted in accordance with the rules of court governing service out of the jurisdiction.

146. In my opinion, Parliament must have recognised that those rules, then RSC Order 11, would be likely to be amended from time to time and, indeed, may well have contemplated that at some future date a rule would be introduced permitting permission to be given allowing service out of the jurisdiction. As Lord Collins explains at para 114, such a rule was introduced with effect from January 1 1984 in RSC Order 11 r 1(1)(m). It subsequently became CPR 6.20(9) and is now CPR 6BPD para 3.1(10), which provides for service of proceedings out of the jurisdiction where "a claim is made to enforce any judgment or arbitral award." As I see it, the question is whether such proceedings are proceedings "relating to a commercial transaction" within section 3(1)(a) in circumstances where such proceedings are contemplated by the present rules of court. I would answer that question in the affirmative.

147. As Lord Phillips has explained, there was during the 20th century a growing recognition round the world of the restrictive doctrine of state immunity under which immunity related to government acts in the exercise of sovereign authority (*acta jure imperii*) but not to commercial activities carried on by the state (*acta jure gestionis*). As I see it, the conclusion that these proceedings are proceedings relating to a commercial transaction is no more than a further example of that growing recognition.

148. The question arises in the context of the particular proceedings in this case. As Lord Phillips observes at para 29, the question in these proceedings is whether Argentina enjoys state immunity. I agree with him that, there being no principle of international law under which state A is immune from proceedings brought in state B in order to enforce a judgment given against it by the courts of state C where state A did not enjoy immunity in respect of the proceedings that gave rise to that judgment, under international law the question whether Argentina enjoys immunity in these proceedings depends upon whether its liability arises out of *acta jure imperii* or *acta jure gestionis*. That involves a consideration of the nature of the underlying transaction and demonstrates that the proceedings, at any rate on the facts of this case, relate to a commercial transaction.

149. I agree with Lord Collins that the expression "relating to" in section 3(1)(a) can be given a narrow or wide meaning. I also agree with him that these are proceedings relating to the foreign judgment. The question is whether they are also proceedings "relating to a commercial transaction" entered into by Argentina. I agree with Lord Collins in para 111 that the wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of section 3. For my part, I see no reason why, in construing the meaning of "relating to", the court should not reflect that practical reality.

150. I agree with Lord Collins in para 112 that a potential overlap with the arbitration provision in section 9 does not support a narrow interpretation and that there is no warrant for holding that section 3(1)(a) should be interpreted as requiring a link with the territorial jurisdiction of the United Kingdom. I also agree with him that the absence of reasoning in the Canadian case to which he refers in para 113 makes it of little assistance. In para 114 Lord Collins notes that it was decided in *Perry v Zissis* [1977] 1 Lloyd's Rep 607 that, since a defendant could not be served out of the jurisdiction in an action on a foreign judgment, no freezing injunction could be granted in respect of assets within the jurisdiction. I agree that that was indeed the position at that time. The position would surely be different now that the rules have been changed. Finally I agree with Lord Collins that it is not likely that section 31 of the Civil Jurisdiction and Judgments Act 1982 would have been enacted in the form in which it was if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.

151. However, Lord Collins accepts at para 115 that neither of those points is conclusive as to the meaning of section 3. That is because there is no impediment in international law to the institution of proceedings to enforce a foreign judgment. Lord Collins adds that it is now possible to serve a foreign sovereign out of the jurisdiction and that the 1978 Act could be construed in the light of present circumstances. He cites *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, 49 and *Yemshaw* [2011] 1 WLR 433, paras 5 to 27 for that proposition. As stated in para 144 above, I would go further and hold that it should be given an updated meaning. As Lord Clyde said in *Fitzpatrick* in the passage quoted above, the general presumption is that an updating construction is to be applied.

152. As I see it, once it is concluded that an updating construction should be applied, the wider meaning would give effect to the practical reality that the sole purpose of the proceedings is to enforce Argentina's liability under a commercial transaction and that there is no impediment to such a construction in international law, both policy and principle lead to the conclusion that the wider interpretation is to be preferred.

153. Lord Collins suggests at para 116 that, but for section 31 and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give section 3 the wider meaning. He adds that there would, however, be no principled basis for doing so. I respectfully disagree. I do not think that either the enactment of section 31 or the fact that some parties use wide submission and waiver clauses points to a narrow meaning of "relating to", whether as a matter of policy or as a matter of principle. In my opinion, viewed as at the time the question has to be decided these proceedings relate both to the New York judgment and to the underlying commercial transaction.