INTERNATIONAL COMMERCIAL ARBITRATION AND STATE IMMUNITY BY KI VIBHUTE
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PROFESSOR Vibhute's recent monograph on the international and comparative law of State immunity provides a welcome introduction to the subject, coupling a good, at times analytical, account of the general principles of law with the convenience of a portable volume. This concise work, shy of 200 pages altogether,

resolves itself into 11 chapters. An introductory first chapter is followed closely by a second dealing with the general theories of State immunity before turning, in the third chapter, to an account of the conceptual difficulties presented to a restrictive theory of immunity. It is a comfort to our readers to be reminded by Professor Vibhute, who is Dean of Law at India's University of Pune, that a restrictive theory is that which is applied in the practice of most municipal courts today. In Chapter Four, Professor Vibhute expands on the difficulty of distinguishing between *acta jure imperii* and *acta jure gestionis*, a distinction that lies at the heart of our modern day "trader theory" of immunity, which this journal's readers will recall requires a distinction drawn between the State, or State organ, or other entity (however these variations on a common theme are defined in the detail of the various municipal laws) when acting as a sovereign would on the one hand and when acting as a trader would on the other. It is somewhat disappointing, although I accept this to be a matter of personal preference, that Professor Vibhute concludes by simply cautioning us all that the different approaches taken to the matter are all equally defective if called upon to provide a logical and sound basis for the distinction.

Professor Vibhute warms to his theme in Chapter Five, dealing therein with the intricacies of characterisation as the issue would be likely to arise in the various municipal judicial determinations on common questions concerning the true nature (commercial or otherwise) of various forms of State and State-related activity. I did profit from his considerate analysis of the differences in terms of the guidance provided on this matter by various municipal legislation, regional and international instruments, and other kinds of material evidence of international law, and, consequently, of the difficulties involved. Our readers are already aware that United States and Canadian legislation would grant the courts relatively broad discretion in this matter, compared, for example, to such legislation elsewhere as have essentially followed Britain's State Immunity Act of 1978, including Singapore's State Immunity Act of 1979. Given the possibility and reality of divergent approaches to the matter, Professor Vibhute advocates an approach essentially grounded in conflicts thinking. Professor Vibhute believes that differences in judicial approach can be resolved by choice of law reasoning (what he calls a "choice of custom approach"), in which case the test of whether or not particular acts constitute *acta jure gestionis* would be determined by the proper law, or even a combination of the proper law and what he calls, somewhat curiously, "the defendant state's own socio-economic standards". If both the proper law and the defendant State's "socio-economic standards" point in the same direction as does the law of the forum, no difficulty is presented. If I understand Professor Vibhute correctly, where there is a conflict between the perspective of the defendant State (as would be determined as such by the defendant State's own courts?) and the law of the forum, the proper law ought to point the way on the issue of the commercial or other nature of the State or State-related activity called into question. Putting aside the problem of thereby also incorporating a *renvoi* problem, my reservation to all this is that the issue of immunity, or indeed absence of immunity, is properly a jurisdictional issue, in which case jurisdictional or forum selection thinking ought to guide the matter, as opposed to choice of law thinking (which should point only towards the putative proper law in addressing questions of hidden choice of law). This could raise the issue of *forum non conveniens*. To cut to the quick, parties would be encouraged to also forum shop for forum rules, thus increasing the possibility and costs of pre-litigational skirmishes. Having said all that, perhaps my real reservation is that while I am genuinely intrigued by Professor Vibhute's proposal that we ought adopt a conflicts solution to a public

international law problem, I do not see how it would contribute to a long-term solution to the public international law problem itself.

Similarly, Chapter Six of Professor Vibhute's work raises conflicts-type difficulties where he deals with the lively question of whether immunity could properly be raised as a jurisdictional, or even enforcement, bar to arbitration, despite the existence of a contractual arbitration clause. Our reader is understandably sceptical. However, Professor Vibhute is equally right to think that it is a genuine issue, even if only in principle and because some of the answers to this problem, which I think Professor Vibhute uncritically accepts, are themselves inadequate. The classic answer is that the arbitrator comes into play because of the arbitration clause; s/he, being thereby a creature of contract and unlike the official of any State which by virtue of its membership of the community of civilised nations is thereby obliged to account for the defendant State's potential immunity, is not obliged to recognise the issue of immunity. However, if we take Professor Vibhute's interest in the role that conflicts thinking could play in handling the immunity question in commercial litigation a little further, we could say that such a contract would raise a hidden choice of law question. One does however agree with Professor Vibhute that the best way to proceed is probably with some kind of implied waiver analysis flowing from the existence of the arbitration clause itself. Having said all that, our readers will recall that there is already much in the way of national legislation addressing the issue, providing sufficient cause for hope that the issue would thereby arise in practice only in somewhat rarefied and exceptional cases, and only in exceptional places.

Chapter Seven develops further the distinction between arbitral jurisdiction and enforcement proceedings. Even if the plea of State immunity has no role to play in arbitration proceedings, or if such a plea is defeated in that context, would it have a place in enforcement proceedings? Again, barring legislative intervention and settled law in the jurisdiction in question, the preferred solution may well lie somewhere on the plane of implied waiver of immunity, but nonetheless subject, or so I would have thought, to contrary *lois de police*. Chapter Eight is devoted entirely to this issue of implied and express waivers of immunity.

The penultimate and final chapters deal, respectively, with the position in India and an appraisal of that position. Professor Vibhute spares no criticism of section 86 of India's Code of Civil Procedure (CCP) of 1908, which at once appears a child of the earlier (pre-1980) practice of Her Majesty's courts in dealing with the recognition of foreign Governments, and which remains the approach today in dealing with the recognition of States before the English courts, namely that certification by the Foreign and Commonwealth Office is (and in the case of recognition of Governments, was) wholly conclusive. According to section 86 of the Indian CCP, the Indian courts are required to defer to the Indian Central Government on this issue. This is in stark contrast with the position taken in the United States Foreign Sovereign Immunities Act of 1976. As explained by the State Department's then Legal Advisor, the view taken was that "[w]e..thought it was the better part of valour...to have it to the courts with very modest guidance." It would, however, be wrong to say that Professor Vibhute is against statutory intervention, or conversely for judicial activism, in this area. His reservations with regard to section 86 of the Indian CCP are directed not only at the level of principle, namely the current practice of executive intervention, but also at the level of the actual, and unfortunately discrepant, behaviour of the Indian courts due probably to the absence of sufficient statutory guidance. It would be no great stretch of the imagination to surmise that this state of affairs is not altogether conducive to doing business in India. His criticisms draw on the comparative survey of foreign laws in the preceding chapters and lend the book a worthy purpose.

Systematic and comprehensive treatment of the various kinds of commercial contexts in which the immunity question has arisen in the case law of the various jurisdictions surveyed, to a point equal to the admirable rigour with which Professor Vibhute handles the Indian case law, would have added value. Having said that, it is not the place of the reader to impose in such a manner on the author, whose purposes would appear to lie elsewhere. Well worth serious attention are Professor Vibhute's proposed amendments to section 86 of the Indian CCP and his warning that even these amendments could only serve as an intermediate measure in anticipation of legislative reform of a more comprehensive and studied nature.

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