

Contents

<i>Foreword by Professor James Crawford</i>	<i>page</i> xvi
<i>Preface and acknowledgements</i>	xix
<i>Abbreviations</i>	xxiii
<i>Table of cases</i>	xxx
<i>Legal instruments and codification documents</i>	cliii
Introduction	1
1 The history of State immunity	6
1. The age of absolute immunity	7
2. Exceptions to absolute immunity	10
3. The emergence of the doctrine of restrictive immunity	11
4. The descent of the State	19
5. The irrelevance of ideologies	23
6. The defendant States	25
7. The sources of the law of State immunity	26
8. Cross-fertilization	27
9. Terminology	29
Conclusion	31
2 General principles	33
1. A general statement of principles	34
2. State immunity as a principle of customary international law	34
3. The presumption of immunity	37
4. Immunity and municipal law	42
5. The legal basis for immunity	44

5.1.	‘Sovereignty’ and the affiliated concepts	46
5.2.	<i>Par in parem non habet imperium?</i>	51
5.3.	What is the basis of immunity?	55
6.	The legal basis for denying immunity	58
6.1.	The ‘private person’ test	59
6.2.	The principle of territorial jurisdiction	64
6.3.	Private act plus territoriality – <i>Binnenbeziehung</i>	68
	Conclusion	73
3	Commercial activity	75
1.	What is a commercial activity?	76
2.	What is a non-commercial activity?	79
3.	Nature or purpose?	85
3.1.	The ‘nature’ approach	86
3.2.	The difficulties with the ‘nature’ approach	87
3.3.	The ‘purpose’ approach	98
3.4.	The ‘context’ approach	103
3.5.	A summary	108
4.	The jurisdictional nexus requirement under the US FSIA	108
4.1.	The first clause of section 1605(a)(2)	110
4.1.1.	‘Based upon a commercial activity’	110
4.1.2.	‘Substantial contact’	112
4.2.	The second clause of section 1605(a)(2)	113
4.3.	The third clause of section 1605(a)(2)	115
4.3.1.	The ‘act’	116
4.3.2.	The ‘direct effect’	124
4.3.3.	‘An immediate consequence’	125
4.3.4.	The ‘place of performance’ test	127
4.3.5.	The ‘legally significant act’ test	129
	Conclusion	129
4	Contracts of employment	132
1.	Terminology	134
2.	The peculiar features of employment cases	136
2.1.	Specialized tribunals	136
2.2.	The inadequacy of the nature/private person test	137
3.	Two models	143
4.	The UK Model	144

4.1.	The European Convention	144
4.1.1.	The plaintiff	145
4.1.2.	The place of performance	147
4.1.3.	The choice of law	147
4.2.	The UK SIA	148
4.2.1.	Contracts of employment as a separate category	149
4.2.2.	The plaintiff	149
4.2.3.	The choice of law	149
4.3.	The Australia FSIA	150
4.4.	Other instruments	152
4.5.	The importance of having a contract	154
5.	The US Model	157
5.1.	The US FSIA	157
5.2.	The plaintiff	162
5.2.1.	Individuals: their nationality	162
5.2.2.	Trade unions	162
6.	Diverse approaches	164
6.1.	The employment relationship	165
6.2.	The duties and functions of the employee	166
6.3.	The status of the employer	170
6.4.	The acts of the employer	171
6.5.	The status of the employee	172
6.6.	The nature of the particular activity	173
6.7.	The territorial connection	173
6.8.	The choice of law clause	174
6.9.	The remedies sought	175
7.	The savings regime	179
7.1.	Diplomatic and consular missions	179
7.1.1.	Proceedings against the foreign State	181
7.1.2.	'Institutional aims'	185
7.1.3.	Proceedings against the diplomat personally	191
7.2.	Foreign armed forces	193
7.3.	Other public institutions	194
8.	Diversity and lack of uniform rules	194
	Conclusion	196
5	Non-commercial torts	199
1.	Terminology	199
2.	The targeted torts	200

2.1. Physical injury and tangible property	200
2.2. ‘Insurable risks’?	201
2.3. ‘Discretionary function’	203
3. The <i>jure imperii</i> / <i>jure gestionis</i> distinction?	207
4. The territorial connection	215
4.1. Tortious act/omission only	216
4.2. Injury/damage only	218
4.3. Both tortious act/omission and injury/damage	221
4.4. A direct effect?	223
4.5. States without immunity legislation	224
5. Attribution	224
6. The terrorism exception in US law: a departure	225
Conclusion	228
6 Separate entities	230
1. Terminology	231
2. Diverse approaches	232
2.1. The UK Model	232
2.2. The US Model	242
2.2.1. The presumption of immunity	244
2.2.2. A question of status	244
2.2.3. ‘A separate legal person’	247
2.2.4. ‘An organ of a foreign State’	249
2.2.5. ‘Pooling’	259
2.2.6. ‘Tiering’	264
2.2.7. The question of timing	273
2.2.8. Other uses of the instrumentality status	273
2.2.9. The Canadian law	274
2.3. Comparison and summary	277
2.4. Somewhere in-between: the Australian law and others	280
2.5. The practice of the States without immunity statutes	283
3. Piercing the corporate veil?	287
Conclusion	296
7 Expropriation	298
1. The general principle: immunity	299
2. Legality and immunity	301
3. The ILC’s aborted provision	303

4.	The ‘expropriation’ provision in the US FSIA	303
4.1.	‘Rights in property’	305
4.2.	‘Taken in violation of international law’	307
4.3.	The territorial nexus requirement	311
5.	The Helms-Burton Act	313
	Conclusion	315
8	Waiver of immunity	316
1.	The US practice	317
1.1.	Who can waive immunity?	317
1.2.	Explicit or express waiver	319
1.3.	How explicit must an explicit waiver be?	322
1.4.	Implicit or implied waiver	324
1.4.1.	Arbitration	325
1.4.2.	The governing law of a contract	327
1.4.3.	Participation or involvement in litigation	329
1.5.	Implicit waiver as explicit waiver	333
1.6.	The specificity of waiver	333
1.7.	Counterclaims	334
2.	The UK practice	335
3.	The practice of other States	340
4.	Does a violation of human rights constitute an implied waiver?	340
	Conclusion	342
9	Measures of constraint	343
1.	Terminology	344
2.	Two distinct immunities: immunity from suit and immunity from execution	347
2.1.	The judicial power of the court	348
2.2.	The universal distinction between the two immunities	350
2.2.1.	The treaties	351
2.2.2.	The US FSIA	353
2.2.3.	The UK SIA and other national statutes	356
2.2.4.	The practice of other States	358
2.2.5.	Two distinct immunities: a universal rule	361
3.	The resurfacing of the ‘purpose’ test	362
3.1.	The treaties	363
3.2.	The US FSIA	363

3.3.	The UK SIA and other national statutes	367
3.4.	The practice of the States without immunity legislation	369
4.	Prejudgment measures	373
4.1.	Immunity as a preliminary issue	374
4.2.	The conditions for prejudgment measures	378
4.2.1.	Under the same conditions as execution	378
4.2.2.	Under more liberal conditions	383
4.2.3.	Under stricter conditions	383
5.	The conditions for measures of constraint	390
5.1.	Waiver	390
5.2.	The ‘purpose’ test	392
5.3.	Separate entity ownership	394
5.3.1.	Legal instruments	394
5.3.2.	The practice of the States without immunity legislation	398
5.4.	The ‘connection’ requirement	399
5.4.1.	Subject-matter connection	399
5.4.2.	Territorial connection – <i>Binnenbeziehung</i>	399
5.4.3.	The entity connection	401
5.5.	The territorial presence requirement	402
5.6.	Executive oversight or authorization	404
6.	Categories of property under special protection	404
6.1.	Diplomatic property	404
6.1.1.	Diplomatic premises	405
6.1.2.	Embassy bank accounts	407
6.2.	Central bank property	410
6.2.1.	The US FSIA	410
6.2.2.	The UK SIA	414
6.2.3.	The Australia FSIA	416
6.3.	Military property	417
6.4.	Other types of public property	418
7.	Mixed accounts and accounts without definite destination	418
7.1.	Mixed accounts	418
7.2.	Accounts without definite destination	421
	Conclusion	421
10	State immunity and human rights violations	423
1.	Territorial jurisdiction	424
2.	State immunity and criminal proceedings	426

3.	State immunity and <i>jus cogens</i>	428
4.	The assertion of extraterritorial jurisdiction	431
5.	The State and its officials	432
6.	The <i>Pinochet</i> case: a dissection	436
7.	Immunity and legality	438
	Conclusion	440
11	The genesis of the UN Convention	441
1.	Early efforts at codification	441
2.	The work of the International Law Commission	446
3.	The debate in the General Assembly Sixth Committee	447
4.	Universal support for the UN Convention	454
5.	What the UN Convention enshrines	455
6.	What the UN Convention avoids	456
	Conclusion	457
	<i>General conclusions</i>	459
	<i>Notes</i>	466
	<i>Bibliography</i>	706
	<i>Index</i>	747