POCKET B

TRANSCRIPT OF JUDGMENT: BEFORE MR. JUSTICE EVANS

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT IN CHAMBERS

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16.4.92.

1991 Folio No.69

BETWEEN:

KUWAIT AIRWAYS CORPORATION

Plaintiff

and

(1) IRAQI AIRWAYS COMPANY
(Trading as IRAQI AIRWAYS)

(2) REPUBLIC OF IRAQ

Defendants

J U D G M E N T

I certify that this is the transcript of the judgment handed down on April 16, 1992, with minor corrections including those referred to in para. 2, 3 + 4 of London and Scandinavian's letter dated 22nd. April 1992. I give the appropriate direction under O.68 R.1

Thursday 16 April 1992 @ 1100

(to the best of my recollection, that direction was given on 16 April 1992).

Anthony Evans 22/9

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J U D G M E N T

Thursday 16 April 1992 @ 1100

Mr. Justice EVANS: Iraq invaded Kuwait on the 2nd August 1990. Kuwait airport was occupied by the Iraqi military forces during the morning. Among the aircraft at the airport were 15 owned by the Plaintiffs, KAC, and 4 operated by other airlines which were in transit at Kuwait. There appears to have been no further fighting at the airport after that morning, but the threat of guerilla action and of possible foreign retaliation, by the U.S.A. or other States, remained. However, the occupation was completed by at latest the 5th August and on the 8th/9th August the Revolutionary Command Council of Iraq ("R.C.C.") published Decrees Nos. 313 and 312 respectively (sic) proclaiming the integration of Kuwait with Iraq, Kuwait later being designated as a Governate forming part of Iraq (Presidential Decree No.248 dated 26th August 1990).

Of the 15 KAC aircraft, five were removed from Kuwait by the Iraqi Air Force. The remaining 10 KAC aircraft were civilian airliners, two Boeing 767's and eight Airbuses. They are the subject matter of these proceedings. They were flown to Iraq on the 6th/8th August in circumstances which I shall have to set out in some detail. There they remained in the custody of the first Defendant IAC until the 17th September when a further RCC Decree No. 369 dated the 9th September took effect. That Decree purported to dissolve the Plaintiffs KAC and transfer all their assets to IAC. Thereafter IAC made what use of the aircraft it could in the prevailing circumstances, but this use was limited by the almost complete cessation of international flights to and from

Iraq. Two of the aircraft were overpainted in IAC livery and one was used for certain internal flights.

When the prospect of a military attack on Iraq pursuant to Resolutions of the United Nations Security Council became imminent, in January 1991, six of the KAC aircraft were flown to Iran and there interned by the Iranian authorities. Later, the four remaining aircraft were destroyed in air raids upon Iraq.

When hostilities ceased and Iraq withdrew from Kuwait, the RCC published Resolution No.55 dated the 5th march 1991 reading (in translation) as follows:-

> "In line with the acceptance of the Government of Iraq of the security Council resolution (686) of 1991 .....the [R.C.C.] has resolved:
>
> First:
>
> All Resolutions of the [R.C.C.] enacted from the 2nd August 1990 and relating to Kuwait are hereby repealed
>
> Second:
>
> All laws [etc.] taken in accordance with the resolutions of the [R.C.C.] referred to in (First) above are repealed and all consequences resulting thereof are annulled .....

This Resolution came into force on 3rd March 1991.

The present Action was begun by Writ issued on the 11th January 1991. Relying upon their title as the registered and beneficial owners of the ten KAC aircraft, together valued at $630,000,000, the Plaintiffs claimed delivery up of the aircraft with consequential damages for the Defendants' alleged unlawful interference with them, or alternatively damages in the amount of the value of the aircraft pursuant to section 3 of the Torts

(Interference with Goods) Act 1977 and at common law. The alleged interference was pleaded as follows:-

"2. On and/or after 2nd August 1990 the First and Second Defendants wrongfully interfered and have continued to interfere with the said aircraft.

Particulars

a. On 2nd August 1990 the Second Defendants invaded Kuwait, took control of the airport and deprived the Plaintiffs of possession and control of, inter alia, the aircraft particularised above.

b. Between 2nd August and 9th August the aircraft were removed from the airport.

c. On a date or dates between 9th August and 17th September the Second Defendants unlawfully transferred possession and control of the aircraft to the First Defendants. The stated intention of the Defendants was to incorporate the aircraft within the First Defendants' fleet and to use them for commercial purposes.

d. The First and Second Defendants have continued wrongfully to interfere with the aircraft by their unlawful possession and control of the aircraft and refusal and/or failure to deliver up the aircraft to the Plaintiffs.

The Plaintiffs subsequently entered judgment in default of appearance against both Defendants on the 11th February and the 24th May 1991 respectively. Damages were assessed at $489,455,380 plus interest against the First Defendants on the 26th February 1991. Various steps were taken to enforce this judgment against the First Defendants including an Anton Pillar order obtained on the 18th February 1991 directed against their premises at 4 Lower Regent Street London W1 and requiring Mr D. Isaac to attend for examination as a proper officer of the First Defendants. Mr Isaac duly gave evidence before an examiner on the 4th March 1991.

On the 7th June 1991 Messrs Landau and Scanlon gave notice to the Plaintiffs' solicitors that they were instructed by both Defendants and that applications would be made pursuant to the RSC Order 12 Rule 8 "on at least the following grounds". The grounds stated were challenges to the Court's jurisdiction pursuant to the State Immunity Act 1978 and "by reason of the doctrine of Act of State", reliance upon the rule of double actionablity which applies under English conflicts of law rules when the alleged tort is committed abroad, and a claim that the dispute is one which properly falls to be resolved by an international forum rather than by the domestic courts of this country, which was not directly involved in the international dispute.

Other matters were raised in the same letter, which concluded as follows:-

> "Finally, we would draw your attention to the fact that Iraq appears to be still in a state of almost complete paralysis following the recent hostilities and that still are no direct communications by telephone, post, or otherwise with Baghdad. In the case of Iraqi airways, every communication and request for information has had to be sent to Amman for onward physical transmission by road from Amman to Baghdad and vice versa. In the case of the government of Iraq, the Embassy here is closed (as you know) and we are again obliged to seek and receive instructions by indirect means. In both cases you will, therefore, appreciate that although we have sought to proceed as quickly as we can, it has not proved possible to act any more quickly than we have done".

Summonses were then issued on the 8th and 9th July 1991 in which the Defendants claimed extensions of time within which to give notice of their intention to defend. This was a necessary preliminary before seeking to challenge the Court's jurisdiction, and the Plaintiffs consented to the First Defendants' application when the matter came before Mr Justice Webster on the 26th July.

The Second Defendants' application under O.12 R.6 was not pursued, their position being different by reason of the State Immunity Act. Both Defendants also applied for a stay of execution of the judgments already obtained against them and this was the major issue at the hearing before Webster J. on July 26th. He ordered a stay of execution but upon conditions set out in his Order.

There was pending at that date a further Summons by the Second Defendants dated the 23rd July 1991. This challenges the validity of service of the Writ upon them, and in the alternative seeks leave to give notice of their intention to defend the action out of time, pursuant to O.12 R.6.

On the 2nd August 1991 the First Defendants issued their Summonses which so far as relevant for present purposes raised four issues:-

(1) the validity of service of the Writ upon them

(2) State immunity under section 14 of the State Immunity Act 1978

(3) whether the Plaintiffs' claim is justiciable in these Courts, and

(4) Forum non conveniens by reference to certain compensation procedures which have been instituted under the authority of the United Nations Organisation.

These four issues and the issue of service upon the Second Defendants are relevant, of course, to the Defendants' applications to have the default Judgments against them set aside. I am not concerned, however, with the merits of those applications, apart from the five specific issues raised. It should be noted that the plea of State Immunity is raised by the First Defendants as a "state entity" under section 14(2) of the S.I. Act, which they are admitted to be, and not at this stage of the proceedings by the Second Defendants, the Republic of Iraq, itself.

These issues were argued before me in November last on the basis of a considerable body of documentary evidence, including affidavits from five deponents who described the circumstances in which the 10 KAC aircraft were flown from Kuwait to Iraq on the 6th/8th August and kept there until the 17th September when Decree No. 369 purported to transfer them from the Plaintiffs to IAC. The deponents were the director General of IAC, Nor Aldin Saffi ("Mr Saffi"); two members of the Plaintiffs' engineering staff, identified for security reasons and with my approval as "KAC1" and "KAC2"; and two I.A.C. employees, Amer Al Shailkly ("Mr Al Shaikley"), the present Director of Engineering and in September 1990 the Line Maintenance Manager, and Sabah Shaucet Abbo ("Mr Abbo") the Assistant Director General (Technical).

The Defendants applied for leave to cross-examine the Plaintiff's witnesses and undertook to produce their own witnesses for cross-examination if leave was granted. I gave leave because it seemed to me that the oral evidence which the defendants sought

to adduce should be available for the appellate Courts, in a case which is destined for appeal in any event, even if I concluded that further evidence was not necessary for my own decision (cf. Bethlehem Steel Corpn. v. Universal Gas and Oil Company Inc. (H.L. unrep. 27th July 1978). The evidence was given on 10th/11th December 1991 and, following delays in arranging for Mr Saffi's attendance, on the 29th January 1992.

In the result, the oral evidence not only added considerably to the affidavits but also presented certain aspects of the case in a fresh light. This means that my findings of fact must depend primarily upon the oral evidence, partly because some new matters were introduced but mainly because the contents of the affidavits were illuminated by it.

The affidavits of KAC1 and KAC 2 were directed principally towards establishing that after about August 13th, when KAC1 returned to Kuwait from holidaying in Amman, representatives of IAC made determined efforts to recruit him and other KAC engineers to work for IAC maintaining and servicing the ex-KAC Airbuses in Iraq. He is a qualified and experienced radio and radar engineer for that type of aircraft. He said that persistent approaches were made to him by Mr Shaikley in Kuwait and that he made three visits to Iraq where he was seen by Mr Saffi and others, including Mr Abbo and a Captain Zaki whom he was told had been appointed Fleet Operations Manager for the newly-acquired Airbus and 767 Fleet. The first visit he described was during the period August 19th-23rd, the second on August 29th/30th and the third with four other KAC personnel on September 16th. He said that he did not

wish to accept the IAC offer but was reluctant to refuse it outright. So he demanded that IAC should accept liability for an 'indemnity' or lump-sum payment which KAC had agreed to pay him, approximately 60,000 Kuwait Dinars, knowing that IAC and the Iraqi Government would never accept this obligation to pay about $200.000 in hard currency. He also described various occasions when he had seen ex-KAC aircraft repainted in IAC livery, before September 17th, and KAC ground equipment and spares being loaded into IAC cargo aircraft at Kuwait or already at Saddam Hussein Airport at Baghdad, also before that date.

KAC2 was in Kuwait on August 2nd and described the invasion and military occupation of the airport. He returned to the airport on August 4th and on August 7th he responded to the new (Iraqi) authorities' broadcast statement that all workers should report for work. He left Kuwait on August 12th and was away until September 13th. On his return he was asked whether he would work for IAC but he declined. He too said that he saw an IAC air freighter loading a KAC spare engine, on August 7th.

In a second affidavit, before he gave evidence, KAC2 corrected his previous statement that he had made a third (September) visit to Baghdad. He explained that he did not go with the party of KAC engineers on that occasion and that his first affidavit, notwithstanding frequent use of the first person, was in fact a report of what the others had told him about that visit when the affidavit was being prepared. This correction naturally casts great doubt upon the accuracy of the rest of his affidavit evidence.

The Defendants' witnesses in their affidavits disputed much of what the KAC engineers said. They said that the 10 disputed KAC aircraft were removed by IAC pilots soon after the 6th August pursuant to instructions given by the Minister of Transport and Communications to the Director-General, Mr Saffi, on that date. This was in no sense, they said, an IAC operation. The Minister in effect took the pilots on secondment because the Iraqi Air Force pilots were unable to fly the Airbuses and Boeing 767's in particular. The aircraft were taken to various military and civilian airfields "for safe keeping" and they remained there until they were transferred to IAC by Decree No.369 on September 17th.

The KAC Engineers' evidence that they were recruited by I.A.C. was challenged. All the KAC personnel, they said, were anxious for their jobs and were pressing IAC to employ them, demanding high salaries and, in one case (KAC1), an exorbitant sum in hard currency. Negotiations took place in Kuwait with Mr Shaikly and Mr Saffi during their visit there on August 19th and with Mr Saffi and others, including Mr Abbo, at Baghdad on August 29th/30th. These were all with a view to employment by IAC if and when the ex-KAC aircraft were transferred to IAC, as did occur on September 17th.

Mr Saffi and Mr Shaikly also gave more detailed accounts of the circumstances in which the aircraft were removed from Kuwait on August 6th/9th.

The KAC engineers' evidence that spare parts or ground equipment were removed from Kuwait or used by IAC before September 17th and that any of the ex-KAC aircraft was overpainted by IAC before September 17th was wholly denied.

These and many other detailed issues were explored in cross-examination but many of them became, in my view, either irrelevant or superfluous. This is because a clear general picture emerged which can be stated as follows.

By August 6th the Iraqi authorities regarded the occupation as complete, hence the broadcast to the Kuwait people that they should return to work and the Decrees (dated 8th/9th August) claiming the integration of Kuwait as a province of Iraq and as a triumph for Arab nationalism. On that day the Minister of Transport and Communications, as the Minister responsible for Civil Aviation, directed Mr Saffi as the Director General of the national airline, IAC, to arrange for the KAC fleet of airbuses and Boeing 767's to be brought to Iraq. Mr Saffi gave the necessary instructions to his Chief Pilot and to Mr Abbo, and soon afterwards the necessary pilots and three ground engineers made their way to Kuwait. This was in no sense a military operation, even though Kuwait airport was under military control. They travelled by road to Basra and then by helicopter, or by light plane - the details are unclear. When they arrived at Kuwait the engineers carried out the basic checks necessary before the aircraft could fly then the pilots took them the short distance to Basra, a civilian airport. Then they were dispersed between Saddam Hussein Airport at Baghdad, also a civilian airport and the home

base for IAC, which was already crowded with the grounded IAC fleet, and at Mosul and Takrete which are civilian/military airports, as well as some remaining at Basra.

Sometime before the IAC pilots removed these aircraft from Kuwait, pilots of the Iraqi Air Force had flown away five other KAC aircraft. These were, I think, 2 HS125s and 2 Gulfstream G3s (two types of executive aircraft) and one Boeing 727 which may or may not have come later into IAC's possession, the evidence is unclear.

The IAC pilots were not instructed to and did not move four foreign aircraft which were grounded by events at Kuwait. These included a British Airways Jumbo 747. When Mr Saffi reported to the Minister that his instructions with regard to the 10 KAC aircraft had been carried out, he told him that these other aircraft were stranded and was able to arrange for them to be released, as they all were except the British Airways aircraft which was about to take off when the airport runway was closed. It remained at Kuwait until it was destroyed during the fighting in January/February 1992.

When Mr Saffi reported to the Minister, he was also instructed to "maintain" or "look after" the KAC aircraft which had been brought to Iraq. This was a problem for him, because IAC had no specialist engineers or service personnel who were qualified to work on the Airbuses. The 767s presented less difficulty because IAC had its own fleet of older Boeing types. He was particularly concerned because an Iranian aircraft which

had been in IAC's possession or custody for some years previously had not been "looked after" and as a result its condition had deteriorated.

The kind of basic maintenance required was limited to checking tyre pressures: moving each aircraft so that its tyres did not become deformed; checking for oil and fuel leaks; and removing and replacing engine cowlings and similar pieces of equipment from time to time. Whether this required particular skills or any specialist qualifications may be doubted. Mr Saffi and his senior managers, however, decided that they should recruit a minimum staff of five Airbus-qualified engineers, one for each of the basic engineering and electrical disciplines involved. KAC1, being a senior radio and radar engineer for the Airbus fleet, was one of these five, and it is easy to see why he was targeted for particular attention and why he felt able to make what Mr Saffi regarded as unreasonable and excessive demands; and why he (correctly) assumed that the demand for a hard currency payment, which required Government approval, could not be met.

The underlying issue is whether IAC, under Mr Saffi's direction, was keeping the aircraft and recruiting these ex-KAC personnel with a view to operating the aircraft as part of its fleet at some future date, or whether it was doing so at the behest of the Iraqi Government so that the aircraft would be available to the Government for some other kind of operation at some future date.

Mr Saffi was in something of a dilemma. IAC's fleet of Boeing aircraft was old, dating from 1982 and earlier, and he had already taken steps to modernise its fleet by the purchase of a substantial number of Airbuses. on 24th June 1990 he had signed a contract to buy 5 of these aircraft with an option to buy 5 more. These were for delivery from 1992, and in the meantime he planned to charter two Airbuses from the Royal Jordanian Airline ("R.J.") which would enable I.A.C. to lay the foundations for the organisation that was necessary to operate an Airbus fleet. This would require as many as 300 pilots, engineers and other ground staff; as Mr Saffi described it, a company within the company (IAC). His ambition was to develop an IAC fleet consisting of two aircraft types only - the Airbus and one other, I think a Boeing.

This ambition was taking shape and negotiations with R.J. were pending when Iraq invaded Kuwait on August 2nd 1990. Eight airbuses then became available for use by IAC as the national carrier for Iraq, of which Kuwait was regarded as forming part. But the aircraft were not new. They dated from 1983/4 and Mr Saffi regarded them as old. He much preferred to have the new ones which were already on order, and, most important of all, there was no immediate requirement for them or for any additions to the IAC fleet. IAC was refused landing and overflying permission by other States from August 2nd, except only for a limited number of flights carrying "hostages" out of Iraq and Kuwait and returning e.g. from London with repatriate Iraq nationals. As Mr Saffi put it, for the Airbuses he had no pilots, no engineers and no passengers. He did not need them - then.

But he was reticent and his evidence was contradictory regarding his relations with the Minister during the period from August 8th until September 9th or 12th when he knew of the Decree No. 369 which became effective on September 17th. On the one hand, he denied having any communications with the Minister or the Government during that period, and he denied that he had any fore-knowledge of the Decree; when it came it was, he said most welcome to him, for the reasons which I have outlined above. On the other hand, he gave accounts of what he told the Minister before the Decree; that he did not want the KAC aircraft, that he would prefer (as he still does) new aircraft and that in any event IAC had no need of any aircraft until such time as international flights could resume.

The evidence shows that, after the Decree took effect, at least two of the aircraft were repainted in the IAC livery and that at least one of the ex-KAC aircraft was used on internal flights.

The evidence is compelling, in my judgment, that when the occupation of Kuwait was regarded as complete the Iraqi Government arranged for the removal by the Iraqi Air Force of the 5 KAC aircraft which it required for other and possibly non-commercial uses, and it directed IAC to take possession of 10 KAC aircraft which were to be used for commercial purposes, and to look after them until such time as commercial operations could resume. This was the object of the "safe-keeping" which Mr Saffi was instructed to achieve. The decision to recruit key specialist personnel for an Airbus fleet and the steps taken to implement this decision

from mid-August onwards confirm that IAC was engaged, on the Minister's instructions, in the preliminary stages of establishing an Airbus operation and to this extent was anticipating the transfer of ownership of the aircraft which became effective, so it was believed, on September 17th.

I have not referred above to certain documentary evidence which became available during the hearing of enquiries made by IAC during August 1990 with regard to the procedures for registering aircraft of "foreign registration" though with references to cargo aircraft or "freighters". These procedures were implemented in October 1990 when some at least of the 10 KAC aircraft were re-registered in Iraq. The question is whether the August correspondence was the beginning of that process, or whether it referred to the proposed charter of two Airbuses from R.J. The latter might seem more likely from the documents themselves and Mr Saffi thought that it was correct; but he also said that the negotiations with R.J. came to an end with the invasion on August 2nd and he could not explain, as I understood his evidence, why I.A.C. should be making such enquiries either for the R.J. aircraft or for some cargo aircraft which he could not identify, as late as August 15th. On balance, I would find that the correspondence was in the nature of a preliminary enquiry regarding the KAC aircraft and was not regarded as urgent in the conditions prevailing during August and September, but I have reached the conclusions which I have expressed above without relying upon this evidence.

I should also record that I find that from about August 8th Mr Saffi was concerned to establish regular commercial flights by IAC into and out of Kuwait Airport and such flights in fact took place from about August 14th. The destinations were limited of course to Iraqi airports and they were regarded by the Iraqi Government and by IAC as internal flights.

State Immunity

It is common ground that IAC is a "separate entity" for the purposes of section 14(2), that is, an entity "which is distinct from the executive organs of the government of the state and capable of suing or being sued" (section 14(1)). Section 14(2) reads:-

> "(2) A separate entity is immune from the jurisdiction of the courts ..... if, and only if -
>
> (a) the proceedings relate to anything done by it in the exercise of sovereign authority, and
> (b) the circumstances are such that a State .... would have been so immune."

The scheme of the Act is such that a State has general immunity from jurisdiction by virtue of section 1 "except as provided in the following provisions of [Part 1] of the Act" (section 1(1)).

The relevant exception is found in section 3 :-

> "3. Commercial transactions .....
>
> (1) A State is not immune as respects proceedings relating to -
>
> (a) a commercial transaction, entered into by the State .....

(2) this section does not apply if the parties to the dispute are States .....

(3) In this section "commercial transaction" means -

.....

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; ....."

There is no definition of "sovereign authority" in the act, but the leading judgment of the House of Lords on the scope and meaning of the Act is authority that section 14(2) comes close to adopting "the straightforward dichotomy between acta jure imperii. and acta jure gestoni that had become a familiar doctrine in public international law" (Alcom Ltd v. Republic of Colombia [1984] A.C. 580 at 600, per Lord Diplock).

The case has been argued before me on the basis that the "familiar doctrine" has to be applied to the acts by IAC of which the Plaintiffs complain. The distinction was finally recognised as part of the common law by the House of Lords' judgment in I Congresso del Partido [1983] 1 A.C. 244 where there was, however, a sharp division of opinion as to the correct application of the rule in the circumstances of that case. The House of Lords held unanimously that the restrictive doctrine of sovereign immunity applied in the case of the Playa Larga, one of the two vessels involved, since, in the words of the headnote, "in taking her out of Chilean waters for her own safety no governmental authority was invoked, even though the instructions might not have been given had the owners not been the Republic of Cuba". But the case of the Marble Islands, whilst the majority held that the pleas of

immunity failed, Lords Wilberforce and Edmund-Davies dissented and would have upheld the judge (Mr Justice Robert Goff, as he then was) on this issue. Lord Bridge of Harwich, however, who formed part of the majority, said this:-

> "Your Lordships appear to be radically divided rather upon the interpretation of the evidence and the significance of the particular facts than upon any question of legal principle" (p.279).

I am grateful for the extensive citation of authority in the present case, but I cannot help feeling, with Lord Bridge, that the correct legal principle is not in issue. Mr Plender Q.C. submits for the Defendants that"the proper test is to ask whether the acts in question were done by Defendant in a commercial capacity invoking no governmental powers". Mr Clarke Q.C. on behalf of the Plaintiffs - "an actus jure imperii. is an act which can only be done by a State such as declaring war and making treaties". It is common ground that the purpose or motive of the Defendant is not decisive, though the Plaintiffs submit that the purpose of the Act can illuminate its nature. This submission acknowledges, however, that the categorisation of the act is determined by its nature.

Of the authorities cited, there were many which show a government acting as a private citizen or commercial party to a transaction or activity might, such as I Congresso del Partido itself, and one at least shows a national airline performing an actum jure imperi. on behalf of its government, notwithstanding that its commercial activities were clearly actus jure gestnionis

(Arango v. Guzman (1980) 621 F 2d. 1371 where the airline implemented immigration regulations on behalf of its Government).

It would be idle to deny that the acts of the Government of Iraq and those carried out on its behalf in invading Kuwaiti territory were acta jure imperii:. Similarly, if Kuwait's property was appropriated for governmental purposes in the course of the invasion and occupation of Kuwait then I should have little difficulty in holding that that too was what I will call a governmental act.

Whether it follows from this that any appropriation of Kuwaits property which took place during or by reason of the invasion is necessarily a governmental act is more debatable and is a question which I need not not decide. Mr Plender's submission that "only a State could appropriate the airline of another State" may well be true, and if the present case was limited to a complaint that the Government of Iraq took possession of the 10 KAC aircraft by reason of its occupation of the airport, then I am prepared to assume that the same immunity would be available to a "separate entity" including IAC which performed that act on its behalf.

But the complaint in the present case is not merely that the defendants took possession or control of the aircraft by reason of the Second Defendants' occupation of the airport by force of arms. It includes the allegations which I have already quoted from the Point of Claim, including "between 2nd August and 9th August the aircraft were removed from the airport."

The circumstances of that removal have been made amply clear by the evidence which I have summarised above. The Defendants' assertion that it was for their safekeeping has to be seen in the light of the facts that (a) the Government through the Iraqi Air Force had already removed 5 KAC aircraft which it required for its other purposes and which was, I assume, a governmental act and therefore immune, and (b) neither the Government nor IAC attempted to remove four other aircraft being operated by foreign airlines which were stranded at Kuwait and were equally vulnerable to whatever form of danger the Government and IAC feared for the KAC aircraft which they removed. The fact is that the Government of Iraq identified these 10 aircraft as ones which were required for civilian operation by IAC and the Minister of Transport on its behalf instructed IAC to take the aircraft into its possession and control and to remove them to Iraq.

There is no evidence which would justify a finding that the government relied upon IAC merely to provide pilots and engineers so that the aircraft could be removed to Iraq for some other purpose or that any other such purpose was governmental rather than commercial (for example, that the aircraft were required as troop carriers). Nor was there any other organisation within Iraq which could implement the decision to use the aircraft for commercial purposes. The fact that they could not be so used immediately was due to other factors, and meanwhile the Minister instructed IAC to "look after" the aircraft, meaning to keep them in such condition that they could be used with the minimum of delay and expense as soon as such use became possible.

It was contended, somewhat faintly, that the present is a dispute "between States" so that immunity is precluded by section 3(2). Neither the Plaintiffs nor IAC is a "State" and I hold that section 3(2) does not apply.

For these reasons, I hold that the First Defendants are not immune from the Court's jurisdiction by reason of section 14(2) of the State Immunity Act 1978, save possibly with regard to any separate allegation which is contained in paragraph (a) of the Particulars to Paragraph 2 of the Points of Claim. I reach this conclusion with regard to the Points of Claim in their original (and present) form and I need say no more about the proposed draft amendments to the Particulars given under paragraph 2 which were produced during the hearing.

An alternative submission by the Plaintiffs is that the First Defendants have lost their immunity in any event by reason of their submission to the Court's jurisdiction under section 2 of the Act. This applies to IAC as a separate entity because, if there has been a submission under section 2, the circumstances are not "such that a State would have been immune" and the condition in section 14(2)(b) would not be satisfied. The issue turns on section 2(3) and (4) :-

> "(3) A State is deemed to have submitted -
>
> .....
>
> (b) .....if it has taken any step in the proceedings.
>
> (4) Sub-section 3(b) above does not apply to ..... any step taken for the purpose only of -
> (a) claiming immunity ....."

The Plaintiffs assert that the First Defendants have taken steps beyond those taken for the purpose "only" of claiming immunity, because in summary :-

(1) they issued a Summons and applied for a stay of execution, obtaining an Order for a stay and complying with the conditions of that Order by swearing an affidavit, as to their assets, as ordered by Webster J., and

(2) including in their present application grounds other than State immunity, i.e their objections to service and to the exercise of jurisdiction on the grounds of Act of State (non-justiciability) and forum non conveniens.

In my judgment, there are two answers to this submission. First, the application for a stay was for an order made in the exercise of the Court's enforcement jurisdiction, and which arose in the present case before the question of the Court's adjectival or substantial jurisdiction was decided. This situation arose because the Plaintiffs obtained judgment in default before the First Defendants appeared or took any step in the proceedings. I take the terms 'enforcement' and 'adjectival' (jurisdiction) from Lord Diplock's analysis of the State Immunity Act in Alcom v. Republic of Columbia (above).

Secondly, the question raised by (2) is whether the present application is a step taken for the purpose "only" of claiming

immunity, or alternatively, whether apart from this application the First Defendants have taken "any step in the proceedings" which constitutes a submission by reason of section 2(3)(b). It is clear in my judgment that the First Defendants' applications with regard to service, Act of State and forum non conveniens are in substance objections to the exercise of jurisdiction and are made in the alternative to the claim for State immunity. I cannot accept that the section was intended to make it compulsory that the claim for immunity could not be heard at the same time and in conjunction with other objections to jurisdiction, and whilst I recognise the support which the Plaintiffs gain from a strict and literal interpretation of the word "only" in section 2(4) I am not prepared to hold that their submission is correct.

Non-justiciability

The defendants rely upon the principle of law which Lord Wilberforce stated in Buttes Gas & Oil Co. v. Hammer [1982] A.C. 888 in the following terms :-

> "So I think that the central question is whether ... there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign States. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of State' but one for judicial restraint or abstention ... in my opinion there is, and for long has been, such a general principle, ... which is effective and compelling in English Courts. this principle is not one of discretion, but is inherent in the very nature of the judicial process."

Later, Lord Wilberforce says:

> "but the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the

judicial function."

That was a reference to judgments of the United States Courts, including ones relating to the same dispute between the two oil companies, Buttes Gas and Occidental, which were concerned to establish the limits of the "judicial no-man's land" (p.938B) or, it may be suggested, "judicial no-go area". The principle was applied in Buttes for the reasons given by Lord Wilberforce at pp.937-8: "The proceedings, if they are to go on, inevitably would involve determination of the following issues ...", and he then selected (1) the territorial issues, arising between the States of Sharjah, UAQ and Iran, regarding sovereignty over and the right to explore for oil in the disputed area, and (2) whether the actions of four sovereign States (Sharjah, Iran, Her Majesty's Government and UAQ) were brought about by what was alleged as a fraudulent conspiracy between Buttes and the Ruler of Sharjah and which were themselves alleged in some respects to be unlawful under international law. Lord Wilberforce concluded:

> "[These issues] have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations ... there are ... no judicial or manageable standards by which to judge these issues, ... the court would be asked to review transactions in which four sovereign States were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law."

In my judgment, the authorities show that certain issues cannot be made the subject of adjudication by the Court, because the process of investigation and judgment would take the Court into areas which the law recognises as the proper and sole concern of Her Majesty's Government and of foreign sovereign States.

There is need for such a rule only when the proceedings raise an issue of this kind for decision. If there is no issue, e.g. as regards the boundary of foreign territory then that can be acknowledged as a fact. But to a limited extent, if the boundary is disputed, and the issue is not central to the proper determination of the proceedings before the Court, (Attorney General v. Buck [1965] Ch.745), the Court can receive evidence and make findings accordingly even when these involve questions of international law (e.g. where conquest and annexation of territory have occurred).

The Defendants' submissions in the present case were based upon their contention that the acts of which the Plaintiffs complain were committed by or with the authority of the State of Iraq in the course of its dealings with another State, Kuwait. Reference was also made to other difficult questions of international and of constitutional law, including (1) should the Courts recognise the efficacy of laws passed by Iraq which purported to apply within the territory of Kuwait? (2) what effect should be given to the various U.N. Security Council Resolutions which condemned the invasion and the misappropriation of Kuwaiti property by Iraq? and (3) is an 'Act of State' defence available to I.A.C. insofar as its possession and operation of the KAC aircraft was authorised by Iraqi law at times when they were within Iraqi territory (cf. Luther v. Sagor [1923] K.B.)?

The Plaintiffs submit, correctly in my view, that these issues taken in isolation raise matters of defence and so are inconsistent with the question of jurisdiction with which I am

concerned at this stage of the proceedings. But I have already held that the Defendants' submissions are concerned essentially with jurisdiction only and I am prepared to treat them on that basis.

So regarded, it seems to me that the submission based on Buttes must necessarily fail in respect of proceedings where the Court has jurisdiction under the State Immunity Act because their subject-matter is a commercial transaction. The common-law rule has many applications not least where issues of State are raised in proceedings where neither of the parties is entitled to State immunity, as was the case in Buttes. But I cannot see any reason for its application so as to preclude jurisdiction where the nature of the issues is such that the Act expressly withholds immunity from jurisdiction because they arise out of a commercial transaction.

This conclusion seems entirely consistent with principle. Lord Wilberforce preferred to regard the requirement for judicial abstention as a free-standing rule but he recognised the analogy which may be drawn with other rules which apply when issues arise regarding the activities of sovereign States or on a foreign territory. These include the common law rules as to sovereign immunity, and so it is no coincidence that the area of judicial abstention has the same limits as the scope of sovereign immunity when the doctrine of restrictive immunity applies.

I hold, therefore, that there is no bar to the Court exercising subject-matter jurisdiction over issues arising in the

present case in respect of which the First Defendants are not entitled to State immunity.

Forum non conveniens

The United Nations Organisation has established a Compensation Commission for the purpose of considering claims against Iraq for damage and loss caused by its invasion of Kuwait. Resolution No. 687 of the Security Council dated 3 April 1991 includes the following :-

> "15. Requests the Secretary General to report to the Security Council on the steps taken to facilitate the return of all Kuwaits property seized by Iraq ....
>
> 16. Reaffirms that Iraq ... is liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.
>
> .....
>
> 18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the funds"

Article 19 provides for establishing a fund out of inter alia the proceeds of petroleum and petroleum products exported by Iraq.

Kuwait's claims against Iraq which preceded this Resolution included demands for the return of the KAC aircraft, and for compensation for those destroyed, which KAC claims in the present proceedings. The Defendants submit that by analogy with the principle forum non conveniens underlying the Spiliada decision [1987] 1 A.C. 460 the Court should refuse jurisdiction in favour of the U.N. Compensation Commission in the present case.

I can limit this plea for present purposes to the adjudicative jurisdiction as defined by Lord Diplock in Alcon's case. Again, the Spiliada principle is strictly one which acknowledges the jurisdiction of the English Court, but I accept the Defendants' submission on the basis that the analogy which they seek to draw here is directed to jurisdiction only and does not involve a submission in this case.

So viewed, the submission in my judgment must clearly fail. There is no suggestion in the Security Council Resolution that the jurisdiction of any municipal Courts is excluded by the Resolution, and even if there was, it would be doubtful to say the least whether that could be effective to preclude the jurisdiction of the English Court properly established in accordance with English law.

The Defendants rely upon Dallal v. Bank Mellat [1986] 1 All E.R. 239 where Hobhouse J. held that the Court should recognise the competence of an arbitration tribunal, established by treaty agreement between the United States and Iran and duly authorised by the municipal laws of both States as regards their nationals. The U.S. Presidential Decree expressly provided that the relevant claims were "suspended, except as they may be presented to the Tribunal" (page 244f).

In the present case, there is no international forum equivalent to an arbitration panel; there is no relevant municipal legislation; and as stated above there is no exclusion of municipal law remedies. Moreover, the proposed fund will be

limited to the proceeds of petroleum etc. exports by Iraq and there is no indication that either the Security Council or Kuwait itself intended to limit the amount of claims against Iraq to a proportionate share of whatever fund might be established.

In these circumstances, I must reject the First Defendants' objection to the jurisdiction of the Court.

Service

On the First Defendants IAC

Evidence

Before the 2nd August 1990 IAC carried on business at premises at 4 Lower Regent Street, London W.1. The business was the usual kind carried on by the London offices of a foreign airline. The manager until July 1990 was Omar Latif and then Fouade Ismail Ibrahim until October 1990 when he was transferred to Baghdad after being, it seems, deported by order of the British Government. When he left, he said to Mr Dinha Isaac who was an accountant employed at the office "You are the old man in the office and you can take [charge]" meaning that he should "do the office job" and look after the office. Mr Isaac had lived in England since 1985 and worked for IAC at the office from the 1st September 1989.

The Manager of the London office reported to the Out Station Manager at IAC's headquarters in Baghdad.

All IAC's scheduled flights into and out of London ceased during the first week of August 1990. Thereafter there were occasional flights for which specific permission was granted by H.M. Government, and when other travel was required by Iraqi nationals wishing to return to Iraq the arrangements were made with Royal Jordanian Airways. Naturally the business of the Regent Street office was much reduced but it was never extinguished. When Isaac gave evidence in March 1991 there were four other employees in London, three in London and one at the associated office at Heathrow.

The Writ was served on Mr Isaac at the Regent Street premises on the 11th January 1991. An articled clerk employed by the Plaintiff's solicitors, Justin Lawrence Draeger, described what he did as follows:-

> ".....by handing a true copy of the Writ of Summons in this action to a person I was informed was and believe to be Mr Isaacs (sic), the Managing Director of Iraqui Airways in London and leaving it at the above-mentioned address being a place of business established by Iraqui Airways in Great Britain for the purposes of section 695(2) of the Companies Act 1985".

When Mr Saffi swore his first affidavit on behalf of the Defendant he described Mr Isaac as "the accountants clerk and acting manager employed by IAC in London" (10th July 1991 para. 5).

The Plaintiffs contend that this service on Mr Isaac was effective as service on IAC on two separate grounds.

First, section 695 of the Companies Act 1985. This provides for service of documents on an "oversea company" at the address which has been registered, by leaving the documents at "any place of business established by the company in Great Britain".

The dispute is whether IAC is an "oversea company" for the purposes of this section. The definition in section 744 of the same Act is :-

> "oversea company" means -
>
> (a) a company incorporated elsewhere than in Great Britain which .... establishes a place of business in Great Britain, and
>
> (b) [continues to have such a place of business]".

The second provision relied upon by the Plaintiffs is R.S.C. Order 65 Rule 3:-

> "3.(1) Personal service of a document on a body corporate may, in cases for which provision is not otherwise made by any enactment, be effected by serving it .... on the mayor, chairman or president of the body, or the town clerk, clerk, secretary, treasurer or other similar officer thereof".

Here, the issue is whether Mr Isaac, on whom the service was effected, was a person of the kind described in Rule 3(1).

Though not directly relevant to these questions as to the validity of service, I should record that the fact of service on Mr Isaac in London on January 11th became known to the First Defendant in Baghdad by January 13th. This was despite the lack

of direct flights and other difficulties of communications between London and Baghdad and it was before the United Nations deadline for the use of force expired on January 15th. Mr Saffi said in his affidavit that a letter enclosing the Writ was received from the acting manager of the London office. He explained in evidence that this referred to Mr Isaac and that the letter came through Amman by a Royal Jordanian plane.

Is IAC an "oversea company"?

IAC was established by Law No. 108 dated the 26th September 1988. Article (1) is translated as follows:-

> "Iraqi Airways Company is a State owned entity having a judicial personality and operated on profit and loss basis. the Council of Ministers shall supervise its work as well as order the auditing of its accounts should the circumstances require that, to ensure it remains within the government programme, and will provide the requirements for it to operate as an economic organisation pursuing and basing its activity on profit and loss. It shall thereafter in this Law be referred to as "The Company".

There is a Board of Directors (Art.2) and a nominal capital of 350 million dinars which, however, is not divided into shares (Article 4). The Board consists of the Director General and seven ex officio or representative members from government departments, and the legal adviser (Art.6). The objectives of the Company are the commercial ones appropriate for a national carrier (Art.3) and the Board is given the necessary powers to operate on a commercial basis (Art.9). Accounts are submitted to the Council of Ministers for approval (Art.12).

It is common ground that IAC is not a "company" within the meaning of Iraqi Companies Law No. 36 of 1983. On the other hand, the Arabic word translated as "Company" in its title and in Law No. 108 ("sharika") distinguished it from another word which means "establishment" ("moa'ssassa)". IAC calls itself and operates as a "company" in all its English-language dealings e.g. on the writing paper used by its London office.

I was referred to the judgment of Millett J. in In re I.T.C. [1987] 2 WLR 1299 and to his valuable analysis of the meaning of "unregistered company" under section 665 of the Act. He held that the I.T.C. was not subject to the winding-up jurisdiction of the English Court. He stressed that the matter depends on the presumed intention of Parliament (p.1239) and held that it was "inconceivable" (p.1241) that the winding-up jurisdiction was intended to apply to an international organisation created by treaty with the attributes of the ITC (p.1244).

The First Defendants submit that essentially a "company" is an association of natural or legal persons, created by contract rather than by statute and having a capital structure which may be transferred from one shareholder to another, citing In Re Stanley [1906] 1 Ch.131 at p.134.

Reference was made to the immediate precursors of I.A.C. who were, at an earlier stage, first registered under the Companies Acts and later de-registered, on the ground that the organisation was a government department, not an oversea company. I do not find this helpful in determining whether or not IAC is within the

statutory definition. Similarly, two United Kingdom bodies are not "companies" although they have many of the attributes of such and are comparable, the Defendants submit, with I.A.C. These are the National Bus Company, created by the Transport Act 1968, and the B.B.C. created by Royal Charter in 1981.

The Plaintiffs submit that a "company" may have only one shareholder, that person being the state, and that the organisation and objectives and method of operation of I.A.C. are consistent with it being a "company" as its name (in English translation) implies.

Mr Saffi in his evidence described how IAC operates, he and his senior managers being responsible for day-to-day business under the supervision of the Board which meets infrequently during normal times. In August/September 1990, when conditions were far from normal, he said, surprisingly, that there were few, if any, formal Board meetings though he was in frequent informal consultation with the other directors.

I am left in no doubt that IAC is and was at all material times a "company" incorporated by statute in Iraq and that service of the Writ upon it was effective on January 11th 1991.

Order 65 Rule 3

My conclusion (above) makes it unnecessary for me to decide whether the Plaintiffs can rely in the alternative on the provisions of Order 65 Rule 3, which I have quoted above. The

essential facts are that, at the material time, Mr Isaac although a junior employee was the "acting manager" of the business of IAC at the Regent Street premises and that business although not extinguished was substantially reduced. There are numerous authorities which show that neither the scale of business being carried on nor the seniority, or lack of seniority, of the person concerned within the defendant organisation is decisive of the question whether service on the body corporate has been effected. I am inclined to the view that the service was effective in the present case, and in the circumstances it is unnecessary for me to say more.

Service on The Republic of Iraq

Evidence

Ex parte leave to serve concurrent Writs on the Second Defendant was granted on the 11th January 1992. Service was to be effected in accordance with section 12(1) of the State Immunity Act 1978 and R.S.C. Order 11 Rule 7. Section 12(1) requires that a Writ shall be served by being transmitted through the Foreign and Commonwealth office (F.C.O.) to the Ministry of Foreign Affairs of the defendant State and service is deemed to have been effected when the Writ is received at the Ministry. Order 11 rule 7 requires that the necessary documents were lodged at the Central Office and sent by the Senior Master to the Secretary of State with the relevant request.

On the 12th January 1991, however, the FCO closed the British Embassy in Baghdad. Iraq broke off diplomatic relations with the United Kingdom as of the 6th February. Quoting from a letter dated 15 May 1991 from the Deputy Legal Adviser :-

> "There was thus no British diplomatic presence in Baghdad at the time of the break in relations, or since, nor have British interests in Iraq been represented by another country".

The Iraqi Embassy in London continued functioning as such from its premises at 21 Queen's Gate in London and those premises on the 15th January were recognised as official premises of a diplomatic mission (ibid.)

The Ministry of Foreign Affairs in Baghdad continued to function before and during the period of military action, but when that action began on January 17th there were difficulties of communication between London and Baghdad, although some channels of communication remained between the Iraqi Embassy in London and the Ministry of Foreign Affairs in Baghdad.

On the 14th January the FCO wrote to the Iraqi Embassy enclosing the Writ "at the request of the Kuwait Airways Corporation". The letter continued :-

> "As Her Majesty's Government has no representative in Iraq at present, the [FCO] would be grateful if the documents could be forwarded to the Ministry of Foreign Affairs in Baghdad".

A "Certificate of Service" dated the 22nd January 1991 certifies that copies of the Writ and other documents were "served upon the Embassy of the Republic of Iraq by the delivery thereof to the Embassy" on the 15th January". The documents thus served

at the Iraqi Embassy were received by an accredited diplomat, Zuhair Ibrahim, who described the circumstances in his first affidavit dated 19th July 1991. The position was complicated by the fact that he had previously received the document which had been served on Mr Isaac at IAC's offices on January 11th. (He says that this was a photocopy only.) He sent a fax copy to the Iraqi Embassy in Jordan for onward transmission to the Ministry of Foreign Affairs in Baghdad but he had received no reply. When he received the documents served at the Embassy on January 15th, he did not forward them to Amman or Baghdad, "Due to the military action which occurred shortly there after, nothing further was done, nor did I hear from Baghdad in response to my previous fax message". (Affidavit page 3). The Ministry's failure to reply is understandable in the circumstances.

The Plaintiffs contend that service on the Iraqi Embassy in London took effect as service on the Republic of Iraq or, more particularly, as service on the Ministry of Foreign Affairs as required by the State Immunity Act. It was the method chosen by the FCO in the circumstances which pertained at the time and therefore it should be regarded as complying with the Act.

Their submission that an embassy is regarded as the "emanation" of the sending State is supported by the evidence of a distinguished former diplomat, Sir John Graham. He describes how diplomatic communications between States are made through the embassies of the States concerned, so that the receiving State (United Kingdom) could well communicate with the sending state (Iraq) through the Iraqi Embassy in London. He says that

ambassadors are regarded as agents of the sending State and that usually the diplomats at an embassy are employees of the Foreign Ministry of the sending State. "The embassy is therefore the emanation of its State for all purposes of dealings with foreign powers by its foreign ministry" (para. 6).

Is service on the Embassy service on the Ministry?

A modern textbook is unequivocally opposed to the Plaintiff's contention :-

"Service out of the jurisdiction

9. ..... It would have been possible to provide for service within the jurisdiction on the Embassy, on the analogy of a foreign company carrying on business within the jurisdiction .... However, it was no doubt considered more diplomatic that the foreign sovereign should not, by reason merely of his mission's presence here for the purpose of diplomatic intercourse between the two countries, be deemed to have a legal presence within the jurisdiction".

(State and Diplomatic Immunity C. Lewis (3rd ed. 1990)).

In my judgment, the requirement of service at, not merely "on", the foreign Ministry of the defendant State is no more and no less than the plain words of section 12(1) demand. Service is effected by transmission to the Ministry and takes effect when the document is received at the Ministry. In no sense is a diplomatic mission in a foreign State the same as the Ministry of Foreign Affairs of the sending State. I respectfully agree with the extract, quoted above, that a clear distinction is drawn between the foreign Ministry which is situated outside the jurisdiction

and the London embassy of the foreign State which, subject only to a legal fiction, is situated within the jurisdiction.

The evidence of service on the Iraqi Embassy which I have quoted above shows that the the correct analysis is a request by the FCO to forward the documents to the Ministry of Foreign Affairs in Iraq; in private law terms, for the Iraqi Embassy to forward the documents as agents for the F.C.O. There is no evidence that this was done or that the documents were received in Baghdad. The Second Defendants' evidence is that they were not. I hold, therefore, that the Writ was not validly served on the Second Defendants.

I am glad that this conclusion accords with the assumption made by Peter Gibson J. in Westminster City Council v. Iran [1986] 3 AER 284 that service in the foreign capital could only be effected by the British Embassy or by some other representatives of the British Government there.

It is unnecessary for me to consider further the detailed submission made with regard to the inviolability of diplomatic missions so far as the service of process is concerned.

Agreement and/or estoppel

The Plaintiffs next contend that, Mr Ibrahim having forwarded to the Ministry of Foreign Affairs in Baghdad a copy of the Writ served on the First Defendants, with covering letter dated January 11th, and having thereby "regarded the Writ as having been

received by Iraq and time for the purposes of judgment in default as having begun to run", the Second Defendants must have agreed to accept informal service of the Writ upon them, a consensual method of service which is permitted under s.12(6) of the Act and under the Rules (Kenneth Allison Ltd v. A.E. Limehouse & Co. [1991] 3 W.L.R. 671) or are estopped from asserting that it was not properly served (ibid.). I can see no evidence to support any agreement or estoppel of this sort, even if Mr Ibrahim had authority to make an agreement or representation, which he did not. The fact is, in my view, that there is no evidence that the Iraqi Embassy in London did comply with the FCO request to transmit the documents to the Ministry in Baghdad, and they were not under any duty to the Plaintiffs to do so.

Appearance

Finally, the Plaintiffs rely on section 12(3) of the 1978 Act:-

> "A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with ...."

They contend that a foreign State defendant cannot object to service without "appearing" in the proceedings, alternatively and in any event that the Second Defendants have taken other steps in the present proceedings, all connected with or arising out of the application for a stay of execution of the default judgment against them.

In support of the former contention, they submit that the Act provides for FCO certification that service has been effected and that such a certificate shall be conclusive evidence (section 21(d)). Therefore, they say, it is unnecessary for the defendant State to challenge service until a certificate is issued, and when it is, no challenge can be made.

This submission overlooks the fact that Plaintiffs may seek to prove service without a FCO Certificate. That is the position here, because the Certificate merely states that the documents were served on the Embassy with the FCO request that they be transmitted to the Ministry. It is also inconsistent with section 12(3) itself which contemplates that a State can object that sub-section (1) has not been complied with.

The meaning of "appearance" in section 12(3) is not easy to determine when it is read in conjunction with the existing Rules of Court, in particular Order 12 Rule 8 which replaced the previous procedures under which a distinction was drawn between conditional and unconditional appearances ((old O.12 R.7). The (new) procedures are defined in O.12 Rules 1, 6 and 8, and O.12 Rule 10 provides for statutory requirements relating to the "entry of appearance". Clearly, the reference to "appearance" in section 12(3) of the 1978 Act has to be read in the light of these procedural changes.

In the circumstances, it is permissible to refer to Article 3 of the European Convention on State Immunity, to which the 1978

Act gave effect. It refers to "taking any step in the proceedings relating to the merits".

In my judgment, an equivalent meaning can properly be given to section 12. The right to object to the validity of service is not lost by taking a step which is not concerned with the merits. That includes both the objection to service and the various steps taken by the Second Defendants in relation to the stay of execution of the default judgment.

I am conscious that I have not dealt with many of the authorities and even some of the issues which were argued before me. I am grateful to both parties for their careful and thorough submissions. If either party wishes me to make any further findings or to deal with any other issues, I shall be glad to do so.