Neutral Citation Number: [2021] EWHC 952 (Comm)

Case No: CL-2019-000509

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23/04/2021

Before :

Mr Justice Butcher

- -

Between :

DYNASTY COMPANY FOR OIL AND GAS TRADING LIMITED

Claimant

-and-

(1) THE KURDISTAN REGIONAL GOVERNMENT OF IRAQ
(2) DR ASHTI HAWRAMI

Defendants

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Charles Kimmins QC, Richard Waller QC, Belinda MacRae and Daniel Benedyk (instructed by **Preiskel & Co**) for the **Claimant**
Graham Dunning QC, Anton Dudnikov and Catherine Jung (instructed by **Wilmer Cutler Pickering Hale and DorrLLP**) for the **Second Defendant**

Hearing date: 8-11 February 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. The Second Defendant ('Dr Hawrami') has made an application challenging the jurisdiction of the court under CPR Part 11. This judgment decides on that challenge.

Introduction

2. The Claimant ('Dynasty') is a company existing under the law of Iraq. It is a joint venture which was formed in 2018 by two private energy companies in Kurdistan, namely South Kurdistan for Oil and Gas Services Limited ('South Kurdistan') and Tigris Holding.

3. Dynasty has brought proceedings against the First Defendant, the Kurdistan Regional Government of Iraq (the 'KRG'), and Dr Hawrami, who was from 2006 until July 2019 the KRG's Minister for Natural Resources. Since that date he has had the title of Assistant Prime Minister for Energy Affairs.

4. The essential claim made in those proceedings is that the KRG, acting through Dr Hawrami, wrongfully failed to provide consent to a change of control in favour of Dynasty in connexion with two production sharing contracts ('PSCs') which had previously been entered into by the KRG with other parties.

5. The Claim Form was served, or purportedly served – there is an issue about whether it constituted valid service – on Dr Hawrami at Heathrow Airport on 31 October 2019. The KRG has not been served with the Claim Form.

6. On 14 November 2019 Dr Hawrami filed an Acknowledgment of Service indicating his intention to contest the jurisdiction of the English Court. His Part 11 challenge was issued on 12 December 2019.

7. The grounds on which Dr Hawrami contests the jurisdiction of the English Court can be grouped under four heads, as follows:

   (1) That he has immunity from suit under s. 14 of the State Immunity Act 1978 ('the SIA');

   (2) That he was not validly served with the Claim Form but should have been served by way of the special procedure laid down in s. 12 of the SIA;

   (3) That the claim is non-justiciable by reason of the doctrine of foreign act of state; and

   (4) That jurisdiction should be declined and the action stayed because England is not the appropriate forum.

8. Before I turn to consider these issues, it is necessary to set out the background in more detail.

Background

The KRI

9. The Kurdistan Region of Iraq ('KRI') is a largely autonomous region in Iraq. It borders Syria to the west, Iran to the east and Turkey to the north. It has an area of approximately 40,000 square kilometres. The KRG is the elected government of the KRI.

10. Under the constitution of Iraq (the 'Constitution'), Iraq is a federal state. The Constitution provides special recognition to the KRI. Article 117 First provides that the KRI is recognised 'as a federal region'. Although other regions were intended to be recognised as components of the federation, only the KRI is recognised in the Constitution itself, and in fact no other regions have been formed.

KROGL

11. The regulation of oil and gas in the KRI is carried out pursuant to the Kurdistan Region Oil and Gas Law ('KROGL') enacted in 2007. The KROGL contained a number of provisions of relevance to the issues on this application, including the following:

> 'Article 4
> The Regional Council shall be established as follows:
> First: The Prime Minister – President;
> Second: The Deputy Prime Minister – Deputy President;
> Third: The Minister of Natural Resources – Member;
> Fourth: The Minister of Finance and Economy – Member; and
> Fifth: The Planning Minister – Member.
>
> Article 5
> The Regional Council shall perform the following functions:
> ..
> Second: approve Petroleum Contracts …
>
> Article 6
> The Ministry [of Natural Resources] or its nominee shall:
> First: oversee and regulate Petroleum Operations. The responsibilities of the Ministry include the formulation, regulation and monitoring of Petroleum Operation policies, as well as the regulation, planning, implementation, supervision, inspection, auditing and for enforcement of all Petroleum Operations by all Persons and all activities relating thereto, including the marketing of Petroleum; and
> Second: negotiate, agree and execute all Authorisations, including Petroleum Contracts, entered into by the Regional Government.
>
> Article 7
> The Minister [of Natural Resources] shall exercise his powers and discharge his functions under this Law, including under Authorisations made hereunder, in such a manner as:
> First: to ensure sound management of the petroleum industry; and
> Second: to ensure that the petroleum industry is developed in a way that minimises damage to the natural environment, is economically sustainable, promotes further

investment and contributes to the long-term development of the Region; and is reasonable and consistent with good oil industry practices.
…

Article 24:
First: The Minister may, after obtaining the approval of the Regional Council, conclude a Petroleum Contract for exploration and development in respect of a specified area, with a Person or a group of Persons … The Person, or group of Persons, may include private companies in the Region and other parts of Iraq or foreign petroleum companies.
Second: A Petroleum Contract may be based on a Production Sharing Contract, or on other contracts which the Minister considers to provide good and timely returns to the people of the Region, as stated in Chapter 10 of this Law.
Third: In order to be eligible to enter into a Petroleum Contract, a Person must demonstrate:
(1) the financial capability, and the technical knowledge and technical ability, to carry out the Petroleum Operations in the Contract Area, including direct experience in carrying out similar petroleum operations, and to submit reliable documents as proof; and
(2) a record of compliance with principles of good corporate citizenship, and a commitment to the Ten Principles of the Global Compact, launched by the United Nations on 26 July 2000.
Fourth:
(1) … a Petroleum Contract grants to the Contractor the exclusive right to conduct Petroleum Operations in the Contract Area.
(2) The Petroleum Contract may be limited to Crude Oil, Natural Gas or other constituents of Petroleum.
…
Sixth: A Petroleum Contract shall oblige the Contractor to carry on Petroleum Operations only in accordance with work programs, plans and budgets approved by the Minister or as otherwise specified in the Contract.'

The PSCs

12. As envisaged and provided for in the KROGL, the KRG has entered into a number of PSCs. A PSC is typically an agreement whereby a government or state entity authorises a contracting party to develop and exploit a state's natural resources in a given block, without granting title to the natural resources in the ground, and on terms that include provision for the recovery of costs incurred by the contractor out of production, if it is sufficient to do so, and for the sharing of any production between them. Under such agreements, the state has no payment obligations, and the risk of the development resides with the contractor.

13. The PSCs relevant to the present case relate to two contiguous oil and gas blocks within the KRI known as the Kurdamir Block and the Topkhana Block, and I will refer to them as the 'Kurdamir PSC' and the 'Topkhana PSC' respectively.

14. The Kurdamir PSC was concluded in February 2008 between the KRG and WesternZagros Ltd ('WesternZagros'), a company existing under the laws of Cyprus but with its headquarters in Canada. In June 2008 an SPV called Talisman (Block

K44) BV ('Talisman 44'), then owned by Talisman Energy Inc, acquired a 40% participating interest.

15. The Topkhana PSC was concluded in August 2011 between the KRG and another SPV, Talisman (Block K39) BV ('Talisman 39'), also owned by Talisman Energy Inc. In December 2014, with the consent of the KRG, Talisman 39 and Talisman 44 were acquired by Repsol Exploración SA, a wholly owned subsidiary of Repsol SA ('Repsol'), an international oil and gas company with its headquarters in Spain.

16. The Kurdamir and Topkhana PSCs were in similar terms. It is convenient to refer to some of the terms of the Kurdamir PSC. That agreement, when originally concluded in 2008, was signed on behalf of the KRG by Dr Hawrami as Minister for Natural Resources and by Nechirvan Barzani, then the Prime Minister of the KRG.

17. The Kurdamir PSC defined 'the Government' as being the KRG. In the Recitals to the Kurdamir PSC appeared the following:

'(A) The GOVERNMENT wishes to develop the petroleum wealth of the Kurdistan Region (as defined in this Contract) in a way that achieves the highest benefit to the people of the Kurdistan Region and all of Iraq, using the most advanced techniques of market principles and encouraging investment, consistent with the Constitution of Iraq including Article 112 thereof;

(B) In accordance with the Constitution of Iraq, the prevailing law of the Kurdistan Region is the Kurdistan Region Law (as defined in this Contract), except with regard to a matter wholly within the exclusive jurisdiction of the Government of Iraq;

…

(I) WesternZagros Limited is a company,
  (i) with the financial capability, and the technical knowledge and technical ability to carry out Petroleum Operations in the Contract Area … under the terms of this Contract;
  (ii) having a record of compliance with the principles of good corporate citizenship; and
  (iii) willing to cooperate with the GOVERNMENT by entering into this Contract, thereby assisting the GOVERNMENT to develop the Kurdistan Region petroleum industry, thereby promoting the economic development of the Kurdistan Region and Iraq and the social welfare of its people.'

18. Article 2 was entitled 'Scope of the Contract'. It provided in part:

'2.1 This Contract is a production-sharing arrangement with respect to the Contract Area, whereby the GOVERNMENT has the right, pursuant to the Constitution of Iraq, to regulate and oversee Petroleum Operations within the Contract Area.
…
2.2 Upon the CONTRACTOR'S request, the GOVERNMENT shall provide and/or procure all Permits relating to the Petroleum Operations required by the CONTRACTOR to fulfil its obligations under this Contract …

2.3 The CONTRACTOR shall conduct all Petroleum Operations within the Contract Area at its sole cost, risk and peril on behalf of the GOVERNMENT …
2.6 The CONTRACTOR shall only be entitled to recover Petroleum Costs incurred under this Contract in the event of a Commercial Discovery. …'

19. Article 6 provided for the Term of the Contract. This involved an exploration period of up to seven years, and then a development period of 20 years, with an automatic right to a five year extension of that period.

20. In Article 17 there were provisions as to use of land and existing infrastructure. These included:

'17.1 The GOVERNMENT shall make available to the CONTRACTOR any land or property in the Kurdistan Region required for the Petroleum Operations; provided, however, the CONTRACTOR shall not request to use any such land unless there is a real need for it. The CONTRACTOR shall have the right to build and maintain, above and below ground, any facilities required for the Petroleum Operations.
17.2 If it becomes necessary for conduct of the Petroleum Operations to occupy and use any land or property in the Kurdistan Region belonging to third parties, the CONTRACTOR shall endeavour to reach amicable agreement with the owners of such land. If such amicable agreement cannot be reached, the CONTRACTOR shall notify the GOVERNMENT. On receipt of such notification:
a) the GOVERNMENT shall determine the amount of compensation to be paid by the CONTRACTOR to the owner, if occupation will be for a short duration; or
b) the GOVERNMENT shall expropriate the land or property in accordance with applicable Kurdistan Region Law, if such occupation will be long lasting or makes it henceforth impossible to resume original usage of such land or property. ….'

21. Article 18 provided for the KRG to assist the Contractor, and enumerated a number of areas for such assistance, including securing any necessary permits (i) for the use and installation of means of transportation and communication, (ii) in matters of customs, (iii) for the Contractor's personnel to work in KRI or other parts of Iraq and for their entry and exit; and (iv) for the environment.

22. Under Article 30.3 the Contractor was exempted from export taxes in relation to any petroleum to which the Contractor was entitled under the Contract; and Article 31.1 contained an exemption from all taxes as a result of income, assets and activities under the Contract. Article 33 provided for the Government to obtain permits or rights for the transportation of any oil through pipelines. Article 34 provided for unitisation, to cover a situation in which a reservoir extended under two different adjacent blocks.

23. Article 39 contained provisions in relation to assignment and change of control. These are of significance to Dynasty's claim. Under Article 39.2, the Contractor was entitled to sell, assign, transfer or otherwise dispose of its rights under the Contract to a third party, 'with the prior consent of GOVERNMENT … which consent shall not be unreasonably delayed or withheld'. Article 39.2 further provided:

'Any CONTRACTOR Entity proposing to sell, assign, transfer or otherwise dispose of all or part of its rights and interests under this Contract to any such third party shall request such consent in writing, which request shall be accompanied by reasonable evidence of the technical and financial capability of the proposed third party assignee….'

Article 39.7 provided, in part:
' "Change of Control" for the purpose of this Article 39.7 means any direct or indirect change of the identity to the Person who Controls a CONTRACTOR Entity (whether through merger, sale of shares or of other equity interests, or otherwise) through a single transaction or series of transactions, from one or more transferors to one or more transferees, in which the market value of such entity's participating interest … in this Contract represents more than seventy five per cent (75%) of the aggregate market value of the assets of such entity and its Affiliates that are subject to the Change in Control. …
Each CONTRACTOR Entity which is or anticipates with a reasonable degree of certainty that it will be subject to a Change in Control, other than to an Affiliated Company or a CONTRACTOR Entity, shall notify the GOVERNMENT as soon as practicable after it becomes aware of the Change in Control or anticipated Change in Control and request the consent of GOVERNMENT, which consent shall not be unreasonably delayed or withheld. …'

24. Article 41 provided for a waiver by the KRG of sovereign immunity. Article 42 provided for the resolution of disputes, by negotiation, mediation, arbitration in London, and in some cases, by expert determination. Article 43.1 provided that the Contract and any dispute arising therefrom or thereunder should be governed by English law.

25. Under Articles 43.2-43.6 were various provisions as to fiscal stability. In particular Articles 43.2 and 43.3 provided:

'43.2 The obligations of the CONTRACTOR in respect of this Contract shall not be changed by the GOVERNMENT and the general and overall equilibrium between the Parties under this Contract shall not be affected in a substantial and lasting manner. 43.3 The GOVERNMENT guarantees to the CONTRACTOR, for the entire duration of this Contract, that it will maintain the stability of the legal, fiscal and economic conditions of this Contract, as they result from this Contract and as they result from the laws and regulations in force on the date of signature of this Contract. …'

The SPA

26. From about 2015 Repsol was indicating an intention to sell its interest in the two blocks. On 1 March 2019 Repsol entered a Sale & Purchase Agreement (or 'SPA') with Dynasty. The SPA was a share sale, whereby Dynasty intended to purchase all of the issued share capital of Talisman 39 and Talisman 44. The SPA is stated to be governed by English law and subject to an exclusive jurisdiction clause in favour of the courts of England and Wales. It defined 'Government' as the KRG. Relevantly for present purposes, the SPA provided as follows in clauses 2.3 and 2.8.

> '2.3 The obligations of the Parties to complete the sale and purchase of the Shares under this Agreement are conditional on fulfilment or waiver of the following conditions:
> 2.3.1 receipt by the Seller of Government consent to the transfer of the K39 Shares, in a form and substance reasonably acceptable to the Seller;
> 2.3.2 receipt by the Seller of Government consent to the transfer of the K44 Shares, in a form and substance reasonably acceptable to the Seller; …
>
> 2.8 In the event that any of the Conditions has not been fulfilled or has not been fulfilled or has not been waived on or before 5.30 p.m. (Madrid time) on the date falling six (6) calendar months from the date of this Agreement (the "Longstop Date") either Party may terminate this Agreement by written notice to the other and, in the event of such termination, this Agreement shall cease to have effect…'

Dynasty's Claim

27. It is Dynasty's case that the KRG unreasonably refused to agree to the change in control which would have occurred had the SPA been implemented, with the result that the SPA was terminated. The nature of this case is most conveniently summarised by reference to the Substituted Particulars of Claim in the action.

28. Dynasty pleads that Repsol wrote to Dr Hawrami on 8 March 2019 to request consent to the Change of Control under the two relevant PSCs, referring to the SPA, and making it clear that the SPA was conditional on the receipt of such consent. On 18 March 2019 Dr Hawrami, on behalf of the KRG, wrote to Repsol with a list of information which was required. That information was not, Dynasty contends, a requirement of the KROGL, nor was it necessary or proportionate. Dynasty also contends that the Ministry of Natural Resources ('MNR') irrationally and unreasonably refused to meet with Dynasty to discuss the information requirements.

29. Dynasty pleads that on 7 May 2019, Dr Hawrami attended a meeting at the InterContinental Hotel on Park Lane, London, at which Repsol and the senior management of WesternZagros were present. Dynasty contends that at that meeting Dr Hawrami expressed 'negative opinions' about Dynasty, accused Repsol of 'having a side agreement' with Dynasty, and said that he was 'annoyed that Repsol had signed a SPA' with Dynasty when he had told it not to. Dynasty alleges that at this meeting, Dr Hawrami stated that he would refuse to grant consent for the change in control to Dynasty in any circumstances, using the phrase 'over my dead body'. It is further pleaded that on 25 July 2019 Repsol wrote to the Prime Minister of the KRG, Mr Masrour Barzani, requesting consent to the change of control. No response was received. As no consent to the change in control had been given, on 2 September 2019 Repsol wrote to Dynasty terminating the SPA in accordance with its clause 2.8.

30. Dynasty also contends that Hiwa Awat Ali, who is executive Director and a shareholder in Dynasty, was unlawfully intimidated by Dr Hawrami and the KRG. It is Dynasty's case that the Deputy Prime Minister of the KRG, Qubad Talabani, 'acting as an agent of Dr Hawrami' demanded, on 3 May 2019, that Dynasty cancel the SPA; that Mr Ali responded that it would not do so; and that Mr Talabani then responded that if it did not 'they' (by which was understood the KRG and Dr Hawrami) would not let Mr Ali set foot in Kurdistan again. It is further alleged that

on 4 and 29 May 2019 Mr Ali was called to see the Head of Intelligence of the KRG, Lahur Shex Jangi; that on each occasion Mr Lahur spoke to Dr Hawrami by phone, and Dr Hawrami asked Mr Lahur to force Mr Ali to cancel the SPA; and on the second occasion Dr Hawrami asked Mr Lahur to arrest Mr Ali and 'pull his ears' to force him to cancel the SPA. It is pleaded that Mr Lahur did not in fact comply.

31. The claim set out in the Substituted Particulars of Claim is put primarily on the basis of alleged wrongs as a matter of English law, namely:

    (1) Conspiracy to injure Dynasty by unlawful means, namely by breaching Article 39.7 of the relevant PSCs, because the conduct of the KRG and Dr Hawrami was, objectively, unreasonable, with an unlawful intent and motive.

    (2) Unlawful interference with Dynasty's economic interests, by breaching Article 39.7 of the PSCs.

    (3) Unlawful intimidation of Dynasty through Mr Ali.

    These are said to have caused the loss of profits from the SPA which Dynasty contends to be an amount of not less than US$1.682 billion.

32. Alternatively, claims are put forward on the basis of Iraqi law, namely:

    (1) Unlawful acts which have caused harm to Dynasty's property / assets in breach of Articles 186 to 191 of the Civil Code of Iraq No. 40 of 1951 (the 'ICC').

    (2) Usurpation of Dynasty's property, namely the right of assignment under the relevant PSCs, contrary to Articles 192 to 201 of the ICC.

    (3) Unlawful acts causing injury to a third party (viz Dynasty) contrary to Articles 202 and 203 of the ICC.

    (4) To the extent Dr Hawrami and/or the KRG have benefited financially, on the basis of gain without cause, pursuant to Article 243 of the ICC.

    (5) For an act which causes disproportionate damage, in accordance with Article 7 of the ICC.

    (6) Conspiracy contrary to Articles 55-59 of the Iraqi Penal Code ('IPC').

    (7) An action for an official having overstepped their duty, pursuant to Article 334 of the IPC.

State Immunity

33. The first basis on which Dr Hawrami challenges the jurisdiction of the court is that he contends that he is immune from the present proceedings by reason of the provisions of the SIA.

The SIA

34. Before turning to consider the issues which arise in this connexion, it is convenient to set out the most relevant provisions of the SIA.

‘**1 General immunity from jurisdiction.**

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

…

3 Commercial transactions and contracts to be performed in United Kingdom.

(1) A State is not immune as respects proceedings relating to—

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(*b*) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section “commercial transaction” means—

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(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;

but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

…

14 States entitled to immunities and privileges.

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom 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 (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(4) Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.'

The Issues as to State Immunity

35. It was common ground between the parties that: (i) the KRI is a constituent territory of a federal state (viz. the State of Iraq); (ii) no Order in Council has been issued in relation to the KRI for the purposes of s. 14(5) of the SIA; and (iii), in consequence,

pursuant to s. 14(6) of the SIA, the KRG, as the government of the KRI, could claim immunity in accordance with, and only in the circumstances provided for by, s. 14(2) of the SIA, as a separate entity.

36. Importantly, furthermore, in Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse [1997] 4 All ER 108, it was accepted that the reference to sovereign authority in s. 14(2)(a) of the SIA is to the sovereign authority of the state recognised by Her Majesty's Government (at 112f-g). That was agreed to be correct by both sides in the present case. Accordingly, it was common ground that the KRG will only have acted 'in the exercise of sovereign authority' for the purposes of s. 14(2), if it acted in the exercise of the sovereign authority of **the State of Iraq**.

37. Against that background, the issues which arise as to whether Dr Hawrami has immunity in respect of the relevant acts are as follows.

    (1) Issue 1: Whether the KRG (and Dr Hawrami on its behalf) was exercising the sovereign authority of the State of Iraq. Dynasty contends that if its acts were of a sovereign nature at all (which is the subject of Issue 2 and which Dynasty denies) they were exercises of the KRI's own sovereignty, not that of Iraq.

    (2) Issue 2: Whether the relevant acts were sovereign in nature.

    (3) Issue 3: Whether Dr Hawrami himself is entitled to immunity.

I will consider these points in turn.

State Immunity Issue 1: Exercise of the sovereign authority of Iraq?

38. The broad issue here is whether the relevant acts were in the exercise of the sovereignty of the state of Iraq. It raises the question of what is entailed by the requirement that a separate entity, as defined by s. 14(1) of the SIA, must be exercising the recognised state's sovereign authority in order for it to claim immunity. Specifically, what is entailed by that requirement when one is considering the acts of the constituent territories of a federal state?

39. It is Dr Hawrami's case that in respect of the relevant acts the KRG (and he on its behalf) was exercising an authority conferred on it by the Constitution of Iraq, which had allocated to the KRG the right and ability to exercise this aspect of the sovereignty of Iraq.

40. This contention is denied by Dynasty, on a number of bases. As a result of the positions of the parties the main sub-issues which arise under this heading can be identified as follows.

    (1) Dr Hawrami raised a 'threshold point'. This was the contention that, if it were accepted that the acts were in themselves sovereign acts (State Immunity Issue 2), then they must have been acts in the exercise of the sovereign authority of Iraq, because sovereignty resides in the state, the KRG was not a state, and accordingly they must have been done in the exercise of the sovereignty of the state, viz. Iraq.

(2) If the court did not accept Dr Hawrami's 'threshold point', Dynasty raised what it called a 'threshold point' of its own, namely a contention that it is not enough that the acts of the constituent territory should be constitutionally warranted or valid in accordance with the constitution of the recognised state. For there to be immunity, the acts of a constituent territory in respect of which there has been no Order in Council must 'implead' the recognised state, and the relevant acts in this case did not do so. Only if that was wrong would it be necessary to look at whether the Constitution of Iraq conferred on the KRG the power to exercise the sovereign authority of Iraq in relation to the acts in question.

(3) If the court rejected Dynasty's 'threshold point', Dr Hawrami contended that, if it would be necessary for the court, in order to determine whether the KRG was exercising the sovereign authority of the State of Iraq, to determine what the Constitution of Iraq provided, as his own case was that it would, then the court could not enter into that enquiry. This, it was submitted for Dr Hawrami, was as a result of the principle of foreign act of state. The consequence of this, it was submitted, was that the court should then dismiss the action.

(4) If the court rejected that argument, then the court needed to consider whether Dr Hawrami had shown that the KRG had, pursuant to the Constitution of Iraq, the right and power to exercise Iraq's authority in respect of the relevant acts. It was to this question that all the live evidence I heard was directed, and which was the subject of a significant amount of the submissions made at the hearing.

Dr Hawrami's 'threshold point'

41. The first argument which needs to be addressed is Dr Hawrami's 'threshold point'. The argument is that if the court were to accept in answer to Issue 2 that the relevant acts were 'acts in the exercise of sovereign authority', which depends on whether they were governmental acts rather than acts which any private citizen can perform, then the sovereign authority in question must have been that of Iraq, because no other entity had 'sovereignty', because sovereignty of its nature resides in an independent territorial unit, the state.

42. This is an ingenious argument, but I do not accept it. It is the case that in order for an act to be one in respect of which a state may claim immunity, it must be an act jure imperii not an act jure gestionis, and that indeed involves considering whether it is a governmental or public act or one which private citizens can perform. However, in s. 14(2)(a) of the SIA, the phrase 'in the exercise of sovereign authority' does not only identify the nature of the relevant acts as governmental or public, but also requires that they must be in the exercise of the authority of the recognised state. That is implicit in the acceptance in BCCI that ' "sovereign authority" in s. 14(2)(a) is a reference to the sovereign authority of the recognised state' (at 112g/h). As I have said, both sides in the present case accepted BCCI to be correct on this point.

43. The fact that the acts may in themselves be ones which a private person could not perform, does not itself answer the discrete question of whether they were done in the exercise of the authority of the recognised state. That requires an investigation of the authority by which the separate entity was performing the relevant acts.

44. The fact that acts of a separate entity are governmental and can be said to be acta jure imperii does not of itself mean that they must be acts in the exercise of the sovereign authority of the recognised state is supported by both Pocket Kings Ltd v Safenames Ltd [2010] Ch 438, and by Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq [2016] 4 WLR 2 at [30-38]. I will return to consider the reasoning in those two cases in due course, but I consider that they are correct in this respect.

Dynasty's 'threshold point': impleading the state

45. I turn to consider what Dynasty called its own threshold point, namely the contention that in order to satisfy the test under s. 14(2)(a) of exercising the sovereign authority of the recognised state 'the constituent territory or separate entity must be acting as or for and on behalf of the state said to be impleaded', and that this is not satisfied simply by showing a constitutional competence to act.

46. Dynasty cited a number of authorities as to the origin of the doctrine of state immunity lying in the sovereign equality of states, and that the foundational rule is that a state should not be directly or indirectly impleaded in the courts of a foreign state against its will. What this meant was that entities other than the state itself would only be accorded immunity if they are acting with the authority of the State such that the action 'impleaded the state' itself. Dynasty argued that this requirement had been expressed in a number of different ways.

47. Ultimately, there appeared to be little dispute between the parties in relation to the relevant legal test as to whether a separate entity can claim state immunity under s. 14(2). Dynasty itself commended what Laddie J said in BCCI, namely (at 112):

> 'In other words, when a constituent territory or other separate entity acts for and on behalf of the recognised state and effectively acts as if it was exercising the state's sovereign authority, it obtains the immunity that the state would have obtained, had it acted on its own behalf.'

This was accepted by Mr Dunning QC, on behalf of Dr Hawrami (at Day 4/157) as correctly stating the relevant test.

48. The dispute between the parties was not so much as to the test but as to how it can be shown that a separate entity acts 'for and on behalf of' the recognised state. In this regard, Dynasty contended that it would not be enough for the KRG to have acted pursuant to a constitutional competence or permission to act. Dr Hawrami countered that his case had never been that the KRG was acting pursuant to a mere competence or permission to act; rather that the Constitution conferred on the KRG the authority to exploit and manage oil and gas resources within the KRI, and that this results in the KRG exercising the sovereign authority of Iraq over the natural resources in the KRI. To that case as well, Dynasty contended, as part of its threshold argument, that a constitutional conferring of authority over oil and gas resources would still not meet the test in s. 14(2), because that required matters to be done at the behest or with the support of the state, and the KRG's actions were being performed without any instructions from or support from the federal government of Iraq, and in opposition to that government's wishes.

49. Insofar as Dynasty contended that a constitutional allocation of responsibility could never, of itself, be sufficient to mean that a constituent territory was acting for and on behalf of the recognised state, I do not accept the argument. It seems to me quite possible that the constitution of a state may allocate a responsibility to a constituent territory, perhaps because it is regarded as being in the interests of the state as a whole that that constituent territory should exercise those powers. I do not see why, in principle, that cannot amount to the constituent territory acting for and on behalf of the state.

50. Furthermore, I do not consider that, in the case of a constitutional allocation of responsibility, the fact that the government of the recognised state opposes the exercise by the separate entity of its powers, necessarily means that that separate entity is not acting 'for and on behalf of' the state. The government of a recognised federal state cannot be identified with the state itself. It is not difficult to conceive of a situation where, perhaps because of a change of political complexion of the central government, its attitude to the exercise of powers by a constituent territory changes. That would not, in my view, necessarily affect the question of whether those powers were constitutionally exercised by the constituent territory for and on behalf of the state.

51. In these respects, the position of constituent territories or political subdivisions of a state may be different from that of many other 'separate entities' within s. 14(1) SIA. In the case of many such entities – for example private or state-owned companies – there will usually be no question of their acting 'for and on behalf of' the state, unless they are doing so at the direction of the state through its government. In the case of constituent territories, however, it may be possible to characterise their acts as being 'for and on behalf of the state' by reference to the constitution of the state itself.

52. In this regard it is to be noted that one of the experts called by Dynasty itself, Prof Kelly, gave evidence that:

    'To internationally assert the sovereignty of the state of Iraq, in my opinion, the KRG must demonstrate (1) that it is the government of an internationally recognized state, or (2) that it has actual or apparent authority to do so granted it by the federal government in Baghdad, or (3) that it has actual or apparent authority to do so granted to it directly by the Iraqi federal constitution.'

53. The recognition of possibility (3), as a distinct basis for the international assertion of the authority of the state is, I consider, consistent with the view I have expressed in the previous paragraphs. While, of course, Prof Kelly's view is in no sense determinative of how the SIA should be construed and given effect to, it is an indication that the view which I have expressed is consistent with internationally accepted norms.

54. It is necessary to consider in more detail, however, the grounds on which Mr Waller QC for Dynasty nevertheless resisted an approach which looks to whether a constituent territory is constitutionally empowered to act in a particular sphere to determine whether it is acting 'for and on behalf of' the state. He submitted that this approach would tend to obliterate the distinction between a state and a constituent territory, which is carefully preserved by the SIA. He submitted that in most cases, a

constituent territory will be acting with constitutional authority, and if this were the touchstone, then constituent territories would almost invariably have immunity, even though they had not been made the subject of an Order in Council. That, he submitted, was clearly not intended by Parliament.

55. I consider that there are a number of answers to these points. In the first place, the correct approach will be to look at whether the constitution, properly regarded, confers on the constituent territory an authority to act on behalf of the state in a sovereign matter. Not every 'constitutional competence' or permission to act will meet this test. Secondly, even if the correct approach were simply to look at constitutional competence, this would not eliminate the distinction between states or constituent territories which have been made the subject of an Order in Council on the one hand and constituent territories which have not been made the subject of such an Order on the other. The former have immunity ratione personae. They need show nothing other than who they are in order to be entitled to the immunities conferred by the Act. Constituent territories which are not the subject of an Order in Council and which are 'separate entities' need by contrast to prove, the burden being on them, that the two conditions in s. 14(2) are met: KAC v Iraqi Airways Co. at 1161E, per Lord Goff; Dickinson et al., *State Immunity*, para. 4.103. Thirdly, while it is clearly correct that Parliament intended that the immunity of constituent territories should be more restricted than that afforded to states, Parliament clearly also provided that they are entitled to immunity 'if, and only if', the two requirements in s. 14(2) are met. That gives no indication that it will or should be rare for a constituent territory to be able to assert immunity.

56. I should also address directly that part of Dynasty's case which was that, to accord immunity to a constituent territory on the basis of a constitutional allocation of responsibility of relevant powers even in circumstances where the recognised state, as represented by the federal government, opposes the exercise of such powers by the constituent territory, would be inconsistent with the rationale of sovereign immunity, which is to avoid impleading the state. My understanding of the argument was that, if the federal government has not directed, authorised or approved such exercise of powers, then an action which complains of that exercise will not 'implead' the state, because it does not concern the state: the state will not be liable in the action, its legal rights will not be affected, and it will not be responsible, legally or morally, for what the constituent territory did.

57. I do not accept this argument. While it is undoubtedly correct that the underlying rationale for sovereign immunity is to prevent the impleading of sovereign states, I do not consider that it is legitimate to import a distinct test of whether the sovereign will be 'impleaded' into s. 14(2). If the two conditions there set out are met, then the separate entity can assert immunity. Those two conditions are not framed in terms of whether the state is 'impleaded'. In any event, in a case in which a constituent territory is, pursuant to the constitution of the state, authorised and entitled to exercise the state's sovereign authority in a particular area, then I think that it can be said, without inaccuracy, that an action in relation to the exercise of such authority by the constituent territory does, at least indirectly, 'implead the state'.

58. Having rejected the two 'threshold arguments' considered above, I consider that it is, in principle, open to a constituent territory to seek to show, by reference to the

constitution of the relevant state, that it is exercising the sovereign authority of the state. I would accordingly proceed to examine the arguments as to the position under the Iraqi Constitution.

Is investigation of the Constitutional position precluded by foreign act of state?

59. At this point, however, as I have said, Dr Hawrami raises another preliminary issue. This argument, which was a late runner at the hearing, is that an enquiry by the court into the constitutional authority and validity of the KRG's acts is impermissible by reason of the doctrine of act of state. Specifically, the argument is that such an examination would contravene the first of the rules identified in the judgment of Lord Neuberger PSC in Belhaj v Straw [2017] AC 964, at 1111 ([121]), namely:

'[121] The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.'

60. Dr Hawrami's argument was that an investigation of whether the KRG had the constitutional authority to manage oil and gas resources within KRI would involve an investigation into the effect of the Iraqi Constitution, and, further, that Dynasty's case involved the assertion that the KROGL was invalid because there was no constitutional authority for it. Both aspects would involve a contravention of Lord Neuberger's first rule. Accordingly, the court could not embark on any investigation of the constitutional position and because of this should dismiss the action.

61. As Mr Waller QC for Dynasty submitted, this is a striking argument. On this basis, because Dr Hawrami asserts that the KRG, though a separate entity, can take advantage of sovereign immunity because it was acting on behalf the state, yet that claim cannot be examined, with the result that Dynasty's action is dismissed. I agree with Mr Waller that the argument should be rejected. If it were actually the case that the court could not investigate the constitutional position to see whether the acts of the KRG were in the exercise of the sovereign authority of the state, then I consider that the consequence would be that Dr Hawrami's claim to state immunity would fail. In the case of a separate entity, unlike the position of the state itself, it is for that entity to prove that it is entitled to assert immunity pursuant to s. 14. Here, the only basis on which it is contended by Dr Hawrami that the KRG is so entitled is by reason of the allocation of relevant authority to it under the Constitution. If that cannot be shown because of the impossibility of the court's investigating the claim, then in my judgment Dr Hawrami would have failed to discharge the burden which rests on him of establishing any entitlement to immunity.

62. In fact, however, I do not consider that the court is prevented from carrying out the necessary investigation by reason of Lord Neuberger's first rule in Belhaj v Straw or by any aspect of the doctrine of act of state. The validity of the Iraqi Constitution is not questioned by either party, and the court is not being called upon to say otherwise. That being the case, there is no prohibition on the court's construing that Constitution. In Al-Jedda v Secretary of State for Defence [2011] QB 773, the Court of Appeal rejected an argument that it was impermissible for the English court to construe the constitution of another state (in fact, the very same Constitution of Iraq which is involved in this case). In paragraphs [189]-[191] Elias LJ said this:

> '[189] … The purpose of this litigation is not to determine the validity of the foreign Constitution; that is not what the claim is about. It is to determine whether the claimant has been lawfully detained or not. In resolving that issue it is necessary to interpret certain provisions of the law of Iraq, and that includes its Constitution. To use Lord Diplock's words, that issue comes in incidentally in proceedings in which the court plainly does have jurisdiction. The domestic law is simply interpreting the Constitution as a necessary step in determining the legal claim before it. The ruling, of course, has no effect at all on the courts of Iraq. They are not in any sense bound by the judgment. But the legal issues arising under Iraq law need to be resolved in order to decide a dispute which is properly before the courts.
> [190] As to the submission that it would infringe comity for the court to hear this claim, Mr Swift effectively sold the pass on this submission when he conceded that the position might be different if there were authorities from the courts in Iraq which had already provided an interpretation of these various provisions of the Constitution. He says that in those circumstances there would be a solid basis to enable the court to make a considered analysis of the relevant principles. However, if the underlying contention is that the need to respect comity should bar the court from questioning the terms of a foreign constitution, that justification does not change depending upon whether there are judicial authorities from the courts of Iraq to guide the British court.
> [191] A related argument was that the court simply has no proper standards with which to assess the dispute before them. Reliance is place on certain observations of the House of Lords in *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888. … Suffice it to say that in my judgment this case is very far removed from the issue in dispute there. The courts are well able, with the assistance of expert evidence, to make findings on the meaning of foreign law, including its Constitution. It is something they do all the time. The lack of any authorities on the point does not alter matters.'

63. In saying this, Elias LJ was agreeing with Arden LJ in paragraph [74]. Their reasoning (which was referred to with approval by Lord Mance JSC in Belhaj v Straw at 1092D/E para. [73(iii)]) appears to me to be applicable in the present case: the fact that in that case there was undoubted jurisdiction over the claim in the action, whereas here the need to construe the Constitution arises in the context of a claim to sovereign immunity, is an immaterial distinction.

64. As to the further submission made on behalf of Dr Hawrami that the doctrine of act of state is brought into play because Dynasty's position involves a contention that the KROGL is invalid, I do not consider that this advances Dr Hawrami's case. As is shown by Lord Mance's statement in paragraph 73(iii) of Belhaj v Straw, the English courts are entitled to assess whether a foreign law is legal under the local constitution. But in any event, it is not the contention of either party that the KRG had no power to pass the KROGL or to enter the PSCs. Clearly that is not Dr Hawrami's position. As to Dynasty, its position is that the KRG did have that power, not pursuant to the Constitution, but under a de facto power which predated the Constitution. In those circumstances, I cannot see that Lord Neuberger's rule 1 is infringed.

Did the Constitution allocate authority to the KRG?

65. I turn to the question of whether the KRG is allocated constitutional authority to exercise the powers of the Iraqi state in the relevant respects, which may be said to be the management of natural oil and gas in the KRI.

66. This is an issue which the court naturally approaches with circumspection. It is a contentious, and politically-charged, issue in Iraq. It is one which the Iraqi Federal Supreme Court has not pronounced upon, and there were some suggestions in the evidence that it may have avoided doing so because of the sensitivity of the issue. Nevertheless, it is an issue which I consider unavoidably arises on this application, given the positions of the parties and my conclusions in relation to the 'threshold issues' considered above. Necessarily my decision on the point has to be made on the basis of the materials which have been presented to the court on this application. Clearly, moreover, as was pointed out by Elias LJ in Al-Jedda, the decision of the court on this question will have no effect on the courts of Iraq.

67. Both parties made detailed submissions in relation to the meaning and effect of the Constitution of Iraq. That Constitution was negotiated in 2005. It was approved in a referendum by the Iraqi people on 15 October 2005, and entered into force after its subsequent publication in the Official Gazette of Iraq, in 2006. The parties proceeded on the unsurprising basis that the meaning and effect of the Constitution was to be gathered primarily by considering the text and its context. There was also some reference to subsequent events as indicating the proper interpretation of the Constitution.

68. For the purposes of assisting the court in understanding and construing the Constitution, each party called expert witnesses. Dr Hawrami called Ambassador Peter W. Galbraith and Professor Brendan O'Leary. Ambassador Galbraith is a retired US ambassador. He has a long-standing involvement with the Iraqi Kurds, and as a result was asked by the Kurdish leaders to assist them to devise a strategy to ensure that the KRI shared powers with the government in Baghdad in a post-Saddam Iraq. He had accordingly retired from the government in November 2003, and had become an adviser to the Kurdish political parties. During the key period of the negotiation of the Iraqi Constitution, in June to August 2005, he was in Baghdad and Erbil with the leaders of the Iraqi Kurds, who he met before and after each of the relevant meetings. He drafted some of the language which the Kurdish leadership proposed for inclusion in the text of the Constitution.

69. Professor O'Leary is Lauder Professor of Political Science at the University of Pennsylvania. As well as his academic work he frequently acts as an international constitutional advisor. Between 2003 and 2009 he was a constitutional advisor to the KRG. He advised the KRG leadership in 2004, and in 2005 during the making of the Constitution.

70. Dynasty called Professor Marc Weller and Professor Michael J Kelly. Professor Weller is Professor in International Law and International Constitutional Studies at the University of Cambridge. He was Deputy Director for International Studies (1995-2000) and Director of the Lauterpacht Centre for International Law (2010-2016) in the University of Cambridge.

71. Professor Kelly is Senator Allen A. Sekt Professor in Law at the Creighton University School of Law. He has worked and published extensively on international and comparative law in general and genocide research in particular.

72. All of these experts were very well qualified to assist the court, and sought to do so. Dynasty suggested in relation to Ambassador Galbraith and Prof. O'Leary that because of their association with the Iraqi Kurds over many years, and their involvement in advising them in relation to the formulation of the Constitution, they lacked an independent perspective and were, as it was put, 'marking their own homework'. This was clearly a matter which I bore in mind, but I did not consider that it significantly affected the weight to be accorded to their evidence, which depended rather on its cogency.

73. In addition to the evidence of these four experts, I was shown a number of other materials which the parties contended assisted in understanding and construing the Constitution. These included, in particular, an Opinion of James Crawford, at that point Whewell Professor of International Law at the University of Cambridge and now a Judge of the ICJ, dated 29 January 2008, an article by AS Deeks and MS Burton entitled 'Iraq's Constitution: A Drafting History', and a speech, later published, by Professor Nicholas 'Fink' Haysom, who in 2005 had been Chief Constitutional Advisor for the United Nations Assistance Mission for Iraq ('UNAMI'), called 'Forging an Inclusive and Enduring Social Contract'.

The Background to the Constitution

74. The relevant background can be briefly summarised as follows. After the defeat of Saddam Hussain in the First Gulf War in February 1991, there was an uprising of the people in the KRI. The Iraqi army then moved north, leading to an exodus of Kurdistan's population. This led to the re-intervention of the allies in Iraq, and to the establishment of a 'no-fly zone' which kept Iraqi forces out of the KRI. In May 1992 elections were held in the KRI, and voters chose a parliament which in turn chose a Prime Minister and Council of Ministers. This Kurdistan Regional Government, which for a period of time split into two rival administrations before reuniting in 2003, conducted the business of government, paying salaries, providing security, running a judicial system, and entering into contracts including for the exploitation of hydrocarbons in the KRI.

75. In 2003 the people of the KRI aligned themselves with the USA in the war against the government of Saddam Hussain in Baghdad, and the KRG's military force, the peshmerga, was active in the Second Gulf War. After the overthrow of Saddam Hussain a US-led Coalition Provisional Authority assumed authority in Arab Iraq. With US encouragement the Kurds decided to reintegrate with Iraq.

76. In March 2004 a Transitional Administrative Law (or TAL) was promulgated by the Coalition Provisional Authority with a view to facilitating governance until a 'permanent and legitimate constitution achieving full democracy should enter into force'. The TAL established a structure of Regions, Governorates and Municipalities operating within what was described as a federal system. It recognised a Kurdistan Regional Government as the official government of the territories which that government had administered on 19 March 2003, and stated that that government

would continue to perform its current functions throughout the transitional period, except with regard to those issues which fell within the exclusive competence of the federal government as specified in the TAL. The exclusive competence of the federal government was defined in Article 25 of the TAL. It included:

> 'E. Managing the natural resources of Iraq, which belong to all the people of all the regions and governorates of Iraq, in consultation with the governments of the regions and the administrations of the governorates, and distributing the revenues resulting from their sale through the national budget in an equitable manner proportional to the distribution of population throughout the country, and with due regard for areas that were unjustly deprived of these revenues by the previous regime, for dealing with their situations in a positive way, for their needs, and for the degree of development of the different areas of the country.'

77. Significantly, the TAL contained provisions as to how a new constitution should be adopted. To be ratified the draft constitution had to pass a referendum with a qualified majority. Ratification required a majority of voters in Iraq to support the text, and further (Article 61(c)) ratification would 'be successful… if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates' did not reject it. Professor O'Leary explained the significance of this, as follows. Iraq then had 18 governorates. 10, including Baghdad, had Shi'a Arab majorities. The Kurds had, and maintain, an overwhelming demographically concentrated majority in three governorates – Duhok, Erbil and Sulaymaniyah. There were enough Kurds in the Kirkuk governorate to prevent the formation of a negative qualified majority of two thirds there. In addition, Kurds comprised significant portions of the electorate in the governorates of Nineva and Diyala. What this meant was that if the Kurds, in the three governorates which largely overlapped with the KRI and in Kirkuk, rejected the draft, it would not be ratified.

78. Iraq-wide elections were held in January 2005, to what would become the constitutional convention as well as the transitional parliament. Most Sunni Arab leaders boycotted those elections. Professor O'Leary describes this as the Sunni Arab leaders having 'largely excluded themselves, bar the Iraqi Islamic Party, from participating in the critical decision-making' for which they 'paid the price in loss of power over the drafting process [of the new Constitution]'. In those same elections, meanwhile, Kurdish voters endorsed a coalition of their key parties within the KRI and outside it. This coalition, led by the Kurdistan Democratic Party ('KDP') and the Patriotic Union of Kurdistan ('PUK'), had sought a mandate to act as Kurdistan's negotiating tribunes. Given the provisions of the TAL as to ratification of the Constitution, and the demographic position which I have already described, this meant, according to Professor O'Leary, that 'the Kurdish leadership therefore had a comprehensive veto power over the content of the constitution: if they instructed their voters to reject the draft it would fail to be ratified'.

79. The process of negotiating the terms of the Constitution took place in June to late August 2005. Ambassador Galbraith describes the following features of the process. In early August 2005, Iraq's political leaders, meeting in the headquarters of Masoud Barzani (President of the KRG) in Baghdad, took over the process of constitution-writing from the formal constitution-drafting committee and began working on a draft modelled on the TAL. On 12 August, Masoud Barzani met Shi'ite leader, Abdul Aziz

al Hakim, and reached 'an agreement that oil from new fields (ie new fields not yet in commercial production) would be managed by the Regions…' That agreement was written up by al Hakim's team, referring to 'ownership of oil and gas from fields *currently exploited*'[1] as belonging to the people, and that the federal government should manage 'these sources' in partnership with the producing regional governments and governorates. This, Ambassador Galbraith says, was the origin of Article 112 First of the Constitution.

80. According to Ambassador Galbraith, the USA was deeply unhappy with the Barzani-al Hakim deal, and US Ambassador Khalilzad made a series of proposals designed to restore federal control. These proposals were rebuffed. However, an approach was made to the Kurdish negotiators by Ahmed Chalabi, an Iraqi exile and member of the Shi'ite leadership, suggesting the addition of language which came to be incorporated as Article 112 Second. Ambassador Galbraith says that he was prepared to recommend the inclusion of language of this sort because he considered it 'to be mostly aspirational, not operational'. Above all, he says, he 'thought it didn't do anything', and did not compromise what would be achieved by the text which would be Article 112 First. On that basis Masoud Barzani agreed to its inclusion.

81. What was to be Article 115 was included in the text on 21 August. There was not much discussion about it at that point. That, Ambassador Galbraith says, is because its substance was a part of what the two key political leaders had agreed on 12 August. Article 121 Second was not a late arrival, and was essentially the same as Article 54 of the TAL.

82. After the main text of the draft Constitution had been finalised between the political leaders in August, and approved by parliament, and just before the referendum, the text of what were to be Articles 113 and 142 were added. In the referendum held on 15 October 2005, the Constitution was ratified by the required double majority: by a 79-21% margin in overall votes, and with majorities in 15 governorates.

The text of the Constitution

83. The most relevant provisions of the Constitution are set out in Annex 1 to this judgment.

The arguments of the parties

84. Dr Hawrami's contention is that the Constitution directly confers upon the KRI, and the KRG as its government, the authority to exploit and manage oil and gas resources located within the region. He makes the following particular points:

    (1) That Article 110 recognises certain discrete powers as being within the exclusive competence of the Federal Government of Iraq. Oil and gas are not amongst them.
    (2) That by Articles 115 and 121 First, all powers not stipulated in the exclusive powers of the federal government are conferred on the regions, and even in

[1] Emphasis added.

relation to powers shared between the federal and regional governments, priority is given to the law of the regions.

(3) Article 111 deals with ownership of oil and gas. Even if it is to be interpreted as meaning that the oil and gas of any part of Iraq belongs to all the people of Iraq, it does not deal with management.

(4) Management is specifically dealt with in Article 112. Article 112 First deals with oil from 'present fields'. 'Present fields' means the specific fields already in production when the Constitution was concluded in 2005 or when it entered into force in 2006. There were no 'present fields' in the KRI at that time. In any event, the Topkhana and Kurdamir blocks have never produced any oil and gas, and therefore certainly did and do not count as 'present fields'.

(5) Article 112 Second is confined to the 'formulation' of 'necessary strategic policies', and even there any competence of the Federal Government is to be exercised 'together' with the producing regions. It says nothing about the execution of jointly formulated policies nor about the management of non-present fields.

(6) As a result of its omission from Article 110 and from Article 112 First, the State's power to manage non-present fields is allocated by the Constitution to the regions, which means, in relation to oil and gas in the KRI, to the KRG.

85. Dynasty's contentions can be summarised as follows:

(1) That under Article 111 the oil and gas in all Iraq belongs to all the people of Iraq, as represented by the federal government of Iraq.

(2) That the provisions of Article 112 are not subject to the provisions of Articles 115 and 121 First, but are rather sui generis provisions.

(3) That 'present fields' in Article 112 First may refer to a reservoir or group of reservoirs which had been identified by seismic survey, and if so the Kurdamir Block would qualify as a 'present field'.

(4) In any event, even if not 'present fields' any authority on the KRG to manage the relevant fields was subject to the terms of Article 112 Second. In fact, the KRG acted without waiting for the federal government to formulate the necessary strategic policies referred to in Article 112 Second, and without adhering to the principles of Article 111 and 110.

(5) The KRG has acted without first adopting a regional constitution which was mandated by and in accordance with the Constitution of Iraq.

(6) For these reasons, the KRG was not exercising a power to manage the relevant fields which was allocated to it by the Constitution. It was exercising its own sovereignty in respect of the management of those fields.

86. I recognise that there are cogent points made on both sides. One possible course, which Dynasty submitted the court might take, if I found the arguments balanced and difficult to resolve in the absence of a relevant decision by the Iraqi courts, would be to conclude that Dr Hawrami (and the KRG) had failed to discharge the burden of proof which rests on him. I take the view, however, that, on the basis of the material presented to me, Dr Hawrami's position is distinctly more persuasive, and for that reason I do not consider that it is open to me to decide the matter in the way adumbrated by Dynasty. My reasons for concluding that Dr Hawrami's case is to be preferred follow, grouped under four heads.

87. In the first place, I consider that the meaning of the text of the Constitution put forward on behalf of Dr Hawrami is both the simpler and more natural construction of its terms.

88. The starting point is that Article 110, in clear contrast to the terms of Article 25 of the TAL, did not include the management of oil and gas within the areas of the exclusive competence of the federal government. Given the structure of the succeeding provisions of the Constitution this is, and must have been appreciated to be, a change of considerable significance.

89. Article 111, which deals with ownership of oil and gas, is not part of Article 110. Furthermore, it does not specify a role for the federal government. Its wording may well have been deliberately ambiguous, so as to allow different parties to put different meanings on it, but even if it is taken to mean that the oil and gas of Iraq belongs to all the people of Iraq wherever in Iraq they may be, it does not deal with the issue of who may manage those resources. On the contrary, the fact that Article 112 deals with management of at least present fields highlights that Article 111 does not.

90. Article 112 First provides for the management of 'present fields' to be undertaken by the federal government with the producing governorates and regional governments. In agreement with Professor Crawford's Opinion (paragraph 20) I consider that the ordinary interpretation of 'present fields' means fields already under production, and that this is supported by the use of the word 'extracted' and the reference to 'producing' governorates. I do not consider that this language embraces areas which were not producing at the date of the adoption of the Constitution. In light of the evidence of Ambassador Galbraith, it appears to be the case that those involved in negotiating the Constitution understood 'present fields' not to include any fields located in the KRI.

91. Given that Article 112 First only applies to 'present fields' it does not afford a basis for saying that the federal government has exclusive powers to manage future fields. On that basis, Article 115, and Article 121, are applicable, and provide that a power not exclusively allocated to the federal government will belong to the authorities of the regions and governorates.

92. Article 112 Second provides that the federal government is 'with the producing regional and governorate governments' to formulate necessary strategic policies in a way that achieves the highest benefit to the Iraqi people using advanced market principles and encouraging investment. That does not, however, state that it is a pre-condition to anything being done in relation to 'present fields', or future fields, that such strategic policies should have been formulated. I agree with Professor Crawford's analysis (paragraph 24), as follows:

> 'But it should be stressed that Article 112 Second, does not confer any legislative authority on the federal government, still less exclusive federal authority. Nor does it stipulate that no contracts are to be concluded for the management by a region of present or future fields until the strategic policies are agreed. Such a stipulation would give the federal government a veto over regional authority which the Constitution nowhere gives, outside the enumerated list of exclusive powers in Article 110…'

93. The argument that Article 112 creates a sui generis regime, where the powers are neither exclusive to the federal government nor shared, and thus not subject to Article 115 (and 121 Second), is unconvincing given: (i) the sharing arrangements specified in Articles 112 and 113, (ii) the clear terms of Article 115, (iii) the absence of any reference in the text of the Constitution to the existence of a third category or the exemption of Articles 112 and 113 from Article 115, and (iv) the fact that Article 112 is placed between Article 110 and 114, which undoubtedly set out powers which fall within the dichotomy referred to in Article 115. It would be more persuasive to suggest that there might, on a proper understanding, be within Article 112 (and Article 113) certain exclusive powers of the federal government. But even if that were correct, I do not consider that the management of non-present fields could be identified as such an exclusive power given the way that Article 112 is expressed.

94. Secondly, if the interpretation of the relevant articles which I have set out above suggests a considerable degree of success on the part of the Kurds in relation to the allocation of state powers over oil and gas in the KRI, this is unsurprising, given the powerful bargaining position with which the Kurdish politicians went into the negotiations, described above. The degree of Kurdish influence on those negotiations is tellingly described by one of Dynasty's own experts, Professor Weller, as follows:

> '… the Sunni perspective, which clearly favoured a more central and integrated federal design, was not heard throughout this process [viz. the devising and negotiation of the Constitution's terms up to and including summer 2005]. The Kurdish side, on the other hand, was heard very loudly. Given its association with the US during the phases of armed confrontation from 1990 through 2003, there was strong receptiveness for the plight of the Kurdish community. Moreover, this was translated into highly professional negotiating positions … and strategies, put forward with the expert assistance of highly experienced and senior advisers like Ambassador Galbraith and Professor O'Leary.'

95. Consistently with this, the view of Professor Haysom, as expressed in May 2006 in a speech in Canada to a conference held under the auspices of the International Peace Academy, was that the 'constitutional text ha[d] been most deeply influenced by the drive for autonomy of the Kurdish community', and that this was particularly 'reflected in those portions of the text that divide the responsibilities and rights of federal government vis-à-vis subnational units', which, in his view 'can be characterised as providing for an underresourced and underpowered federal government'. He also said:

> 'They [natural resources – oil and gas] are not in the exclusive federal list of powers, and to the extent that current resources are jointly managed, it is the region that will be preeminent. Meanwhile, regions would have exclusive rights over new oil and gas ventures. The constitution leaves the mechanisms for shared management to a forthcoming hydrocarbon law.'

96. The significance of this is that, just after the ratification of the Constitution, well-placed observers considered that the Iraqi Kurds had indeed converted their bargaining position into a favourable allocation of state powers in relation to natural resources. Prof. Haysom was at that time assisting the constitutional committee

working under Article 142, to produce a set of proposed amendments to the Constitution. The amendments which were ultimately proposed by the sub-committee sought to modify Articles 115 and 121 Second by excluding natural resources from them. Those proposed amendments ultimately came to nothing, and the Constitution remained unamended. As Professor O'Leary argued, the result is that the Constitution remains in the terms which Professor Haysom regarded contemporaneously as meaning that 'regions would have exclusive rights over new oil and gas ventures.'

97. Thirdly, I do not consider that it can be said that the KRG was, in the relevant respects, acting pursuant to its own sovereignty, as opposed to that of Iraq. The Constitution is the source of sovereign authority in Iraq, and is the preeminent and supreme law in Iraq. There was no suggestion before me that it is invalid. As discussed above, it allocates the constitutional power in relation to the management of oil and gas in other than 'present fields' to the regions. That is the source of the KRG's power to exercise sovereignty in that regard. This excludes the notion that it was exercising its own sovereignty.

98. The case that the KRG was exercising its own sovereignty is in any event a problematic one. It is clearly the case that in the period 1992-2004 the KRG exercised, de facto, the powers of a sovereign, including in relation to natural resources in the KRI. However, in 2004, with the TAL, authority in relation to natural resources was allocated to the federal government. For that reason alone it is not clear that there was any continuing sovereignty in the KRI which could be exercised by the KRG. Moreover, with the Constitution, authority was re-allocated, as part of a 'fresh start' for Iraq. The Constitution did not retain or preserve existing separate sovereignties. Furthermore, the KROGL expressly states that it is made in accordance with the Constitution (see in particular Articles 2, 3 and 5 of KROGL, especially Article 3 Third and Fourth).

99. Dynasty argued that the position was not materially different from that found to obtain in Pocket Kings Ltd v Safenames Ltd [2010] Ch 438, and, in relation to the same subject matter as the present case, in Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq [2016] 4 WLR 2. In relation to the former, even if the decision in that case is correct that the authority by which the Commonwealth of Kentucky regulates gambling within the Commonwealth is an exercise of its own authority (paragraph [20]), the constitutional position in relation to Iraq and the KRI is not the same.

100. As regards the latter, what Dynasty relies on is paragraph [37] of Burton J's judgment. There Burton J said that the entry into of the relevant exploitation agreement was 'an exercise of the sovereign authority of the KRG itself, not of Iraq'. He said further, 'They [ie the KRG] would say so [viz that it was acting in its own right], and, because the FGI [ie the Federal Government of Iraq] alleges that the KRG has had no right to do what they have done, the FGI would also assert that what was done was not done by way of exercise of the sovereign authority of Iraq'.

101. Mr Dunning QC contended that that passage was based on a misunderstanding of Professor Crawford's Opinion, and in particular the statement in paragraph 43 that, in the absence of agreed strategic policies pursuant to Article 112 Second of the Constitution, the KRG was entitled 'to proceed in the exercise of its own

constitutional authority and in compliance with its own constitutional duties'. Mr Dunning submitted that what Prof Crawford had there been saying was that the KRG could, in such circumstances, proceed in accordance with a power conferred on it by the Constitution itself; he was certainly not saying that it could proceed under an authority which did not derive from the Constitution; but that Burton J had understood this as saying that it could proceed to exercise its own sovereignty. I rather doubt that Burton J made the mistake which Mr Dunning ascribes to him; but I agree with Mr Dunning as to what Professor Crawford was saying, and that it does not provide support for the conclusion reached by Burton J in paragraph [37].

102. Be that as it may, in relation to the specific conclusion reached by Burton J in paragraph [37] of his judgment in Pearl to which I have referred I do not, with respect, consider it to be correct. It was, it is right to say, only one of many points considered by Burton J, and it was not in any event determinative of whether the KRG could, in that case, be subject to a peremptory order because of the KRG's submission to the jurisdiction. Moreover the point was not, Mr Dunning told me, subject to the same degree of evidence and argument as it has been here. In the present case, furthermore, it is Dr Hawrami's clear position that the KRG was not acting 'in its own right', if by that is meant acting otherwise than in exercise of powers of the state of Iraq allocated to it under the Constitution. Furthermore, I consider that Mr Dunning is correct to say that in focussing on whether the Federal *Government* would contend that the KRG had no right to do what it had done, rather than whether the Constitution provided that the KRG had the relevant powers, Burton J's reasoning does not meet the way in which Dr Hawrami here contends that the KRG (and he) are entitled to claim immunity.

103. Fourthly, I do not consider the fact that the KRI has not adopted a regional constitution assists Dynasty's case. It is true that the Constitution of Iraq, by Article 120, requires regions, and thus the KRI, to adopt a regional constitution. It does not, however, lay down any time frame within which that is to be done; and nor does it say that until such a constitution is adopted, the government of the region cannot act. The operation of Article 112 (and Article 115), in particular, is not made conditional upon the adoption of a regional constitution.

104. For these reasons, I consider that the KRG's relevant acts, assuming that that they were in themselves sovereign acts, were done in exercise of the sovereign authority of the state of Iraq.

State Immunity Issue 2: Sovereign acts?

105. The issue of whether the relevant acts were acts done in the exercise of sovereign authority arises at two stages of the analysis. Given that the KRG is a 'separate entity' within s. 14 of the SIA, it will not have immunity unless the proceedings 'relate to anything done by it in the exercise of sovereign authority' (s. 14(2)(a)). In addition it will not be immune unless the circumstances are such that a State would have been so immune (s. 14(2)(b)) which itself entails that the exception in s. 3 is not applicable. As was recognised by Dynasty, however, in cases such as the present in which only the commercial exception within s. 3 would potentially be applicable in relation to the immunity of a state, the two tests under s. 14(2)(a) and (b) can be conflated.

106. The question of whether or not proceedings 'relate to anything done in the exercise of sovereign authority' requires the Court to consider:

> '… whether the acts performed by [the separate entity] to which the proceedings relate were performed in the exercise of sovereign authority, which here means acta juri imperii (in the sense in which that expression has been adopted by English law from public international law.)' (per Lord Goff in Kuwait Airways Corporation v Iraqi Airways Co [1995] 1 WLR 1147 at 1156 F/G.)

107. The question to be addressed in deciding whether an act is jure imperii was formulated by Lord Wilberforce in I Congreso del Partido [1983] 1 AC 244 (at common law), as follows:

> 'When … a claim is brought against a state … and state immunity is claimed, it is necessary to consider what is the relevant act which forms the basis of the claim: is this, under the old terminology, an act "jure gestionis" or is it an act "jure imperii": is it … a "private act" or is it a "sovereign or public act", a private act meaning in this context an act of a private law character such as a private citizen might have entered into?' (at 262 E/G),
>
> And
>
> 'The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.' (at 267B/C)

108. In Kuwait Airways Lord Goff, having quoted from Lord Wilberforce's speech in I Congreso said (at 1160A):

> 'It is apparent from Lord Wilberforce's statement of principle that the ultimate test of what constitutes an act jure imperii is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform.'

109. The issue is as to the character of the act, not the motivation for it. Lord Sumption in Benkharbouche v Embassy of the Republic of Sudan [2019] AC 777, said, at [8]:

> '… the classification of the relevant act was taken to depend on its juridical character and not on the state's purpose in doing it, save in cases where that purpose threw light on its juridical character.'

110. In Holland v Lampen-Wolfe [2000] 1 WLR 1573, Lord Hope re-emphasised that:

> 'It is the nature of the act that determines whether it is to be characterised as jure imperii or jure gestionis. The process of characterisation requires that the act must be considered in its context." (at 1577B/C)

111. In that case the writing of a memo, alleged to be defamatory, by the defendant, who was a civilian educational services officer with responsibility for educational training programmes provided to military personnel and their families at a US base in England, was held to be an act jure imperii. At 1587C/D Lord Millett expressed the matter in this way:

> 'The defendant was responsible for supervising the provision of educational services to members of the United States armed forces in the United Kingdom and their families. He published the material alleged to be defamatory in the course of his duties. If the provision of the service in question was an official or governmental act of the United States, then so was its supervision by the defendant. I would hold that he was acting as an official of the United States in the course of the performance of its sovereign function of maintaining its armed forces in this country.'

112. Relatively few cases have been decided in this jurisdiction relating to the exploitation of state-owned natural resources. The issue was considered, albeit briefly, and without a concluded view being expressed, in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No. 2) [2007] QB 886. At [133] Moore-Bick LJ said:

> '… As the judge pointed out, the agreement contains many of the hallmarks of a commercial transaction, but the fact that it relates to the exploitation of oil reserves within the territory of the state suggests that it involved an exercise by the state of its sovereign authority in relation to its natural resources and so falls outside the realm of activities which a private person might enter into….'

113. In Pearl v KRG, to which I have already referred, Burton J was presented with an issue as to whether those proceedings related to anything done by the KRG in the exercise of sovereign authority. The 'Heads of Agreement' which the parties had entered into in that case, and which Burton J had to consider was in many respects similar to the PSCs in the present case. At paragraph [36], having referred to Svenska v Lithuania, he said:

> 'Certainly, as Mr Dunning points out, and as is apparent from the Constitution, the ownership and management of oil and gas is plainly vested in "the people of Iraq" and the respective Governments, this is not simply a contract for sale, but a vesting of long-term rights, and the parties themselves thought it necessary to include in the Heads of Agreement the waiver of immunity clause … I am persuaded on balance that KRG entered into this agreement *in the exercise of sovereign authority*.' (italics in original)

114. Some further assistance can be gained from a consideration of certain Federal Court decisions from the United States. These have to be treated with care, but are of some interest, given the similarity of the 'commercial activity' exception in s.

1605(2)(a) of the US Foreign Sovereign Immunities Act 1976 to the way in which English law has approached the characterisation of acts as commercial transactions within s. 3, or not, by concentrating on the nature of the acts in question rather than the state's purpose in entering into them. The indication in Belhaj v Straw that the doctrine of act of state in the US has moved away from the approach of English law, and thus that recent US authorities on that area may be of little assistance, does not appear to me to apply to cases dealing with the 'commercial activity' exception in relation to sovereign immunity.

115. In IAMAW v OPEC 477 F. Supp. 553 (C.D. Cal., 1979) it was said (at 567-8) that 'The control over a nation's natural resources stems from the nature of sovereignty … The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples…' Similarly, in In re Sedco, Inc 543 F. Supp. 561 (S.D. Tex., 1982), it was said, in the context of conduct of Pemex, a Mexican State-owned oil company, (at 566) that 'A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.' In Jones v Petty Ray Geophysical Geosource 722 F. Supp. 343 (S.D. Tex., 1989) the In re Sedco, Inc approach was followed, and it was held that a petroleum production sharing agreement between Sudan and an energy company was not a 'commercial activity'. More recently, in RSM Prod. Corp. v Fridman, 643 F. Supp. 2d. 382 (S.D.N.Y., 2009), it was found that the Deputy Prime Minister of Granada, in denying the plaintiff's application for a licence to conduct oil and gas exploration off the coast of Granada, had 'exercised a right that is "peculiar to sovereigns"', because ' "licensing the exploitation of natural resources is a sovereign activity"…' (at 399).

116. In my judgment, the entry into by the KRG of the PSCs were 'sovereign or public acts', or acts jure imperii, and not 'private acts'. They concerned the exploitation of the natural resources of the KRI. There is no doubt that those resources were publicly, and not privately, owned, whatever the precise meaning which is given to Article 111 of the Constitution; and only a government, acting on behalf of the public, could enter into contracts such as these in relation to the exploitation of such resources. They were entered into pursuant to powers which, as I have found, were allocated to the KRG under the Constitution, and under the KROGL, which was enacted to give effect to those powers. Moreover, the terms of those contracts contain a number of provisions which it is apparent that no private person could make, including promises in relation to such matters as compulsory purchase, planning consents, customs, tax exemptions and pipeline rights. The parties to those agreements also considered it expedient to include a waiver of the KRG's sovereign immunity. Consistently with the decision of Burton J in relation to the 'Heads of Agreement' with which he was faced in Pearl v KRG, I conclude that the entry into of the PSCs was in the exercise of sovereign authority.

117. Dynasty contends, however, that even if the entry into of the PSCs was a sovereign act, the same does not apply to decisions to sanction, or not sanction or consent to, a transfer of control of the contracting entities. I do not consider that this is correct. A decision as to whether or not a new party should be permitted to become a replacement party to a long term contract for the exploitation of natural resources

which, as I have said, contains a series of stipulations by the KRG which a private citizen could not make, would seem to me to partake of the same sovereign nature as the making of the contract at the outset. Consent to whether there can be a change of control over a contracting entity is the functional equivalent to consent to novation of the contract because in relation to arrangements of the present kind, the expertise, integrity and financial position of those standing behind the contracting entity will be of great importance.

State Immunity Issue 3: Can Dr Hawrami claim immunity?

118. The further issue arises as to whether Dr Hawrami himself is protected by the immunity to which, as I have found, the KRG is entitled in respect of the relevant acts. In this regard, there is no dispute that Dr Hawrami, at all times material to Dynasty's claim, acted for and on behalf of the KRG, as Minister for Natural Resources of the KRG. This is how the case against him is pleaded: see Substituted PoC paras. 3, 22-27, 31.

119. Dynasty contends that an individual who acts as the servant, agent or employee of a 'separate entity' within the meaning of s. 14 of the SIA is not entitled to immunity, even though the 'separate entity' is immune in respect of the relevant acts. This, Dynasty says, is at least the case where the 'separate entity' has not acted on the instructions or at the behest of the government of the State but rather pursuant to a constitutional entitlement to act.

120. It is convenient to start with the position of servants, agents, officials or functionaries of the state itself. The SIA does not expressly provide for the case where suit is brought against any such agents of a foreign state. There was authority at common law (and in other countries), however, that a foreign state's right to immunity could not be circumvented by suing its servants or agents. Consistently with this it has been held that the immunity provided for by s. 1 of the SIA extends to the servants or agents of foreign states who are sued in respect of matters where they were acting in discharge or purported discharge of their duties as such (see Propend Finance Pty Ltd v Sing (1997) 111 ILR 611; Jones v Ministry of the Interior of the Kingdom of Saudi Arabia [2007] 1 AC 270).

121. As it was put extra-judicially by Lord Lloyd-Jones in the 2018 Grotius Lecture to the BIICL:

> '… since a State can act only through individuals, if State immunity does not extend to protect officials acting in an official capacity immunity could easily be circumvented by simply bringing an action against the individual actor. If such proceedings were permitted in circumstances where the State itself would be immune if sued, the reality is that in most cases the State would have to stand behind its servant or agent and its immunity would be defeated.'

122. In relation to the position of servants, agents or other functionaries or officials of separate entities 'distinct from the executive organs of the government of the State [and]… capable of suing and being sued', in Propend Finance v Sing Leggatt LJ, giving the judgment of the Court of Appeal, said (at 670), that if the entity was entitled to immunity

> '… then its servants or officers would of course benefit by immunity in similar fashion to the officers or functionaries of a State entitled to immunity.'

123. In Grovit v De Nederlandsche Bank NV [2006] 1 WLR 3323 it was accepted (para. [62]) that the employees of a separate entity (viz. the central bank of the Netherlands) would be entitled to immunity in respect of acts done in the exercise of sovereign authority. In my judgment, though this was a matter of concession, it was a correct concession. Were it not the case, then there could be a simple circumvention of the immunity to which a separate entity, acting ex hypothesi in the exercise of sovereign authority, was entitled pursuant to s. 14(2) SIA.

124. The argument put forward by Mr Waller QC for Dynasty was that individuals who were servants or agents of a separate entity should, at most, be entitled to immunity where that entity was acting on behalf of the state pursuant to a delegation of a function to it by the government of the state, and not in a case of a constitutional allocation of a function to the separate entity. This appeared to me, in essence, an attempt to revisit Dynasty's 'threshold' argument which I have considered and rejected above. Once it is recognised, as I have concluded it should be, that a separate entity may be entitled to immunity if it is exercising sovereign authority pursuant to a constitutional allocation to it of such authority, then I consider that its servants or agents should be entitled to the same immunity, for otherwise it would lead to the circumvention of the immunity which it has been found that the entity should have.

Service

125. Dr Hawrami contends that the service of the Claim Form effected upon him at Heathrow Airport was invalid and ineffective because he should have been served by the method set out in s. 12(1) SIA. That sub-section provides:

> 'Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.'

126. By way of background to the present point, in PCL v The Y Regional Government of X [2015] EWHC 68 (Comm), which was an earlier decision in the same litigation as the decision in Pearl Petroleum v KRG to which I have already referred, it was held by Hamblen J that, because of the terms of s. 14(5) of the SIA, and because the KRI is a constituent territory of the federal republic of Iraq, the KRG was entitled to insist on service by means of the method prescribed by s. 12 of the SIA. That required service on the Ministry of Foreign Affairs of Iraq, located in Baghdad. That, as Mr Dunning QC informed me, was what had happened after the decision of Hamblen J in that earlier litigation. That earlier litigation, and Hamblen J's decision, did not involve service on an individual servant or agent of the KRG, but it was Dr Hawrami's case before me that, just as the KRG would have to be served via the Ministry of Foreign Affairs in Baghdad, so should he have been.

127. Dynasty contends that Dr Hawrami's case in relation to service is wrong for three reasons. First, it contends that s. 12 does not apply to service of proceedings on servants or agents of states. Secondly, whether or not the first point is correct, s. 12 does not apply to service of proceedings on servants or agents of constituent territories of states. And thirdly, if s. 12 could in principle apply to servants or agents of states or constituent territories, it would not apply on the facts of the present case.

128. I will start with the position of servants or agents of states (not, for the avoidance of doubt, including the head of state amongst such servants or agents). In my judgment, there is no requirement that such servants or agents should be served by the method prescribed in s. 12. This is the view expressed in Fox and Webb *The Law of State Immunity* (3rd ed revised), where at p. 231 it is stated:

> 'Service on a State entity, or a person in the service of the State, is not required to be by the special procedure.'

Further in footnote 287 on p. 230 it is said:

> 'Leave is not necessary for service within the jurisdiction; for natural persons or even foreign incorporated companies who are agents of a foreign State service may be based on presence within the UK. In such cases the defendant will have to dispute the court's jurisdiction and seek a declaration of no jurisdiction on the ground of State immunity.'

129. This is also the preferred view, expressed in Dickinson et al. *State Immunity* para. 4.079.

130. I consider that these statements are correct. Entities, servants or agents distinct from the State as defined in s. 14(1) are not, by that sub-section, accorded the privilege in s. 12. There is no good reason for reading the SIA so as to afford them that privilege. In this regard, there is no question here of the circumvention of an immunity which the Act confers. The fact that individuals may be served otherwise than through the s. 12 procedure does not prevent a claim for immunity if they were acting in their capacity as servants or agents of a state acting in the exercise of sovereign authority.

131. That s. 12 should not apply to service on servants or agents of States is supported by practical considerations. It would be productive of uncertainty if it did apply. While it can be reliably said whether an entity falls within the meaning of State in s. 14(1), it may not be known by a claimant at the time of issue and service of proceedings whether an individual (a) was a servant or agent of the State, or was such an agent at the relevant time, and (b) will contend that (s)he was acting on behalf of the State. Certainty is better achieved by the individual being served by ordinary process, and then being able to assert immunity if appropriate. In addition, while the s. 12 procedure makes good sense as a method of effectively drawing the attention of a State, which is likely to have many departments and representatives, to proceedings commenced against it, the same does not apply to proceedings against an individual servant or agent. Their attention will be as, and quite possibly more, effectively drawn to the proceedings by service in accordance with the ordinary rules. Furthermore, as Mr Kimmins QC submitted, to interpret the SIA as having the effect

for which Dr Hawrami contends would give rise to anomalous cases in which a servant or agent might, for example, be domiciled in this jurisdiction, but could only be served by the documents being transmitted via the Foreign Commonwealth and Development Office to the Ministry of Foreign Affairs in the foreign state.

132. Given my conclusion in relation to service on servants or agents of States, I consider that the same must apply to the servants or agents of 'constituent territories of a federal State' (as that term is used in s. 14(5)) and a fortiori in relation to the servants or agents of separate entities which are not constituent territories. There is no express provision in the SIA that such persons should be served in accordance with the s. 12 procedure and there are various practical considerations, similar to those I have outlined above in relation to the servants or agents of states, why they should not.

133. For the sake of completeness I should add that I did not find the two cases upon which Dr Hawrami relied in support of the contention that servants or agents of a State should be served in accordance with s. 12 to be of assistance in that regard. In Certain Underwriters at Lloyd's London and Others v HM Treasury [2019] EWHC 3182 (Admin), the matter decided was that where the claim is one for judicial review, service on Interested Parties did not fall within s. 12 at all, because the claim form did not institute proceedings against a foreign state. The issue with which I am concerned did not need to be decided and, indeed, seems not to have been the subject of contest given that the Interested Parties did not appear and were not represented. The other case, Mashate v Yoweri Museveni Kaguta [2011] EWHC 3111 (QB) (and [2012] EWCA Civ 1168), insofar as touching on relevant issues at all, concerned service on a head of state. There was, however, no dispute before me that a head of state in his public capacity must be served in accordance with s. 12 SIA because 'the sovereign or other head of that State in his public capacity' falls within the definition of 'State' in s. 14(1), and thus an action against such a head of state must, by the express terms of s. 12 be subject to the service regime there set out.

Act of State

134. Dr Hawrami further contends that the claim against him is not justiciable on the basis of the doctrine known as foreign act of state. Specifically, he relies on what was described as the 'second rule' in Lord Neuberger's summary of the doctrine in Belhaj v Straw at paragraphs 120-124. That 'second rule' was formulated by Lord Neuberger as that:

> 'the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.'

135. Dynasty's primary position is that Dr Hawrami's reliance on act of state adds nothing to his case on sovereign immunity. While Dr Hawrami contended that there might be circumstances in which he could have lost in relation to sovereign immunity but the doctrine of act of state would still be applicable, as I have found that he is entitled to assert immunity, reliance on the act of state doctrine in the present case does not further assist him.

136. The doctrine of act of state, and in particular its 'second rule', is in various ways controversial. The Supreme Court in Belhaj v Straw did not have to decide any issue in relation to property rights, and left open the scope of any 'second rule' in that area (see paragraphs [136]-[143] in the judgment of Lord Neuberger, with whom Lady Hale and Lords Wilson and Clarke were in agreement). By comparison with the complexity of the issues involved, the points on the doctrine of act of state were argued rather briefly before me. Furthermore, on at least one of Dynasty's arguments, it would be premature to seek to make a determination on the issue of act of state at this stage in the proceedings.

137. In light of these matters I consider that it is unnecessary for me to express views on the issue of the potential application of the doctrine, and that it would be better for such matters to be decided in a case in which they were important to the result.

Forum Non Conveniens

138. Dr Hawrami contends that the present action should be permanently stayed on the basis that the courts of the KRI are clearly and distinctly more appropriate for the trial of the action.

139. This challenge gives rise to two distinct issues. The first is whether the court has a discretion to stay, or whether instead the present case is subject to the regime of the Brussels Recast Regulation. The second is whether, if the Brussels Recast Regulation is not applicable, whether the court should exercise its discretion to stay.

Is the case subject to the Brussels Recast Regulation?

140. Dynasty's first response to this part of Dr Hawrami's application is to contend that Dr Hawrami is precluded from seeking a stay because: (i) the present is a 'civil [or] commercial matter' within the meaning of the Brussels Recast Regulation (Regulation (EU) No. 1215/2012), (ii) Dr Hawrami was domiciled in England at the time he was served, and (iii), therefore, in accordance with the rule in Owusu v Jackson [2005] ECR I-1383, the claims against him cannot be stayed on the basis of *forum non conveniens*.

141. Dr Hawrami now accepts, for the purposes of this application, that Dynasty can show that he was domiciled in England. He does not dispute that, if the action against him is a 'civil or commercial matter' within the Recast Regulation, then the claims against him cannot be stayed. The issue is whether the present action comes within the scope of the Recast Regulation.

142. By Article 1 of the Recast Regulation it is provided:

> '1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).'

143. Dr Hawrami submits that the present action is not a 'civil or commercial matter'. He submits that it is an action which is brought against him because he exercised

public powers and/or is an 'administrative matter'. Further or alternatively he submits it is a matter relating to the liability of the State for acts or omissions in the exercise of State authority, within the last twenty words of Article 1 of the Recast Regulation, which were added to the Brussels Regulation when it was recast, and which I will call, for convenience 'the State authority clause'.

144. I was referred to a number of authorities on the boundary of 'civil and commercial matters' where the acts or omissions complained of are those of a public authority or public official. A helpful summary of much of the jurisprudence is provided by Briggs: *Civil Jurisdiction and Judgments* (6th ed), at 2.31-2.35.

145. At para. 2.35 Prof. Briggs attempts a summary of the law, of which the first two elements are stated as follows:

> 'First, if the claim is one based on ordinary civil law duties, which is to say, it originates in a private law relationship (contract, tort, maintenance), it will be a civil or commercial one, even when enforced by a public law entity. … Second, if the claim is brought against a defendant which performs the functions out of which the claim is brought as a matter of public law, it is unlikely, though not impossible, that the proceedings will be in a civil or commercial matter. This will be so even if the allegation made against the defendant is that it was negligent, or acted without legal excuse for what it did, in a way which is, in terms of its content, practically identical with duties owed by other persons in other contexts.'

146. Dr Hawrami relied in particular on the case of Grovit v De Nederlandsche Bank NV [2006] 1 WLR 3323 (Tugendhat J), and [2008] 1 WLR 51 (Court of Appeal). In that case, one of the companies in a group which operated money transaction offices applied for registration in the Netherlands. In response the defendant, the Central Bank of the Netherlands, sent a letter to the London office of another company in the same group, stating its intention not to register the company and giving reasons. The claimants sued the bank and two of its officers for libel. Both at first instance and in the Court of Appeal it was held that the claim was not a 'civil or commercial matter'. This was notwithstanding that it was formulated on the pleadings simply as a claim in defamation. In the Court of Appeal, Dyson LJ, having referred to a passage in an earlier edition of *Civil Jurisdiction and Judgments* than the one referred to above, said, at [13] that he found valuable:

> '… in particular the statement that it is more helpful to ask whether the claim is brought by or against a public law body acting as such or by or against it instead acting as any other private individual.'

147. At para. [16] Dyson LJ, having considered both Sonntag v Waidmann [1993] ECR I-1963 and Lechouritou v Germany [2007] IL Pr 14, said that he considered that the Judge had clearly reached the correct decision in holding that the claim was not a civil or commercial matter. He said:

> 'The bank and its employees, the second and third defendants, were undoubtedly exercising public law powers. They were performing the role of an administrative authority carrying out governmental supervisory functions which

had been delegated to the bank by the Dutch Government to protect the integrity of the financial system in the Netherlands…'

148. Similarly, at [21]-[22] May LJ said:

'[21] … The claimants' simple but only point within the permission to appeal granted by this court is that a claim for libel is a "civil matter". This supposes that the question only has to address the nature of the claim which the claimant brings irrespective of the nature of the defendant, and the function which it was undertaking and from which the claimant's claim derived. Dyson LJ has referred to the judgment of the Court of Justice in *Sonntag's* case … and in *Lechouritou's* case … and the matter to my mind is shortly and decisively, for present purposes, put in those judgements and in summary in para 31 of *Lechtouritou's* case where the court said:

> "Thus, the court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers."

[22] In my judgment, in agreement with Dyson LJ, Tugendhat J came to the right decision as to the exercise by the defendants in this case of their public powers. …'

149. In my judgment, the present case is one which falls outside the scope of 'civil or commercial matters' because it is concerned with the exercise of public powers. I reach this conclusion having regard in particular to the following:

(1) The claim is made against only two Defendants, the KRG and Dr Hawrami. As I have already referred to, Dr Hawrami is said to have been, at all material times, the Minister for Natural Resources (Substituted PoC para. 3). He is pleaded to have acted at all material times with the authority of the KRG, such that the KRG is vicariously responsible for his conduct (para. 23). Dr Hawrami's involvement was as 'the point of contact and interface on behalf of the [KRG] and the MNR on the issue of consent under Clause 39.7 of the PSCs.'

(2) The complaint is about a failure to permit a change of control under the relevant PSCs. Those PSCs were not contracts which any private party could have entered into. Instead, as pleaded in the Substituted PoC itself, the KRG enters into such contracts because it exercises administrative control over the natural resources of the KRI (para. 2), they are provided for by the KROGL (paras 4-6), they are the arrangements by which all exploration and production operations are carried on in the KRI, and revenue under them is transferred to the KRI's Ministry of Finance (para. 10).

(3) It seems clear, as Mr Dunning QC submitted, that in determining whether a change of control should be permitted, even if acting vis a vis its counterparty pursuant to the terms of the relevant PSCs, the KRG (through the MNR, its Minister (Dr Hawrami), and the Regional Council) was required to comply with the requirements of KROGL, including in particular Articles 6 and 7, and taking

into account Article 24, thereof. If its decisions were justified as a matter of compliance with KROGL, then it is very difficult to see how they would be 'unreasonable' for the purposes of the Change of Control provisions of the PSCs.

(4) According to the evidence of Mr Taher, as a matter of the law of Iraq and of the KRI, decisions as to changes of control under PSCs are considered as administrative decisions taken in the course of the exercise by the government of its administrative duties.

(5) The same facts as are relied upon in relation to its other causes of action (including conspiracy) are relied upon by Dynasty as founding the cause of action, in Iraqi law, of officials overstepping the bounds of their duty and abusing the authority of their office, contrary to Article 334 of the IPC. Mr Kimmins QC was prepared to concede that that cause of action might not be 'civil or commercial'. However, I consider that what this tends to show is that the complaint is one about the improper exercise of public powers, and that while it has been pleaded in other ways as well, this way of pleading it accurately reveals its nature.

150. Considering these matters, the case is, in my view, one which falls on the same side of the dividing line as Grovit v Nederlandsche Bank, and where, in Prof Briggs's phrase, Dr Hawrami performed the functions out of which the claim is brought as a matter of public law. I consider that this qualifies the claim as an 'administrative matter' for the purposes of Article 1 of the Recast Regulation, and even if not 'administrative' is nevertheless not a 'civil or commercial' matter.

151. Thus far I have not considered whether the present case falls within the State authority clause added to the Recast Regulation. As is apparent from Lechouritou v Germany, the issue of whether an act was in the exercise of State authority was relevant before the recasting of the Regulation, to the question of whether the case was a 'civil or commercial' matter. The addition of the State authority clause certainly reinforced that; and may have expanded the scope of the second sentence of Article 1.

152. I have already held that the acts in question were acts or omissions in the exercise of sovereign authority, and were acta jure imperii, such as to entitle Dr Hawrami to claim the benefit of state immunity under the SIA. I consider that the corollary of that is that the case falls within the State authority clause of Article 1 of the Recast Regulation. The possible arguments against that conclusion appear to me to be two-fold. First, that the relevant clause speaks of the liability of 'the State', whereas here, subject to the second point considered below, the liability would be of the government of a constituent territory of a State. I do not consider that that should mean that the State authority clause is inapplicable. Ex hypothesi, the constituent territory was exercising State authority and performing acts or omissions jure imperii. The clause should in my view be read as saying that actions involving the liability of an entity exercising State authority and performing acta jure imperii do not fall within the scope of the Recast Regulation. In other words, if an entity is exercising State authority, then it is its liability which is being referred to in the phrase 'the liability of the State', whether or not it is the State itself or a constituent territory of a State.

153. The second possible argument is that it might be said that a claim against a servant, agent or functionary of a State-actor does not involve 'the liability of the State'. In the present case, however, it is alleged both that Dr Hawrami is himself liable, and also that the KRG is vicariously liable for his acts, so this argument does not appear to arise here, as there is undoubtedly an alleged liability of the entity which exercised State authority. In any event, a State-actor will very often in reality have to stand behind its servants or agents, if they are sued in respect of acts done on behalf of the State. It is accordingly likely that an action against servants or agents of a State-actor will in practice involve 'the liability of the State'.

154. I therefore conclude that the present case falls within the State authority clause of Article 1, and thus, for that further or additional reason, falls outside the scope of the Recast Regulation.

Should the court stay the proceedings in its discretion?

155. On the basis that the terms of the Recast Regulation are not applicable to the case, Dr Hawrami applies for a stay of the present proceedings on the basis of forum non conveniens.

156. The principles applicable are familiar, and were stated in Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460. For present purposes, they are as follows:

(1) In a case in which jurisdiction has been founded as of right by service within the jurisdiction, a stay will only be granted on the ground of forum non conveniens where the court is satisfied, the burden being on the defendant, that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In considering whether there is such another forum, the court will consider what factors point in the direction of another forum, and will consider whether the other forum is the 'natural forum' or 'that with which the action has the closest and most real connection'.

(2) If the court concludes that there is some other available forum for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. On this the burden rests on the claimant.

157. There are thus two stages involved, on which the burden of proof differs. I will proceed to deal with the two stages below, as there was an issue between the parties about each.

Stage 1

158. In relation to the question of whether there is another forum which may be said to be the natural forum, or that with which the action has the closest and most real connexion, I have reached the clear conclusion that there is: the courts of the KRI. The evidence indicates that the courts of the KRI are available to hear any claim against the KRG and one of its ministers. The matters which have led me to the

conclusion that those courts constitute the forum with which the action has the closest and most real connexion can be summarised under five heads.

159. Connexions of Parties with particular places In relation to the connexions of the parties with particular places, Dynasty's connexions are with Iraq and the KRI. Dynasty is an Iraqi company. It has its base of operations in the KRI, and is controlled by Kurdish shareholders. Its literature describes it as 'a joint venture between two of Kurdistan's leading private energy companies'.

160. In relation to Dr Hawrami, he has dual nationality: British and Iraqi. He is, or may be treated for these purposes, as being domiciled in the UK. But he was at the material times a Minister of the KRG. It is Dynasty's evidence that he has a residential and a business address in Erbil. It seems clear that he spent time in both places.

161. Where the relevant events occurred The events with which the claim is concerned appear to have occurred largely in the KRI. The relevant correspondence during 2019 was addressed to and from the MNR or other parts of the KRG in Erbil. At least some was addressed personally to persons physically present in Erbil: for example the letter to the Prime Minister of 25 July 2019. Most communications sent by Repsol were sent from the 'Country Manager – Kurdistan', Mr De Los Reyes, and if he was not in the KRI, there is no suggestion on the communications that he was in England. The communications sent by Dynasty appear clearly to have been sent by persons in the KRI. The phone call which Dynasty contends took place on 3 May 2019 between the Deputy Prime Minister, Qubad Talabani, and Hiwa Ali was between two people who were in the KRI. The meetings between Hiwa Ali with Mr Lahur took place in Sulaymaniyah.

162. Dynasty relies heavily on the meeting between Dr Hawrami and Repsol and WesternZagros at the Intercontinental Hotel in London on 7 May 2019. Dr Hawrami contends that it was a without prejudice meeting and reference should not be made to it. Be that as it may, the fact that this meeting was in London appears adventitious, and a matter of convenience: it was a meeting involving representatives of Spain- and Canada- based international oil companies, with representatives of the KRG.

163. Although Dynasty contends that Dr Hawrami was masterminding the conduct of the KRG, and from England, it is part of Dynasty's case that he was conspiring with the KRG, which must include other members of the Regional Council, who were in the KRI. It is also inherent in Dynasty's pleaded case that the decision not to approve a change of control only finally became effective after the letter to the Prime Minister of 25 July 2019 went without response. Accordingly, Dr Hawrami was not, on Dynasty's own case, the only person involved on behalf of the KRG.

164. Applicable law The law which is to be applied to the issues, consistently with my decision that the Recast Regulation does not apply because the matter is not a 'civil or commercial' one, and considering that the Rome II Regulation contains a similar exception, is to be determined in accordance with the Private International Law (Miscellaneous Provisions) Act 1995. Under s. 11 (1) of that Act, the general rule in relation to claims in tort or delict is that the applicable law is the law of the country in

which the events constituting the tort or delict in question occurred. Under s. 11(2), where elements of those events occur in different countries, the applicable law is, relevantly, 'the law of the country in which the most significant element or elements of those events occurred.'

165. Given the nature of the test, it is not possible to form any concluded view at this stage as to what is the applicable law. My provisional view, however, is that the applicable law is the law of Iraq, and in particular the law of the KRI. I say this because it appears to me on the material at present that the most significant elements of the events constituting the alleged torts or delicts occurred in the KRI. In this regard I have had regard to the points I have made above, as to where events occurred. In addition, there is a strong argument that the final decision as to whether a change of control should occur lay, pursuant to KROGL, with the Regional Council, and there was no suggestion that a decision by the Regional Council would be made anywhere other than in the KRI. The meeting in London on 7 May 2019 was one at which no representative of Dynasty was present. While it is Dynasty's case that that meeting evidenced the fact that Dr Hawrami's mind was – unreasonably - made up, it does not appear to have any particular juridical significance in constituting the torts or delicts alleged. Finally, if any loss was suffered by Dynasty as a result of the lack of consent to a change of control, that loss was, on the evidence, clearly suffered in the KRI.

166. My provisional view that the applicable law is the law of the KRI has this significance: it is, other things being equal, preferable that issues are decided by courts applying their own law. The weight of the point is not to be overstated, because it is of course commonplace for courts to apply other laws, but it is a factor which points towards the courts of the KRI as being the most appropriate forum.

167. Dynasty contends that, if the applicable law is the law of the KRI, that does not have even the significance I have accorded it in the previous paragraph because the courts of the KRI would have to have regard to English law. I do not consider that this point has any cogency. The alternative claims which Dynasty pleads in the Substituted Particulars of Claim under Iraqi law do not appear to be based on the terms of the PSCs or English legal standards incorporated into the PSCs, but on Iraqi law concepts of fault. In any event, insofar as reliance was placed, in the context of Iraqi law claims, on the requirement in the PSCs that consent should not be unreasonably withheld, I am not persuaded that considerations of English law would occupy any significant time. This is because it seems likely that, if the KRG's conduct was justified in accordance with KROGL, then it would be regarded as a reasonable ground for withholding consent.

168. <u>Documents and witnesses</u> In relation to the location of documents, the position appeared to me as follows. Any documents of the KRG, including of the MNR, will be in the KRI, and many may be in Kurdish. Dynasty's documents, to the extent that it has any, will probably be in the KRI. Documents relating to quantum, including the value of the PSC, would appear likely to be predominantly in the KRI. Dr Hawrami may have his own documents here, but it seems likely that any which are not electronic, and thus easily transportable, will not be very numerous. I did not understand Dynasty to suggest otherwise.

169. As to witnesses, Dynasty's evidence identifies 13 witnesses it may call, and anticipates that Dr Hawrami / the KRG might call 9. Apart from Dr Hawrami, there was no suggestion that the other witnesses for him/the KRG are based anywhere other than in the KRI. Those witnesses include the President of the KRG, Nechirvan Barzani, the Prime Minister, Masrour Barzani, the Deputy Prime Minister, Qubad Talabani, and Mr Lahur, Head of Intelligence. It seems to me that it might be disruptive to the government of the KRI if all those witnesses had to give evidence in England. In any event, it would clearly be more convenient for them to give evidence in the KRI. The witnesses Dynasty considers that it might call include 5 from Repsol and 2 from WesternZagros. I agree with Mr Dunning QC that it is by no means clear that those companies will agree to or facilitate their employees giving evidence. Of the other witnesses, with one possible exception, I understood them all to be based in the KRI.

170. The overall shape of the case The underlying subject matter of the claim, which is the right to exploit resources in the region of the KRI, and which Iraqi Kurdish interests (viz Dynasty and its shareholders) wish to enjoy, is strongly suggestive of the KRI as being the natural forum.

171. It is the case that the relevant PSCs were governed by English law; but Dynasty was not a party to them. It is also the case that the SPA with Repsol was governed by English law, but the KRG was not party to it. I agree with the submission made on behalf of Dr Hawrami that it is useful to pose the question of whether persons in the position of Dynasty had, in the absence of a contract with the KRG, a reasonable expectation that English law and English jurisdiction would apply to any claim that they might have against the KRG in respect of a refusal to allow them to participate in PSCs regarding the KRI's natural resources. In my view the answer to that question is that they would not.

172. Accordingly my conclusion as to the first stage of the enquiry is the case has its closest and more real connexion with the KRI and the courts of the KRI are the natural forum for its resolution.

Stage 2

173. I therefore turn to the second stage of the enquiry. In relation to this, guidance was given by the Privy Council in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804. The Privy Council rejected the argument that, at the second stage, the claimant had to show that justice would not be done in the foreign jurisdiction. At paras. 95-101 Lord Collins, giving the judgment of the Board, said:

> '[95] The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances.
> [96] Is the court able to find that justice will not, or may not, be done because of endemic corruption in the foreign system? …

> [97] Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the appellants' submission, even in what they describe as endemic corruption cases, (ie where the court system itself is criticised) there is no principle that the court may not rule….
> …
> [101] The true position is that there is no rule that the English court … will not examine the question whether the foreign court or the foreign system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence…'

174. Some consideration to what might or might not constitute 'cogent evidence' was given by Andrew Smith J in Ferrexpo v Gilson Investments Ltd [2012] EWHC 721 (Comm). The judge there rejected the submission that because there was evidence from a distinguished expert as to a risk of injustice that would suffice to establish one. While recognising that allegations of the risks of injustice in the foreign forum are ones on which it may be difficult for the claimant to present 'direct or primary evidence' (para. [43]) he continued, at [44]:

> '[44] But this is no reason that allegations of the kind made by Ferrexpo need not be supported with evidence that enables the court to examine their basis, and which is sufficiently detailed and focused to justify them. In my judgment, some of Ferrexpo's evidence, including evidence upon which Professor Koziakov relied, is not of this quality. Some of it could properly be described as mere "press or political comment" unsubstantiated by independent evidence …'

175. I was also referred by both sides to, and found helpful, the commentary of Prof. Briggs in *Civil Jurisdiction and Judgments* (6th ed). At para. 4.30, in relation to the second stage of the Spiliada test, he says:

> '… What is required of the claimant is that he establish, by clear and cogent evidence, the grounds on which he says it would be unjust to leave him to go to a foreign court. An English court will not proceed on the basis of whisper or suggestion, and it will not be at all receptive to a general disparaging of a foreign court's procedure. Despite the occasional surprising decision, it is only rarely that the strong presumption of a stay will be rebutted on these grounds.'

176. At para 4.35, in considering 'direct attacks on the integrity of the foreign court', he comments on the general difficulties of an English court conducting 'some kind of quality audit' of the judicial systems of friendly states, and the absence of 'judicially manageable standards by which this could be done'. Subsequently, having referred to the development of the law ratified in Altimo Holdings, Prof Briggs says:

> 'There can be no objection to this development if there is proper and focused evidence that the foreign court will not (or would be acting quite out of character if it were to) do justice according to the law. But "a real risk" may set the bar rather low. It immediately raises the question what manner of evidence would be needed to sustain such a contention, and the answer is that there is no answer. Evidence of judicial propensity in general, or of judicial propensity when one of

> the litigants is well connected, may suffice; rather less focused observations from organisations which have given themselves grand names and which compile 'indexes of corruption', for example, may be accorded rather less weight. But as the circumstances of each case will be individual, the question of how to discharge the burden of proof will vary from case to case.'

177. Aspects of the cautions enunciated by Prof Briggs are in my view well founded. The bar should not be set too low. It must be borne in mind that in being invited by the claimant to act on a risk that justice will not be done in the other forum, the court is also being invited to take the risk of other undesirable results, including that the case is tried in a forum other than the natural one in circumstances where justice could in fact have been done in the natural forum, as well as acting in a manner which may be contrary to comity.

178. In addition, as the passage quoted indicates, there are reasons for circumspection in having regard to general statements as to a country's legal system, even coming from reputable organisations. Unless the court can see what underpins such statements, it is very difficult to place weight upon them. General statements are easily made, but may embody an opinion by the author with which others might not agree, based on evidence which others might not find convincing.

179. Against that background I turn to consider the case made by Dynasty as to why it would be unjust for a stay to be granted. It had two principal aspects. First that the courts of the KRI lack independence; and second, that the courts of the KRI lack competence. I will take them in turn.

180. The first is that the courts are not independent of the executive or at least of the political parties, and would not find in favour of Dynasty and against the government in a matter of the present magnitude and sensitivity. In relation to this case as to the lack of independence of the KRI courts, Dynasty relied principally on a report from Prof. Gerges. While I do not doubt Prof Gerges' expertise in relation to international relations in the Middle East and on Islamist violence, there was, I thought, considerable force in the point made on Dr Hawrami's behalf that he was not shown to have any particular expertise in relation to the justice system within the KRI. He is not a lawyer, and clearly not one practising in the KRI. He does not list any publications in his CV relating to Kurdish matters. His report contains occasions where he seems to suggest that matters relate to the KRI when in fact they occurred in other parts of Iraq. This is notwithstanding that there are apparently cogent grounds for care being taken to distinguish evidence relating to the KRI from that relating to the remainder of Iraq, or the wider region, not least in the terms of the House of Commons Foreign Affairs Committee's report *UK Government policy on the Kurdistan Region of Iraq*.

181. Prof. Gerges referred to, and Mr Kimmins QC relied upon, a number of comments in publications about the judicial system in the KRI. With the exception of two matters, to which I will return, the – relatively short – comments applicable to the judicial system in the KRI are unspecific as to the basis of their statements (eg. in the US Department of State's Country Reports, the second part of the sentence 'The Kurdistan Judicial Council is legally, financially and administratively independent

from the KRG Ministry of Justice, but the KRG executive reportedly influenced politically sensitive cases'), or can fairly be said to be 'press or political comment'.

182. Dynasty also relied on various matters which it said showed the power and influence of Dr Hawrami, for example his closeness to the Prime Minister and the President of the KRI. I will not go through this material. Suffice it to say that none of it appeared to me to demonstrate that Dr Hawrami had influence over the courts of the KRI.

183. For his part, Dr Hawrami relied upon an expert report from Mr Taher, and evidence from Mr Aziz, who represents the MNR in proceedings brought against an affiliate of Dynasty under the same management, Tigris Energy, in the courts of the KRI. Mr Taher is the head of a litigation practice in the KRI and gives examples of pursuing claims against companies associated with one of the main KRI political parties and of overturning administrative decisions taken by ministries of the KRG. Mr Kimmins criticised Mr Taher's report on the basis that he had exhibited no documents and given inadequate details, but it appears to me that I cannot ignore it. As to Mr Aziz, he gives evidence that more than 85 cases were commenced against the KRG and its instrumentalities in the Erbil Administrative Court during 2019, and says that there would have been further cases brought in the Sulaymaniyah Administrative Court. This it is said would be surprising if the courts were inherently biased against challenges to the actions of the KRG. Mr Aziz also gives examples of successful claims having been brought against the KRG and its ministries. This was attacked by Mr Kimmins QC on the basis that the amounts involved in those cases were insignificant. Again, however, I considered that I could not ignore this as at least some evidence of a willingness on the part of the KRI courts to find against the government. Moreover, while Mr Kimmins said that it 'spoke volumes' that, having 'scraped the barrel' and 'looked everywhere', Mr Aziz had only been able to come up with these examples, I noted that Dynasty had not produced an example of any case, whether of high or low value, which it contended ought to have succeeded but did not.

184. Dr Hawrami also relied on the fact that one of Dynasty's shareholders, South Kurdistan, and Tigris Energy, had both commenced proceedings in the courts of the KRI against the MNR in the last few years. On behalf of Dr Hawrami it was submitted that this indicated that these entities did not regard those courts as likely to be so biased in favour of the MNR that there was no point in suing. There appeared to be some force in this. I did not regard as convincing Mr Jalal's statement that Tigris Energy had known that it would not get a fair trial but had commenced proceedings only as a matter of principle.

185. There were two aspects of the material exhibited by Prof Gerges which need to be separately considered. The first of these related to an incident at the beginning of 2014, concerning a Mr Shwan Sabir. I was shown two reports which referred to this. One was a piece written by Kawa Hassan entitled 'Kurdistan's Politicized Society Confronts a Sultanistic System'. This was published by the Carnegie Endowment for International Peace, under a general disclaimer that the views were the author's own. It recounts that Shwan Sabir, 'a judge and investigator in the regional judiciary council', used his Facebook page to criticise the High Judicial Council for not being impartial and to argue that courts in Kurdistan were not independent. It is said that after a complaint from the council, the court in Erbil ruled that he should be arrested,

but following intense pressure from lawyers and activists he was released. That account is said to be based on a personal interview with a journalist and human rights activist. The other account which I was shown was in a report by the Gulf Centre for Human Rights entitled 'Iraqi Kurdistan: No safe haven for human rights defenders and independent journalists'. This, by reference to what the author had been told by the Chair of the Board of Trustees of the Public Aid Organisation ('PAO'), a development organisation in Erbil, was that 'PAO board member Sham Sabir [was] arrested and detained for three days in 2013 for criticising on Facebook how court cases were delayed and unprocessed, sometimes for many years.'

186. It is difficult to place a great deal of reliance on this. The reports appear to be at least third hand. The nature of what Mr Sabir posted is rather differently summarised, as is his position. In each case the account was transmitted through someone who appears to have had – and this is not intended critically – a wider agenda.

187. The other example was what Mr Kimmins QC referred to as evidence of 'mass resignations' from the judiciary. The basis for this is a report by the Tahrir Institute for Middle East Policy, dated December 2019. It recounts the resignation of Judge Latif Sheikh Moustafa from the regional judicial council, on the basis that he was protesting the intervention of the region's two main political parties in judicial appointments. The author (Kamal Chomami) says that this resignation 'comes after four other resignations of senior judges for similar reasons in the past four years'. There is, however, no indication of who these other judges were, or any more specific identification of the reasons. I was given no account of the origin, purpose or composition of the Tahrir Institute for Middle East Policy. I have no reason to doubt that its objectives are worthy. However, it appears clear from the article itself that it has political aims in view. For example, an extension by the Consultative Council of Masoud Barzani's term of office is described as 'illegal', and the article contains a series of criticisms of the effect of the dominance of the two parties, the KDP and the PUK, and of the weakness of the opposition to them.

188. A report by a press organisation, Peregraf, of a press conference with Judge Moustafa tends to suggest, as does the Chomani piece, that his primary concern was that the two political parties had divided the ten appointments to the Council of Cassation 50/50 between them. Mr Dunning QC suggested that a reason for this might be that Judge Moustafa had had political affiliations himself, other than with the two main parties; and in any event submitted that judicial systems in which appointments may be heavily influenced by party affiliations are by no means unknown in fora whose fairness is not open to doubt. He also made the point that there is material to indicate that Dynasty and its shareholders have strong ties with one of the two political parties, namely the PUK (DJS6, Insider's View Bulletin, 29 September 2020).

189. Having considered the arguments made and material presented, I have concluded that it has not been shown by cogent evidence that there is a real risk that the courts of the KRI are so lacking in independence of the KRG that they will not do justice in accordance with the applicable law. In reaching this assessment, the following matters are most significant: (1) that Prof Gerges was not shown to have specific expertise in relation to the KRI; (2) that there is evidence from practising lawyers in the KRI which indicates that the courts are prepared to decide cases against the

government; (3) that there are significant questions as to the reliability and objectivity or as to the basis of various statements made by commentators; and significantly (4) there is no evidence of any case or cases being decided unjustly or perversely because a lack of independence on the part of the judiciary means that it will not decide cases against the government or governmental agencies irrespective of the merits. While it cannot be said that there is no evidence of a risk, I do not consider that what there is, carefully considered and taken as a whole, amounts to cogent evidence of a real risk.

190. The other aspect of Dynasty's case on the second stage of the Spiliada test was that the courts of the KRI lack the competence to deal with the present case. This aspect was not much emphasised in Dynasty's written or oral submissions. It suffices to say that, taking into account the evidence of Mr Taher and Mr Aziz, and also that Mrs Al Qurnawi accepts that she has never practised before the courts of the KRI, I was not persuaded that there was a real risk that justice could not be obtained in the courts of the KRI by reason of their incompetence or the insufficiency of their procedures to deal with a case of this nature.

191. On the basis of these considerations, and in the exercise of my overall discretion, had I not found that Dr Hawrami was entitled to immunity, I would have stayed these proceedings.

Overall Conclusion

192. For the reasons I have set out above, I will make a declaration that the court has no jurisdiction pursuant to the SIA. Further, had Dr Hawrami not been entitled to avail himself of immunity, I would have stayed the proceedings on the grounds of forum non conveniens.

193. I will receive submissions from the parties as to the precise form of the orders which should be made, if they are not the subject of agreement.