The Foreign Act of State doctrine: in the hot seat

Does the Foreign Act of State doctrine apply at all when the foreign state itself seeks adjudication? Joseph Dyke & Anastasia Medvedskaya explore a tricky question for the English courts

IN BRIEF

- The Foreign Act of State doctrine acts as a bar to the exercise of the English courts' adjudicative jurisdiction.
- Previous decisions had been clear that, if the doctrine was engaged by a case's subject matter, it was not legally capable of being waived.
- The Commercial Court has found that the doctrine does not apply in circumstances where it is a foreign state that positively seeks the English courts' adjudication.

When it is engaged, the Foreign Act of State doctrine (FAOS) is a substantive bar to the English courts' adjudicative jurisdiction. Cases concerning FAOS often have important political content (or ramifications), and thus it can sometimes have controversial results. But does FAOS apply at all when the foreign state itself seeks adjudication?

In *Federal Republic of Nigeria v JPMorgan Chase Bank NA* [2022] EWHC 1447 (Comm), [2022] All ER (D) 52 (Jun), Mrs Justice Cockerill dismissed Nigeria's *Quincecare* claim against the defendant bank. However, the judge also rejected the bank's invocation of FAOS, finding that it simply did not apply where it was Nigeria positively seeking to impugn the relevant governmental acts.

This article considers whether that aspect of the judgment gives sufficient weight to well-established principles that FAOS is non-waivable and operates by virtue of a case's subject matter, rather than the invoking party's status.

The Foreign Act of State doctrine

FAOS is an established English common law principle that the courts cannot inquire into the legality of foreign states' acts in certain circumstances. The rationale is based on sovereignty and comity, and states' mutual recognition of their respective spheres of influence in a domestic context. FAOS is closely related to (and was often considered alongside) the 'non-justiciability' principle, whereby the English courts will not adjudicate on sovereign states' transactions (see *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888).

In *Belhaj and another v Straw and others; Rahmatullah v Ministry of Defence and another (No 2)* [2017] UKSC 3, [2017] All ER (D) 45 (Jan), which concerned FAOS's application to extraordinary rendition claims, Lord Neuberger summarised FAOS as the impossibility for the English courts to adjudicate upon the lawfulness or validity of sovereign acts of foreign states.

Lord Neuberger set out four 'possible' rules within FAOS. Rules 2 and 3 were expressed (at [122]) as follows:

> 'The second rule is 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.
>
> 'The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states…'.

Nigeria v JPMorgan was concerned with Rule 2.

What engages FAOS?

In *Belhaj*, Lord Neuberger recognised a difficulty in drawing coherent principles out of previous FAOS case law. However, the authorities are tolerably clear on two points, namely: (1) that FAOS applies because of a case's subject matter; (2) that FAOS is non-waivable.

In *Ecuador (Republic of) v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2005] All ER (D) 48 (Sep), one issue was whether an investment treaty arbitration was an interstate transaction engaging 'non-justiciability'. Lord Justice Mance, as he then was, 'accept[ed] that the English principle of non-justiciability cannot, if it applies, be ousted by consent' (at p256).

In *Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), [2009] All ER (D) 232 (Nov), one issue was whether an arbitrator could rule on whether Serbia was party to an arbitration agreement, even if the question whether Serbia was a 'successor state' was 'non-justiciable'. Mr Justice Beatson held (at [125]) as follows:

> 'if the issue is non-justiciable, it is difficult to see how Serbia can challenge the partial award. Its acceptance of its status as a "successor state" does not avoid the problem because a principle of non-justiciability "is not one of discretion but is inherent in the very nature of the judicial process"… and cannot be waived'.

In *High Commissioner for Pakistan in the United Kingdom v Prince Mukkaram Jah* [2016] EWHC 1465 (Ch) (*'Hyderabad Funds'*), which concerned a money transfer between the former princely state of Hyderabad and Pakistan's first High Commissioner in the UK, one issue was whether Pakistan's invocation of FAOS was abusive. Mr Justice Henderson, as he then was, held (at [89]) as follows:

> 'whereas sovereign immunity is capable of being waived, the principle of act of state or non-justiciability is not. If the court lacks jurisdiction to determine

an issue, such jurisdiction cannot be conferred upon it by the parties, and the court is in principle obliged to investigate the question itself even if the parties do not wish to do so, or even if it would otherwise be an abuse of process for a party to ask the court to do so. There are clear statements, at the highest level, of the critical difference, in this respect, between the doctrines of sovereign immunity and act of state'.

The 'clear statements' referenced were those of Lord Millett and Lord Lloyd in *Pinochet* ([2002] 1 AC 61; [2000] 1 AC 147).

In *Belhaj*, Lord Sumption held that:

'except in rare cases where there are no judicial or manageable standards by which to determine an issue, [FAOS] is not an immunity. It is a rule of substantive law which operates as a limitation on the subject matter jurisdiction of the English court'.

In *'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela* [2021] UKSC 57, [2021] All ER (D) 72 (Dec), one issue was whether acts done in purported exercise of presidential power engaged Rule 2 of FAOS. Lord Lloyd-Jones held (at [135]) that:

'it is an exclusionary rule, limiting the powers of courts to decide certain issues as to the legality or validity of the conduct of foreign states within their proper jurisdiction. It operates not by reference to law but by reference to the sovereign character of the conduct which forms the subject matter of the proceedings'.

Nigeria v JPMorgan

The case forms part of the ongoing fallout from the high profile 'Malabu' matter. On instructions from authorised officials, the defendant paid monies out of Nigeria's depository account to accounts held by Malabu, a Nigerian company associated with a disgraced former minister with a money laundering conviction.

Nigeria contended that the defendant knew Malabu's past was 'extremely murky', and that Malabu and certain officials giving instructions were involved in a fraud on Nigeria. Therefore, the bank breached its *Quincecare* duty not to follow a customer's instructions where the bank was on notice that they may facilitate a fraud on the customer.

Cockerill J dismissed Nigeria's claim overall, but also rejected the defendant's invocation of Rule 2 of FAOS.

The judge acknowledged that in *Belhaj* Lord Mance had held (at [73]) that Rule 2 was 'by definition, limited to sovereign or *jure imperii* acts, excluding in other words commercial or other private acts'. The defendant argued Rule 2 applied because determining whether there was a fraudulent scheme required inquiry into the validity of several Nigerian government acts.

It was common ground the relevant acts were *jure imperii* and FAOS applied *prima facie*. Thus, unsurprisingly, 'much of the debate … was on the subject of "waiver"'. However, the case was not decided on 'waiver'. Instead, the court engaged in a slightly tautological approach; treating the issue as '[FAOS] therefore applies unless [it] does not apply because it is [Nigeria] which seeks to challenge their validity'.

Clear statements of FAOS's non-waivable character were effectively cast aside. Lord Lloyd-Jones' confirmation that FAOS operated 'by reference to the sovereign character of the conduct which forms the subject matter' was explained away (at [190]) as 'essentially explicatory of wider points'. However, what it was explicatory of was the aforementioned series of clear statements at first instance and appellate level that what engages FAOS is a case's subject matter, not the status of the invoking party.

Several reasons were given (at [191]) for avoiding Henderson J's clear statement that FAOS was non-waivable:

- **First reason**: '[*Hyderabad Funds*] was a "Rule 3" case, concerning annexation of territory—a different aspect of the act of state doctrine underpinned by different principles and where the concept of non-justiciability makes much more sense'. This, respectfully, is incorrect. Although the 'Police Action' by which India occupied/annexed the former princely state of Hyderabad in 1948 formed part of the factual background, the relevant sovereign act was the money transfer between official representatives of two sovereign states (see *Hyderabad Funds* at [75]-[78], and in a later judgment ([2019] EWHC 2551 (Ch); [2020] Ch 421 per Mr Justice Marcus Smith at [295]-[299]).
- **Second and third reasons**: 'Secondly [*Hyderabad Funds*] was a case where the state involved was invoking the doctrine, in other words was explicitly asking the court not to rule on the relevant executive acts. Thirdly to the extent that this dictum is said to suggest that the doctrine cannot be expressly waived it is (therefore) obiter'. However, that does little to detract from the clear statements by judges at the highest level that FAOS is non-waivable;
- **Fourth reason**: 'the judge made the statement in reliance on [*Pinochet (No.3)*]—but that case, which describes the FAOS doctrine as "of uncertain application" would not seem to support such a rigid rule'. Thus, the clear statements by Lord Millett and Lord Lloyd in *Pinochet* were apparently avoided because a different judge (Lord Nicholls) introduced his treatment of FAOS by describing it (realistically) as 'of uncertain application'.

Then, the judge moved 'back to principle' (at [192]) and found that, given the basis of FAOS was comity, where a foreign state positively sought adjudication, there could be no 'objectionable interference with the [state's] internal affairs'. Indeed, it would be 'inimical to comity' to refuse adjudication.

However, it is not explained why 'objectionable interference' must only be viewed from the foreign state's perspective, rather than that of the English courts, which, given the historical background of FAOS and its development alongside the principles of non-justiciability and judicial restraint, where courts avoided being placed in the invidious position of ruling upon foreign states' sovereign acts, would make sense. The prospect of the English courts being used by a foreign government to obtain judgments on claims concerning acts *jure imperii* (perhaps undertaken by a former or rival government) is 'objectionable'. It is ironic that such a prospect emerges from *Nigeria v JPMorgan*—where the central claim was based on acts allegedly done by officials perpetrating a fraud against their own state.

If FAOS applies, it cannot be waived. To say FAOS does not bar a claim because of a state's invocation of English jurisdiction bears obvious parallels with the concept of 'waiver' and the effect of a submission to the jurisdiction on procedural state immunity. Accordingly, the tautologous finding that FAOS 'applies unless…[it] does not apply' appears to have been a device for avoiding having to consider the state's conduct as 'waiver' and running into that conceptual problem.

Concluding remarks

Notwithstanding multiple considerations at the highest level, FAOS continues to prove thorny territory for the English courts. As foreign states frequently use the English courts for dispute resolution, the court's judgment raises important issues regarding the circumstances in which such disputes may legitimately be adjudicated upon in England and Wales. NLJ

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