Neutral Citation Number: [2008] EWHC 1841 (Comm)

Case No: 2007 FOLIO 1440

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2008

Before :

MR JUSTICE BURTON

- -

Between :

ORASCOM TELECOM HOLDING SAE
(a company incorporated and registered in Egypt)

CLAIMANT

- and -

(1) THE REPUBLIC OF CHAD

(2) LA SOCIETE DES TELECOMMUNICATIONS DU TCHAD
(*AKA* SOTEL TCHAD)

DEFENDANTS

- and -

CITIBANK N.A.

THIRD PARTY

- and -

(1) INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

(2) EUROPEAN INVESTMENT BANK

INTERVENORS

- -
- -

Mr Toby Landau QC (instructed by **Gide Loyrette Nouel LLP**) for the **Claimant**
Mr James Dingemans QC (instructed by **Saunders LLP**) for the **First Defendant**

Hearing date: 17 July 2008

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Judgment

Mr Justice Burton :

1. This has been the hearing of an application by the Claimant, Orascom Telecom Holding SAE ("Orascom"), for a final Third Party Debt Order (what used to be called a Garnishee Order) in respect of monies held by the Third Party Citibank NA ("Citibank") for the First Defendant, the Republic of Chad ("Chad"), in order to enforce its unpaid Arbitration Award by the International Chamber of Commerce ("ICC") against Chad made on 12 June 2007. A number of bank accounts is held by Citibank for Chad, which were in issue when these proceedings were first brought, but, by virtue of concessions made by Orascom, and as a result of the intervention in the proceedings of the World Bank and the European Investment Bank in respect of some of the accounts, the application has been slimmed down so as to remain in respect of only one account, the "Borrowers' Account".

2. Chad, though ably represented by solicitors and Counsel, Mr James Dingemans QC, has not played a very active role in these proceedings in the sense of giving instructions to its solicitors and Counsel or producing any substantial evidence, which has had the effect that (i) the only material evidence as to the nature of the Citibank accounts has been provided by Orascom, by reference to publicly available material published on the website of the World Bank (ii) Orascom did not, at least at the outset, know precisely what case, if any, would be put forward by Chad in opposition to the application. In this latter regard, Mr Toby Landau QC produced a very thorough skeleton argument in support of the application dealing with every issue that he considered might possibly arise: in the event there have only been two issues before me in contention between the parties (i) whether the Borrowers' Account is "*property which is for the time being in use or intended to be used for commercial purposes*", and thus within s13(4) of the State Immunity Act 1978 ("the 1978 Act"), which permits execution against the property of a State which is otherwise immune from the jurisdiction of the courts of the United Kingdom (ii) whether there has been waiver by Chad of immunity from execution by virtue of its submission to the ICC Rules and, in particular, Article 28(6) of those Rules.

3. Notwithstanding that Chad is ranked number 171 out of 177 countries in the United Nations Development Programme Human Development Index, it has numerous oil reserves which are exploited commercially by a number of multi-national oil companies. In 1998, a 1000 km pipeline was constructed across Chad and Cameroon to deliver oil supplies to the Atlantic Ocean for onward transport to international markets. The project involved investment of some US $4 billion, of which approximately US $300 million was loaned by the World Bank ("IBRD"): as will be seen, the arrangements with Citibank were set up in order to facilitate and secure repayment inter alia to the World Bank of such loans out of the proceeds of sale of such oil and/or in respect of the use of such pipeline.

4. The involvement of Orascom arose in the following way. In or about 2000, Orascom established, at Chad's request, a joint venture telecommunications company in Chad, together with the Second Defendant ("Sotel Tchad"), the Chad national telecommunications company. At a time when Orascom had made substantial investments, Chad itself intervened, so as, in effect, to force Orascom out, by such steps as freezing bank accounts, closing business premises, shutting down the network and eventually cancelling an operating licence by decree. Although Chad was not party to the Arbitration Agreement which formed part of the contractual arrangements

between Orascom and Sotel Tchad, Orascom joined both Sotel Tchad and Chad in an ICC Arbitration in Geneva.

5. Chad was joined into the arbitration on 4 March 2005, and, on 4 April 2005, Chad lodged with the ICC a response and counterclaim which contained an objection to the jurisdiction of the ICC arbitrators. In the event however, it is entirely clear, and was no longer in issue by the time of the hearings before me, that Chad withdrew such objection and accepted the jurisdiction of the ICC. On 26 October 2005 Chad signed the Terms of Reference for the arbitration, by Clause 11 of which the seat of arbitration was provided to be Geneva, Switzerland, and, by Clause 13, the applicable rules were to be the ICC Rules. On 28 February 2006, a further Response was lodged with the ICC in Paris by Chad, which, by Title IV, at point 4, stated (in a passage translated by Orascom's solicitors):

> "*In this case, the serious allegations made by the Applicants extend beyond the limits of the agreement and are levelled directly at the Republic of Chad, which must meet any such liabilities by taking part in this claim. In so doing, the Respondents have simplified any arguments there may have been about the matter.*"

6. The Final Award rejected Chad's defences, and certain other technical pleas, and ordered Chad to pay substantial sums constituting in excess of £3.7m. So far as the original jurisdiction objection referred to above is concerned, paragraph 14 of the Award read as follows:

> "*In its Response to the Request for Arbitration of 25 March 2005, the Respondents raised objections regarding the Arbitral Tribunal's jurisdiction over the Republic of Chad.*
>
> *The Respondents are hereby advised that the Terms of Reference did not contain these objections since the Chadian State is a direct party to the arbitration and since the objections were withdrawn from their response to the Claimant's Statement of Claim of 28 February 2006. The Arbitral Tribunal thus did not have to rule on this point.*"

7. The evidence put in by Orascom, which has not been in dispute, was that the requirement of the World Bank for the channelling of the oil and oil pipeline proceeds through Citibank in London, was described as the Revenue Management Program ("RMP"), which is fully explained on the World Bank's website. The RMP requires that all of Chad's oil revenue be paid directly into what is described as an escrow account established at Citibank in London, and the first account, into which the monies due by way of gross revenue to Chad in respect of royalties, taxes or dividends is required to be paid, is called the "Transit Account". The evidence describes how:

> "*All direct and indirect revenues from oil extraction and transportation flow first into the* ***Transit Account****. In this account, amounts are set aside on the 15th of every month to cover debts owed to* [the World Bank] *and* [the European

> Investment Bank]. *Remaining funds are then transferred to Chad's Borrower's Account, which is part of the escrow agreement.*"

8. The amounts which are thus "*set aside*" are to provide for Chad's debt service payments to the World Bank and the European Investment Bank. There are, it seems, three such accounts with Citibank: the IBRD Debt Service Account, the EIB Debt Service Account and the IBRD Debt Service Reserve Account. The Claimant originally sought a final order in respect of those accounts also, and included them in the interim freezing order which I granted at the first hearing of this application, but, in the light of the intervention to which I referred in paragraph 1 above, by which the World Bank and the European Investment Bank asserted a proprietary interest in those accounts, such case has no longer been pursued. So far as the direct revenues are concerned, the evidence is as follows:

> "*Of the direct revenues, which are royalties and dividends, 10 per cent is put aside in a future generations fund, also housed at Citibank. The remaining 90 per cent move to a special oil revenue account in Chad.*"

9. On the evidence supplied by Citibank pursuant to an order for information that I made at the first hearing, Citibank gave the following information:

   i) As at 29 April 2008 there was a nil balance in the Transit Account.

   ii) All the sums in the three Debt Service Accounts had been transferred to a money market fund at the Citibank London branch ("Citi"), the Citi Institutional Liquidity Fund ("CILF"), where three accounts, CILF 154724, 4225 and 4726 were, as at 29 April 2008, held with substantial balances on behalf of Chad (though, as set out above, now conceded by Orascom to be subject to a proprietary interest of the Intervenors).

   iii) As provided in the RMP, as set out in paragraph 8 above, 10% of the direct revenues was put aside in a Fund for Future Generations, which account has remained with Citibank, not in a Citi CILF account, with a balance as at 29 April 2008 of US$114,945.68: Orascom has not made any claim in respect of such account.

   iv) The content of the Borrower's Account was also transferred to a money market account, CILF Account No 4723, and, as at 29 April 2008, there is a balance of US$43,830,642.73.

   A freezing order was made by me on 12 May 2008 in respect of the five accounts referred to in (i), (ii) and (iv) above, and there is no reason to believe that the position has materially changed since 29 April 2008.

The First Issue: The Borrowers' Account

10. The 1978 Act "*represented a marked relaxation of the absolutist principle*" of sovereign immunity (see per Lord Bingham of Cornhill in **Jones v Minister of the Interior of the Kingdom of Saudi Arabia and Another** [2007] 1 AC 270 at 280

para 8). Unlike, it seems, the French and American position, which, as will be seen, depends upon development by the courts, the UK statutory scheme now allows for considerable exceptions to the doctrine of sovereign immunity both in respect of the bringing of suit and the enforcement of judgments and awards. So far as immunity from suit is concerned, there is a central provision at s3 of the 1978 Act, which states in material part as follows:

> "***3***. *(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 ...*
>
> *(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.*"

11. In this case, there is no issue as to immunity from suit, because it is not being sought to bring substantive proceedings against Chad in this country, and of course those proceedings have already been brought, Chad has submitted to being a party and the Award has been made by the ICC Arbitrators. So the relevant provision of the 1978 Act is that relating to the question of any immunity from execution. In this regard, s13 provides as follows, in material part:

> "*13. ...*
>
> *(2) Subject to subsections (3) and (4) below--*
>
> *(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and*

> *(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.*
>
> *(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.*
>
> *(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes …*"

12. In relation to what I have to decide, the central question is the definition of "*commercial purposes*" in s13(4). The definition is provided by the 1978 Act itself in s17(1) namely:

> "*…"commercial purposes" means purposes of such transactions or activities as are mentioned in section 3(3) above.*"

13. Therefore the question I have to decide is whether the monies in the Borrower's Account, now contained in the CILF Account No 4723, constitute '*property which is for the time being in use or intended for use for the purposes of* [one or more of the] *transactions or activities mentioned in s3(3).*'

14. The only parts of s3(3) which have been relevant before me are (subparagraph (a)) "*any contract for the supply of goods or services*" and (subparagraph (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*". The proviso in s3 relating to contracts of employment does not of course apply. As for subparagraph (c), the limitation imposed on this general and residual third category of transactions or activities is where such transactions or activities are entered or engaged upon "*otherwise than in the exercise of sovereign authority*". This limitation only applies to the general category in (c) and, as pointed out in **Alcom Ltd v Republic of Colombia** [1984] 1 AC 580, by Sir John Donaldson MR in the Court of Appeal (at 586-7) and by Lord Diplock in the House of Lords at 603B-D, the very absence of such limitation from subparagraphs (a) and (b) means that the contracts or transactions there referred to will qualify for the commercial transaction exclusion, even if they are entered into or engaged upon by the State in the exercise of sovereign authority.

15. The question for me to decide therefore, in order to resolve whether execution against the Borrower's Account is prevented by s13(2), or permitted by s13(4), is whether it and its contents were for the time being in use or intended for use for the purposes of a contract for the supply of goods or services, or of a loan or other transaction for the provision of finance.

16. Mr Dingemans QC for the Defendant draws my attention to the following:

i) In **Alcom Ltd** (above) the House of Lords, reversing the decision of the Court of Appeal, concluded that a current bank account used inter alia for the purposes of meeting expenditure incurred in the day-to-day running of a foreign embassy did not fall within s13(4). Whereas the Court of Appeal concluded that expenditure incurred in the day-to-day running of the embassy fell within the "*very wide*" definition of commercial transactions contained in s3(3), the House of Lords disagreed. Lord Diplock stated as follows at 604B-D:

> "*Such expenditure will, no doubt, include some moneys due under contracts for the supply of goods or services to the mission, to meet which the mission will draw upon its current bank account; but the account will also be drawn upon to meet many other items of expenditure which fall outside even the extended definition of "commercial purposes" for which section 17(1) and section 3(3) provide. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceedings. Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which section 13(4) provides.*"

ii) This very passage in Lord Diplock's speech founded Mr Dingeman's further case that, since the account was indivisible, the Court would need to be satisfied that, subject to *de minimis exceptions*, all the contents of the bank accounts were earmarked by the foreign state for the relevant commercial purposes.

iii) Mr Dingemans relied particularly on a decision of Aikens J in **AIG Capital Partners Inc v Republic of Kazakhstan** [2006] 1 WLR 1420. He submitted that the facts of that case, in which Aikens J concluded that the contents of bank accounts held in London by ABN AMRO were immune from execution, are directly relevant. Aikens J did not accept the submission that, because the funds were traded in London, i.e. they were invested in security accounts which were actively traded, that the funds were thus in use, or intended for use, for commercial purposes. **AIG** was referred to in **Jones (**above) without disapproval.

iv) Mr Dingemans referred to the decision of Stanley Burnton J in **AIC Ltd v The Federal Government of Nigeria** [2003] EWHC 1357 QB where, once again,

there were funds in accounts in London, on this occasion with HSBC, belonging to the Federal Government of Nigeria, which accounts had been dormant for at least 18 months. Stanley Burnton J concluded:

> "*56. The test in s13(4) of the State Immunity Act applies as of the date of the issue of process of execution against the property in question: the words "for the time being" make this clear. The use or intended use of property may change over time. In the case of a bank account, the onus is on the judgment creditor to show that the use or intended use of the account is, apart from minimal exceptions, for commercial purposes within the meaning of the Act: Lord Diplock in Alcom at page 604D-E. Evidence of recent use of an account wholly for commercial purposes over a significant period of time may lead to the conclusion that the account is used or intended for use wholly for commercial purposes; but the older the use in evidence, the weaker the inference that may be drawn as to the use or intended use of the account …*
>
> *59. … even where there is evidence that an account was previously wholly used for commercial purposes, it does not establish that the present or intended use of that account is commercial.*"

Mr Dingemans relied upon s13(5) of the 1978 Act by reference to the certificate of the head of a State's diplomatic mission in the United Kingdom there referred to, whereby:

> "*for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.*"

In this case, Chad relies on such a document signed by the Chad Ambassador to the UK, M. Djoumbé, which reads (in the unofficial translation by Chad's solicitors) as follows:

> "*I, the undersigned, Ambassador Maitine Djoumbé, Ambassador Extraordinary and Plenipotentiary of the Republic of Chad, allocated to Great Britain and Northern Ireland with residence in Brussels, certify that the account of the Republic of Chad held at Citibank London which is the object of litigation in the matter of Orascom against Sotel Tchad and the Republic of Chad is not used for commercial purposes by the Republic of Chad.*"

Mr Dingemans recognises that this is not the most forthcoming of documents, and it is not provided by the Act to be conclusive evidence, but simply evidence which requires the contrary to be shown. In **AIC**, Stanley Burnton J did not find that the

Nigerian High Commissioner's certificate, which in that case was actually supplemented by a witness statement by the Nigerian Finance Attaché, was ousted:

> "*58. A mere statement that an account is dormant begs the question of the duration of the dormancy. In this case, however, the period of dormancy is specified in the certificate of the High Commissioner. If an account has been dormant for at least 18 months, it cannot be said to be presently used for any relevant purpose, and the previous use is weak evidence of the present intention as to its use. In this case, that evidence is insufficient to disprove the statement in the High Commissioner's certificate.*"

In **AIG**, Aikens J was influenced by the certificate of the Ambassador in that case:

> "*92(4) Last, but not least, there is the certificate of the ambassador. That is clear and unambiguous. I have seen no evidence to contradict it other than the fact that the securities accounts are traded. For the reasons I have given, the trading of those accounts does not mean they were being used or were intended for use for commercial purposes*."

17. In the light of these authorities, Mr Dingemans submits that the Borrower's Account in this case is not used or intended to be used for commercial purposes. It is effectively a second transit account in respect of monies derived from the Transit Account proper, and its destination from London was provided by the RMP to be a special oil revenue account in Chad with a commercial bank, from which it would continue directly to Chad's Central Bank, where it would then be used for sovereign purposes. Quite apart from the possibility within Lord Diplock's dicta in **Alcom** that it could be said to be a mixed account, such account could not in those circumstances be said to be an account used, or intended to be used, for commercial purposes.

18. Mr Landau QC submits that as to (i) in paragraph 16 above, the **Alcom** case is of no relevance: the conclusion of the House of Lords was that use for diplomatic purposes was not for commercial purposes. As to (ii) in paragraph 16 it is quite clear from the evidence referred to in paragraphs 8 and 9 above that the only money which could be said to have been admixed, namely that 10% of the oil direct revenues which were to be set aside and invested for future use by way of the Future Generations Fund, has already been separated – the Fund for Future Generations has remained, as set out in paragraph 9(iii) above, with Citibank proper, while the funds in the Borrower's Account are quite separate from the Future Generations Fund, and are invested in the CILF account number 4723, which is the only account now in issue.

19. Mr Landau submits that the facts of **AIG** were quite different, as is clear from Aikens J's judgment, of which I set out the material passages below:

> "*8. As referred to above ... AAMGS' predecessors had agreed with Kazakhstan to hold cash and securities of the National Fund of the Republic of Kazakhstan, "as custodian and banker" pursuant to a global custody agreement dated 24 December 2001. AAMGS is now the global custodian of cash and securities of the national fund. The*

claimants wish to enforce the judgment against these assets insofar as they are held by AAMGS in the jurisdiction.

9. In a letter dated 22 September 2004 from AAMGS to Holman, Fenwick & Willan, solicitors for the claimants, AAMGS stated that it held cash and securities "to the order of the NBK" in a number of jurisdictions, including England and Wales. The letter stated that the value of the cash held on behalf of the NBK within England and Wales was £3.1m. The value of the securities held on behalf of the NBK was stated as £91m. It is agreed that this cash and these securities form part of the assets of the national fund. These assets were referred to (together) as "the London assets" of the national fund. It is also agreed that AAMGS holds the cash and securities in two separate types of account, respectively the cash accounts and the securities accounts. Under the terms of the global custody agreement, the cash and the securities are held by AAMGS in the name of NBK.

...

14. The national fund is described in a presentation document that was prepared by NBK in 2003. That states that the funds that make up the national fund come from tax revenues derived from oil extraction and other mining activities; budget transfers of other earnings derived from the oil sector and other mining activities; investment income from the management of the national fund itself; and some other revenues. The assets of the national fund were US$ 2.2 billion as at 1 May 2003.

...

16. The national fund is managed by NBK under the terms of Agreement No 299 on Trust Management of the National Fund of the Republic of Kazakhstan ...

...

92. ... my firm view is that the London assets were not in use or intended for use for commercial purposes at any stage. My reasons, briefly, are as follows:

(1) The London assets formed part of the national fund. That fund was, in my opinion, created to assist in the management of the economy and government revenues of Kazakhstan, both in the short and long term. Management of a state's economy and revenue must constitute a sovereign activity.

(2) The national fund had to be managed by NBK in accordance with the law set out in the Budget Code, in particular article 24. That demanded that the national fund be invested: article 24, para 2. I accept that this required that investment had to be placed in authorised financial assets in order to secure, amongst other things,

"high profitability levels of the [national fund] in the long term outlook at reasonable risk levels". I also accept the uncontroverted evidence that the securities accounts held by AAMGS on behalf of NBK were actively traded at all times and that NBK obtained from Kazakhstan a commission on good results and paid a penalty for poor ones. But I cannot accept that this activity is inconsistent with the Stability and Savings Funds of the national fund being used or intended for use for sovereign purposes. The aim of the exercise, at all times, was and is to enhance the national fund. To do that the assets have to be put to use to obtain returns which are reinvested in the national fund, ie. to assist the sovereign actions.

(3) Mr Salter relies on the definition of "commercial purposes" set out in section 17(1) of the 1978 Act and points to the fact that "commercial purposes" means transactions and activities mentioned in section 3(3) of the Act. Those include "any transaction or activity (whether of a commercial ... financial ... or similar character) into which a State enters or in which it engages otherwise in the exercise of sovereign authority". He says that the trading activities of the securities accounts by AAMGS are clearly financial transactions and their aim is to make profits. Therefore they could not be transactions "in the exercise of sovereign authority" within section 3(3). So, for the purposes of 13(4), at least the securities accounts of the London assets constitute "property in use or intended for use for commercial purposes". Again, I must disagree. The dealings of the securities accounts must, in my view, be set against the background of the purpose of the global custody agreement. That was established to assist in running the national fund. The securities accounts contain assets which are part of the national fund. In my view the dealings are all part of the overall exercise of sovereign authority by Kazakhstan."

20. That is not at all the case here. The monies are not the London assets of a national fund of Chad, and are not being operated or traded in London pursuant to a global custody or any other agreement between Chad and Citibank. The monies are in London because they were required to be channelled through the mechanisms expressly set up by the RMP, in order to preserve them so that Chad's direct oil revenues pursuant to the oil contracts were not simply passed direct to Chad, and so that there could be security and protection for the World Bank and the European Investment Bank to allow for their loans to Chad to be safely and transparently repaid.

21. Mr Landau's starting point is the dictum of Lord Diplock at 603B referred to in paragraph 14 above, by reference to what Lord Diplock calls the *tripartite definition* of a commercial transaction in s3(3):

> "*Paragraph (a) of this tripartite definition refers to <u>any</u> contract for the supply of goods or services, without making any exception for contracts in either of these two classes that are entered into for purposes of enabling a foreign state to do things in the exercise of its sovereign authority either in the United Kingdom or elsewhere. This is to be contrasted with the*

> *other paragraph of the definition that is relevant to the instant case, paragraph (c), which on the face of it would be comprehensive enough to include all transactions into which a state might enter, were it not that it does specifically preserve immunity from adjudicative jurisdiction for transactions or activities into which a state enters or in which it engages in the exercise of sovereign authority, other than those transactions that are specifically referred to in either paragraphs (a) or in paragraph (b) ...*"

22. He relies on the assistance of the authors of *State Immunity*, published by the Oxford University Press, Andrew Dickinson, Rae Lindsay and James Loonam. They point out, at page 359, para 4.030 (in a passage which commences with an obvious but unfortunate typographical error in referring to s3(1)(c) which is clearly intended to refer to s3(3)) that the language of s3(3)(a) is very broad, and in particular, in relation to s3(3)(b), that:

> "*Two aspects of this element of the definition are of note. The first is that the provision of finance may be <u>either by or to the State</u>.* [My underlining.]"

23. I am entirely satisfied that this account, the Borrower's Account, was established by the RMP, and has been operated, specifically for the purposes of a commercial transaction, namely:

    i) so as to receive the proceeds of a *contract for the supply of goods or services*; and/or

    ii) so as to be part of a system specifically established for the purposes of (repayment of) the loans by the World Bank etc to Chad.

24. In those circumstances:

    i) The question of dormancy, which happens to have been material on the facts on **AIC**, has no relevance here. Neither the precise use made of the account, nor the fact that, similarly to **AIG**, the funds, while held in London, have been invested or traded, nor thus the issue as to whether, simply by virtue of their trading or investment, the moneys could be said to be being used for commercial purposes, arises. The Borrower's Account is established, and the money is put and kept in such account, for the purposes of a commercial transaction, as set out in paragraph 23 above, and that, by virtue of the definition in s17 of the 1978 Act, is sufficient.

    ii) For the reasons set out in paragraph 18 above admixture does not arise on the facts here.

    iii) The Ambassador's certificate, which I have quoted in paragraph 16(iv) above, is of no persuasive power. This is not simply by reason of its exiguousness and lack of explanation. At the time it was given, all the money with Citibank (save for the Future Generations Fund) was the subject matter of Orascom's claim, such that there were in fact, as the Ambassador plainly knew or ought to

have known, not one account as referred to but (at least) six. Further, on any basis (though this has now been overtaken by the subsequent intervention of the World Bank) the three Debt Service Accounts, which (if all 6 accounts were intended to be embraced) were plainly otherwise covered by his purported certificate, manifestly fell within s3(3)(b), and were thus obviously within s13(4). In any event, I have no doubt that, on the facts of this case, within s13(5) of the 1978 Act Orascom has *proved the contrary*.

25. In those circumstances Orascom succeeds on the first issue, which is enough for its purposes, and I would make the Order sought against Citibank in respect of the Borrower's Account, on the basis that there is, pursuant to the 1978 Act, no immunity from execution against that account of the unpaid award. However, as the second issue was argued before me, I shall turn to deal with it.

The Second Issue: Waiver

26. As appears from s13(3), set out in paragraph 11 above, there can be waiver by a State of the immunity from execution if it amounts to written consent by the State. Mr Landau submits, if, contrary to his primary contention and, in the event, contrary to my finding above, execution is not permitted by virtue of s13(4), that, in consenting to ICC Arbitration and in fact signing the Terms of Reference containing the express reference to the ICC Rules by Clause 13 (at paragraph 5 above), Chad waived any immunity with respect to execution pursuant to this provision.

27. The ICC Rule in question is, as stated in paragraph 2 above, Article 28(6), which reads:

> "*Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"

28. This Article is part of the new Rules in force as from 1 January 1998. The previous provision, which features in the jurisprudence to which I shall refer, was contained in the earlier Rules, in force as from 1 January 1988, namely Article 24(2):

> "*By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.*"

29. Mr Landau refers to the French version of both Articles, which each contain, with regard to the English words with respect to *undertaking to carry out the award without delay*, the French words "*les parties s'engagent à exécuter sans délai la sentence*".

30. Mr Dingemans seeks to set up a preliminary objection to the question of waiver, by reference to a passage at pp320-321 in a work adduced and relied upon by Mr Landau, namely *A Guide to the ICC Rules of Arbitration* (2nd Edition) by Messrs

Derains and Schwartz, to which work I shall be referring further below. The passage highlighted by Mr Dingemans is:

> "*Thus, while Article 28(6) should generally have the effect of preventing appeals against the Arbitral Tribunal's findings of fact or law in jurisdictions where such appeals may still be permitted, there are many jurisdictions that will not give effect to a waiver of all recourse, e.g. in respect of possible violations of due process, international public policy or the competence of the Arbitral Tribunal or that might not otherwise recognise the efficacy of a waiver incorporated by reference to the ICC Rules. Thus, for example, while Article 192 of the Swiss Private International Law Act permits non-resident parties to an arbitration in Switzerland to exclude various grounds of recourse against an Award rendered there, this provision has been construed as requiring a specific exclusion agreement to this effect, which the relevant provision in the ICC Rules is not considered to satisfy.*" [And there is a reference to one or more Swiss decisions in a footnote.]

31. Mr Dingemans draws attention to Clause 13 of the Terms of Reference, to which I have referred in paragraph 5 above, and which reads:

> "*13. Rules Applicable to the Arbitration Proceedings*
>
> *The rules applicable to this arbitration case are the International Chamber of Commerce Rules of Arbitration. These rules are, however, subject to the mandatory rules of Swiss International Arbitration Law (Chapter 12 of Switzerland's Federal Code on International Private Law).*"

32. At the second hearing of this application, which was adjourned because of the intended intervention of the World Bank, I gave permission to both parties to adduce evidence of foreign law, to Orascom (with reply if so advised by Chad) as to French law with regard to the French jurisprudence on the effect of the ICC Rules on waiver, to which I refer below, and to Chad (with reply by Orascom if so advised) as to Swiss international arbitration law in the above context,. Chad did not avail itself of my Order and has adduced no foreign law. Mr Landau, understandably, submits that I should not permit any reliance by Chad upon assertions as to Swiss law in the absence of evidence and of compliance with my Order. I conclude that I can, and should, consider what, if anything, I can make, in the absence of any such Swiss law evidence, of the passage adduced by Mr Landau and referred to by Mr Dingemans set out above. I am satisfied that, without any such further assistance, the most that the passage can be interpreted as saying is that there is some limitation in Swiss private international law upon the exclusion by the parties of any right to challenge in the Swiss courts an award made in Switzerland; but that that has no effect upon my construction of Article 28(6) nor any impact on the question as to whether there can be execution of the award in the courts of England and Wales.

33. The effect of Article 28(6), or indeed of its predecessor Article 24(2), has not yet been considered by any court in this jurisdiction. Mr Landau has referred to two authoritative texts:

i) *The Law of State Immunity* by Lady Hazel Fox QC, in which Mr Landau refers particularly to the passage at 266-7, which reads:

> "*Waiver by way of arbitration or choice of jurisdiction or law clause*
>
> *The extent of waiver to be deduced from entry into an arbitration agreement may be variously interpreted according to its scope. If the arbitration is to be held in the forum State (or to apply forum State law) then waiver of immunity to the jurisdiction at least to the extent of the supervisory powers over arbitration of the forum court may be implied. The difficult issue is whether such consent to arbitration constitutes waiver of enforcement of the award. Where the State has in addition committed itself under institutional rules such as the ICC Arbitration Rules or is a party to the New York or UNCITRAL Conventions, all of which instruments impose obligations on the party to honour any arbitral award rendered, an even stronger case of implied waiver of immunity from execution of the award can be argued.*"

ii) passages in *International Chamber of Commerce Arbitration* (Third Edition) by Craig, Park and Paulsson, as follows:

> "*By operation of Article 28(6), the parties "undertake to carry out any Award without delay …" Accordingly, an ICC award must be considered binding between the parties when rendered. It constitutes not only a moral obligation to comply with the terms of the award, but also a title from which legal rights flow. Thus, an award will ordinarily be considered to have res judicata effect from the date it is rendered.*
>
> *The fact that the ICC Rules comport an obligation on the parties to carry out the award has an effect on its immediate enforceability pursuant to the terms of international conventions. The New York Convention, for example, requires enforcement in a signatory State without the need for prior judicial recognition by the courts at the place of arbitration. A signatory State is not required to grant enforcement, however, if it can be shown that "[t]he award has not yet become binding on the parties.*
>
> …

> *While the legal consequences of an ICC award may vary according to national laws ... as well as the availability of recognition and enforcement treaties, it is clear that by consenting to the ICC Rules, the parties agree to the extent possible that ICC awards are binding when rendered, and accept an obligation to respect them. Article 28(6) of the Rules is therefore perhaps the most significant factor in the estimated voluntary compliance with awards (according to the Secretariat) in more than 90% of ICC arbitrations.*"

34. Mr Landau submits that the Court should adopt the ordinary approach for construction of commercial contracts in construing contractual provisions in the context of s13(3) of the 1978 Act: in this regard he refers to Saville J in **A Company Ltd v Republic of X** [1990] 2 Lloyd's Reports 520 at 523, as approved by the Court of Appeal in **Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan** [2003] 2 Lloyd's Reports 571 at 577 per Waller LJ:

> "*Saville J rejected an argument that in some way a restrictive operation should be adopted to clauses dealing with waiver of immunity, since one of the parties is a state ...*"

35. In both those cases, what was being sought to be construed was a term, otherwise contained in a commercial contract to which a State was a party, said to amount to a waiver of immunity. In this case, I am being asked to construe the effect of submitting to arbitration on the basis of the relevant article of the ICC Rules within a statutory context in which it is made clear that there is ordinarily immunity from enforcement of an arbitration award, subject to the exclusory provisions of subsections 13(3) and (4). If there was ambiguity in Article 24(2) of the 1988 Rules, such ambiguity has not been resolved in Article 28(6) of the 1998 Rules.

36. For the purpose of construction of such articles without the benefit of any previous United Kingdom decision, Lord Hoffman in **Fiona Trust & Holding Corporation v Privalov** [2008] 1 Lloyd's Reports 254 at 29 makes it clear that "*it makes sense in the context of international commerce*" for decisions about the effect or construction of internationally effective clauses "*to be informed by what has been decided elsewhere*". Lady Fox's work, from which I quoted in paragraph 33(i) above, published in 2002, continues immediately after the passage I quoted:

> "*There has been considerable diversity of views among both jurists and courts as to how far a State can be assumed to give its consent and to waive immunity from execution in national courts in these situations.*"

37. She refers to decisions in Sweden, Switzerland, the United States and France. However, in the more recent work by Derains and Schwartz, published in 2005, a more up-to-date picture is given. Their review commences at p320 in addressing Article 28(6), which "*sets forth the general obligation of the parties to comply with Awards promptly and voluntarily, a factor that has encouraged their spontaneous performance and also enhanced their enforceability*". After the passage quoted in paragraph 30 above, the authors continue by referring to the fact that:

> "*In an important recent ruling of the French Court of Cassation, it was decided that, by virtue of Article 28(6) of the ICC Rules, a State that has agreed to ICC arbitration is deemed to have waived its immunity to execution in France.*"

38. This was a reference to the decision in **Creighton Ltd v Qatar** [Cour de Cassation 6 July 2000] which, by reference to Article 24(2) of the 1988 Rules, reversed a decision of the Paris Court of Appeal that such Article did not constitute a waiver of immunity against execution, and referred the case back to the Paris Court of Appeal which, on 12 December 2001, duly overturned its earlier decision. Mr Landau produced these two decisions in **Creighton**. He also however, very properly, produced a commentary *Recent Developments in State Immunity from Execution in France: Creighton v Qatar* by Gaillard and Edelstein in *Mealey's International Arbitration Report* of October 2000 at p49, which, on one reading of it, could be said to cast possible doubt on the effect of **Creighton v Qatar**:

> "*The conclusion that in the presence of such a waiver, an award may be enforced against the totality of a state's assets has been tempered only by the recent* ***Ambassade de la Fédération de Russie en France v Compagnie Noga d'Importation et d'Exportation*** *decision of August 10 2000 in which the Paris Court of Appeals found that diplomatic immunity of states was governed by a legal regime distinct from the law of ordinary state immunity of execution, derived from the principles of public international law.*" [p52]

39. However, the passage concludes:

> "*The precedent set by* ***Creighton v Qatar*** *is nevertheless a major development in French law of arbitration. The Court's finding that the state had waived its immunity from execution by agreeing to submit disputes to ICC arbitration – or similar arbitration rules – has opened the way for vastly increased enforceability of arbitral awards rendered against states in France.*"

40. The **Creighton** decision, albeit that neither in the Cour de Cassation nor in the Paris Court of Appeal is there very full reasoning, seemed powerful support for Mr Landau's case, notwithstanding the apparent shadow over it by reference to the **Noga** decision, and nothing seems to turn on the fact that the decision was on the old Rules rather than the new. The strength of Mr Landau's argument appears to rest on the first part of the Article – the undertaking to carry out (*exécuter*) any award without delay i.e. by way of complying with it, as opposed to the second part of the Article in which the reference to waiver of "*any form of recourse*" has been changed to waiver of "*any form of appeal*".

41. Apart from **Creighton**, to which I shall return, reliance was placed by Mr Landau upon the decision of the United States Court of Appeals (5th Circuit) on 22 December 2004 in **Walker International Holdings Ltd v The Republic of Congo**. In a passage which was relied upon by Mr Landau, Circuit Judge Garza concluded the part of his

judgment in which he upheld the appellant's case that there had been waiver of immunity as follows:

> "*In addition, the ROC agreed to abide by the Rules of the ICC which precludes the ROC from asserting a sovereign immunity defense. Rule 28(6) states …* [he then recites it]. *Therefore we hold that the ROC explicitly waived its sovereign immunity. Accordingly we need not address a potential implicit waiver (pp6-7).*"

42. This is how the evidence of foreign law stood at the adjourned hearing referred to in paragraph 32 above, when I permitted Orascom to adduce expert evidence of French law. What I anticipated was that it would resolve any doubt as to whether the decision of the Cour de Cassation in **Creighton** took precedence over the decision of the Paris Court of Appeal in **Noga**. The helpful and detailed expert report of Maitre Phillippe Leboulanger of 2 June 2008 put beyond doubt both the precedence of the Cour de Cassation, and of its decision in **Creighton**, and the immateriality of **Noga**, in the sense that Maitre Leboulanger (to whose report Chad served no evidence in reply) explained not only that **Noga** related to a different matter, namely the immunity of diplomatic missions, but that it was positively consistent with the **Creighton** decision. However, in a passage at paragraph 55 of his report, Maitre Leboulanger made a statement which led to an understandable reaction and challenge from Mr Dingemans. Paragraph 55 reads in material part:

> "*Accordingly, when a state signs an ICC arbitration agreement, attachments of state's assets are authorised by French courts when the state's assets are destined to private activities.*"

43. Mr Dingemans' response, in paragraph 5 of his second supplementary skeleton argument, reads as follows, by reference to that passage in paragraph 55:

> "*It is not clear from the report what is meant by 'private activities'. If it is intended to mean activities such as commercial activities, then it seems that the effect of signing the ICC arbitration agreement under French law is equivalent to s13(4) of the State Immunity Act 1978 in England and Wales, which does not prevent the issue of any process in respect of property which is for the time being in use or intended for use* [for] *commercial purposes.*"

44. At my initiative, and under a very tight timescale prior to the hearing fixed for 16 July, Maitre Leboulanger supplied a supplemental report to deal with this question. In this report, he appears to suggest that there is a category of "*private activities*", which may be wider than "*commercial activities*". His report reads, in material part, as follows:

> "*1. State's assets "destined to private activities" means, as a general rule, assets destined to any activity which is not a sovereign activity, i.e. "jure" imperii", by contrast to "jure gestionis" activities.*

> *"Jure gestionis" activities include not only commercial activities strico sensu but also any activity of economic nature or any other activity which is not sovereign.*"

45. He concludes:

> "*Under French law, in the presence of an ICC arbitration agreement (which includes Article 28(6)):*
>
> - *assuming that the sums deposited in Chad's bank account are not diplomatic property but are used for commercial purposes, such sums are seizable (**Creighton** and **Noga**);*
>
> - *assuming that such sums are neither diplomatic property nor used for commercial purposes, they may nonetheless be destined to "private activities" (jure gestionis), which is a concept broader than the concept of "commercial purposes" and may also be seized (see **Creighton** and **Noga**). In other words, the mere fact that these sums are not destined to commercial purposes does not necessarily mean that they are not destined to private activities.*"

46. In the circumstances, Mr Landau accepts that the position is in fact less clear than he would wish, and indicated that, if he were not to succeed on the first issue, he would want the opportunity for further French law evidence to clarify the position: I am at the moment far from convinced, if only simply by reference to the Latin words and such recollection as remains with me of Roman law, that activities "*jure gestionis*" are any wider than commercial activities or that there is a third category at French law of private activities, between commercial activities and sovereign activity. In any event, it does not appear that Maitre Leboulanger was advising that Article 28(6) amounted to an absolute waiver.

47. In this context, I looked again at the case of **Walker**. In fact it is clear from his judgment and the fact that Judge Garza commenced the passage which I have quoted in paragraph 41 above, with the words "*In addition …*" that he was also, and perhaps primarily, resting his decision on his earlier finding that, quite apart from the ICC Rules, there was, in that case, a written agreement whereby the Republic of Congo "*expressly and irrevocably waives any such right of immunity (including any immunity … from any execution or attachment in aid of its execution) … and agrees not to assert any such right or claim in any such action or proceeding whether in the United States or otherwise*". To that extent, the Court's decision did not rest solely upon an interpretation of Article 28(6) and, particularly as in fact no reasoning was given for any interpretation of Article 28(6) in the very short passage which I have cited above, it may simply have been a supplementary remark in support of the decision that the Court was making in any event on the basis of the express written agreement waiving the sovereign immunity defence.

48. It appears to be clear from **Walker** that there is no statutory framework in the United States which confirms or defines immunity from execution, such as there is in the 1978 Act by reference to commercial purposes. The same appears to be the case in France, i.e. that it is the French courts which have developed, and now established in

the Cour de Cassation, the extent of the power to waive immunity from execution and, in the case of the relevant articles of the ICC Rules, concluded that they amount to such a waiver for such purposes. However, on one reading of Maitre Leboulanger's reports, it may be, as Mr Dingemans suggests, that such waiver, as so developed, is limited similarly to the statutory provisions of the 1978 Act, and would not support the wide construction of Article 28(6) for which Mr Landau contends.

49. In those circumstances, I am reluctant to conclude that, without more, interpretation by the French and/or US courts of the effect of Article 28(6) (or the old 24(2)) in a situation where there is no statutory framework such as the 1978 Act, should be imported into this jurisdiction so as to expand the waiver of immunity beyond the commercial purposes exception in s13(4): certainly without the full evidence of French and/or US law which, for the obvious reason that I have in fact resolved this application in favour of Orascom without regard to the second issue, would not be appropriate now, and in any event Mr Landau would have sought more time for any definitive appreciation of French and/or US law.

50. Accordingly I do not resolve the second issue, and have already adjudicated on the issue of costs, so as to order that Chad pay Orascom's costs save for the costs of the two reports by Maitre Leboulanger, as to which, in the circumstances, I have made no order.

51. For the above reasons, I make the final Third Party Debt Order sought against Citibank in respect of the Borrower's account, both with regard to the outstanding sum pursuant to the unpaid award now calculated at £3,980,410.38 and, subject as above, Orascom's costs to be assessed. As I am handing down this judgment and had already indicated at the close of the hearing what decision I have reached, I was invited to consider the question of permission to appeal. I am entirely satisfied that there is no reasonable prospect of success for any appeal by Chad. The only matter which was mentioned by Mr Dingemans as founding any basis for an appeal was the question of admixture, as to which, on the facts of this case as set out above, there is no basis whatever for any argument.