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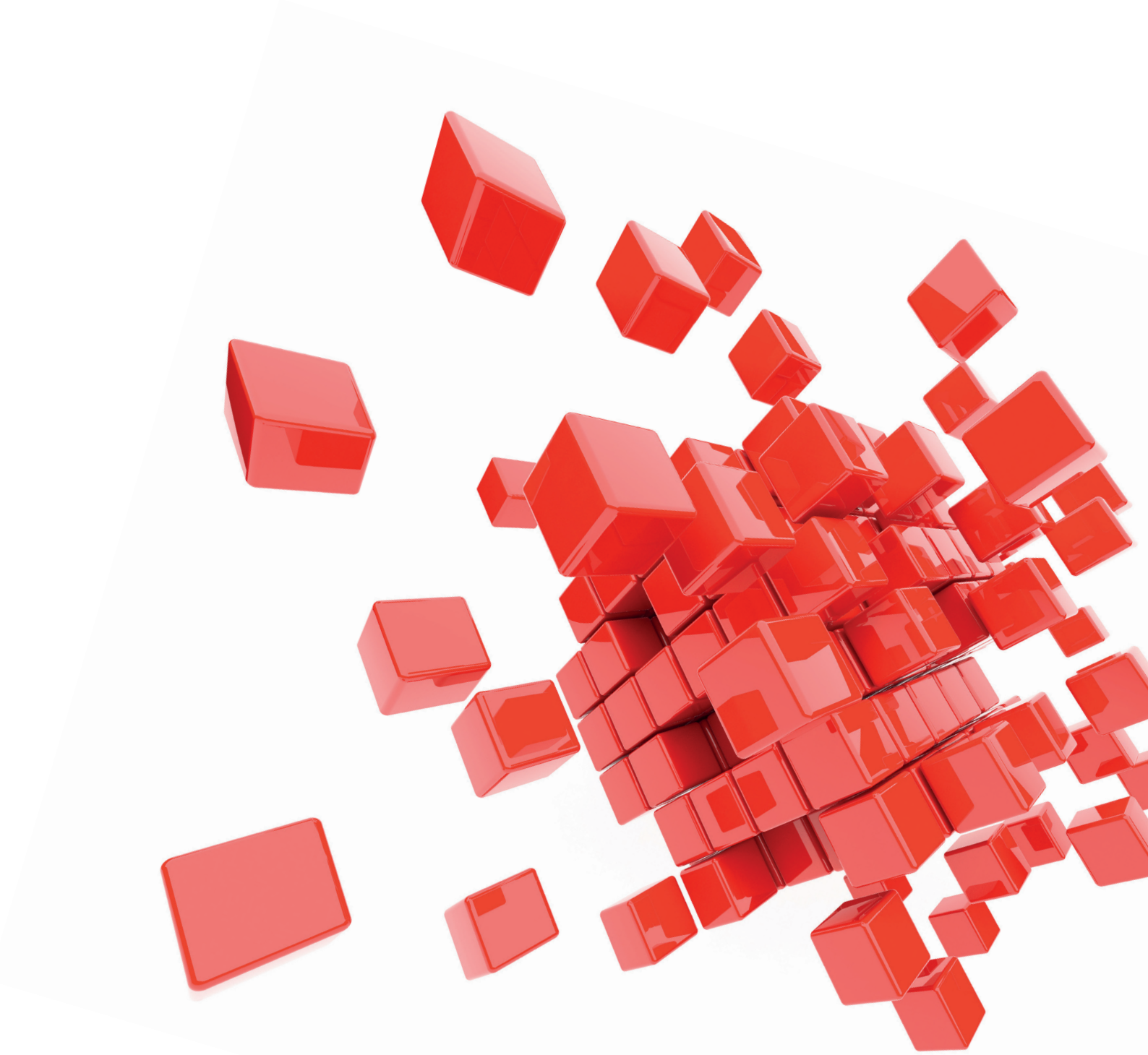
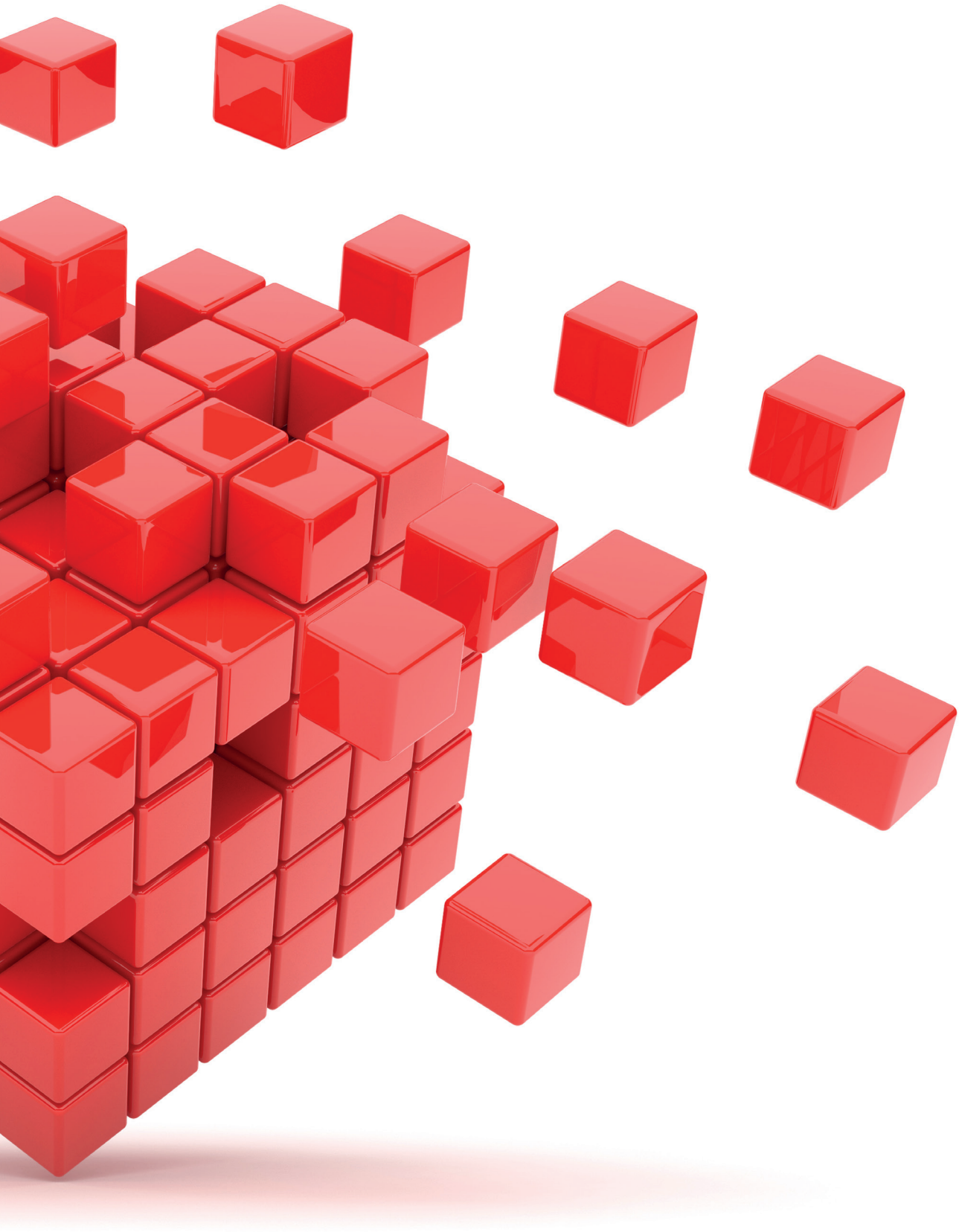


Sovereign Immunity

Key points for commercial parties | July 2018



Introduction

Sovereign immunity is a complex topic. This bulletin highlights key points to consider, particularly when drafting or reviewing a sovereign immunity waiver clause, from an English law perspective (as applied by the English courts).

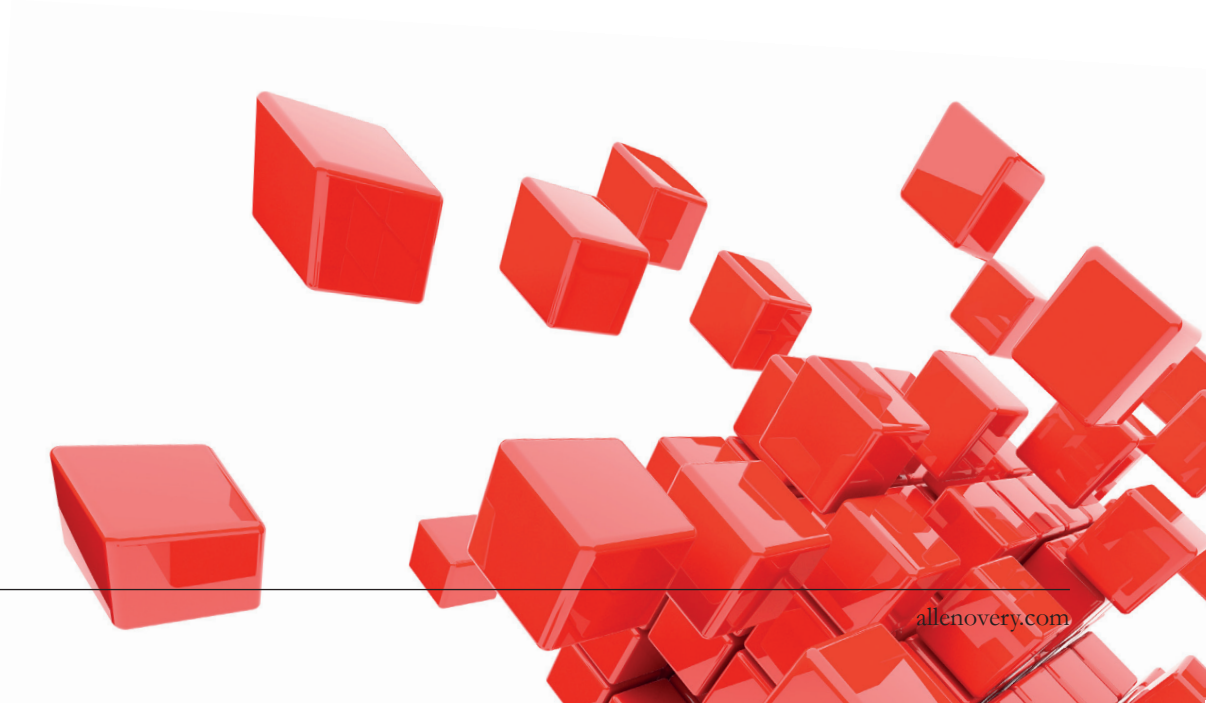
The immunity of foreign states (and separate entities exercising sovereign authority) under English law is principally dealt with under the State Immunity Act 1978 (**SIA**). This affords a broad immunity to foreign states from the jurisdiction of the English courts: (1) to hear a dispute and reach a judgment; (2) to recognise a foreign judgment or arbitral award; and (3) to order injunctive relief, specific performance or other execution of any judgment or award against a state's assets, unless one of the exceptions in the SIA applies.

In addition to the SIA, the common law principle of non-justiciability can be applied by the English courts. An example of this is where proceedings would require a court to consider the territorial claims of different states. The English courts would not hear these proceedings.

Some international or European organisations may also have immunity and special privileges pursuant to separate legislation or treaties. It is important to check the relevant legislation (both primary and secondary) and also the constitutional documents of any such organisation to establish whether it does indeed have immunity and, if so, whether there are any exceptions that apply.

In this bulletin we consider the extent to which commercial parties are able to rely on the exceptions to the immunities afforded to states under the SIA. We do not consider the immunity of the UK Government and its assets under the Crown Proceedings Act 1947.

This bulletin covers only the English law position. Parties may not end up bringing proceedings or enforcing in England, so it is sensible to take advice in all jurisdictions where parties are likely to want to bring proceedings or enforce, to establish whether a state may have immunity.



Key exceptions to state immunity

Although the starting point under the SIA is that foreign states are immune from the jurisdiction of the English courts, there are some important exceptions to immunity that may apply in appropriate circumstances. The purpose of a sovereign immunity waiver clause is to seek to fall within certain of those exceptions such that a foreign state cannot claim immunity from the jurisdiction of the English courts: (1) to hear proceedings; (2) to recognise judgments and awards; and (3) to order relief. A well-drafted clause will cover each of these three elements. It is likely, however, that the courts will scrutinise these clauses very carefully. It is therefore critical that they are drafted properly. A party's approach to drafting can have a direct impact on whether or not a remedy will be available against a state. In the absence of an effective waiver, there are certain other exceptions that parties may be able to rely upon (see further below).

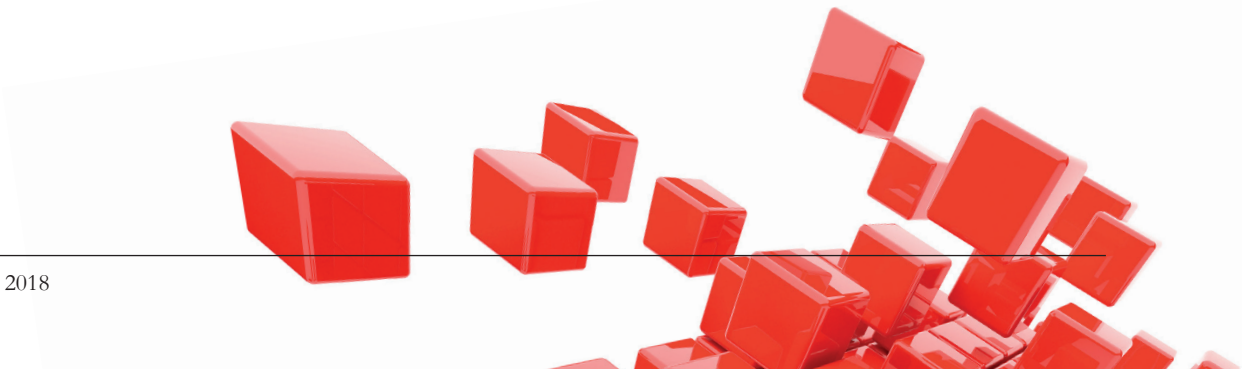
The first element: Ensuring that the English courts can hear the dispute

The SIA provides that a foreign state is not immune from the jurisdiction of the English courts to hear disputes (sometimes described as "adjudicative jurisdiction") if the foreign state has *submitted* to the jurisdiction of the English courts. A state may submit to the jurisdiction of the English courts by a prior written agreement. It is this exception to immunity that parties seek to invoke when they include immunity waiver wording in their contracts. The choice of English law alone is not enough to amount to a submission to the jurisdiction of the English courts. To ensure that the English courts can hear a dispute against a state party, it is therefore advisable to include an express submission to the jurisdiction of the English courts. In practice, in many commercial transactions this submission may appear in the "jurisdiction" clause, not in the "immunity waiver" clause. It is, however, prudent to reflect the language of the SIA and include a "submission" since a mere waiver of immunity, without an express submission to the jurisdiction, may not always be enough.

In the absence of an express submission, it may still be possible for the English courts to hear a dispute against a state party if the proceedings in question relate to a *commercial* transaction. This is defined very broadly in the SIA and includes: (1) a contract for the supply of goods or services; (2) a loan or other transaction for the provision of finance (which includes a guarantee or indemnity of any financial obligation); or (3) any other transaction (commercial, industrial, financial, professional or similar) which the state enters into otherwise than in the exercise of sovereign authority.

Notwithstanding this exception it is prudent to retain submission language (if it is commercially achievable).

The SIA also makes it clear that a foreign state is *not* immune from the adjudicative jurisdiction of the English courts if the proceedings relate to arbitration and the state has agreed in writing to submit disputes to arbitration.



The second element: Recognition of foreign judgments or arbitral awards

If parties have a foreign judgment which they want to enforce in the English courts it is first necessary for that judgment to be *recognised* by the English courts.

An application to have a judgment recognised entails an exercise of the adjudicative jurisdiction of the English courts, even though recognition can be a fairly routine or administrative process, so the starting point is that a state is immune. The preferred drafting solution is therefore to provide a clear submission by the state not only to the jurisdiction of the (original) court intended to hear disputes but also to any other court worldwide where the successful party might wish to have a judgment of that (original) court recognised.

The "commercial transaction" exception will not assist in proceedings for recognition of a foreign judgment. However, if the foreign judgment is against a state that is not the state of the court issuing the judgment (and assuming the judgment is not against the UK) then parties can rely on section 31 of the Civil Jurisdiction and Judgments Act 1982 as an alternative to finding an exception to immunity under the SIA. Broadly, this provides that the English courts will have jurisdiction to recognise the foreign judgment if the foreign court that gave the original judgment would (still) have had jurisdiction to hear the matter had it applied rules corresponding to those set out in the SIA.

With proceedings to recognise a foreign (or indeed an English) arbitral award, it is only necessary to show that the state agreed in writing to arbitrate.

The third element: Enforcement – injunctions, specific performance and execution

The starting point is that a state is immune from orders for relief such as injunctions and specific performance, and a state's property is immune from any process for the enforcement of a judgment or arbitral award.

However, the SIA provides that a state will not be immune if it has *consented* in writing to the enforcement mechanisms described in the SIA. This is why parties to commercial contracts often seek to include express consent to enforcement in these contracts. Again, it is prudent to reflect the language of the SIA since waiver is not necessarily the same as consent.

In the absence of consent in writing to the enforcement mechanisms described in the SIA, a state will nonetheless not be immune from the issue of any process in respect of the enforcement of any judgment or arbitral award in respect of any property which is for the time being in use, or intended for use, for commercial purposes. In practice this is very hard to demonstrate since, under the SIA, the state's certificate as to the use or intended use of particular property will be presumed conclusive unless there is evidence to the contrary and any property must be used "solely (save for de *minimis* exceptions)" for commercial purposes to fall within this exception to immunity. The time for assessing the use is execution, not when the transaction is entered into.

If the counterparty is a *central bank*, the presumption is that its property is not in use for commercial purposes. Moreover, even if a central bank is a separate entity from the state it is entitled to immunity from injunctive relief and execution as if it were a state.For all these reasons (if commercially achievable) a clause expressly giving consent to all forms of enforcement, including injunctive relief, specific performance and execution is generally to be preferred by commercial parties.

Further drafting points

In addition to the above three elements parties should also consider:

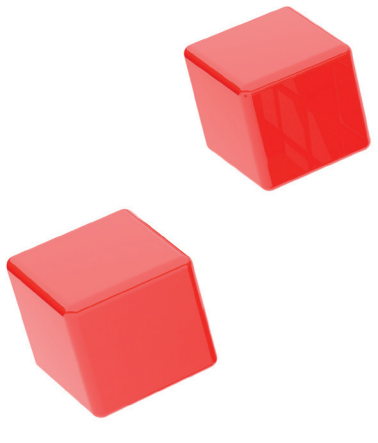
- a process agent clause. Absent such a clause, the SIA requires proceedings to be served on a state via the Foreign and Commonwealth Office which can be cumbersome and, expressly gives a state additional time in which to respond to proceedings served on it directly, meaning that several months may pass before proceedings are up and running; and
- (possibly) warranties bolstering waivers, cross default provisions and/or self-help remedies (which may mean there may be no need to go to court in the first instance).

What is the fall-back position in the absence of a waiver clause?

In the absence of a sovereign immunity waiver clause, parties can consider:

- relying on the fact that the transaction is a commercial one so that the English courts have jurisdiction to hear a dispute (but note this is not enough for recognition or enforcement of any judgment). Parties may even consider an express statement to the effect that the transaction is commercial;
- entering into a contract with a special purpose vehicle, separate from the state;
- obtaining a private third party indemnity or structuring the transaction through a separate non-state entity so that the issue of immunity does not arise; and/or
- self-help remedies – for example set-off or enforcing security.

As noted above, if arbitration is the chosen form of dispute resolution there is generally no need for an express submission in relation to proceedings before the English courts in support of arbitration or proceedings for the recognition of an arbitral award, but the parties still need to consider enforcement (ie the third element).



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If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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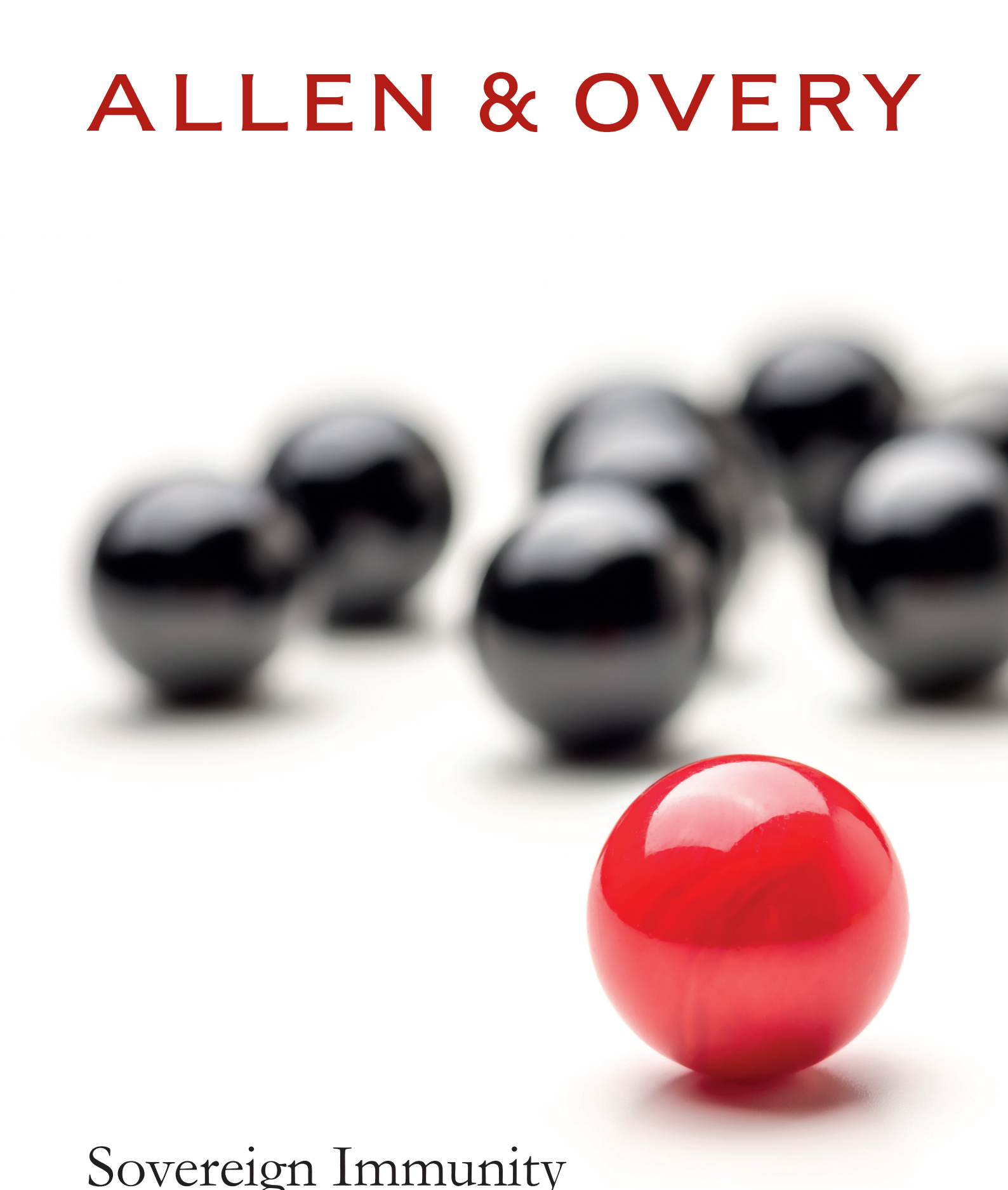

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