The Arbitrator's Clothes: Peremptory Orders and State Immunity in Arbitration

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An arbitration can be severely disrupted by a party who refuses to comply with an order or direction of its tribunal. In such circumstances, a peremptory order may be used to force the non-compliant party to comply with the earlier order or direction within a specific timeframe.

An arbitral tribunal's peremptory order was recently enforced under the Arbitration Act 1996 (UK) ("the Act") in *Pearl Petroleum Company Ltd & Ors v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361. The underlying arbitration to the enforcement proceedings related to Pearl Petroleum Company Ltd and others' (collectively, "PPCL") rights under an agreement ("Agreement") with the Kurdistan Regional Government of Iraq ("KRG"), under which PPCL would exploit two gas fields in KRG, Khor Mor and Chemchemal. In return, PPCL would receive payment for condensate and LPG delivery.

During the arbitration, KRG stopped paying PPCL, contrary to the terms of the Agreement. The tribunal issued an interim measures order requiring KRG to pay. KRG did not.

PPCL successfully applied to the tribunal for a peremptory order, which required KRG to pay to PPCL the sum of US$100 million found to be due under the Agreement, within 30 days.

However, KRG did not comply in time, and the tribunal permitted PPCL to commence enforcement proceedings against KRG in the High Court of England and Wales. The Court was asked to consider (amongst other things):

• the validity and enforcement of the peremptory order under the Act; and
• whether KRG was immune from the Court's jurisdiction under the State Immunity Act 1978, on the basis of its existence within the government of the Republic of Iraq.

These are dealt with below.

Validity and enforcement of the tribunal's peremptory orders

There are four relevant provisions of the Act, of which a brief understanding is necessary to understand KRG's argument. *First*, section 39 provides that "*parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings*", including orders for provisional relief. In the present case, the parties had chosen the LCIA Rules as *lex arbitri*, Article 25 of which permitted the arbitral tribunal to order on a provisional basis the payment of

money.

Secondly, section 41(1) allows parties to agree on the powers of the tribunal to act, where one of those parties failed "*to do something necessary for the proper and expeditious conduct of the arbitration*".

Thirdly, where a party does not comply with an order made in the context of section 41(1), the Act permits a tribunal to issue a peremptory order. Section 41(5) says:

> "If without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the tribunal considers appropriate".

Lastly, if a party still refuses to comply, section 42 permits the affected party to apply to the supervising court to enforce the peremptory order.

KRG argued that the enforcement of a peremptory order was only appropriate where the order of an arbitrator sought to be enforced (i.e. the tribunal's interim measures order requiring KRG to make payment under the Agreement) "*was one which was made for the proper and expeditious conduct of the arbitral proceedings*". His Honour understood KRG's argument to mean that a peremptory order should only be enforced where a "*party fails to comply with any [such] order or directions of the tribunal*", i.e. an order to do something "*necessary for the proper and expeditious conduct of the arbitration*".

Essentially, KRG's position was that an order requiring it to pay sums under the Agreement was not one made for the proper and expeditious conduct of arbitral proceedings. Accordingly, a peremptory order, and the ability to enforce it, was not available to PPCL under the Act.

Mr Justice Burton felt this interpretation went too far. His Honour pointed to section 41(5), which clearly permitted peremptory orders where a party fails to comply with "*any order or directions of the tribunal*", and to the general duty of parties under the Act, which required parties to do "*all things necessary for the proper and expeditious conduct of the arbitral proceedings…this includes complying with…any order…of the tribunal*". Further, his Honour found that KRG was not able to explain sufficiently how the provisions of the Act permitting the tribunal to issue an order expressly for the payment of money did not apply in this case.

His Honour, therefore, concluded that the parties had "*clothed the Arbitrators with a power to enforce their orders, if necessary by a peremptory order, and including an order for the payment of money*".

As to the validity of the tribunal's orders, his Honour provided some guidance for future applicants. Not every breach of every order will lead to a peremptory order, such as *de minimus* non-compliance, and there is no requirement for arbitrators to expressly refer to the words "*proper and expeditious conduct*" in its orders. Further, the courts are not obliged to necessarily construe the wording of such orders in detail to ensure that arbitrators are complying with the duties given to them.

In the present case, the tribunal had not so spelt out a reference to "*proper and expeditious conduct*" in its order, but it did clearly set out the importance of restoring the status quo between the parties, i.e. that PPCL was duly paid under the Agreement for what was lifted, and to permit one of the co-claimants within PPCL to continue with the arbitration and obtain relief.

Mr Justice Burton held that both the interim measure and peremptory orders were required to

preserve the subject matter of the arbitration, namely the rights under the 25 year contract between the parties, and were therefore valid. Accordingly, his Honour held that the Court had jurisdiction under section 42 to enforce the peremptory order against KRG.

KRG sought protection under the *State Immunity Act 1978 (UK)*

Mr Justice Burton considered some complex questions relating to the application of the *State Immunity Act 1978* ("the SIA"), including whether KRG was immune to the peremptory order enforcement proceedings before the Court because of its existence within the structure of the Government of the Republic of Iraq.

The SIA applies to any foreign or Commonwealth State other than the United Kingdom, which includes the sovereign or other head of State in his public capacity, the government of that State, and any department of that government. The SIA does not apply to any other "separate entity" which "*is distinct from the executive organs of the government of the State and capable of suing or being sued*".

Mr Justice Burton considered the meaning of "sovereign authority", particularly the distinction between acts *jure gestionis* and *jure imperii*, the former being a sovereign or public act; the latter, a private act such as a private citizen might have entered into.

In coming to his conclusion, his Honour referred to the fact that the Agreement related to the grant for not less than 25 years of the right to operate gas fields in KRG. It was not merely a contract for the sale of gas by a government to a commercial party, but rather, KRG assigned rights to a third party which were granted to it under the Constitution of the Republic of Iraq.

His Honour also concluded that it was only the gas fields which were already producing at the date of the entry into force of the Constitution in 2006 which were vested with the Republic of Iraq, but not the two fields which were the focus of the Agreement. As such, KRG was found to be acting in its own right in respect of Khor Mor and Chemchemal.

Following analysis of the Agreement, the Constitution of the Republic of Iraq, and the expert opinion of Professor James Crawford, Mr Justice Burton concluded that KRG was a "*separate entity*", in that it was found to be "*distinct from the executive organs of the government of the State and capable of suing or being sued*" and, therefore, it did not have the protection under the SIA.

Comment

Some interesting questions were put before the Court in this decision. *Firstly*, the case shows that, for arbitrations seated in England and Wales (and Northern Ireland), the supervising court was not willing to limit its enforcement powers in respect of peremptory orders, or the circumstances under which a tribunal may issue interim measure or peremptory orders. The Court also clarified the practical requirements for a tribunal to meet when issuing such orders.

Secondly, the case shows the risks facing a private commercial entity entering into an arbitration agreement with a state actor. Of course, the SIA provides solace for arbitration, in that "*a State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration*". However, much like KRG's argument, a state actor may argue that enforcement proceedings do not relate to the underlying arbitration, and that it is therefore immune to such proceedings. Accordingly, *Pearl Petroleum* could be authority to protect claimants against state actor respondents attempting to argue such a point and causing subsequent disruption to an underlying and ongoing arbitration.

Lastly, a private entity may very well find itself involved in a private arbitration against a state actor,

as well as in an investment arbitration, as a foreign investor, against the same state actor (or Host State) under an investment treaty. In the former, a private entity enforcing an arbitral order or direction against a state actor respondent may need to argue that the state actor is *not* exercising sovereign authority and so it is not immune from the enforcement proceedings under the SIA. Whereas, in the context of any investment arbitration between the same parties, the private entity may be required to argue that the state actor is exercising sovereign authority, in order to establish the tribunal's *ratione personae* jurisdiction to hear the investment dispute (as required, for example, under Article 25 of the ICSID Convention). A complicated inconsistency might arise which may be used against the private entity – foreign investor in such circumstances.