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Recent Trends in State Immunity

Leon Chung (Herbert Smith Freehills LLP) · Thursday, April 25th, 2013 · Herbert Smith Freehills

An important issue for any business engaged in international transactions is the ability to obtain effective relief if it becomes involved in legal proceedings. A key benefit of international arbitration is the ability of successful parties to enforce awards across multiple jurisdictions, which is made easier because of the 1958 New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards. However, special considerations apply where the party against whom enforcement is sought is a sovereign State or a State-owned corporation. Those considerations are particularly important because States may choose to rely on the doctrine of sovereign, or State, immunity to insulate their assets from enforcement.

Questions of sovereign immunity must be considered at two levels – in relation to (1) jurisdiction and (2) execution. With respect to immunity from jurisdiction, in most cases, the agreement to arbitrate constitutes a waiver of that immunity – both in relation to the arbitral proceedings themselves and any ancillary proceedings in the national courts. However, with respect to enforcement, often neither the arbitration agreement itself nor the New York and ICSID Convention constitute a waiver of the right to immunity from execution. As a result, the incidence and success rate of State parties seeking to resist arbitral awards is higher compared with awards made against commercial entities.

It is important for any business engaged in international transactions to consider the application of sovereign immunity in the jurisdictions in which they operate. The cases discussed below provide a snapshot of some of the recent activity in this area, demonstrating the significant variation in the recognition and application of the principles of sovereign immunity between jurisdictions.

1 Australia

The scope of sovereign immunity in Australia was recently considered by the High Court and Federal Court of Australia in proceedings concerning the Australian Competition and Consumer Commission (ACCC) and PT Garuda Indonesia Ltd (Garuda), an Indonesian state-owned entity. Under Australian law, foreign States and “separate entities” of foreign States are immune from the jurisdiction of the Australian courts, subject to a number of exceptions, including where the proceedings concern a commercial transaction, contract of employment or personal injury. “Separate entity” is defined under the Foreign State Immunities Act 1985 (Cth) (the Act) as an individual or body corporate that is an agency or instrumentality of the foreign State.

In 2009, the ACCC commenced proceedings against a number of airlines including Garuda. Garuda sought an order that the proceedings brought by the ACCC be dismissed or stayed,

claiming sovereign immunity.
The key issues in the proceedings were:

• whether Garuda was a separate entity, which would entitle Garuda to invoke sovereign immunity; and
• whether the conduct alleged by the ACCC concerned a commercial transaction, which would prevent the application of principles of sovereign immunity.

The Full Court of the Federal Court held that Garuda was a separate entity. The Court considered that in order to determine whether an entity satisfies the separate entity definition, it must first be determined whether the entity is an agency or instrumentality of the foreign State. In relation to this question, "[t]he most relevant factor in determining whether a natural person or a corporation is an agency or instrumentality is whether that body is carrying out the foreign State's functions or purposes." Regard should be had to:

• the ownership and control of the entity;
• the functions performed by the entity, the foreign State's purposes in supporting the entity; and
• the manner in which the entity conducts itself or its business.

In Garuda's case, factors leading to the Court's conclusion that it was a separate entity included Indonesia's substantial shareholding (95.5%, with the remaining shares held by corporations controlled by the Indonesian Government) and the fact that all of Garuda's shareholders were governed by Indonesian State ownership laws. By contrast, the Court held that Malaysian Airline System Berhad, another airline involved in the proceedings, did not meet the definition of separate entity, as it was a public, listed company with private shareholders.

Notwithstanding Garuda's prima facie entitlement to claim sovereign immunity, the Full Court found that the conduct alleged by the ACCC fell within the "commercial transaction" exception, preventing Garuda from invoking the immunity. The Court considered that the term "commercial transaction" should be construed broadly and could extend to alleged breaches of competition law, including to commercial activities of an entity acting "in the manner of a private player within the market."

The High Court affirmed the decision holding that nothing in the legislation limited the exception to private parties to the transaction or to proceedings concerning activity of a contractual nature.

2 France

In a series of related judgments, the French Supreme Court, the Cour de cassation, recently extended the application of particular rules relating to the scope of sovereign immunity in the context of an express waiver given by a State. The case built upon the principles enunciated in related proceedings in 2011, in which it was held that, for a waiver of sovereign immunity to extend to the diplomatic assets of a State, the waiver has to expressly and specifically provide for such.

In March 2013, the French Supreme Court considered the position where an entity sought to execute a judgment against non-diplomatic assets used for public purposes (monies owed by French companies to Argentina, constituted by tax and social revenues) in circumstances where Argentina had purportedly waived, in writing, its right to State immunity.

The Court held that a waiver in respect of public assets, as with assets used for diplomatic purposes, must be express and specific in describing the particular goods, or class of goods, in relation to which the waiver is granted. In making its decision, the Court relied on principles of customary international law, as reflected in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property.
Since the purported waiver was not express and specific, Argentina had not waived its immunity from execution of the relevant claims against those assets.

3 Singapore

The principles of sovereign immunity were also recently considered by the Singapore Court of Appeal in a case in which the Maldives Government and a company wholly-owned by the Maldives Government claimed that an injunction should not have been granted against them because it contravened principles of sovereign immunity.

Although the Court of Appeal set aside the injunction on grounds of balance of convenience, it rejected the claim for sovereign immunity and found that it had jurisdiction to grant an injunction. In reaching this conclusion, the Court of Appeal had particular regard to the fact that:

• the underlying agreement between the parties effectively contained a waiver of sovereign immunity; and
• the acts in question were not done in the exercise of the State's sovereign power but, rather, the dispute was properly characterised as one of private law, to which private law remedies applied and, therefore, sovereign immunity was not available.

4 Germany

A recent German case considered whether the Government of Thailand was immune from the jurisdiction of German courts.

The relevant acts of the Thai Government which led to the dispute were properly characterised as sovereign, or public, in nature, rather than commercial dealings. Thailand could not, therefore, be prevented from relying on principles of sovereign immunity on that basis.

To determine whether the Thai Government could in fact invoke sovereign immunity, the Supreme Court then considered whether such immunity had been waived in a bilateral investment treaty (BIT) between Germany and Thailand.

The Court held that:

• a party will only be taken to have waived sovereign immunity where circumstances clearly evidence such an intention; and
• the fact that an initial arbitral award as to jurisdiction has not been appealed by a State party is not relevant to the question of waiver, nor will it prevent that party from claiming sovereign immunity in subsequent proceedings.

For the waiver in question to exist, the dealings between the parties must have been properly covered by the scope BIT and its arbitration clause. The case was remitted to a lower court to make this determination.

5 United Kingdom

Sovereign immunity was also considered in cases before United Kingdom courts last year. In one such case, the Privy Council considered whether La Generale des Carrieres et des Mines Sarl (Gecamines), a corporation owned by the Democratic Republic of Congo (DRC), was directly liable for debts which the DRC owed to F.G Hemisphere Associates LLC (Hemisphere). The primary question in relation to Gecamines was whether its juridical personality and its apparently separate commercial assets and business were so far lacking in substance and reality as to justify assimilating Gecamines and the State for all purposes.

In finding that Gecamines was not an organ of the State, the Privy Council held that there was a presumption that the State-owned corporation was a separate entity and that this presumption should only be displaced in "quite extreme circumstances". Circumstances relevant to determining the separate entity question were considered in more detail in Rahima Patel's blog piece.

In another case, the Supreme Court of the United Kingdom provided guidance on when property is "for the time being in use or intended for use for commercial purposes" (an exception to sovereign immunity under United Kingdom legislation).

The property in question was held not to be in use for a commercial transaction. In reaching this conclusion, the Court considered the construction of the commercial transaction exception to sovereign immunity, holding that, (1) the origin of the property against which execution is sought, and (2) whether the property has been used for commercial purposes in the past, are irrelevant. The Court noted that this exception is narrower in wording than other provisions of United Kingdom legislation governing sovereign immunity, which refer to proceedings "relating to" or "in connection with" a commercial transaction.

6 Conclusion

It has been recognised for a long time that States and their entities are entitled to some immunities from the jurisdiction of the courts of other countries. However, there are also good arguments for limiting the scope of that immunity, especially in the modern era of state capitalism, where the "'sovereign"' not only governs but engages in commercial transactions. However, until that position is reached in international law, and in light of the vigour with which States and State-owned entities are seeking to resist enforcement proceedings, it seems sensible to seek, where possible, an express waiver of immunity from jurisdiction and enforcement, in terms which are as specific as possible. It is important to ensure that the waiver is effective both in the jurisdictions in which enforcement may be sought and under the domestic laws of the State party.

At a minimum, it is essential that companies engaging in cross border transactions or business involving States or State-owned entities turn their mind to the issue of sovereign immunity and the way in which it may limit the protection and relief they might otherwise be afforded.

Leon Chung, Erin Christlo, Alexandra Payne , Herbert Smith Freehills

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