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A Procedural Bar to Award Enforcement? State Immunity in England & Wales

Rupert Coldwell (Clyde & Co.) · Friday, November 18th, 2016 · Clyde & Co.

James Crawford described the principle of state immunity as *"…a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts…it precludes the courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party. It is a procedural bar (not a substantive defence)…"**[1]** The principle is one of customary international law and has been encoded in its various forms by the municipal laws of numerous States. Although Article V of the *New York Convention* does not expressly list state immunity as a ground to resist award enforcement, it would arguably fall within the public policy ground under Article V(2)(b) for many jurisdictions.

A number of State parties have recently sought to shield themselves from award enforcement proceedings in England and Wales by claiming immunity under the *State Immunity Act 1978* ("the SIA"). In such cases, a few of which are discussed below, the courts have been asked to consider the boundaries to certain sections of the SIA in the context of award enforcement. Undoubtedly, these and other decisions emanating from the English courts will be closely observed by States and private contracting parties alike, as they seek to better understand the possible risks and strategies associated with enforcing arbitral awards against assets located in England & Wales.

Para-statal entities and the exercise of sovereign authority: Section 14 of the SIA

As reported back in February 2016 (see here), the case of *Pearl Petroleum Company Ltd & Ors v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 examined whether a regional arm of the Federal Government of Iraq, being the Kurdistan Regional Government ("the KRG"), had exercised the sovereign authority of Iraq for the purposes of section 14 of the SIA. In that case, Pearl sought to enforce a peremptory order issued by an LCIA tribunal in relation to its gas field exploitation agreement with the Kurdistan Regional Government of Iraq ("the KRG"). The KRG challenged the proceedings by (amongst other things) asserting immunity under the SIA. In particular, the Court was required to determine whether, under section 14, the KRG was exercising sovereign authority, and if so, whether such exercise was one of the sovereign authority of the State (i.e. Iraq, to which immunity would follow) or of the KRG as a *separate entity* (to which it would not).

The Court found that, although the KRG's acts in respect of the exploitation agreement were sovereign (*jure imperii*) rather than commercial (*jure gestionis*), such sovereign authority was

being exercised by the KRG as a "*separate entity*", and not by Iraq. In particular, the Court considered the division of sovereign authority in Iraq's Constitution to find that only gas fields present at the date of the Constitution (2006) were vested in Iraq. In contrast, the two fields the subject of the dispute were not "present fields" under the Constitution, and as a result, it was held that the KRG was "*acting in its own right*" in respect of them. Therefore, the KRG was not afforded immunity under the SIA in this respect. *Pearl Petroleum* raises just some of the complex issues which can arise in identifying whether or not an organ or para-statal entity of the State is exercising the sovereign authority of that State, for the purposes of their claim for immunity under the SIA.

The arbitration exception to immunity: Section 9 of the SIA

The same court in *Gold Reserve Inc. v The Bolivarian Republic of Venezuela* [2016] EWHC 153 was asked to determine the application of sub-sections 9(1) and 9(2) of the SIA, this time in the context of a claim for immunity from proceedings to enforce an investor-state arbitral award. The underlying ICSID award, made under the Canada-Venezuela BIT ("the BIT"), required Venezuela to compensate Gold Reserve for failing to afford certain protections to its mining project investments located in Venezuela. In the face of the arbitration agreement in the BIT and the arbitration exception to immunity under section 9, Venezuela argued no valid arbitration agreement existed as it had not agreed in writing to submit disputes with Gold Reserve to arbitration under the BIT. Venezuela's secondary assertion was that Gold Reserve was not an 'investor' which was *capable of accepting* an offer to arbitrate.

The Court found Venezuela had agreed to submit a dispute with Gold Reserve to arbitration under the BIT, by virtue that the arbitration agreement comprised Venezuela's unilateral offer to Gold Reserve to arbitrate, which Gold Reserve accepted upon commencement of the arbitration. Venezuela then relied upon sub-section 9(2): "*[Section 9] does not apply to any arbitration agreement between States*", to argue that the arbitration agreement in the BIT was one "*between States*", and therefore section 9 did not operate to exclude immunity in this case. The Court rejected this argument because, unlike agreements between States, the object of a BIT is to confer rights on an investor, including the valuable right to arbitrate.[2] Accordingly, the arbitration exemption to immunity under section 9 was, to this extent, applicable.

As to the secondary question, the Court found that Gold Reserve constituted an 'investor' capable of accepting Venezuela's offer to arbitrate under the BIT. The Court did not accept that Gold Reserve's acquisition and share transfers leading to its indirect ownership of mining operations in Venezuela amounted to an 'investment' under the BIT. However, it did find that its significant expenditure in developing the Brisas Project (c. USD300m) and existence in Venezuela was sufficient to define it as an 'investor' capable of agreeing to arbitration. Accordingly, Venezuela was bound by the arbitration agreement and the exception to immunity under section 9 was invoked. Interestingly here, the court was required to examine the complex question of whether Gold Reserve could be deemed an investor, a question which had been before the tribunal in the underlying arbitration. Therefore, the nature of Venezuela's challenge here required a deeper examination of the case which could appear, to some extent, at odds with the summary enforcement policy underpinning the *New York Convention*.

(The parties in *Gold Reserve Inc.* have recently settled what remains of the dispute, to the extent that Venezuela are to pay Gold Reserve the amount of USD770m in instalments and for Venezuela to enter into further mining relationships with Gold Reserve. The settlement does, however,

appear dependent upon Venezuela obtaining finance to fund it (*Bloomberg*, 8 August 2016 report).)

The 'commercial purposes' exception to execution of State property: Section 13 of the SIA

More recently, the case of *L R Avionics Technologies Limited v The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm) related to an arbitral award made under the Nigerian *Arbitration and Conciliation Act 1998*, which awarded Avionics a sum of approximately £5m for Nigeria's breach of a contract for the supply of military equipment. Avionics sought to enforce the award in England and to seek execution against Nigerian-owned property in the UK, namely, a property on Fleet Street which it had leased to a private company to administer Nigerian visa and passport services.

Section 13(4) provides that "…*the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award…*" unless the property in question "…*is for the time being in use or intended for use for commercial purposes…*" Avionics asserted that the property had a commercial purpose given its private leasing arrangements. Nigeria argued that the property was the property of the State which was not being used for commercial purposes, and therefore it was immune from enforcement and execution under section 13. The Nigerian High Commission had duly certified this position, as required under section 13(5).

The Court held that the issuing of visas and passports to nationals and others wishing to travel to Nigeria clearly amounted to "*consular activities*" by reference to the *1963 Vienna Convention on Consular Relations*, and that Nigeria's outsourcing of the consular activities to a private company did not change the fact that they were consular activities. Accordingly, the Court considered the "*nature or character of the relevant activity*" in finding that the property, via an agent of Nigeria, was being used to carry out consular services, and it was therefore immune to enforcement under the SIA.

Comment

Private parties to State agreements commonly seek safeguards against claims of state immunity to avoid (amongst other things) award enforcement. For example, a party might decide to focus its pre-contract due diligence to determine whether a para-statal entity and its functions are, in fact and law, operating as an arm of the State (the parameters of which, in England & Wales, were discussed in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 and *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27), and thus whether immunity carve-out strategies are required in the contract negotiation. Further, parties may seek to negotiate broadly termed immunity waiver provisions, to achieve waiver of immunity from all potential court proceedings which might arise in a particular jurisdiction, with the preservation of award enforcement in mind. However, such provisions are, of course, normally at the mercy of the commercial negotiating positions of the parties, as well as the contracting State's policy towards immunity, which could differ drastically from State to State. Needless to say that private parties and States alike will be looking closely to these and future cases to ensure those safeguards will operate effectively and to better understand the risks posed by state immunity to assets located in England & Wales.

[1] J Crawford, *Brownlie's Principles of Public International Law*, 8th ed, (Oxford University Press), 487.

[2] The court here referring to the decision in *Czech Republic v European Media Ventures SA* [2007] EWHC 2851 (Comm) at [23].

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