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State Immunity from Enforcement in The Netherlands: Will Creditors be Left Empty-Handed?

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In the context of investor-state dispute resolution in The Netherlands, the Yukos case has recently captured the spotlight in the global arbitration arena and beyond. While much of the attention has been focused on the setting-aside proceedings and the issue of jurisdiction of the arbitral tribunal, the case also raises interesting questions regarding the enforcement of arbitral awards against a states' assets and the principle of state immunity.

Following the adoption of the so-called "Yukos Law" in Belgium and similar legislation in France regarding the attachment of foreign states' assets, the Dutch Supreme Court has recently shed new light on the scope of state immunity from enforcement in The Netherlands. In its judgment of 30 September 2016, the Dutch Supreme Court ruled that assets of foreign states located in the Netherlands cannot be subject to attachment and enforcement, unless those assets are used for non-governmental purposes. It is the attachment creditor that bears the burden of proof in this respect. This applies to both conservatory attachments and measures in satisfaction of a judgment or award.

In its judgments of 14 October 2016 (published here and here), the Dutch Supreme Court confirmed this general presumption of sovereign immunity from enforcement of judgments and arbitral awards against a state's assets. It also made clear that a possible waiver of state immunity must be made expressly and cannot be implied from the general provisions contained in bilateral or multilateral arbitration agreements between state parties.

The sovereign immunity defence – customary international law

The doctrine of state immunity under Dutch law has been primarily shaped by case law and international conventions. The legal basis for the sovereign immunity defence is laid down in a single provision of the General Provisions Act of 1829, which incorporates standards of customary international law into the Dutch legal system of enforcement measures.

In line with the International Court of Justice ruling in *Jurisdictional Immunities of the State*, Dutch case law has developed along the lines of Article 19 of the UN Convention on Jurisdictional Immunities of States and their Property (the "UN Convention"), most of which – although not yet in force and not yet ratified by The Netherlands – is considered to be customary international law.

Consequently, the Dutch Supreme Court ruled that the three exceptions to sovereign immunity of a foreign state's assets listed in Article 19 of the UN Convention are applicable under Dutch law. In

summary, this means that assets of a foreign state may only be attached:

i. with the express consent of the state;
ii. if the state has allocated or earmarked property for the satisfaction of the claim; or
iii. where it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes.

No distinction between conservatory and executorial measures

One of the aspects that was heavily debated among the signatories to the UN Convention was whether the 'commercial purposes exception' should also be available with regard to conservatory measures against a state's assets. The consensus reached is reflected in Article 18 of the UN Convention, which rules out the possibility of levying conservatory attachments on a state's assets without the state's prior express consent.

However, the Dutch Supreme Court has expressed the view that the distinction made between conservatory and executorial measures in the UN Convention does not reflect international customary law and consequently does not apply under Dutch law. Provided that a creditor succeeds in proving that the state's targeted assets in The Netherlands are intended to be used for commercial purposes, the Dutch courts will permit conservatory attachment of those assets.

Presumption of immunity

The presumption of immunity as confirmed by the 2016 Dutch Supreme Court decisions puts creditors to the challenge of proving that the foreign state's targeted assets are intended to be used for non-governmental (i.e. commercial) purposes. Creditors should not expect to receive any assistance from the Dutch courts in meeting this challenge. The Dutch Supreme Court has held that the state party is under no obligation to disclose any information regarding its assets, nor are states required to appear in the proceedings and put forward a sovereign immunity defence.

The Dutch Supreme Court has not gone as far as to exclude so-called 'mixed funds' from attachments, e.g. funds of a state held in a Dutch bank account for governmental as well as commercial (or other) purposes. In order to attach 'mixed funds', however, a creditor will need to demonstrate the extent to which the funds are intended to be used for a non-governmental purpose.

Pre-attachment judicial review

Any party who wishes to attach assets in The Netherlands will have to use the services of a bailiff. Bailiffs are under a statutory obligation to submit a report to the Dutch Ministry of Justice as soon as they receive instructions to attach assets of a foreign state which may be in violation of the Dutch State's international obligations.

The Dutch Ministry of Justice has the power to prevent the attachment of assets, or render an attachment which has already been levied null and void, until the creditor has demonstrated in court proceedings initiated against the Dutch State that the relevant assets are not covered by sovereign immunity. As a result of the confirmed presumption of immunity, the Dutch Ministry of Justice may be inclined to challenge virtually any attachment intended to be levied against a foreign state's assets.

This results in a system of pre-attachment judicial review similar to those introduced in Belgium

and France, albeit that in The Netherlands the executive branch of government essentially determines whether such judicial review should take place.

No implied waivers

An exception to the presumption of sovereign immunity exists if the investor can demonstrate that the state has waived its right to invoke such defence. Unlike the UK State Immunity Act 1978, which contains an arbitration exception to state immunity, there is no general rule under Dutch law which provides that a state is taken to have waived its immunity defences by entering into an arbitration agreement with a private party.

In accordance with the UN Convention, the Dutch Supreme Court found in one of its 14 October 2016 rulings that express consent from the state is required for a waiver of immunity to be effective. More specifically, it found that neither Article 10(2) of the Energy Charter Treaty 1994, which provides that *"Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations"*, nor Article 26(8), which provides that *"…Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards"* could be interpreted as an express waiver of state immunity.

Both provisions deal only with the enforcement of arbitral awards within the territory of one of the contracting states involved in the dispute, not third party states. Many bilateral investment treaties contain similar provisions, which are thus unlikely to be interpreted as express waivers of immunity in relation to measures of constraint against a state's assets in The Netherlands.

Comment

Although some authors have advocated to limit the scope of state immunity in an era of free trade and foreign investments, the 2016 decisions of the Dutch Supreme Court seem to follow a recent international trend towards absolute state immunity from enforcement against a state's assets.

One thing is certain: if it was not already an uphill battle to enforce arbitral awards against foreign states in The Netherlands, it now certainly is a mighty mountain to climb. It will be challenging for creditors to prove that the state's assets they wish to attach serve commercial rather than governmental purposes, especially because states have no obligation to assist in adducing any evidence in that respect. An upside for creditors seeking enforcement in The Netherlands is that – contrary to some other jurisdictions – the commercial purposes exception also applies to conservatory attachments.

Investors are therefore advised to seek a waiver of immunity from enforcement when contracting with states. It is important to ensure that the waiver is express and specific, and that it is effective not only under the domestic laws of the state party involved, but also under the laws of jurisdictions in which enforcement proceedings may be pursued.

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This entry was posted on Tuesday, April 25th, 2017 at 5:07 am and is filed under Arbitral Award, Energy Charter Treaty, Enforcement, State Immunity
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