Kluwer Arbitration Blog

PCA Award Trapped in the Confines of the Singapore State Immunity Act

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In early March 2017, the Singapore High Court released a judgment in which it considered an important question of enforcement of investor-state awards.

In *Josias Van Zyl v Kingdom of Lesotho* [2017] SGHCR 2, AR Pereira was asked to decide whether an order to enforce a final award in a treaty dispute administered by the Permanent Court of Arbitration is to be served through diplomatic channels, or whether it could be served by way of simple service on the defendant's solicitors in Singapore.

While admittedly technical, the issue of service of process is fundamentally important for the enforcement of treaty awards. Having an enforcement order or a writ that cannot be served is equivalent to having a cheque that cannot be cashed. Singapore praises itself on being one of the most forward-thinking jurisdictions in Asia for treaty disputes. That praise, inevitably, should come with a convenient and speedy service mechanism. The convenience of service on a foreign State is inherently dependent upon the procedural privileges and immunities that a State enjoys in the enforcement jurisdiction. Having to resort to diplomatic channels is a universally accepted but arguably cumbersome and potentially lengthy procedure. In contrast, serving enforcement orders on solicitors next door is a convenient, predictable, and speedy process.

In essence, in *Josias Van Zyl v Kingdom of Lesotho,* AR Pereira decided Singapore's fate when it comes to enforcement of treaty awards. He sent a strong message to the legal community that Singapore, at least in the interim, is not prepared to deviate from the traditional service mechanism through diplomatic channels, even where the enforcement circumstances might justify a more flexible and speedy procedure.

A blog post on Singapore would be incomplete without a reference to Hong Kong. In Hong Kong, service on a foreign State is governed by Order 11 Rule 7 of the Rules of the High Court. The Rules' provisions are far from controversial and as such have not generated much debate or case law, apart from an important caveat of the *Congo* judgment. As a general rule, in Hong Kong, a person to whom leave has been granted to serve on a State must lodge a request in the High Court Registry for service to be arranged by the Chief Secretary for Administration, who will then effectuate the service. The Chief Secretary would forward the service request to the Ministry of Foreign Affairs, where the request would be served through consular or diplomatic channels. Helpfully, in addition to a rather non-controversial set of service rules, there is no requirement in

Hong Kong for the plaintiff seeking to serve a State to demonstrate in the service application that the State does not enjoy immunity from suit or immunity from execution (*NML Capital Ltd v Republic of Argentina*).

This is where the similarities between the two jurisdictions end. Hong Kong's Rules of the High Court allow flexibility of service on a foreign State where the State has agreed to a procedure different from that specified in the rules. In addition to that, the Hong Kong judiciary is known to exercise an important degree of flexibility by allowing service on Hong Kong solicitors rather than through diplomatic channels where the circumstances so warrant. In *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2009] 1 H.K.L.R.D., Reyes J noted that the enforcing party sent the originating summons to various government officers of the defendant State, which in turn had caused the State to acknowledge service. Against this background, Reyes J granted the plaintiff an ex parte order for substituted service by posting the originating summons to Congo's solicitors in Hong Kong.

The Singapore judiciary takes a completely opposite approach to service on a foreign State. Having been seized of the matter, AR Pereira, in a succinct judgment of 9 pages, determined that the Enforcement Order falls within the confines of s14 of the Act and dismissed the plaintiff's application to serve the Enforcement Order on Lesotho's solicitors in Singapore, thus precluding the plaintiffs from pursuing the easiest way of service.

Procedural Background

The underlying arbitration was conducted under the auspices of the PCA and the UNCITRAL Rules (*PCA Case No. 2013-29: Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho*). The claim was brought by a group of South African investors, including the plaintiffs, against Lesotho, under the Treaty of the Southern African Development Community, for expropriation of their mining leases by the government. On 18 April 2016, a PCA tribunal seated in Singapore released its final award on costs. It is this final PCA award that the plaintiffs are seeking to enforce against Lesotho in Singapore.

The plaintiffs first tried to serve the Enforcement Order on Rajah & Tann, Lesotho's solicitors in Singapore. Rajah & Tann declined to accept service on the basis that they had no instructions from Lesotho to do so. The plaintiffs then sought to serve the Enforcement Order on Webber Newdigate who represented Lesotho in the PCA arbitration, but to no avail. Persisting, the plaintiffs attempted service on Lesotho's Attorney-General. That attempt was brushed off by Webber Newdigate on the basis that service was not compliant with s 14(1) of the Singapore State Immunity Act. That is why the plaintiffs motioned for substituted service of the Enforcement Order on Rajah & Tann in Singapore.

Reasoning and Judgment

AR Pereira, having looked into the plaintiff's numerous attempts to navigate their Enforcement Order through the – almost Machiavellian – ping pong game by Lesotho's counsel, took the view that the Enforcement Order must be served through diplomatic channels, for the following reasons.

Firstly, the Enforcement Order, when served, has the effect of instituting proceedings against a State within the meaning of s 14 of the State Immunity Act and of O69A r6(2) of the Singapore Rules of Court. AR Pereira found no reason to exclude enforcement proceedings from the

procedural requirements of service on foreign States.

Secondly, AR Pereira rejected the plaintiffs' arguments that the High Court should apply the Singapore Rules of Court, in particular Order 69A Rule 6, to allow the plaintiffs to serve the Enforcement Order on Lesotho's Singapore solicitors. He noted that Order 69A Rule 6 of the Rules of Court is silent on the mode of effecting service on foreign States, but that must be because when the Rules were drafted, investor-state enforcement proceedings were not in contemplation, thus the omission should not remove the mandatory requirements of s 14 of the State Immunity Act. The plaintiff's counsel argued that in any event, Lesotho is well aware of the enforcement proceedings given that it is involved in the set aside proceedings in Singapore and has retained counsel to pursue its set aside application. That argument did not convince AR Pereira who found that "if the State Immunity Act requires service in accordance with a specified procedure", then it should not matter how the related set aside proceedings have developed.

Finally, AR Pereira found that the setting aside proceedings and the enforcement proceedings are fundamentally different. It is impossible to equate the initiation of the setting aside proceedings to the "appearance" in the enforcement proceedings. For that reason, Lesotho's initiation of the setting aside proceedings in Singapore cannot be construed as a waiver of its procedural privileges under the State Immunity Act.

Conclusion

In effect, the Singapore courts have affirmed that they will not treat a State's participation in related proceedings as a waiver of the State's procedural privileges under the State Immunity Act. Arguably, this determination makes service of enforcement orders in treaty matters more cumbersome, but it gives respondent States certainty that they will keep their procedural privileges irrespective of whether they have initiated setting aside proceedings before the Singapore courts or not. Many other jurisdictions would loathe waiving the States' procedural privileges, so AR Pereira's determinations are not at all surprising. However, one cannot help but wonder whether Singapore would have risen to an entirely different level of accommodating treaty disputes from inception to enforcement, had AR Pereira allowed (as Reyes J did in Hong Kong) the Enforcement Order to be served on Lesotho's local solicitors in Singapore.

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