Kluwer Arbitration Blog

Pearl & Others v The KRG of Iraq: The DIFC Courts' Tough Stance on State Immunity and Other Lessons

Gordon Blanke (Blanke Arbitration LLC) · Thursday, September 7th, 2017

A recent ruling of the DIFC Court of First Instance (see Claim No. ARB 003/2017 – Pearl Petroleum Company Limited & Others v. The Kurdistan Regional Government of Iraq [2017] DIFC ARB 003) deals with the question as to whether a State immunity defence may be available to a State entity or a governmental defendant in response to a DIFC ex parte order for recognition and enforcement of a foreign arbitral award. It also addresses other related issues, including in particular the obligation of full disclosure within the context of an ex parte application for an order for recognition and enforcement and the requirements of service of such an application under the 1983 Riyadh Convention.

The proceedings before the DIFC Courts originate in an application by the Defendant, the Kurdistan Regional Government of Iraq (the "KRG") – the governmental entity of the Kurdistan Region of Iraq (the "KRI"), a constituent region of the Federal Republic of Iraq ("Iraq") – to set aside an order made by the DIFC Court of First Instance ex parte on 29 May 2017 (the "Order"). By that Order, the DIFC Court recognised and enforced a pair of arbitration awards rendered under the LCIA Rules in London and permitted alternative service of the Order on KRG's Counsel in London (rather than the Defendant itself in Iraq). In support of its enforcement endeavours, the Claimant, in turn, applied for an order that the KRG disclose its worldwide assets in order to allow the Claimant to obtain a global freezing injunction over the KRG's assets. The awards essentially found that the KRG was in breach of its payment obligations under a contract with the Claimant for the production and sale of petroleum products, including in particular condensate and liquefied petroleum gas ("LPG"), (the "Contract") and ordered monetary compensation in billions of USD in favour of the Claimant. More specifically, under the Contract, the Claimant enjoyed long-term exclusive rights to develop and produce LPG within specially designated gas fields in the KRI in return for the construction of gas production facilities at those fields and a pipeline for the supply – free of charge – of a specified amount of gas to two power plants in the KRI. The Claimant also had the right to market and sell, including by way of export, all excess gas to third parties. In the event that the Claimant was unable to market and export the LPG for "political reasons beyond [its] control", the KRG was obligated to lift and pay for the LPG. In breach of this obligation, the KRG failed to make full payment for LPG that the Claimant was prevented from exporting due to an ongoing political dispute between the KRG and the Federal Government of Iraq (the "FRI") in relation to the proper ownership of the right to manage hydrocarbons located within the KRI. The Contract further contained an express waiver stating that "the KRG waives on its own behalf and that of the [KRI] any claim to immunity for itself and its assets".

Over the course of the arbitration, the tribunal granted interim relief requiring the KRG to continue to make payments to the Claimant under the Contract pending the outcome of the arbitration. In the light of the KRG's continued failure to comply, the tribunal ultimately granted a peremptory order against KRG in the same terms pursuant to section 41(5) of the English Arbitration Act 1996, the governing procedural law of the arbitration (the "Peremptory Order"). This was followed by an order for enforcement of the Peremptory Order by Burton J of the English High Court, with an application for permission to appeal dismissed by Briggs LJ in May 2016 on the ground that the Peremptory Order rightfully stopped the Claimant from being held at ransom by the KRG over non-payment of continuing supplies under the Contract at the risk of insolvency. In further course, the KRG attempted a section 68 action before the English High Court to set aside one of the awards for serious irregularity in the arbitration process (such as failure to accord a fair hearing), which it subsequently withdrew without explanation.

In response to the defence of State immunity from these proceedings raised by KRG, Justice Sir Jeremy Cooke, sitting in the DIFC Court of First Instance, was resolute in finding that the DIFC Courts constituted an autonomous judicial body that could not be subjected to the wholesale application of a body of English common law on the basis of the so-called "cascade" or "waterfall" provisions of Article 8 of DIFC Law No. 3 of 2004 (on the Application of Civil and Commercial Laws in the DIFC), which lists "the laws of England and Wales" as the ultimate position to which the applicable law on the merits is defaulted where the parties have failed to agree otherwise or in the absence of a law with a closer connection to the underlying dispute. In Sir Jeremy's own self-explanatory words,

"Whilst this Court is a common law court, there is no basis for incorporation of a body of substantive 'common law', whatever that may mean, into the substantive law which falls to be applied in the DIFC. The KRG sought to argue for such a body of common law, including state immunity as recognised generally by common law courts throughout the world, to be treated as part of the law of the DIFC, because it was said to incorporate, in turn, customary international law in relation to state immunity. I can see no basis for any such contention as a matter of substantive law, given the nature of the jurisdiction of the CFI […]. That jurisdiction is founded on statutory provision which requires the law of the DIFC to be first applied and only in absentia to move on to the cascading subparagraphs' provisions, of which the last is the law of England and Wales, which for reasons which are apparent, in the light of the decisions of the English Courts set out above (Burton J and Briggs LJ) on the absence of immunity of the KRG in the present case, does not assist the KRG. The KRG effectively wishes to stop the clock at a time prior to the English State Immunity Act of 1978, and to apply in the DIFC what it contended was the common law position at that time, which was said to reflect the common law position throughout the world and which is said to form part of DIFC law. This is untenable.? Whilst the law of the DIFC is interpreted in accordance with the methodology of the common law and proceeds incrementally, the courts have no power to create law by incorporating some external body of law for which there is no provision in Article 8 of DIFC Law No 3 of 2004. The DIFC creates its own precedents on the basis of the law to be applied under the provisions of the statutory framework." (DIFC ARB 003/2017, para. 18)

As regards the substance of immunity, Sir Jeremy found the contractual waiver in the terms contained in the Contract to be express and, as a matter of contractual interpretation, to amount to a "full waiver of immunity", including immunity from execution (DIFC ARB 003/2017, para. 28). Sir Jeremy concurred with the findings of Burton J and Briggs LJ in the English courts to the effect that the waiver given by KRG in the Contract was "concise", "robust" and "general" (ibid.) and,

given the plain reference to KRG's assets, extended beyond a simple immunity from injunctive relief to immunity from execution (ibid.). In doing so, Sir Jeremy distinguished the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region in Democratic Republic of Congo and others v FG Hemisphere Associate LLC [2011] HK CFAR 395 inter alia on the basis of the disputed waiver in that case being implied (rather than express) (DIFC ARB 003/2017, paras 33-34) and found support in Article 7 of the 2004 UN Convention on Jurisdictional Immunities of States and their Property (albeit not binding on the UAE, nor on the FRI or Iraq as non-parties), which provides for the effectiveness of a waiver of immunity from suit and execution by way of a written contract, as current international thinking at the time of the Contract (DIFC ARB 003/2017, paras 30-32). In any event, Sir Jeremy found obiter that the State immunity defence had to fail by virtue of an issue estoppel, the proper interpretation of the waiver provision having already been the subject of the proceedings before the English courts (DIFC ARB 003/2017, para. 36).

On service, Sir Jeremy was understandably strict in finding that "the terms of Article 6 [of the Riyadh Convention on service of documents on a opponent party ('Legal and non-legal documents […] required to be served […] shall be dispatched') (my emphasis)] are self-evidently mandatory" (DIFC ARB 003/2017, para. 59) and required service on the Defendant in Iraq. This also applied to any inter partes application for disclosure of assets. No alternative method of service was admissible under the Riyadh Convention, regardless of the DIFC Courts' more generous rules of service. In this context, Sir Jeremy did not hesitate to confirm that the DIFC Courts, in turn, were bound by the terms of treaties that formed part of the domestic legal order of the UAE by virtue of Article 5 of UAE Federal Law No. 8 of 2004, including the Riyadh Convention. (DIFC ARB 003/2017, para. 57) As a consequence, the service of the Order had to be set aside, although the ex parte Order itself remained in place (DIFC ARB 003/2017, para. 60). In this context, Sir Jeremy confirmed that the Claimant was not in default of its obligations of full disclosure in support of its ex parte application for the Order given that in the prevailing circumstances (especially after having failed on a related account before the English courts), the Claimant could not have (reasonably) anticipated that the KRG would advance (afresh) a defence of State immunity (DIFC ARB 003/2017, para. 63), nor – given uncertainties in the translation of Article 6 of the Riyadh Convention that only emerged during the hearing before the Court – properly gauged the mandatory nature of that provision and the need for service of the KRG in Iraq, (DIFC ARB 003/2017, paras 65-66).

Finally, Sir Jeremy found obiter that taken altogether, the overall devious and recalcitrant behaviour exhibited by the KRG over the course of the legal proceedings ad datum, including its systematic attempts to avoid payment and delay the proceedings by advancing and withdrawing a section 68 action as well as evidence showing the KRG's attempts to conceal assets to avoid payment, meet the test for the risk of dissipation of assets to grant an order for disclosure of the KRG's assets worldwide. Sir Jeremy would have made an order to that effect had the Court's order for alternative service not been set aside.

These are all valuable lessons on the operation of the DIFC Courts' rules of service and the role that the defence of State immunity may play in proceedings before the Courts. It is reassuring to see that the DIFC Courts are not unduly impressed by arguments of sovereign immunity and by governmental award debtors that attempt to avoid compliance with arbitral awards entered against them at any cost. Sir Jeremy, correctly in my view, unerringly – even though obiter – found in favour of an order for disclosure of the KRG's assets worldwide, being no doubt determined to facilitate the successful enforcement of the awards through ring-fencing efforts made by the Claimant whilst prioritizing strict compliance with the rules of service under the Riyadh

Convention.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, September 7th, 2017 at 12:59 am and is filed under Dubai, Enforcement, English Arbitration Act, State Immunity
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.