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Anti-suit Injunctions Against Sovereign States: The English High Court Weighs In

Talia Zybutz (Twenty Essex) · Monday, August 15th, 2022

Can a court restrain a State from pursuing civil proceedings in a foreign jurisdiction? This was the question before the English High Court in *UK P&I Club N.V. and United Kingdom Mutual Steam Ship Assurance Association Ltd v República Bolivariana de Venezuela RCGS "Resolute"* [2022] EWHC 1655 (Comm). UK P&I Club N.V. (the "English Club") and its parent company (the "Dutch Club") (together "Claimants") sought a final anti-suit injunction against the Defendant, Venezuela, restraining it from pursuing proceedings in Dutch Curaçao and Venezuela.

While anti-suit injunctions are common in English courts, this injunction, had it been granted, would have been the first time the Courts took such action directly against a State (without the State having somehow provided its consent).

This is a relevant case for the doctrine of State immunity in England & Wales that provides important insight on the extent to which courts are willing to deal with States as they would with any other private party. Separately, the judgment provides an illustrative example of how parties that have not entered into an arbitration agreement can find themselves bound by one.

Background

In early 2020, the VL Naiguatá GC-23 ("Naiguatá"), a Venezuelan navy patrol vessel, was sent to intercept the RCGS Resolute ("Resolute"), an ice-classed cruise liner which engaged in tourism to Antarctica. An altercation between the vessels broke out and the Naiguatá sank.

Following the loss of its vessel, Venezuela brought civil claims in the courts of Dutch Curaçao and in Venezuela itself. These claims were worth around €125M and €300M respectively. The defendants to these claims were the Resolute, its owners and head managers, and the Claimants as the vessel's P&I insurer.

The Claimants' view was that, in substance, these claims sought to enforce the terms of the contract of insurance between the Dutch Club (as insurer) and its members, especially the owners (as assureds). This would mean that Venezuela was bound by the contract of insurance, including the London arbitration and English law clauses.

In February 2021, the Claimants commenced proceedings in England seeking an anti-suit

injunction restraining Venezuela from pursuing its foreign claims on this basis. The following month an interim anti-suit injunction was granted against Venezuela in ex parte proceedings.

Venezuela objected to this and on 4-5 May 2022 there was a hearing before Sir Ross Cranston to consider Venezuela's objections and whether the interim anti-suit injunction should be made final. Sir Ross Cranston's judgment is dated 28 June 2022.

Are Venezuela's claims within the scope of the arbitration agreement?

Unlike a 'standard' anti-suit injunction case, the arbitration clause that the Claimants were seeking to enforce was contained in an insurance contract to which Venezuela was not a party.

Sir Ross Cranston explained that, while normally considered a contractual remedy, anti-suit injunctions can also be granted on a "quasi-contractual" basis. For example, Venezuela was not a party to the insurance contract between the Claimants and the assureds, but if it wanted to rely on this contract in foreign proceedings, it would be bound by its terms (including the arbitration clause). The Claimants could therefore seek an anti-suit injunction against Venezuela on what is called a "derived rights basis". The key question was whether Venezuela was in fact relying on the contract in the foreign proceedings. Put another way, were Venezuela's claims in substance contractual?

There was no dispute on Curaçaon law: Venezuela accepted the evidence of Claimants' expert that these claims were subject to the terms of the insurance policy.

Competing experts from both parties debated this point in the context of Venezuelan law. However, the Court concluded that it had to focus on the nature of the right, not its source, and that, under Venezuelan law, a direct action by a third party against a liability insurer would be subject to the terms of the insurance contract.

This meant that all of Venezuela's foreign claims fell within by the arbitration clause, and its only remaining prospect of avoiding the effects of this clause was to claim sovereign immunity.

Can anti-suit injunctions be granted against States?

Venezuela made two arguments. First, it claimed immunity from the Court's jurisdiction under section 1 of the State Immunity Act 1978 (the "SIA"). Second, even if the Court had jurisdiction, it claimed to be immune from injunctive relief under section 13(2)(a) of the SIA.

Venezuela's first argument: State immunity

State immunity under the SIA is subject to a number of exceptions, including an exception applicable to cases where proceedings relate to a commercial transaction entered into by the State (section 3 of the SIA). The scope of this exception should be interpreted against the restrictive approach to State immunity generally, where there is an important distinction between claims arising out of a State's sovereign and non-sovereign acts.

Venezuela argued that its foreign litigation was a sovereign act. The proceedings related to a naval patrol vessel, and included claims for lost military equipment and environmental damage to sovereign territory. The Court disagreed and considered these were commonplace private law claims, and therefore, the commercial transactions exception applied.

So did the arbitration exception, which covers cases where a State agrees in writing to submit a dispute to arbitration (section 9 of the SIA). Given that Venezuela was not a party to the underlying insurance contract, practitioners may question how the "in writing" criteria is fulfilled here. Nevertheless, the Court was prepared to treat it as if it had been satisfied.

Venezuela's second argument: immunity from injunctive relief

So far, so difficult for Venezuela. At this point in the judgment, the Court had decided that Venezuela's foreign claims fell within scope of the arbitration agreement, and fell within the commercial transactions and the arbitration exceptions to the principle of State immunity.

Nevertheless, Venezuela succeeded in avoiding an anti-suit injunction by relying on the protection in section 13(2)(a) of the SIA. This provides that, subject to certain exceptions:

> *"relief shall not be given against a State by way of injunction or order for specific performance …"*

The Claimants countered this by arguing that section 13(2)(a) of the SIA was incompatible with their right to a fair trial under article 6(1) of the European Convention on Human Rights ("ECHR"). Article 6(1) of the ECHR provides (as relevant):

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

Legislation, so far as possible, needs to be read and given effect in a way that is compatible with ECHR rights (section 3 of the Human Rights Act 1998 ("HRA")). The Claimants argued that, as section 13(2)(a) was incompatible with their article 6(1) rights, it should be read as being limited to a State's sovereign activities.

As the Court considered article 6(1) to be engaged, the key question was whether the interference with that right caused by section 13(2)(a) of the SIA was justified.

The Claimants argued it could not be justified as it went beyond the requirements of customary international law in protecting States from anti-suit injunctions in respect of their non-sovereign as well as their sovereign acts. They argued that Venezuela could only show the interference was justified if (1) there was a binding rule of customary international law conferring immunity from anti-suit injunctive relief, or (2) a tenable view that customary international law mandates immunity from such relief.

The judge did not agree with this approach. He distilled five principles from the jurisprudence:

1. restrictions on article 6(1) are only justified if they pursue a legitimate objective by proportionate means and do not impair the essence of the claimant's right;
2. both customary international law and domestic policy may offer justification;
3. in the absence of a recognised rule of customary international law, the domestic rule is compatible with article 6(1) if it is within the range of possible rules consistent with current international practices;
4. the restrictive doctrine of customary international law is based historically on the idea that governmental acts of one state are not matters upon which the courts of other states will adjudicate;
5. there is an international consensus as to the scope of state immunity in favour of the restrictive doctrine.

As to the state of customary international law, the court considered that there was no clear and settled view regarding orders for injunctions against States. However, there was substantial uniformity in the view that criminal or financial penalties attached to coercive measures are of no effect against States. Section 13(2)(a) was therefore not an outlier, and the interference was justified as it fell within the range of possible rules consistent with current international standards.

In any event, the Court considered that section 13(2)(a) could be justified by domestic policy. In particular, section 13(2)(a) made sense as States cannot be held in contempt (the ultimate sanction for breaching an injunction), this was an area of international sensitivity touching on comity and procedural propriety, and even if the Claimants could not obtain an anti-suit injunction, they still had a remedy in damages for breach of the arbitration clause.

Finally, the Court concluded that even if article 6(1) had been breached, this was not an appropriate case for interpreting the underlying statute pursuant to section 3 of the HRA. In the Court's view, the changes suggested by the Claimants involved an exercise more akin to legislating than interpreting, and this was not the Court's place.

Conclusion

This case will be a stark warning for States seeking to rely on State immunity in the context of their commercial transactions. It is also a timely reminder that States (and other actors) may find themselves bound by arbitration clauses they did not expressly agree to. As to the anti-suit injunction, even in commercial dealings, States remain immune from this particular form of relief.

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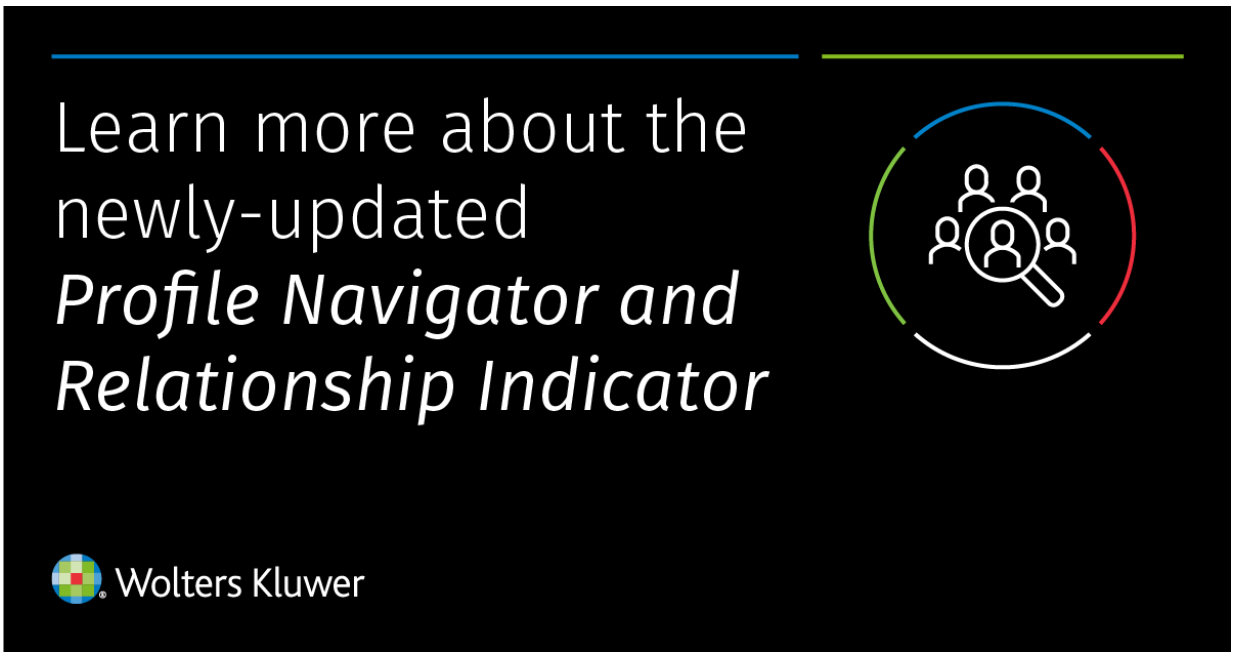

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