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Is the Last Bastion of State Immunity Under Siege? Some Reflections on the English High Court’s Decision in General Dynamics v Libya

Hannepes Taychayev (Assistant Editor for East and Central Asia) and Gladwin Issac (S&R Associates)
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The doctrine of immunity from execution, viewed as the “last bastion of State immunity“, has traditionally shielded sovereign assets from being used to satisfy adverse arbitral awards. While municipal laws on State immunity vary, the dominant view in modern international legal practice is that a State’s consent to arbitration, whether under a treaty or a contract, constitutes a waiver of immunity from jurisdiction, but not from execution. Immunity from execution generally requires a further express waiver. This principle is also codified under the English State Immunity Act 1978 (the “SIA”).

However, the English High Court (the “Court”) has departed from this default position in its recent ruling in *General Dynamics United Kingdom v The State of Libya* [2024] EWHC 472 (Comm) (“General Dynamics”). In this post, we dissect the Court’s decision in *General Dynamics* and reflect on its principal takeaways.

Background

The case relates to an award issued by a Geneva-seated ICC tribunal constituted pursuant to a Swiss law-governed contract executed between General Dynamics United Kingdom (“GD UK”) and the State of Libya (“Libya”) for the supply of communication and information systems to be installed in Libyan army vehicles (the “Contract”). GD UK, the award creditor, sought leave of the Court to enforce the award in the UK and execute it against Libya’s assets in the territory. The Court granted this permission and issued an interim charging order (“ICO”) against a Libyan asset in London. Libya applied to the Court to have the ICO discharged on the basis that the asset was immune from execution under SIA s.13(2)(b).

GD UK contended that Libya had waived its immunity under SIA s.13(3) by providing written consent in Clause 32 of the Contract (the “Arbitration Agreement”). Relevant to this argument were the third and last sentences of the Arbitration Agreement referenced below, in particular, the phrase “[…] and wholly enforceable […]” in the last sentence.

> […] The award shall be final and binding upon the Parties […] Both parties agree that the decision of the arbitration panel shall be final, binding and wholly enforceable. [Emphasis supplied]

In response, Libya submitted that clear language was required to constitute a valid waiver and that under Swiss State immunity law, any waiver must be express and cannot be implied. Therefore, the question before the Court was whether Libya's submission to arbitration under the Contract qualified as a waiver of its immunity from execution (and not only jurisdiction) within the meaning of SIA s.13(3).

Waiver of Execution Immunity Under the SIA

The increasing acceptance of the doctrine of restrictive immunity has influenced how municipal courts treat arbitration agreements entered into by States and State-owned entities ("SOEs"). Under this doctrine, the general principle of immunity applies only to the sovereign acts of a State, and not to the commercial acts (Article 10, United Nations Convention on Jurisdictional Immunities of States and Their Property).

Under the SIA, which adopts the restrictive theory of immunity, State immunity from jurisdiction is subject to certain exceptions – the 'commercial exception' in s.3(1)(a) and the 'arbitration exception' under s.9(1). The latter provides that a State's consent to arbitration waives its immunity from jurisdiction. The 'arbitration exception' has been interpreted by the English Court of Appeal, in *Svenska Petroleum Exploration v Lithuania,* to also include *exequatur* proceedings relating to the enforcement of foreign arbitral awards against a State, but not subsequent proceedings targeting the seizure of assets owned by that State.

Therefore, while an *exequatur* is the first step towards execution against assets, submission to arbitration only waives a State's immunity from proceedings before English courts for recognition and enforcement of the award. It does not waive the State's immunity from proceedings for execution of that award through measures of constraint on the State's assets. Although the SIA recognises a waiver of execution immunity under s.13(2)(b), this waiver must be express and in writing, and not implied. However, the SIA does not prescribe any form requirements for written consent under SIA s.13(3), which means that the validity of a waiver ultimately rests on the interpretation of the language contained in the waiver.

Waiver Through the Lens of the 'Good Faith' Principle Under Swiss Law

The starting point of inquiry for the Court was the interpretation of the language in the Arbitration Agreement under Swiss law, the governing law of the Contract. Only then could the Court determine if such language met the threshold for a waiver of execution immunity under English law, the law of the enforcement jurisdiction. With no evidence of the parties' subjective intentions at the time of execution of the Arbitration Agreement, the Court observed that the Arbitration Agreement must be interpreted objectively, based on the principle of 'good faith' under Swiss law. In the absence of any guidance on what this concept entails under Swiss law and since English law does not recognise a general duty of good faith in dealings between commercial parties, the Court

concluded that it should be interpreted as the understanding that a reasonable person, having the knowledge that the parties had at the time of contracting, would arrive at.

Applying this principle, the Court found that the true intention of the parties here was to enforce their respective obligations under the Contract, including those resulting from the Award. The Court reasoned that the phrase "[…] wholly enforceable" in the last sentence should have a distinct and significant meaning, separate from the preceding phrase "final and binding", which, having already been adopted in the third sentence, was found to be repetitive and surplus. In particular, the use of the qualifying adverb "wholly" indicated that the word "enforceable" was not meant to be limited in effect. Consequently, the Court viewed the phrase "wholly enforceable" in the final sentence as evidence of the parties intention to make an express waiver of execution immunity.

Furthermore, the good faith approach to the true meaning and effect of the Arbitration Agreement revealed that the parties intended that any resultant award be enforced as if it were between non-State actors and before the courts of any contracting State of the New York Convention. In light of the above, the Court held that the last sentence of the Arbitration Agreement constituted a valid waiver of Libya's immunity from execution (and not only jurisdiction) within the meaning of SIA s.13(3).

Key Takeaways

While at first glance, the Court's decision may seem to undermine the conventional notions of execution immunity, *General Dynamics* reflects a fresh, progressive judicial approach to this issue. The ruling not only factors in the reasonable expectations of the parties when submitting to arbitration but also the commercial context in which such agreement came to be reached. Here, Libya inadvertently agreed to its assets being attached to satisfy an adverse arbitral award. It failed to foresee that the addition of the qualifying adverb "*wholly*" to the word "*enforceable*" in the Arbitration Agreement could meet the relatively high threshold for an express waiver of execution immunity before an executing court.

Readers may note that *General Dynamics* is not the first instance of a court addressing the 'double waiver' argument – that a State's submission to an arbitration agreement constitutes a waiver of both jurisdiction and execution immunities. From an institutional arbitration-standpoint, this argument has had limited success, beginning with the decision of the French Court of Cassation in *Creighton v Qatar* ("*Creighton*") and followed by the decision of the US Court of Appeals for the Fifth Circuit in *Walker International v Congo* ("*Walker*"). These courts held that the incorporation by reference in arbitration agreements of the then applicable ICC Rules of Arbitration, 1998 – which under Article 28(6) (now Article 35(6) of the ICC Rules of Arbitration, 2021) dealt with the parties' duty to carry out the resulting award – constituted a waiver of immunity from execution.

That said, the 'double waiver' argument has not been received well, at least under English law. For instance, in *Orascom v Chad* ("*Orascom*"), the Court faced a similar issue but avoided ruling on it since the asset in question was used for commercial purposes and therefore, did not attract State immunity. However, Burton J. expressed reluctance to import the French and US law positions in *Creighton* and *Walker*, respectively, to English law (para 49). To that extent, one may argue that this part of the *Orascom* ruling is *obiter dicta*.

Nevertheless, it remains unclear why Pelling J. refused to address the "*Creighton argument*" (para

25) in *General Dynamics*. Perhaps, leaving aside any precedential value of the *Creighton* and *Walker*rulings before English courts, reliance on the applicable ICC Arbitration Rules (which were incorporated by reference in the Arbitration Agreement) was unnecessary as the 'written consent' requirement under SIA s.13(3) stood satisfied by the language in the Arbitration Agreement.

Returning to *General Dynamics* more specifically, two points are noteworthy.

First, state immunity from execution appears to be "out of place in the context of arbitration". Some courts, although still in minority, are now willing to look beyond the traditional lens of execution immunity and adopt an increasingly commercial and less deferential approach to execution immunity, holding States and SOEs to the same standards as non-State actors when they engage in commercial undertakings.

Second, the language (of the arbitration clause) matters. The absence of a form requirement for written consent under SIA s.13(3) means that English courts may find a valid waiver of execution immunity if the language in the dispute resolution clause could be interpreted to grant the award creditor an unqualified right, or imposes on the sovereign debtor an unqualified duty, to execute the resultant award. States and SOEs should, therefore, reflect on the precise language of the dispute resolution provisions in their contracts to avoid any unintentional waivers of execution immunity.

Looking to the Future

Despite *General Dynamics* being the first sign that the order of things may be changing, we understand that matters do not culminate here. The Court has granted permission to Libya to appeal, and it remains to be seen if the last bastion will be breached.

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