
DEFENCES TO ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS IN ENGLAND

1. Sovereign immunity as a defence to enforcement of foreign judgments and awards in England.

Overview

Sovereign immunity derives from the notion of equality of states. It is based on the premise that no state can interfere in the affairs of another foreign state by claiming jurisdiction over that state. Foreign states generally enjoy immunity from all types of claims, and, as a result, the rendering of an arbitral award against a state party will likely present additional enforcement and execution challenges. States vary in their willingness to enforce and execute awards against a foreign sovereign and its assets. Sovereign immunity from enforcement applies to the situation where a state is a party to enforcement proceedings instituted in England. The two questions for a relevant court to answer will be:

- whether a sovereign party is immune from the jurisdiction of the English courts in relation to the enforcement proceedings instituted before it (this is a question of state immunity from enforcement jurisdiction); and
- whether a sovereign asset on which the enforcement is sought is immune from the execution in England (this is a question of state immunity from execution).

State Immunity Act 1978

In the United Kingdom, sovereign immunity is governed by the State Immunity Act 1978 ("the Act"). The general provision under section 1 of the Act is that a foreign state is immune from the jurisdiction of the UK courts unless one of the exceptions in the Act applies.

Pursuant to section 14(1), the definition of a State includes the government or any department of the government of that jurisdiction. This does not include a "separate entity," which is "distinct from the executive organs of the government of the State and capable of suing or being sued." Under section 14(2), a separate entity will, however, be immune where the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune to such proceedings.

Sovereign Immunity from enforcement jurisdiction

Under section 9(1) of the Act, immunity to the jurisdiction of the UK courts is waived where a state or state entity is a signatory to an arbitration agreement, thereby expressly agreeing to submit a dispute to arbitration. Accordingly, in the United Kingdom, a valid arbitration agreement will be construed as a waiver of immunity and jurisdictional immunity will not ordinarily present itself as an issue as regards an arbitral tribunal.

In *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania* [2006] EWCA Civ 1529, the English Court of Appeal explained that "Arbitration is a consensual procedure and the principle underlying [section 9 of the Act] is that, if a state has agreed to submit to arbitration it has rendered itself amenable to such process as may be necessary to render the arbitration effective."

Accordingly, while not an issue that is exclusively of concern to states or state entities, the first issue to be considered in determining whether the defence of sovereign immunity may apply is whether the state or state entity has entered into a valid arbitration agreement. For example, a State may argue that it is not bound by an arbitration agreement because it was not a direct signatory.

Even where a state or state entity is a signatory, there are other challenges that could be made to the validity of the arbitration agreement. A State entity may assert, for example, that a waiver of immunity is not permitted by its national laws, and that it did not, therefore, have authority to enter into the arbitration agreement. Any objections as to the validity of an agreement to arbitrate need to be raised early in the proceeding in order to avoid the risk that the relevant party may lose the right to argue that there is no valid arbitration agreement under section 73 of the Arbitration Act 1996. This means that issues in relation to sovereign immunity tend to be raised at an early stage of the arbitration, at the same time as any other issues with respect to jurisdiction of the arbitral tribunal.

In such circumstances, the tribunal may rule on the issue in an award as to jurisdiction or address the issue in the final award on the merits. Alternatively, the tribunal may stay the proceedings while an application is made to the court under section 32 of the Arbitration Act 1996 (determination of preliminary point of jurisdiction).

Such issues can be raised at a later stage, provided that the state or state entity can show that at the time it took part in the arbitral proceedings, it did not know, or could not with reasonable diligence have discovered, the grounds for objecting to the jurisdiction of the tribunal (i.e., in relation to the issue of whether there is a valid arbitration agreement).

In *Svenska Petroleum*, the arbitral tribunal issued an interim award in which it found that the Government of Lithuania had validly agreed to submit disputes to arbitration, and accordingly that the tribunal had jurisdiction to determine the claim. The interim award was not challenged at the time, and a final award on the merits was given sometime later in favour of Svenska.

The Government challenged enforcement of the award on the basis of sovereign immunity. The Court of Appeal held that by failing to make an application to the court under section 32 of the Arbitration Act 1996, and by continuing to participate in the arbitration, the Government was estopped from denying that it had agreed to refer disputes to arbitration and that there was, therefore, no basis on which it could avoid enforcement on the grounds of sovereign immunity.

The case of *Tsavliris Salvage (International) Limited v The Grain Board of Iraq* [2008] EWHC 612 (Comm) on a challenge of an arbitration award by a state-owned entity, the Grain Board of Iraq (GBI). Tsavliris was the salvor and argued that GBI, as the owner of the cargo on the vessel, was liable for the cargo's portion of the salvage. Tsavliris had been successful in obtaining an arbitration award against GBI, but GBI

applied to challenge the award under section 67 of the Arbitration Act 1996 on the basis that:

- There was no valid arbitration agreement (as the owners of the cargo were not parties to the Lloyds Standard Form of Salvage Agreement, 2000 edition) and, therefore, the arbitrator had no jurisdiction to determine the question of GBI's liability; and
- GBI was not a separate entity, it was part of the Ministry of Trade (MOT) of the Republic of Iraq and it was therefore immune from the arbitration proceedings.

The case was decided in favour of Tsavliris on the first ground. The judge held that GBI had entered into a valid arbitration agreement and therefore no state immunity existed (pursuant to section 9(1) of the Act). Although the case was determined on this basis (i.e., that there was no sovereign immunity due to the existence of a valid arbitration agreement) the Judge went on to provide some helpful guidance on distinguishing between a department of government and a separate entity for the purposes of section 14(1) of the Act:

- A consideration of all the relevant circumstances is necessary to decide whether an entity is distinct from the executive organs of government. This determination does not depend on one single factor;
- A detailed analysis of the constitution, function, powers and activities of the party is likely to be essential; and
- Caution needs to be exercised before treating a party with separate legal personality as a department of government.

Having considered all of these matters, the court concluded that GBI was a separate entity that possessed a separate legal personality, together with financial and administrative independence. In reaching this conclusion, the Judge had regard to the fact that GBI's main function and purpose was to import grain, and that it was entitled to enter into contracts in its own name, without referring to the MOT for approval.

Having concluded that GBI was a separate entity, the Judge considered whether GBI would have attracted immunity under section 14(2) of the Act, in that it was acting in the exercise of sovereign authority. The Judge found that GBI would not have been entitled to rely on this provision in any event because entry into the salvage agreement was deemed not to have the character of a governmental act.

A landmark decision of the Supreme Court in *NML Capital Limited v Republic of Argentina* [2011] UKSC 31 confirms that states cannot claim immunity when facing enforcement in England of foreign adverse judgments in commercial cases. The case concerned a claim by NML to enforce a New York court judgment in England against the Republic of Argentina in relation to sovereign bonds issued by Argentina. The Supreme Court unanimously held that Argentina was not entitled to claim State immunity in respect of the enforcement proceedings. One of the key factors influencing the court was the fact that the bonds contained a widely drawn provision whereby Argentina agreed to submit to the jurisdiction of the English courts for the purposes of enforcement and to waive its immunity.

Recent case law on the sovereign immunity from enforcement

In *Pearl v Kurdistan* [2015] EWHC 3361 (Comm) the court considered immunity-based objections raised by the Kurdistan Regional Government of Iraq (KRG) in the context of an application for enforcement of a peremptory order issued by LCIA in a commercial arbitration relating to a petroleum contract. The judge rejected KRG's claims to sovereign immunity on the basis that KRG, as a "separate entity" within the meaning of section 14 of the Act, was not immune from the jurisdiction of the English courts since KRG was exercising its own sovereign authority, not that of the state of which it forms a part, that is, the Federal Republic of Iraq.

In *Gold Reserve v Venezuela*, [2016] EWHC 153 (Comm) the court analysed Venezuela's claim to immunity in the context of enforcement of an investment arbitral award. The award required Venezuela to pay damages to the claimant investor as compensation for violation of the investor's rights under the Canada-Venezuela Bilateral Investment Treaty. Gold Reserve submitted an ex parte application to the English court for permission to enforce the award as if it were a judgment of the court. Phillips J made the requested order ex parte on documents alone and the order was then served on Venezuela. Venezuela sought to set aside the order, invoking, among other things, immunity under the SIA and alleging a breach by the claimants' advisers of the duty of full and frank disclosure in ex parte proceedings. The court rejected the state's immunity plea on the grounds of waiver resulting from the state's standing offer to arbitrate the dispute with the investor under the Treaty. It followed that Venezuela could not rely on state immunity in the award enforcement proceedings. The dispute between Venezuela and Gold Reserve was settled in late February 2016.

Sovereign immunity from execution

The final hurdle will be to locate state-owned assets within the United Kingdom that are available for execution purposes under section 13 of the Act. The Act enables execution against a State's assets but only with the written consent of the State (section 13(3) of the Act) or where the relevant property is for the time being in use or intended for use for commercial purposes (section 13(4) of the Act).

Where State-owned property is not used or intended to be used exclusively for commercial purposes, it will not be possible to execute a judgment or award against those assets. The English courts are, therefore, unlikely to allow execution against certain categories of assets belonging to States, such as the property of a State's central bank or other monetary authority or the property of a diplomatic mission. In *Alcom v. Republic of Colombia* [1984] AC 580, enforcement was not permitted in respect of a bank account used to make payments both in relation to commercial transactions as well as by the Republic of Colombia's diplomatic mission in the United Kingdom.

In *SerVaas Incorporated v Rafidain Bank & Republic of Iraq & Ors* [2012] UKSC 40 the Supreme Court provided guidance on the scope of the "commercial purposes" exception from immunity from execution, and, in particular when it can be said that property is "in use or intended for use for commercial purposes" pursuant to section 13(4) of the Act. It has confirmed that the origin of the property against which execution is sought is irrelevant in this analysis. In this case, it could not be said that the assets were in use for commercial purposes and, since it was not possible to look to their origins for assistance in this regard, they were held to be immune from execution.

Given that the commercial purpose exception is more limited than previously considered, it is likely that many judgment debts will now be more difficult to enforce against states. The decision is a useful reminder that the commercial purpose exception is an important tool when enforcing against states but has limitations that need to be borne in mind. Where no current commercial use is found, a creditor will not be able to look to any commercial origins or intentions for assistance. It is, however, conceivable that in some situations the origins of an asset may have been sovereign in nature (for example if purchased with tax revenues) whilst the current use is commercial (such as security on a loan or payment for goods). In such cases this judgment clarifies that the asset would fall within the exception and not be immune from enforcement.

This judgment follows closely behind the Privy Council decision in *FG Hemisphere Associates LLC* which limited whom state debts could be enforced against. It was held in that case that only in "quite extreme" circumstances will a state-owned entity be equated with the state and vulnerable to enforcement action by a creditor of the state. Together these cases highlight the importance of giving careful consideration both to exactly who the relevant entity is and the purpose of the assets. Where possible, these points should be considered when entering into a contract rather than at the enforcement stage.

States, for their part, will, as a result of this decision, have more chance of shielding assets from enforcement where they had an original commercial purpose but are not currently used for entirely commercial purposes.

Conclusion

The law as regards sovereign immunity differs from jurisdiction to jurisdiction. Many jurisdictions follow similar principles to the UK (a restrictive approach to the sovereign immunity), however, there are jurisdictions (including Hong Kong and China) which maintain the principle of absolute immunity from execution, so no exception can be made for commercial purposes. Whether it is possible to enforce in those jurisdictions will depend on whether the entity in question is in fact a state owned entity.

Steven Philippsohn
PCB Litigation
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