SLAUGHTER AND MAY/

MAY 2025

ENFORCEMENT OF AWARDS AGAINST STATES: EXCEPTIONS TO STATE IMMUNITY

In two recent decisions, the Court of Appeal has provided important guidance on the English courts' approach to the rules on state immunity, finding in both cases that exceptions to state immunity applied.

The Court of Appeal has delivered two significant judgments on the scope of state immunity (or sovereign immunity) in relation to separate attempts by states to resist enforcement of arbitral awards against them.

In *General Dynamics v Libya*, the Court of Appeal found that the phrase "final, binding and wholly enforceable" in an arbitration agreement constituted written consent within the meaning of section 13(3) State Immunity Act 1978 (SIA78). The majority of the Court found that this wording alone was enough to waive Libya's immunity from execution against its assets for the purposes of enforcing an arbitral award.

In *Hulley & Ors v Russia*, the Court of Appeal held that a foreign court judgment can create an issue estoppel preventing a state from re-arguing whether an exception to state immunity under the SIA78 applies, in this case whether Russia had agreed to submit a dispute to arbitration for the purposes of section 9 SIA78.

Both decisions offer guidance for commercial parties seeking to enforce arbitral awards against states in the UK, and, where negotiating positions allow, they are a helpful reminder of the importance of clear drafting to carve outs from state immunity.

State immunity

Where private commercial parties transact with states and state-owned enterprises, the ability of the commercial party to bring claims against the state should the state default on its obligations and the extent to which the commercial party can enforce any resulting arbitral award or court judgment against the state's assets are often key considerations.

State immunity is a general rule of customary international law which under English law is applied principally through the SIA78.

The general rule is that a state is immune from adjudication and enforcement by the UK courts. The UK courts have no jurisdiction to adjudicate (i.e. hear and determine) disputes with states (section 1), unless an exception in the SIA78 applies, such as where a state agrees in writing to submit a dispute to arbitration (section 9).

Even where a state has waived its immunity from suit, it may not have waived its immunity from enforcement of any resulting court judgment or arbitral award. The UK courts will not enforce a judgment or award against the property of a state (section 13(2)(b)) or grant interim or final relief against a state such as an injunction or an order for specific performance (section 13(2)(a)). Again, these restrictions are subject to certain narrow exceptions, for example where the state has given "written consent" to enforcement (section 13(3)).

General Dynamics v Libya

In *General Dynamics v Libya*, a dispute arose in relation to a contract under which UK-based company GDUK agreed to supply Libya with a defence communications system. The contract was governed by Swiss law and contained an ICC arbitration agreement which provided that the decision of the arbitral tribunal "shall be final, binding and wholly enforceable".

A £16 million arbitral award was issued in favour of GDUK. The English High Court gave GDUK permission to enforce the award in the UK and subsequently made a

final charging order over property owned by Libya in London. Libya challenged the High Court's decision arguing it was immune from execution against its property.

The Court of Appeal's decision

The Court of Appeal unanimously upheld the decision of the High Court, finding that under the terms of the parties' arbitration agreement Libya had provided "written consent" to execution against its property for the purposes of sections 13(2)(b) and 13(3) SIA78.

"Clear words" not required by section 13(3) SIA78

The Court of Appeal first considered the requirements of section 13(3) SIA. It held that a court must determine whether and to what extent a state gave its consent by construing the words used according to the relevant applicable law (in this case Swiss law as the law governing the underlying contract). There was no requirement to use any specific wording such as "consent" and it was unclear what would be required, beyond that the words used show consent, for that consent to be regarded as "express". As it was already the case that words would not be construed as giving consent if they express an intention which is unclear or equivocal, there was no scope for an additional requirement for "clear words" as contended for by Libya.

"Wholly enforceable" can amount to a state's consent to execution

Turning to the second ground, the Court of Appeal unanimously found that the wording in the arbitration agreement constituted Libya's written consent to execution of its property within the meaning of sections 13(2)(b) and 13(3).

Phillips LJ, who gave the leading judgment, considered that the words "final, binding and wholly enforceable" of themselves were insufficient to constitute consent to execution. However, the arbitration agreement incorporated the ICC Rules through which the parties had undertaken "to carry out any award without delay" (Article 28(6)). Phillips LJ noted that this provision had been interpreted by courts in other leading arbitral jurisdictions as amounting to a waiver of execution immunity and considered the same approach should be taken in this jurisdiction.

Zacaroli LJ and Lewison LJ agreed with Phillips LJ but found that the words "wholly enforceable" in themselves were sufficient to constitute consent to execution. They both considered that this wording should be interpreted as constituting Libya's submission to the whole process of enforcement, including recognition of an award and execution.

Hulley & Ors v Russia

In *Hulley & Ors v Russia*, the Court of Appeal considered whether an earlier finding by the Dutch courts that Russia had agreed to submit a dispute to arbitration created an issue estoppel preventing Russia from re-arguing the point before the English courts when determining whether Russia was immune from the jurisdiction of the English courts.

The Court of Appeal's decision follows a long-running arbitration dispute in which Russia was found to have breached its obligations under the Energy Charter Treaty and ordered to pay more than US$ 50bn (plus interest) to the claimants, former majority shareholders in OAO Yukos Oil Company. The claimants sought recognition and enforcement of the awards in the English courts. Russia challenged the jurisdiction of the English courts, arguing that it was immune (section 1 SIA78) and the exception in section 9 SIA78 did not apply as Russia had not agreed to submit the dispute to arbitration. Russia also challenged the awards in the Dutch courts and the English enforcement proceedings were stayed pending the outcome of that challenge. The Hague Court of Appeal dismissed Russia's challenge, finding that there was a valid arbitration agreement between the parties, and its decision on the issue was later upheld by the Dutch Supreme Court (although some other issues are still pending before the Dutch courts).

The stay on the English enforcement proceedings was partially lifted for determination of certain preliminary issues. The English High Court held that the Dutch courts' decision created an issue estoppel preventing Russia from re-arguing before the English court whether it had validly agreed to submit the dispute to arbitration. Russia appealed to the Court of Appeal.

The Court of Appeal's decision

The Court of Appeal unanimously rejected Russia's appeal, finding that the English court could rely on an issue estoppel arising from the decision of a foreign court in deciding whether an exception to state immunity (here the section 9 arbitration exception) applied.

In the Court of Appeal's view, when the English court gives effect to an issue estoppel, whether arising from an English or a foreign court judgment, it was not correct to say that the English court was not deciding the issue at all. Rather, the issue estoppel meant that any evidence seeking to contradict the earlier judgment was not relevant. Therefore, in this case, the High Court had not declined to determine whether Russia had agreed to

submit the dispute to arbitration. Instead, the High Court had determined that Russia had so agreed, applying the English law principle that when the requirements for an issue estoppel are met, the previous decision of a court of competent jurisdiction was conclusive on the relevant issue. Issue estoppel created a substantive right recognised in English law and there was nothing in the SIA78 that deprived a party of that right, nor prescribed how a court should decide whether an exception to immunity to applied.

The Court of Appeal also held that there was no conflict on public policy grounds between applying the principle of issue estoppel and respecting state immunity.

Takeaways

For private commercial parties which enter contracts with states and state-owned enterprises (or invest in reliance on investment treaty protections), commercial parties' recourse against states which renege on their obligations remains a perennial issue. Even where states waive their immunity to adjudication (e.g. by agreeing to arbitrate), questions may remain over the potential to successfully enforce any resulting judgment or award.

The Court of Appeal judgments provide welcome guidance for commercial parties seeking to enforce and execute arbitral awards against states in the UK.

The decision in *Hulley* confirms that if a foreign court has already found on the facts that a state has consented to arbitration, the state will not be able to argue otherwise in enforcement proceedings before the English courts and the arbitration exception to state immunity will apply. Although SIA78 is understood to be a 'comprehensive' and 'complete code' on state immunity, the English courts will apply ordinary principles of English law when determining whether an exception to state immunity applies.

The decision in *General Dynamics* provides helpful clarification on the requirements for "written consent". However, the differing views expressed by the members of the Court on the meaning of "wholly enforceable" and whether that is sufficient to constitute "written consent" leaves scope for uncertainty and highlights the need for clear and unambiguous drafting in waiver of sovereign immunity and arbitration agreements (where negotiating positions allow).

That said, the Court of Appeal's decisions may not be the final word as the states in both cases have sought permission to appeal the Court of Appeal's judgments to the Supreme Court.

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