FOREIGN STATE IMMUNITY AND ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS: ISSUES IN GOLD RESERVE INC V THE BOLIVARIAN REPUBLIC OF VENEZUELA [2016] EWHC 153 (COMM)

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HIGH COURT JUDGMENT ENFORCEMENT OF AN ICSID AWARD AGAINST THE REPUBLIC OF VENEZUELA

Monica Feria-Tinta examines State immunity issues in the recent High Court decision *Gold Reserve Inc v Venezuela* concerning the enforcement of an ICSID award of US$713 million (plus interests and costs) against a Sovereign State, by reference to the wider context of State immunity principles under international law, as reflected in the State Immunity Act 1978.

The case brought to centre-stage important procedural questions tied to issues of State immunity concerning the recognition and enforcement of awards against foreign States under English law.

"From the date of execution of the arbitration agreement throughout the proceedings and, ultimately, at the time of enforcement of an award, the presence of a State party to the dispute gives a particular coloration to the arbitration process"- observed a publicist writing on international arbitration, back in the 1980's.[1] That *particular coloration* in the context of enforcement of an international award against a Sovereign State refers to issues of State immunity. But State immunity is not a single brick-like notion. To a public international law mind, it translates immediately into two separate, in the words of the International Court of Justice ("ICJ"), *distinct*, notions: Jurisdictional Immunity (immunity from suit) and Enforcement Immunity.[2]

As a general rule, whilst "a State is not entitled to plead immunity from jurisdiction once it has agreed to submit a dispute to arbitration" ("by agreeing to arbitrate a dispute, the State essentially waives the immunity from jurisdiction defence"),[3] "immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts".[4] As put by the ICJ, "[e]ven if a judgment has been lawfully rendered against a

foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory." [5]

The UK State Immunity Act 1978, which governs the law of state immunity in the United Kingdom, "embodying the 'restrictive' theory of state immunity"[6], reflects this distinction between jurisdictional and enforcement immunity. Under the 1978 State Immunity Act, "[...] waiver of immunity from jurisdiction does not per se entail waiver of immunity from execution of any resulting judgment [or for the purposes of this article, award]" as for that, "a separate waiver is required"[7]. Thus, "submitting to the jurisdiction of the courts is not to be regarded as a consent to execution"[8]. In the same vein, voluntary submission to jurisdiction [as in the case of arbitration, by means of an arbitration agreement], "does not extend to measures of execution". [9]

To a practising public international law mind, drawing the precise contours of such two distinct notions, jurisdictional and enforcement immunity, require the use of even thicker a lens than the one used at merely theoretical level when legal notions are put into motion by means of procedure. Further precisions are to be made.

What immunity?

What immunity–if any- is involved in the enforcement of an international arbitral award in the forum State where a party is seeking its enforcement? Or to put it more sharply, what type of immunity may be at stake *in an application for leave to enforce an award?*

Indeed, "[e]xecution proper can ensue only after recognition of the award in the form of a confirmation, an exequatur, or similar proceedings."[10] If in the past the nature of such proceedings was still a matter of controversy "in the sense that they m[ight] be regarded as the ultimate phase of the arbitration process or as the preliminary phase of execution",[11] this has gained clarity today. Recognition of an award and execution are two different notions. The proceedings for recognition are jurisdictional in nature (and covered by a waiver of jurisdictional immunities), the execution, governed by the rules on

KEY TAKEAWAYS

Recognition of an award and execution are two different notions. The proceedings for recognition are jurisdictional in nature (and covered by a waiver of jurisdictional immunities), the execution, governed by the rules on enforcement immunities.

Underlying the case is the fundamental question of what is the correct method by which court proceedings are to be served on States in the context of enforcement of awards in England and when is an ex parte order appropriate.

Gold Reserve v the Bolivarian Republic of Venezuela leaves us with an unsettled statement of the law in that regard. The procedural questions it raises remain issues to be clarified in the future by the English courts.

enforcement immunities.

English Courts dealt with the question in *Svenska Petroleum Exploration v Lithuania.*[12] The point turned on the construction of Section 9 (1) of the 1978 State Immunity Act, which reads:

> "Where a State has agreed in writing to submit to a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

Counsel for Lithuania argued that "proceedings which relate to the arbitration" within the meaning of Section 9 of the 1978 State Immunity Act, are concerned only with proceedings relating to the conduct of the arbitration itself and do not concern proceedings to enforce any award which may result from it. His reasoning understood by proceedings to enforce, those including the proceedings to turn the award into an order of the court on which the execution could be levied. The Court of Appeal rejected this. It held that an application for leave to enforce an award as a judgment is the final stage in rendering the arbitral procedure effective and that it falls within section 9(1) of the State Immunity Act. That is, that such proceedings are jurisdictional in nature.

The correctness of that approach has been recently tested in the Jurisdictional Immunities case, where the ICJ held that the court seized of an application for exequatur of a foreign judgment rendered against a State has to ask itself "whether the respondent State enjoys immunity from *jurisdiction.*"[13]

As English Courts continue to be busy with regards to the enforcement of foreign arbitral awards, issues of State immunity tied to issues of procedure, may increasingly come centre-stage as in the recent case of *The Gold Reserve Inc v The Bolivarian Republic of Venezuela*, decided on 2 February by the High Court.

Gold Reserve Inc v The Bolivarian Republic of Venezuela

The High Court in London issued a judgment in respect of an application made by the Republic of Venezuela to set aside an order made ex parte granting leave to enforce an arbitration award against Venezuela. The order had been obtained by Gold Reserve Inc ("GRI"), seeking to enforce an arbitral award issued under the Additional Facility rules of the International Centre for Settlement of Investment Disputes ("ICSID") on 22 September 2014, by a tribunal with seat in Paris.[14] The arbitration referred to mining concessions and mining rights in the Brisas Project, originally held by a Venezuelan company, acquired in 1992 by Gold Reserve de Venezuela, a subsidiary of Gold Reserve Corp, a company incorporated in the US, whose parent company since October 1998 had been GRI, a Canadian company. The tribunal had found Venezuela in breach of a Bilateral Investment Treaty between Canada and Venezuela, in detriment of GRI, and had ordered Venezuela as a consequence, to pay US$713 million to GRI plus interests and costs.

In its application to set the ex parte order aside, Venezuela submitted that the Court "had no power to make an order against Venezuela" by reason of state immunity. In particular, it argued that it was immune from the jurisdiction of the English courts, and had not lost that immunity, because it had not agreed to arbitrate with the party who had sought permission to enforce the award, Gold Reserve Inc. In other words, Venezuela's central point on immunity was that no waiver of *jurisdictional immunity* had taken place. In addition, Venezuela maintained that the arbitration claim form ought to have been served pursuant to section 12 of the 1978 State Immunity Act[15] (it was not), and that there was no-disclosure of material matters by GRI when applying *ex parte*.

In its judgment of 2 February, Mr. Justice Teare upheld the ex parte order. In a key passage of its judgment he stated:

When a judge is faced with an application for permission to enforce an award against a state as if it were a judgment the judge will have to decide whether it is likely that the state will claim state immunity. If that is likely then he would probably not give permission to enforce the award but would instead specify (that being the language of CPR part 62.18(2)) that the claim form be served on the state and consider whether it was a proper case for granting permission to serve out of the jurisdiction. He would envisage that there would be an inter partes hearing to consider the question of a state immunity. For that reason any applicant for permission must draw the court's attention to those matters which would suggest that the state was likely to claim state immunity. Indeed, since the court is required by section 1(2) of the State Immunity Act to give effect to state immunity even though the state does not appear, it is important that the court be informed of the available arguments with regard to state immunity.[16]

"WHAT TYPE OF IMMUNITY MAY BE AT STAKE IN AN APPLICATION FOR LEAVE TO ENFORCE AN AWARD?"

CPR part 62.18(2)) which sets the procedural requirements relating to the enforcement of awards (to be read in conjunction with the 1978 State Immunity Act when enforcing an award against a State) reads:

Enforcement of awards
62.18
(1) An application for permission under –
(a) section 66 of the 1996 Act11;
(b) section 101 of the 1996 Act;
(c) section 26 of the 1950 Act12; or(d) section 3(1)(a) of the 1975 Act13, to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.
(2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.
(3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part.
(4) With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.
[...].
(6) An application for permission must be supported by written evidence – (a) exhibiting – (i) where the application is made under section 66 of the 1996 Act or under section 26 of the 1950 Act, the arbitration agreement and the original award (or copies); (ii) where the application is under section 101 of the 1996 Act, the documents required to be produced by section 102 of that Act; or (iii) where the application is under section 3(1) (a) of the 1975 Act, the documents required to be produced by section 4 of that Act; (b) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award; and (c) stating either – (i) that the award has not been complied with; or (ii) the extent to which it has not been complied with at the date of the application. (7) An order giving permission must – (a) be drawn up by the claimant; and
(b) be served on the defendant by – (i) delivering a copy to him personally; or (ii) sending a copy to him at his usual or last known place of residence or business.
(8) An order giving permission may be served out of the jurisdiction – (a) without permission; and
(b) in accordance with rules 6.40 to 6.46 as if the order were an arbitration claim form.
(9) Within 14 days after service of the

> *order or, if the order is to be served out of the jurisdiction, within such other period as the court may set – (a) the defendant may apply to set aside the order; and (b) the award must not be enforced until after – (i) the end of that period; or (ii) any application made by the defendant within that period has been finally disposed of. (10)The order must contain a statement of – (a) the right to make an application to set the order aside; and (b) the restrictions on enforcement under rule 62.18(9)(b). [...]*

In the case in question, GRI had failed to inform the Court that "Venezuela was likely to rely upon state immunity". Although it was clear from the award presented to the judge, that throughout the arbitration Venezuela had challenged that GRI was an "investor" for the purposes of the BIT (and that therefore had been an arbitration agreement with GRI), and known that Venezuela had continued to rely on State Immunity in proceedings in Paris seeking the annulment of the award, and in proceedings in Luxembourg, the party seeking the enforcement of the award had failed to "summarise the arguments" on State Immunity on which Venezuela continued to rely, "for the benefit of the judge".[17] Teare J stated:

> *"[...] Mr Miller told the court in unqualified terms that Venezuela was not entitled to state immunity. On an ex parte application, as Bingham J, stated in Siporex Trade v Comdel at p.437, the applicant "must ... identify any likely defences". Consistently with that guidance Mr Miller ought to have identified what Venezuela might say in relation to the proposition that it was not entitled to state immunity.*[18]

He therefore concluded that GRI had failed to give full and frank disclosure. "Had GRI given full and frank disclosure with regard to the state immunity defence. I had no doubt that an ex parte order would not have been made", Teare J held.[19] Likewise it would have been required that the arbitration claim form be served on Venezuela. [20]

Despite the "serious failure to give full and frank disclosure", Teare J maintained the order but marked the claimant's failure with an appropriate order as to costs, [21] as he concluded, following an inter parte hearing in the context of the application to set the order aside, that GRI was an investor for the purposes of the BIT.

Teare J found that the GRI satisfied the definition of investor under the Venezuela-Canada BIT (to whom Venezuela had made an offer to arbitrate), but it found so on a narrower basis than the arbitral tribunal. In his examination of whether there had been an agreement in writing for the purposes of section 9 of the State Immunity Act 1978 he found that there existed such an agreement.

"SHOULD FAILING TO DISCLOSE THE INTENTION OF THE OPPOSING PARTY TO RAISE SOVEREIGN IMMUNITY ISSUES HAVE FOR SOLE CONSEQUENCE THE PAYING OF COSTS? OR ARE MORE FUNDAMENTAL PRINCIPLES AT STAKE?"

Venezuela submitted that GRI was not an investor under the BIT because it had not made an investment in the territory of Venezuela but only acquired the indirect ownership of shares and mining rights "without taking any active step of its own by way of commitment of money or resources to the economy of Venezuela in connection with that acquisition".[22] The State argued that what had taken place had been a merger and share swap between a US parent company and its own subsidiary, (effectively a corporate restructuring) which did not constitute making an investment required by the BIT. Teare J agreed with Venezuela, that mere passive

ownership of an asset is insufficient to satisfy the test of being an "investor". "An active relationship between the investor and the investment" is required.[23] He found, however, that GRI qualified as investor not because of how it had acquired the Brisas Project, but because in subsequent years GRI had expended nearly US$300 million in developing the Brisas Project.[24] It was this US$300 million which qualified as investment under the treaty, in his judgment. It was held as a consequence that Venezuela had lost its right to rely on state immunity in the proceedings.

Sovereign procedural rights

A number of procedural-related questions arise from the decision.

Should failing to disclose the intention of the opposing party to raise sovereign immunity issues have for sole consequence the paying of costs?

Or are more fundamental principles at stake?

The rationale of the judge was a practical one. He subsequently reached the conclusion that GRI was an investor for the purposes of the Venezuela-Canadian BIT and a party to an arbitration agreement in writing with Venezuela, within the terms of section 9 of the State Immunity Act 1978, concluding that therefore Venezuela did not enjoy jurisdictional immunity.

The issue nevertheless is, whether such inter parte hearing and decision of the judge subsequently, be purported, to give legality retrospectively to an ex parte order that in accordance with the procedural rights of the State at that point in time, should have not been given.

Further, Teare J took the view that this all came about as a failure of the claimant to make a full and frank disclosure. But admittedly he acknowledged also duties of the court to give effect to state immunity even when the State does not appear. It would follow that the court had an independent duty before issuing an ex parte order, to ensure that no state immunity defences were intended to be raised, in particular, in the face of the circumstances of the case where throughout the proceedings the State had claimed not to have waived immunity.

Underlying the case is the fundamental question of what is the correct method by which court proceedings are to be served on States in the context of enforcement of awards in England and when is an ex parte order appropriate. That is, a fundamental question of due process. At stake after all are the procedural rights of a State in the context of being impleaded before the courts of another State.[25]

Gold Reserve v the Bolivarian Republic of Venezuela leaves us with an unsettled statement of the law in that regard.The High Court granted permission to appeal to the Court of Appeal in the case. However, as news emerged of the parties having reached a settlement out of court,[26] such procedural questions may remain issues to be clarified in the future by English courts.

EndNotes:

1. G Dealume, "State Contracts and Transnational Arbitration", (1981) 75 AJIL 784, at p. 785.

2. Jurisdictional Immunities of the State (Germany v Italy-Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, at para. 113. ["Jurisdictional Immunities case"]

["Jurisdictional Immunities case"]

3. H Bagner "Article I", in H Kronke, P Nacimiento et al, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Wolters Kluwer, 2010, at p. 27.

4. Jurisdictional Immunities case, at para. 113.

5. Ibid.

6. I Brownlie, Principles of Public International Law, OUP, Fifth Edition, p. 340.

7. J Crawford, "Execution of Judgments and Foreign Sovereign Immunity", (1981) 75 AJIL 820, at 860.

8. I Brownlie, op cit at p. 342.

9. Ibid., p. 343.

10. G Dealume, op cit, p. 815.

11. Ibid.

12. Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and another (No 2) [2006] EWCA Civ 1529.

13. Jurisdictional Immunities case, op cit, para.130. Emphasis added.

14. Gold Reserve Inc and Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/09/1.

15. Section 12 of the 1978 State Immunity Act reads:
Procedure
12 (1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.
[...]

16. § 71.

17. § 72

18. § 74.

19. § 76.

20. § 91.

21. § 91.

22. § 19.

23. § 37.

24. § 46.

25. Recent developments in the US show that in other common law jurisdictions, the non-permissibility of ex parte proceedings in the context of enforcement of awards against foreign States is gaining support. See, for example, a recent US government Amicus Curiae intervention before the US Court of Appeals for the Second Circuit dated 30 March 2016 in Mobil Cerro Negro, Ltd v Bolivarian Republic of Venezuela.

26. GAR, " Venezuela settles with Gold Reserve", 25 February 2016.