2021 ROUNDUP: INTERNATIONAL ARBITRATION IN THE COURTS

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Members of Brick Court Chambers were involved in a number of significant cases in the courts that concerned international arbitration. This note summarises some of the salient points arising in these cases.

STATE IMMUNITY

Section 1(1) of the State Immunity Act 1979 (the SIA) provides that a "*State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act*". Section 1(2) of the SIA requires a court to give effect to state immunity even though the state does not appear in the proceedings in question. Part 1 of the SIA therefore provides a complete code governing the circumstances in which a foreign state may be impleaded before the domestic courts.

In the context of international arbitration, the most relevant exception is set out in section 9 of the SIA, which provides that:

> Where a State has agreed in writing to submit 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.

Section 9 encompasses enforcement proceedings: *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2007] QB 886. Section 9 further encompasses enforcement of a foreign judgment upholding the arbitration award and awarding interest: *L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm).

There were a number of developments in the law on state immunity in the context of enforcement proceedings in 2021. Two of those cases are addressed below.

The court's jurisdiction to grant interim remedies against States

In ***Tethyan Copper Company v Islamic Republic of Pakistan & Others***, the Eastern Caribbean Court of Appeal (Pereira CJ, Webster and Theodore JJA) considered the jurisdiction or power of an appellate court to grant interim relief against a State pending appeal.

After nearly eight years of arbitration under the ICSID Convention, Tethyan Copper Company (TCC) was granted an award against the Islamic Republic of Pakistan for a sum in excess of US$6.2 billion. TCC applied without notice to the BVI court to register and enforce the award

against Pakistan as well as for injunctive relief against various other respondents. Additionally, TCC applied for charging orders over shares held directly or indirectly by the second respondent, Pakistan International Airways Corporation Ltd ("PIAC"). TCC argued that PIAC Pakistan is, in effect, a government department of Pakistan.

A number of *ex parte* orders were made by the High Court, including provisional charging orders to secure a sum of US$3b over the issued share capital of a number of the BVI companies; injunctive relief; a receiver was appointed over the shares, the business and the assets of the Third and Fifth Respondents. The Respondents sought to discharge the orders on a several grounds, including state immunity.

Part 1 of the SIA concerns immunity from the adjudicative jurisdiction of the court. A separate question arises in relation to immunity from enforcement, which is governed by section 13 of the SIA. TCC addressed Pakistan's immunity from enforcement, but failed to bring to the court's attention issues concerning Pakistan's immunity from the adjudicative jurisdiction of the court. Wallbank J granted the Respondents' application to discharge the orders, including on the ground of failure to provide full and frank disclosure. Wallbank J stated at [42] that "*in light of the fact that TCC knew that Pakistan was pursuing arguments on adjudicative immunity in two other jurisdictions, it was incumbent upon TCC to bring this to the court's attention*". However, Wallbank J allowed a short stay of his judgment to allow TCC to make an application to the Court of Appeal.

TCC applied to the Court of Appeal for a stay of the judge's order discharging the injunctions or alternatively for the grant of injunctions pending the hearing of its appeal. The Court of Appeal considered a number of authorities, including the recent case of *Hulley Enterprises Ltd. and Others v Russian Federation* [2021] EWHC 894, in which Henshaw J decided that the court did not have jurisdiction under section 103(5) of the Arbitration Act 1996 to make an order for security for costs in circumstances where the Russian Federation had challenged the court's jurisdiction on the grounds of state immunity and that question had yet to be determined. Henshaw J considered previous authorities and distilled the following point of principle at [227]: "*until questions of state immunity have been determined, the court has no power to determine other questions, whether of jurisdiction or otherwise, over and above the court's 'jurisdiction' to decide the immunity issue*". Applying a similar rationale, the Court of Appeal concluded at [31]:

> As the matter currently stands before this Court, state immunity exists and continues to so exist until such time as TCC brings an appeal and is successful thereon. Accordingly, the Court was of the view that in the circumstances, immunity having been determined, the court is not empowered, given the clear wording of sections 1(1) and 1(2) of the SIA, to assume jurisdiction over Pakistan at this stage and grant the interim relief sought.

Vernon Flynn QC represented the Islamic Republic of Iran, instructed by Ogier.

Service of an order granting permission to enforce an arbitration award

In ***General Dynamics United Kingdom Ltd. v The State of Libya*** [2021] UKSC 22, [2021] 3 WLR 231, the Supreme Court considered whether section 12(1) of the SIA applied in the context of the enforcement of an arbitration award against a foreign state in circumstances that rendered service through diplomatic channels unduly difficult. Section 12(1) provides that:

> Any writ or other document required to be served for instituting proceedings against a state shall be served by being transmitted through the Foreign, Commonwealth and Development 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.

The majority judgment was given by Lord Lloyd Jones JSC (with whom Lord Burrows JSC agreed). Lady Arden JSC gave a short concurring judgment. Lord Stephens JSC (with whom Lord Briggs) gave the dissenting judgment. The Supreme Court addressed two key issues.

The first issue before the Supreme Court was whether section 12(1) always required the service of a document through the Foreign, Commonwealth & Development Office (FCDO) when impleading a foreign state before the domestic courts.

The context of the case was enforcement of an arbitration award pursuant to section 101 of the Arbitration Act 1996, where the relevant procedure as set out in CPR rule 62.18 provides that an application for permission may be made without notice in an arbitration claim form, the court *may* require the claim form to be served, and an order giving permission *must* be served on the defendant. The claimant's case, which succeeded in the Court of Appeal, was that the document instituting the proceedings was the arbitration claim form, which was not required to be served. In contrast, the order for permission, which was required to be served, did not institute the proceedings. Therefore, on the claimant's case, the enforcement of an arbitration award against a state fell outside the scope of section 12(1) altogether.

The majority rejected this approach and found that section 12(1) always required service of a document through the FCDO when instituting proceedings against a foreign state. Given that section 12(1) was applicable, rules of court could not oust the requirements of primary legislation and it followed that the court did not have the power to dispense with service in exceptional circumstances.

The Supreme Court was unanimous that that section 12(1) did not constitute a rule of customary international law. The majority held that the construction of section 12(1) as being a mandatory and exclusive method of service against states was nevertheless strongly supported by international law and comity. In contrast, the minority held at [134] that "*international comity requires that states entering into commercial transactions should abide by the rules of the marketplace and that there should be friendly waiver of technicalities*".

The difficulty in effecting service through diplomatic channels on Libya following the collapse of the Gadaffi regime gave rise to the second key issue before the Supreme Court: whether an interpretation of section 12(1) of the SIA which imposed such a mandatory rule for service on states would infringe a claimant's right of access to the court under Article 6 of the

European Convention of Human Rights (ECHR) or the common law principle of legality and should therefore be construed as permitting alternative service pursuant to section 3(1) of the Human Rights Act (HRA), which provides that "*So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights*."

The majority rejected this approach. Lord Lloyd Jones addressed the key points succinctly at [84], noting the privilege of service of initiating process through diplomatic channels pursues a legitimate objective by proportionate means and does not therefore impair the essence of the Article 6 right of access to the court for the following reasons:

> Service through diplomatic channels is a well-established procedure for service of States which, although not universal, is required by a large number of States and is the required method of service on a defendant state under the UNCSI [United Nations Convention on Jurisdictional Immunities of States and Their Property] and the ECSI [European Convention on State Immunity]. In view of the fact that it is the only permitted method of service on a State under the ECSI, which is a Council of Europe treaty, compliance with that provision can hardly be considered a violation of article 6 ECHR. The procedure secures benefits for both claimants and defendant states in circumstances of considerable international sensitivity and where, without such a provision, difficulties are likely to be encountered in effecting service. It is also intended to prevent attempts at service by alternative methods, for example on State representatives or on diplomatic premises, which might all too easily constitute a violation of international law. It provides a means of service which is in conformity with the requirements of both international law and comity. Furthermore, although exceptional circumstances prevented the effective operation of the procedure in the present case, this is not a sufficient basis for impugning the entire procedure. The exceptional circumstances encountered in the present case cannot diminish the value of the rule as a means of protecting the interests of both parties and the United Kingdom as the forum state.

While this conclusion seems readily justifiable where section 12(1) merely causes delay, it is more difficult to accept that the essence of the article 6 right of access to the court is not impaired in circumstances where service through diplomatic channels is not possible, for example, if there is no channel for communication between the FCDO and the state to be served. Lady Arden stated at [93] that she expressed no final view on that question. She further reiterated the principle established by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 that section 3 HRA could not be relied upon where the Convention-compliant interpretation went against the grain of the existing legislation.

Therefore, while perhaps unlikely, this judgment leaves open the possibility of a declaration of incompatibility between section 12(1) of the SIA and Article 6 ECHR, pursuant to section 4 of the HRA 1998, where service through diplomatic channels is indeed impossible.

Harry Matovu QC represented the State of Libya, instructed by Curtis, Mallet-Prevost, Colt & Mosle

SERIOUS IRREGULARITY

In ***RAV Bahamas Ltd & Bimini Bay Resort Management Limited v Therapy Beach Club Incorporated*** [2021] UKPC 8, the Judicial Committee of the Privy Council considered challenges to arbitral awards on the grounds of serious irregularity under section 90 of the Bahamas Arbitration Act 2009 (which is materially identical to section 68 of the Arbitration Act 1996). It was common ground before the Privy Council that the policy underlying the two Acts was similar.

The key issue of principle on the appeal to the Privy Council was whether, in order to uphold a challenge to an arbitral award for serious irregularity, there must in every case be: (i) a separate and express allegation of substantial injustice by the applicant; and (ii) separate and express consideration by the Court of whether the irregularity complained of has caused or will cause substantial injustice and a separate and express finding to that effect.

The judgment of the Judicial Committee was given by Lord Hamblen and Lord Burrows. They held that while it is good practice and should be encouraged, it is not a requirement of a serious irregularity challenge that there be a separate and express allegation, consideration and finding of substantial injustice. It is sufficient that, as a matter of substance, substantial injustice be established and found.

On the facts of the case, two provisions of section 90 were relied on.

In relation the first ground of challenge, it was alleged that the arbitrator failed to deal with an issue put to her concerning the period for which damages could be awarded. The Board reviewed a number of authorities considering section 68(2)(d) of the Arbitration Act 1996, summarised by Akenhead J in *Raytheon* [2014] EWHC 4375 (TCC) at 33(g), and concluded that the issue in this case was essential and crucial to the determination of the Respondent's entitlement to damages as, if accepted, it would mean that it would not be entitled to damages for three years of the six-year claim period. Although the issue was not pleaded, the Board held that having regard to the conduct of the arbitration proceedings as a whole, it is apparent that the arbitrator's attention was sufficiently clearly drawn to the issue as one which she was required to determine, and that she would reasonably be expected to deal with it. Given that the arbitrator made no reference to this issue in her award, the Board held that she failed to deal with an "issue" which had been "put to" her and that her failure to do so was an irregularity under section 90(2)(d).

In terms of what amounted to substantial injustice, the Board relied at [34] on English authorities that established that it is necessary for the applicant to show that "(i) his position was 'reasonably arguable', and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award". The Board went on to accept at [35] that some irregularities may be so serious that substantial injustice is "inherently likely". Given that the relevant issue in this case would potentially more than halve a $6.8m damages

award, the Board held that in failing to deal with it, the award was, on the face of it, obviously unfair and unjust.

The second ground of challenge was that the arbitrator had failed to give the Appellants a fair opportunity to address certain adjustments she had made to the Respondent's calculation of damages for consequential losses: (i) to reflect the failure of aspects of its claim, which had previously been presented on a global basis; and (ii) the fact that the evidence of its quantum expert was based on memory and unsupported by documents. The Appellants relied on section 90(2)(a), which refers to a "failure by the tribunal to comply with section 44". Section 44 is materially identical to section 33 of the Arbitration Act 1996, and essentially sets out the arbitrator's duty to act fairly.

Lord Hamblen and Lord Burrows allowed the challenge in relation to (i) because the parties had previously addressed that claim on a global basis, and the first time the Appellants had learned of the arbitrator's deductions in that respect had been in the award. This was another irregularity the substantial injustice of which was self-evident. By contrast, the challenge in relation to (ii) failed because the failure of the Respondent's expert to rely on documents in support of his evidence was obvious, and the Appellants had a fair opportunity to address that point. There was, therefore, no unfairness or irregularity in the deduction made by the arbitrator to reflect that.

Vernon Flynn QC acted for the Appellants, instructed by Charles Russell Speechlys and McKinney Bancroft & Hughes

PUBLIC POLICY

In ***Betamax Ltd v State Trading Corporation (Mauritius)*** [2021] UKPC 14, the Judicial Committee of the Privy Council considered the extent to which a court can set aside or refuse to enforce an international arbitration award on the basis that it conflicts with public policy under section 39(2)(b)(ii) of the Mauritian International Arbitration Act. The decision is of wider significance given that section 39(2)(b)(ii) enacts Article 34 of the UNCITRAL Model Law into Mauritian law; and is thus reflected in the legislation of many leading arbitration jurisdictions as well as in sections 68(2)(g) and 103(3) of the English Arbitration Act and in Article V(2)(b) of the New York Convention. The Privy Council noted at [21] of its judgment that there is no reason of principle to adopt a different approach to public policy in setting aside cases and in enforcement cases under the New York Convention.

The appeal was brought from a judgment of the Supreme Court of Mauritius setting aside an international arbitration award made in favour of Betamax, on the basis that the underlying contract had been entered into in breach of the public procurement law of Mauritius and thus the award was "*in conflict with the public policy of Mauritius*". However, the question whether the underlying contract between Betamax and State Trading Corporation (STC) had been

entered into in breach of the public procurement law of Mauritius was within the jurisdiction of the arbitrator and had been decided in favour of Betamax in the award. The finding that the award was in conflict with the public policy of Mauritius therefore involved re-examination of questions of law falling within the jurisdiction of the tribunal.

The key issue of principle on the appeal to the Privy Council was the scope of section 39(2)(b)(ii) of the International Arbitration Act in relation to a decision of an arbitral tribunal which decided that a contract was *not* illegal on the basis of its interpretation of legislative provisions and regulations that were applicable to the contract. The Board held that to accept the Supreme Court's approach in those circumstances would be to enable section 39(2)(b)(ii) to be used as a means of reviewing any decision of an arbitral tribunal in an award on an issue of interpretation of the contract or of legislative provisions where, on one of the alternative interpretations of the contract or the legislative provisions, the result was that the agreement was illegal. Such an approach would be inconsistent with the purpose of the International Arbitration Act and the Model Law, and the principle of finality that is reflected in them.

The Board reiterated that the policy of modern international arbitration law is to uphold the finality of the arbitral tribunal's decision on the contract made within the arbitral tribunal's jurisdiction, whether right or wrong in fact or in law, absent the specified vitiating factors (e.g. fraud or a breach of natural justice).

Thus, in relation to the issue of whether the award conflicts with public policy, the court's intervention must proceed on the court's application of public policy to the findings (whether of fact or law) made in the award.

Mark Howard QC and Salim Moollan QC acted for the Appellant, instructed by Fladgate

LAW GOVERNING THE VALIDITY OF THE ARBITRATION AGREEMENT IN ENFORCEMENT PROCEEDINGS

In ***Kabab-Ji SAL v Kout Food Group*** [2021] UKSC 48, the Supreme Court considered one key issue of principle and two procedural questions concerning the enforcement of awards under the Arbitration Act 1996 (1996 Act).

The Supreme Court's unanimous judgment was given by Lord Hamblen and Lord Leggatt (with whom Lord Hodge, Lord Lloyd-Jones and Lord Sales agreed).

The enforcement proceedings related to an ICC award issued by an arbitral tribunal seated in Paris. The award concerned a dispute arising out of a number of franchise agreements governed by English law and entered into by Kabab-Ji SAL (KJ) and Al Homaizi Foodstuff Company. The latter later became a subsidiary of Kout Food Group (KFG). KJ commenced the arbitration against KFG only, which participated under protest.

KFG then resisted enforcement of the award in England on the basis that it was not a party to the arbitration agreements, such that it was not bound by the award. It relied on article V(1)(a) of the New York Convention (Convention) as enacted into English law in section 103(2)(b) of the 1996 Act, which provides:

> Recognition or enforcement of the award may be refused if the person against whom it is invoked proves:
>
> ….
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

It is in this context that the Supreme Court considered the key issue of principle, namely the law governing the validity of an arbitration agreement in the context of enforcement proceedings involving section 103(2)(b) of the 1996 Act.

The Supreme Court recalled its finding in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb*" [2020] USKC 38; [2020] 1 WLR 4117 that article V(1)(a) of the Convention established two uniform international conflict of law rules. The primary rule was that the validity of the arbitration agreement is governed by the law chosen by the parties (i.e. "to which the parties subjected it"). The default rule was that where no choice has been indicated, such validity is governed by the law of the seat of arbitration (i.e. "the law of the country where the award was made").

The Supreme Court then held that a choice of law clause for the whole contract would normally be a sufficient "indication" of the law to which the parties subjected the arbitration agreement for the purposes of article V(1)(a) of the Convention/section 103(2)(b) of the 1996 Act.

The Court further clarified that the principles applicable to the identification of the law governing the validity of the arbitration agreement before the award was made as expressed in *Enka*, applied with equal force at the enforcement stage.

On the facts of the case, the Supreme Court found that the question of whether KFG became a party to the arbitration agreements was governed by English law and that there was no real prospect that a court might find at a further evidentiary hearing, that KFG became a party to the arbitration agreements.

The first question of procedure examined by the Supreme Court was whether refusals of enforcement under section 103 of the 1996 Act could be decided summarily.

KJ argued that the determination of whether KFG had proved its alleged ground to resist enforcement of the award required a full evidential hearing and trial of the issue.

KJ relied on section 103(2) of the 1996 Act, which requires that the person resisting enforcement of an award "proves" one or more grounds set out in section 103(2)(a) to (f) and mirrors article V(1) of the Convention (requiring that such person "furnishes…proof" of the grounds).

KG further relied on *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, in which the Supreme Court held that, where the party resisting enforcement seeks to prove that there was no valid arbitration agreement binding upon it, the English court has to investigate and determine that issue for itself (per Lord Mance [28]).

The Supreme Court rejected KJ's argument. It reasoned that (i) *Dallah* did not prescribe a specific procedure for the court to make its determination; and (ii) there was nothing in the Convention or the 1996 Act specifying the manner in which the requisite "proof" was to be established.

The second procedural question considered by the Supreme Court was that of the circumstances when the English court ought to exercise its discretion to adjourn a decision on recognition or enforcement of an award pending a decision by the court of the seat on whether to set aside or annul such award, pursuant to section 103(5) of the 1996 Act. Section 103(5), which enacts article VI of the Convention, provides:

> Where an application for the setting aside or suspension of the award has been made to [a competent authority of the country in which, or under the law of which, that award was made], the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

The question arose out of the fact that KFG had challenged the award before the Paris Court of Appeal, the decision of which was pending when KJ commenced the enforcement proceedings in England. By the time the matter reached the Supreme Court, the Paris Court of Appeal had refused to annul the award.

The Supreme Court nonetheless clarified that an adjournment to avoid a risk of a decision inconsistent with that of the courts of the seat of arbitration is likely to be granted where the grounds relied on for resisting enforcement of the award and those relied on before the court of the seat to set aside/annul the award are the same and governed by the law of the country of the seat. However, these considerations do not apply where the English court will apply English law to the question.

On the facts of the case, the Supreme Court found that an adjournment would not have been appropriate noting that the risk of contradictory decisions could not be avoided, given the approach taken by the French courts to the determination of the validity of an arbitration agreement.

The decision of the French Court of Cassation on KFG's challenge to the award is still pending. However, the Court of Cassation is likely to follow its own approach thereby highlighting the difficulties for different domestic courts with their own legal traditions and views to interpret the Convention in a uniform manner.

Klaus Reichert SC was a member of the Arbitral Tribunal.