

## **Enforcement of Awards and States – Khawar Qureshi QC**

### **Key emerging issues:**

#### **Against Whom?**

- (1). Continental Transfert Technique v. The Federal Government of Nigeria and others [2009] EWHC 2898 (Comm) (16/11/09) (“Continental”) (Jonathan Hirst QC sitting as Deputy Judge of the High Court)

#### **Against what assets?**

#### **Do ICC Rules contain a broad waiver of immunity from execution?**

- (2). Orascom Telecom v. The Republic of Chad [2008] EWHC 1841 (Comm) (28<sup>th</sup> July 2008) (“Orascom”) (Mr. Justice Burton)

**In the context of Enforcement of Arbitral Awards more generally and the scope of Section 103(1)(b) of the Arbitration Act 1996 (“Section 103”) there is reference at the end of this paper to a third case, namely**

- (3). Dallah Estate v. Ministry of Religious Affairs Government of Pakistan [2009] EWCA Civ. 755 (“Dallah”)

## Overview.

- I. There has been a significant increase in civil claims against States and State entities (or, at the very least, an increase in visibility of such claims).**
- II. The Arbitration Act 1996 (“the AA 1996”) contains no express provision dealing with State parties as such. This is unsurprising, given that (pursuant to the AA 1996) a State party which has agreed in writing to submit a dispute to arbitration is (for most purposes) to be treated no differently to a non-State party<sup>1</sup>.**
- III. However, the most common complaint when a State/State entity is involved and on the losing end of an arbitral award arises at the stage of enforcement<sup>2</sup>,**

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<sup>1</sup> See Section 9 of the State Immunity Act 1978 which provides, inter-alia, as follows “Arbitrations (1) 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”. For Judicial consideration of this provision see the case of *Svenska Petroleum v. Lithuania* [2006] EWCA Civ 1529 (the Court of Appeal, inter-alia, holding that Section 9 could not be construed as excluding proceedings relating to the enforcement of a foreign arbitral award).

<sup>2</sup> For an illustration of a failed attempt to seek a pre-Award freezing order in support of an ICSID claim against a State see the case of *E.T.I Euro Telecom N.V v. Republic of Bolivia* [2008] EWCA Civ. 880 (28<sup>th</sup> July 2008) (“ETI”). In that case, by way of an urgent appeal from a decision of Andrew Smith given on 11<sup>th</sup> July 2008, 2 weeks later, the Court of Appeal was asked to reverse the decision of the Judge which set aside freezing orders granted in favour of ETI against Bolivia.

ETI had invested in a company in the Bolivian Telecoms sector (“Entel”) and argued that its investment had been expropriated or interfered with by Bolivian State authorities. On 12<sup>th</sup> October 2007 ETI commenced an ICSID arbitration against Bolivia (making a claim under a Bi-lateral Investment Treaty for damages against Bolivia). On 1<sup>st</sup> May 2008, the President of Bolivia issued a nationalisation decree, which appeared to have an adverse effect on ETI’s investment. On 5<sup>th</sup> May 2008, ETI obtained a without notice freezing order from a US Court directed against the assets of Entel. The claim in the US Courts was stated as being in support of the ICSID arbitration.

Around USD\$50 million was being held in a London account in the name of Entel and ETI applied on 7<sup>th</sup> May 2008 for a without notice freezing order directed at those funds. The freezing order was granted on 9<sup>th</sup> May 2008 and extended on 30<sup>th</sup> June 2008. Section 44 of the Arbitration Act 1996 and Section 25 of the Civil Jurisdiction and Judgments Act 1982 were relied upon by ETI as providing the legal jurisdiction for a freezing order to be granted.

On 11<sup>th</sup> July 2008, the Judge heard and accepted argument on behalf of Entel and Bolivia to the effect that there was no legal jurisdiction to grant a freezing order in this case – however the freezing orders continued until the Court of Appeal had determined the matter. The Court of Appeal discharged the freezing order.

The Judgment of Lord Justice Lawrence Collins considered the arguments in great detail. His Lordship concluded that the UK Freezing Order could not properly be maintained because (1) Section 25 of the Civil Jurisdiction and Judgments Act 1982 did not apply to arbitration proceedings (2) The Arbitration Act 1996 only applied to ICSID arbitration to a very limited extent and thus Section 44 thereof was equally inapplicable in this case (3) the UK Freezing Order was directed against Entel which was not a party to the ICSID proceedings.

See also the cases of *Mobil v. Petroleos* [2008] EWHC 532 (Comm) –no real urgency/dissipation of assets /no assets in UK/seat of arbitration in New York – worldwide freezing order refused (per Section 44 AA 1996).; and *Belair LLC. Basel LLC* [2009] EWHCA 725 Comm – worldwide freezing order granted per Secyion 44 AA 1996.

- IV. The Statutory framework in the UK which provides that the point of reference for execution of Judgments and Awards against States and State entities is the State Immunity Act 1978 (“SIA”); see the decision of the Court of Appeal handed down on Thursday 4<sup>th</sup> February 2010 in the case of *NML Capital v. Argentina* [2010] EWCA Civ 41 (enforcement of US Court Judgment –held no submission to UK Courts jurisdiction for enforcement purposes).**
- V. Whilst securing assets against which enforcement can be effected is not easy in most cases, the availability of immunity to a “State” (as defined at Section 14 (1) of the SIA) at the adjudicative stage (subject to the exceptions provided for by Sections 2-11 SIA<sup>3</sup>), as well as the enforcement stage (Sections 13-14 SIA), makes the process of enforcement more difficult.**
- VI. As the two cases referred to below illustrate, the key issues at the enforcement stage are (i) against which entities can an award be enforced (are assets of State organs which were not a party to the arbitration susceptible to enforcement?) (ii) against which assets can an award be enforced and what constitutes a waiver of immunity?**

**(1). The Continental case.**

1. The Claimant (a Nigerian company) obtained an award dated 14<sup>th</sup> August 2008 in the sum of around £140 million against the Federal Government (and Republic) of Nigeria, its Attorney General and the Ministry of the Interior. The seat of the tribunal was Nigeria and hearings had taken place in London. The underlying contract apparently concerned the provision of ID cards for the Ministry of the Interior.
2. On 10<sup>th</sup> December 2008 the Claimant obtained leave to enforce the Award pursuant to Section 101 AA 1996. On 9<sup>th</sup> June 2009, the judgment granting leave to enforce was made absolute. In September 2009, the Claimant applied to join NNPC (the State owned Oil and Gas Corporation) as a 5<sup>th</sup> Defendant, as well as to seek Interim Charging Orders (“ICO”) against NNPC’s property in London worth around £10 million and its shares in a wholly owned subsidiary Duke Oil Services Limited. Clarke J heard the application and, on the basis of evidence supporting the contention that NNPC was an organ of the State, granted the Interim Orders.

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<sup>3</sup> Whilst Section 9 SIA overcomes jurisdictional immunity vis enforcement of an Arbitral Award against a State, the scope of assets against which enforcement can be directed (absent a very clear waiver of wider immunity) is essentially limited to those which satisfy the “commercial purposes” test; see Section 3 (3), 13(4) and 17(1) SIA

3. On 19<sup>th</sup> October 2009, the Claimant applied for Interim Third Party Debt Orders (“ITPDO”) against 5 banks with respect to bank accounts held by NNPC. The application stated that the judgment debtor was NNPC and that the Banks owed money to NNPC.
4. As is usual, no notice of the application was given to NNPC. On 28<sup>th</sup> October 2009, the Banks were ordered by Master Kay not to pay NNPC – the accounts were effectively frozen. The Banks were apparently due to meet payments under 17 Letters of Credits, and NNPC was unable to pay staff salaries or business expenses. It is noteworthy that the Court does not normally extract a cross-undertaking in damages when an ITPDO is granted – as the Judge observed (para. 29/3<sup>rd</sup> line) “the procedure is paper based and fairly mechanistic”.
5. NNPC apparently discovered that its accounts were frozen when its General Manager received a text message from one of the Banks on 3<sup>rd</sup> November 2009. An application to set aside the ICO and the ITPDO was made on 6<sup>th</sup> November 2009, and heard on 10<sup>th</sup> November 2009.
6. The Court considered the scope of CPR 72.1(1) and held that, on its proper construction, a TPDO could only be made in respect of a debt owed to the judgment debtor. The bank accounts were all in the name NNPC and it was not the judgment debtor. The ITPDO were thus set aside.
7. The Court applied the approach set out by Aikens J. (as he then was) in the case of *AIG v. Kazakhstan* [2005] EWHC 2239 (Comm). In that case, an attempt was made in the UK to enforce an ICSID Award against the State of Kazakhstan. The Claimant applied for a ITPDO against cash and securities (“the Assets”) held by ABN AMRO (“ABN”) to the order of the National Bank of Kazakhstan (NBK). Aikens J. held that the Assets were part of a “Stabilization Fund” and, that whilst Kazakhstan had a beneficial interest in the Assets, the relationship of creditor and debtor was between NBK and ABN only.
8. As for the ICO, Section 2 of the Charging Orders Act 1979 enables a charging order to be made in relation to “*any interest held by the debtor beneficially in land, securities or funds in court or under any trust*”. An argument was advanced on behalf of NNPC to the effect that Section 101 AA 1996 only enabled an Award to be enforced against a named party in the award. The Judgment of Gross J. in the case of *Norsk Hydro v. State Fund of the Ukraine* [2002] EWHC 2120 was referred to. However, the Judge expressed the view that this related to the stage where permission to enforce the Award was sought, and not the modalities of enforcement of the Award.
9. The central question in this regard was whether the property of NNPC as an organ of the State (with separate legal status and personality) was nevertheless susceptible to the ICO. The Court referred (paras. 38-41 of the Judgment) to the

*Congo* line of cases in which, in effect, the Courts in London and France had held that SNPC (Congo's equivalent of NNPC) was an organ of the State and its assets could be regarded as belonging to the State.

10. Whilst commentators have seized upon these decisions to suggest that “*an award creditor may be able to enforce an award against a state against assets held in the name of a state entity*” (Gill et al [2009]), the Judge pointed to the existence of a sham and fraud (Congo trying to conceal its assets to avoid enforcement) as underpinning the findings in the *Congo* line of cases. In the subsequent case of *Kazakhstan v. Istil* [2006] EWHC 448 (Comm) Steel J considered that there was no basis for disregarding the separate legal personality of an entity in that case on the basis that it was an organ of the State.

### **State Responsibility.**

11. Professor James Crawford has written on the issue of the susceptibility of property or funds of separate state instrumentalities engaged in non-immune transactions vis claims against the State or other instrumentalities and observed that this must depend (i) on the status and organization of the instrumentalities (ii) the extent to which the ordinary law of the forum allows recourse to assets in this way.
12. Professor Crawford drew attention to Article 8 of the ILC Draft Articles on State Responsibility, whereby conduct is attributed to the State where the instructions/direction/control of the State is manifest in the conduct. He noted that Public International Law recognizes the distinct and separate legal personality of corporate entities at the national level (subject to piercing of the veil in cases of fraud or impropriety). As such, their conduct was not attributable to the State unless they are exercising governmental authority (within the meaning of Article 5 of the Draft Articles).
13. The Judge did not set aside the ICO, and determined that whether NNPC was a department of the Nigerian State should be subject to further argument.

**(2). The Orascom Case.**

14. Chad was the subject of an ICC arbitration award made against it on 12<sup>th</sup> June 2007, in favour of Orascom for a sum in excess of £3.7 million. The underlying dispute concerned investments made by Orascom in the telecoms sector in Chad.
15. Orascom sought to enforce the award against sums in Bank accounts in London. 5 Bank accounts were frozen on 12<sup>th</sup> May 2008. The World Bank and European Investment Bank intervened to assert a proprietary interest in sums contained in some of the accounts. The result was that sums in only one account (containing the proceeds of the sale of oil) were the subject of argument as to whether they were immune from enforcement/execution measures.
16. Section 13 of the State Immunity Act 1978 prohibits any enforcement of a judgment or arbitration award against the property of a State unless the State has provided consent (by way of prior agreement), or the property is in use for or intended for use for commercial purposes.
17. Burton J. considered existing case law and concluded that, unlike in other cases where a Bank Account was said to contain funds which formed the national fund of a State or the assets of the Central Bank of a State, the Chad account in question was established and operated specifically for the purposes of a commercial transaction, namely so as to receive the proceeds of a contract for the supply of goods or services (oil), and/or so as to be part of a system specifically established for the purposes of repayment of loans by Chad.
18. A further argument that was considered but not determined concerned whether Chad had waived immunity against enforcement/execution measure by virtue of the application of Article 28(6) of the ICC Rules which provided that “*Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out the Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*”. Burton J. considered conflicting academic opinions as to whether this provision was clear enough to constitute the required waiver, as well as decisions from French and US Courts. His Lordship was reluctant to conclude, without more, that Article 28(8) was clear enough in its terms to effect a waiver in this regard.

**(3). The Dallah case.**

19. Whilst there are some commentators who suggest that the English Courts have been too concerned to protectively “ring-fence” the arbitral process (not least with regard to sparsity of appeals on points of law pursuant to Section 69 AA), a recent decision of the Court of Appeal in the case of *Dallah Estate v. The Ministry of Religious Affairs Government of Pakistan* [2009] EWCA Civ 755 (20<sup>th</sup> July 2009) (“Dallah”) has provided an opportunity to consider whether other commentators are right to contend that the English Courts still retain excessive power to intervene and thus disrupt the arbitral process.

**The AA and the NYC.**

20. More than 140 States have signed up to and (in theory at least) are required to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (often referred to as the New York Convention - “the NYC”) pursuant to their domestic laws. Article V of the NYC is intended to severely curtail the scope for review of an international arbitral award by domestic courts in a jurisdiction where enforcement and execution of the award is sought (“the Enforcing Court”). There are compelling reasons to observe that if domestic Courts are able to act as a court of appeal or review of the substance of an arbitral award, the rationale for arbitration – expeditious and effective dispute resolution – is seriously undermined.
21. Article V NYC confers a discretion upon domestic Courts to refuse enforcement of an arbitration award if any of the following matters are proven;

*“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

*(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

*(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

*(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

*(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*

*(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*

*2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

*(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

*(b) The recognition or enforcement of the award would be contrary to the public policy of that country. “*

22. The most troublesome provision of the NYC in terms of the approach adopted by Courts in some jurisdictions is Article V(2) (b) – the so called “public policy” exception which has been interpreted as conferring an almost open ended authority for review in certain jurisdictions. Section 103 AA broadly follows the structure and content of Article V NYC, and Section 103(2) (a) AA was the subject of detailed consideration in the Dallah case.

### **The Decision of the Court of Appeal.**

23. A Saudi Company (Dallah) offered to provide services for Pakistani pilgrims to Mecca, and entered into an MOU with the Government of Pakistan (“GOP”) in July 1995. Thereafter, in January 1996 the GOP created a Trust entity, and the Trust then entered into an agreement with Dallah dated 10<sup>th</sup> September 1996 (“the Agreement”). The Agreement contained an ICC arbitration clause. A dispute arose and Dallah commenced an arbitration on 19<sup>th</sup> May 1998 whereby it named the Ministry of Religious Affairs of the GOP as the Respondent. The GOP did not accept that it was a party to the agreement and challenged the jurisdiction of the arbitral tribunal (which sat in Paris).
24. On 26<sup>th</sup> June 2001 the arbitral tribunal issued a partial award determining that the GOP was bound by the Agreement. On 23<sup>rd</sup> June 2006 the arbitral tribunal awarded Dallah damages and costs totaling around USD\$ 20 million (“the Award”). On 9<sup>th</sup> October 2006 Clarke J. gave Dallah leave to enforce the Award

pursuant to Section 101 AA. Aikens J. set aside leave to enforce on 1<sup>st</sup> August 2008. 11 months later the Court of Appeal upheld Aiken J's decision.

**The Issue.**

25. The GOP invoked Section 103 (2) (b) of the AA ("Section 103(2)(b)") to resist enforcement of the Award. Section 103 (2)(b) provides as follows;

*"103 Refusal of recognition or enforcement*

*(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.*

*(2) 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.."*

26. The Agreement contained no choice of law clause. In determining the question whether the GOP was bound by the Agreement, the arbitral tribunal had applied "those transnational general principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business".
27. Aikens J had accepted GOP's arguments that, pursuant to Section 103(2)(b) this issue needed to be considered with reference to French Law at the stage of enforcement of the arbitral award. Aikens J. heard evidence from French Law experts and carried out an extensive review of the documents before concluding that, as a matter of French Law, the GOP could not be considered as being bound by the Agreement.
28. Before the Court of Appeal, Dallah, inter-alia, argued that it would be wrong for the English Court to re-open the question as to whether the GOP was bound by the Agreement. Dallah's arguments were essentially as follows - the Tribunal had decided this issue, the GOP had not sought to challenge the award before the French Courts, and, moreover, for the English Court to permit the GOP to adduce expert evidence as to whether, as a matter of French Law, the GOP was indeed bound by the Agreement would generate uncertainty and conflict with the rationale for enforcement of international arbitral awards.

29. However, the Court of Appeal considered the NYC and Section 103 (2) AA, with reference to 2 previous cases which had considered the nature and extent of the discretion provided to the Enforcing Court (*Dardana Ltd. V. Yukos Oil Co* [2002] EWCA Civ 543, and *Kanoria v. Guinness* [2006] EWCA Civ 222). At paragraph 58 of the Judgment, Lord Justice Moore-Bick observed that Section 103(2) AA is concerned with “the fundamental structural integrity of the arbitration proceedings” – which meant in turn that the Court was unlikely to allow enforcement of an award if it was satisfied that its integrity was fundamentally unsound. As Lord Justice Rix observed (at paragraph 87 of the Judgment) “*there could hardly be a more fundamental defect than an award against someone who was never party to the relevant contract or agreement to arbitrate.*”
30. The Court of Appeal confirmed that it was not necessary for GOP to have challenged the Award before the French Courts. Section 103(2) provided a free-standing right to raise the points of principle enshrined in Article V NYC before the English Courts.
31. Whilst expeditious and effective enforcement of international arbitration awards was necessary, Article V NYC reflected core safeguards to ensure that an Enforcing Court was able to deal with points of fundamental principle. Indeed, the Court of Appeal left open the question as to whether there might be circumstances where an English Court would enable enforcement of an arbitral award even though the Courts in the seat of an arbitration had set aside an arbitral award.

#### **Concluding Observations on the Dallah case.**

32. The Court of Appeal made it clear that Section 103(2) was concerned with fundamental issues which affected the integrity of the arbitration proceedings. The NYC marks a considerable concession on the part of States whereby they have agreed to provide a “passport” to an international arbitration award, which would enable its enforcement far more quickly and effectively than decisions of many foreign Courts.
33. As such, Article V NYC contains essential safeguards to ensure that parties are not subject to enforcement/execution measures in circumstances where there is a manifest and fundamental defect in the underlying arbitral proceedings.
34. The Dallah decision confirms the importance of those safeguards, and reflects consistently strong English Court support for the arbitral process. The Supreme Court has granted permission to appeal in this matter, and we await the outcome.

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