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Central Bank of Venezuela waives state immunity

In the recent judgment, *Deutsche Bank AG, London Branch v Receivers Appointed by the Court (Receivers) v Central Bank of Venezuela* [2023] EWHC 1942 (Comm), the Court held that state immunity did not apply and permitted payments to be made to Deutsche Bank AG out of funds held by receivers on behalf of the Central Bank of Venezuela.

Facts

This case is one of the latest developments of the highly publicised fallout arising out of gold bullion swaps entered into in 2015 between Deutsche Bank AG London Branch ("**DB**") and the Central Bank of Venezuela ("**BCV**") (the "**Swap Contracts**").

Following the imposition of US sanctions on Venezuela (which prompted the termination of the Swap Contracts), substantial sums were payable by DB to BCV (the "**Funds**").

However, two rival parties (the Guaidó Board and the Maduro Board) both claimed to be entitled to the Funds. Problems therefore inevitably arose as to how, where and to whom the Funds should be paid.

DB applied to the High Court seeking appointment of receivers and a Court Order to this effect was granted that year in May 2019 (the "**Receivership Order**"). Since then, the Funds have been held by the receivers.

The receivers incurred expenses and became entitled to remuneration, which was mainly paid by DB. DB applied to the High Court to amend the Receivership Order to alter the procedure for payment of the receivers' expenses and remuneration to require BCV to reimburse DB for past and future payments to the receivers (the "**DB Order**").

One of the interested parties, known as "the Maduro Board" (which claims to be or represent BCV), objected to DB's application on the basis of sovereign immunity grounds.

The Court was asked to decide whether DB were prevented from obtaining their requested order due to sovereign immunity.

The Parties' positions

DB said that BCV had waived its state immunity so as to permit the Court to make the order sought, by the written terms of the Swap Contracts. The Guaidó Board made submissions in support of DB's argument.

DB also argued in the alternative that the Maduro Board had waived state immunity by virtue of a letter sent by its solicitors which said that the Receivership Order should be left in place without variations.

The Maduro Board submitted that BCV had only waived immunity in respect of enforcement against BCV's property if an arbitral award had been issued or possibly if there was a judgment (and they said neither was present).

The State Immunity Act 1978

Pursuant to the State Immunity Act 1978 (the "**SIA 1978**"), a sovereign state is typically immune to legal proceedings and its property (including the property of its central bank), is generally protected from enforcement.

Section 1 of the SIA 1978 confers states with the general immunity:

"(1) 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."

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

However, Section 9(1) of the SIA 1978 provides:

*"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."*
(Emphasis added)

The effect of Section 9(1) is that the arbitration agreement constitutes a waiver of immunity in relation to proceedings in the Courts of England in relation to arbitration proceedings under the Arbitration Act 1996.

Section 9(2) of the SIA 1979 provides:

"This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between states."

The effect of Section 9(2) is that parties are permitted to choose exactly what waiver of immunity the arbitration agreement brings about.

It is therefore sensible for parties to go a step further in spelling out their intentions as to how state immunity waiver is to operate (if at all), particularly in respect of enforcement against property.

In this case, the Parties spelt out their intentions in Paragraph 10 of the Swap Contracts. Much of the debate between the Parties in this case related to the construction of this paragraph and the Court was asked to determine the correct interpretation.

Interpretation of paragraph 10 – "Waiver of immunity"

Paragraph 10(i) provides that there was no waiver apart from the exceptions provided at 10(ii).

Paragraph 10(ii) provides:

First sentence: *"Notwithstanding sub-paragraph (i) above of this Master Confirmation, [BCV] irrevocably and unconditionally waives its right to immunity under the State Immunity Act 1978 (the "Act") **from execution or enforcement or other legal or judicial process** brought against [BCV] within the United Kingdom **in respect of, or relating to an arbitral award or any other order, judgment, or other relief arising out of or in relation to an arbitration pursuant to paragraph 11 (Arbitration)**, including without limitation for the avoidance of doubt consent to any service of process, any enforcement or execution against any property or revenues of*

[BCV] (irrespective of its use or intended use), or any action in rem, arrest, detention, sale or attachment (but only after and not before judgment or arbitral award) of any property or revenues of [BCV]". **(Emphasis added)**

Second sentence: *"For the avoidance of doubt, the waiver described herein (a) shall not be construed as a general waiver of immunity and shall constitute a waiver of immunity under Section 2(2) and Section 9(1) of the Act, and a consent under Section 13(3) of the Act in each case only to the extent consistent with the provisions of this sub-paragraph (ii); and (b) **shall not constitute a consent to any enforcement against any property of [BCV], or any action in rem, arrest, detention or sale of any property of [BCV] in each case to the extent that the value of such property exceeds the lesser of (a) an amount denominated in US Dollars equal to 90 per cent of the [DB] Initial Exchange Amount plus Costs and (b) the amount of the arbitral award that is being enforced."*** **(Emphasis added)**

The Court engaged in the usual process of contractual interpretation when construing paragraph 10(ii) i.e. considering the provision as a whole and taking into account the relevant surrounding circumstances. It was confirmed by the Court that this was the correct process and that no "special rules" apply by virtue of the paragraph in question relating to state immunity.

The Judge observed that the words "execution or enforcement" as well as "other legal or judicial processes" in the first sentence could relate not only to an arbitral award but also to any "other judgment or relief" arising out of the subject LCIA arbitration pursuant to the arbitration clause at paragraph 11. The words "any other order, judgment or relief" extend to the myriad of arbitration claims that could be brought in relation to the arbitration under the Arbitration Act 1996.

The Judge found that the emphasised text in the first sentence appeared to waive immunity from execution or enforcement in relation to any such order, judgment or relief i.e. not merely if an arbitration award or judgment had been issued (as advanced by the Maduro Board).

The effect of the emphasised text in the second sentence is that the state immunity waiver of paragraph 10(ii) is not a consent to any enforcement against BCV's property or any action in rem etc if the value of such property exceeds the lesser of the two values at (a) and (b) (the latter being the amount of the arbitral award being enforced).

The Maduro Board argued that as no award had yet been published, the amount of the arbitral award was zero, therefore there could be no enforcement at all. The Judge, however, was not convinced and determined instead that paragraph 10(ii) operated to waive immunity from the execution or enforcement not only of arbitral awards, but also of any other order, judgment or other relief arising out of the LCIA arbitration.

The Court granted the DB Order.

Comment

Aside from the public interest in this ongoing dispute, this particular case is also of interest as it serves as another reminder of how the court will defer to the usual process of contractual interpretation when construing a contract.

Parties should pay close attention to the express wording to ensure that they spell out their intentions as to how an agreement is documented. This of course is not limited to state immunity waiver clauses.

Cases involving state immunity are few and far between. This case serves as a reminder that whilst a sovereign state is typically immune to legal proceedings and it is generally protected from enforcement pursuant to the SIA 1978, where the parties have entered into an arbitration agreement, Section 9(1) of the SIA 1978 will usually operate to waive state immunity in relation to proceedings in the Courts of England in relation to the underlying arbitration proceedings. This should be borne in mind for any industry players who contract with sovereign states.

A full copy of the judgment can be found [here](#).

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