STATE IMMUNITY AND ARBITRATION AWARDS:

CAN THE EMPIRE STRIKE BACK?

Authored by: Catherine Eason (Partner) and Frances Jenkins (Senior Associate) – PCB Byrne

The growth of international private investment and the inevitable growth in disputes between Sovereign States and Investors has created a tension between the English Court's obligations under international treaties on the one hand, and the doctrine of State Immunity on the other.

A key issue for investors when considering which jurisdictions to enforce an award in, is the extent to which a Sovereign State may avoid the enforcement of an arbitration award in England by relying on the doctrine of State Immunity.

The English Court has recently considered two novel points relating to the State Immunity defence and clarified, for the first time that, issue estoppel can apply to a Sovereign State, and that Article 54 of the ICSID convention is a written submission to the English jurisdiction for the purposes of s.2(2) of the State Immunity Act 1978 (the "Act").

The two decisions considered in this article highlight the pro-investor enforcement regime in England and illustrate the limited scope of State Immunity in certain circumstances.

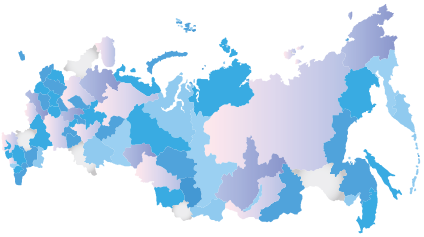
The Law on Sovereign Immunity

First, by way of introduction to the position under English law:

The Act provides that the English courts do not have jurisdiction to adjudicate disputes or permit enforcement actions against sovereign states unless an exception applies (s.1(1)).

Some of these exceptions include:

1. Where a state has submitted to the English jurisdiction by a prior written agreement (s.2(2)); and,
2. Where a State has agreed in writing to submit a dispute to arbitration, it is not immune from proceedings in the English Courts which relate to that arbitration (s.9(1))



Hulley & Ors v Russian Federation[1]

In the well-known Yukos saga, the English Court recently considered Russia's defence, on the grounds of State Immunity, to former Yukos shareholders' attempts to enforce various arbitration awards worth over US$ 50 billion, which were issued by the Permanent Court of Arbitration in July 2014 (the "Awards").

This decision is significant because it has brought welcome clarity to the issue of the interaction between the doctrines of issue estoppel and state immunity where, previously, there had been no clear authority.

In this case, Russia attempted to re-argue its failed case on the lack of jurisdiction of the arbitral tribunal, which had previously been dismissed by the Dutch Supreme Court.

Background

The background to this high-profile case is well known and highly complex. For that reason, only a very basic summary of the pertinent procedural background is described in this article.

Following the issue of the Awards, the Claimants commenced enforcement proceedings in England. Russia then challenged the jurisdiction of the English Court on the basis that Russia was immune under s.1(1) of the Act.

The Claimants argued that the exception in s.9(1) of the Act was applicable because Russia had agreed in writing to submit the dispute to arbitration under the Energy Charter Treaty ('ECT').

The ECT is a multi-lateral investment treaty which Russia signed in 1994, but never ratified.

Article 45(1) of the ECT provided that, even though Russia had never ratified

the ECT, Russia agreed to apply the ECT provisionally pending its entry into force. Therefore, according to the Claimants, Russia had agreed in writing to submit disputes under the ECT to international arbitration under Article 26 of the ECT (Settlement of Disputes). Accordingly, the exception set out in s.9(1) of the Act applied and Russia's claims of state immunity should be dismissed.

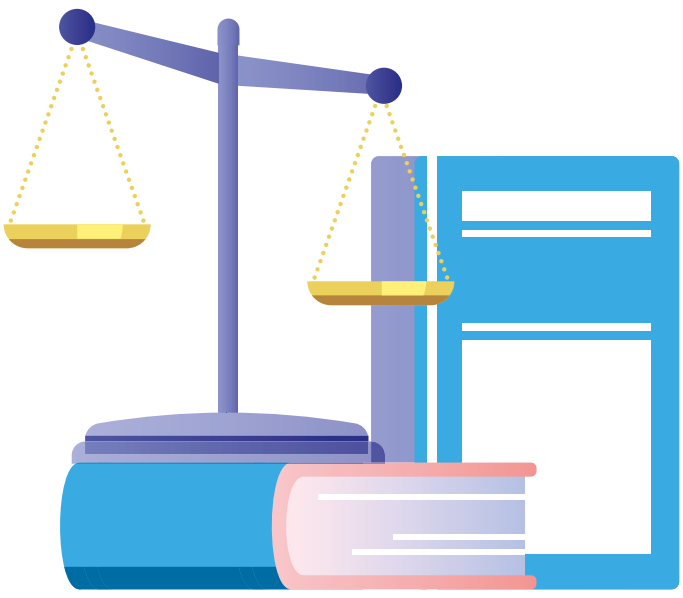
The Claimants' attempts to enforce the Awards in England however were brought to a halt as Russia challenged the Awards in the Hague courts on the basis that, amongst other points, the arbitral tribunal had no jurisdiction to hear the dispute. Ultimately Russia was unsuccessful before the Hague courts.

Enforcement Proceedings

The Court then considered Russia's arguments of State Immunity. The Claimants argued that a final and conclusive answer to Russia's argument about the applicability of Articles 45 and 26 of the ECT had been given by the curial courts and, therefore, this gave rise to an issue estoppel which prevented Russia from running the same failed case in England.

Russia however argued that, notwithstanding issue estoppel, the Court was under a freestanding duty pursuant to s.1(2) of the Act to decide state immunity on a case-by-case basis, and consider whether s.9(1) of the Act, applied to the fact of any given case, irrespective of issue estoppel.

The Court confirmed that foreign judgments can give rise to issue estoppel, but commented that there was a lack of clear authority on this point when a State is involved.



1 [2023] EWHC 2704 (Comm)

However, the Court said, there were no provisions in the Act which would make issue estoppel inapplicable to a State, assuming that the requirements for issue estoppel were met.

The Court then considered the application of the issue estoppel doctrine to the current case, finding both that it applied, and that Russia had waived its immunity.

It is now therefore clear that issue estoppel can apply to foreign judgments against a Sovereign State, and state immunity under the Act is not necessarily a successful defence when arbitration awards come to be enforced in England.

Infrastructure Services Luxembourg & Another V Kingdom of Spain[2]

A similar issue arose in a case in which the Claimants applied to enforce an ICSID award in the sum of around €120 million against the Kingdom of Spain ("Spain"). This decision is interesting as it demonstrates the Court's commitment to the UK's obligations under international law and the pro-investor stance which the Court appears to be taking when recognising and enforcing ICSID awards.

At a very high level, the Claimants brought arbitration proceedings against Spain under the ECT and obtained an ICSID award. Spain's application to annul the ICSID award was rejected by the ICSID ad hoc committee.

Following the Claimants' application to register the award in England, Spain resisted this application on the basis that (i) the English Court lacked jurisdiction to register the award, under s.1(1) of the Act, as Spain was a Sovereign State; and (ii) the arbitral tribunal lacked jurisdiction to make the ICSID award in the first place.

The Claimants relied on s.2(2) of the Act and argued that Spain had agreed to submit to the jurisdiction, and on s.9(1) of the Act, whereby Spain's agreement to arbitrate under Article 54 of the ICSID convention constituted an agreement in writing to submit a dispute to arbitration for the purposes of s.9(1) of the Act.

The Court agreed with the Claimants and confirmed, for the first time, that Article 54 of the ICSID Convention was a "prior written agreement" for the purposes of s.2(2) of the Act. Furthermore, the Court also considered that s.9(1) of the Act was satisfied by the ICSID Convention and the ECT.

Stepping back, these decisions paint a picture which highlights the English Court's commitment to its obligations under international treaties and the importance that it places on the rule of law, even as against Sovereign States.

2 [2023] EWHC 1226 (Comm)