ARBITRATION & ADR - UNITED KINGDOM

Commercial Court declines to lift stay on enforcement of arbitral awards against Russia

10 June 2021 | Contributed by Clifford Chance

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Introduction

In *Hulley Enterprises Ltd v The Russian Federation*,(1) the High Court declined to lift a stay of the hearing of an application for the enforcement, under the Arbitration Act 1996, of certain arbitral awards and a related jurisdictional objection by the respondent (Russia) on grounds of sovereign immunity. While a decision setting aside the awards at the arbitral seat (the Netherlands) had been overturned on appeal, a further appeal to the Dutch Supreme Court was pending as at the date of the English judgment. Justice Henshaw considered that the Dutch appeal had realistic prospects of success and was not being pursued by Russia as a mere delay tactic. In the circumstances, and in the interests of comity, avoidance of inconsistent decisions and efficiency, he ordered the continued stay on enforcement. The claimants' further application for an order that Russia pay security was denied.

Background

Section 103(5) of the Arbitration Act provides that if "an application for the setting aside or suspension of [an] award has been made to such a competent authority as is mentioned in subsection (2)(f)" (this being "a competent authority of the country in which, or under the law of which, [the award] was made"), then "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". It may also, or in the alternative, "order the other party to give suitable security".

The principles relevant to granting a stay of proceedings under Section 103(5) of the Arbitration Act were summarised by Justice Gross in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp*.(2) On the one hand, enforcement should not be frustrated merely by the fact that the respondent party has sought to challenge the award at the arbitral seat. On the other hand, the pro-enforcement assumption underlying the Arbitration Act is sometimes outweighed by the respect due to the courts exercising jurisdiction at the arbitral seat. When weighing its discretion as to whether to grant a stay of proceedings and to order the provision of security, the court might consider the following points:

- whether the challenge at the arbitral seat was a *bona fide* application, as opposed to a delaying tactic;
- whether that application has a real prospect of success; and
- the extent of delay and any resulting prejudice occasioned by a stay.

However, all must depend on the circumstances of the individual case.

When considering whether to stay proceedings, a court of England and Wales will also consider its general case management powers under Civil Procedure Rule (CPR) 3.1. A case management stay may be justified where there are related parallel proceedings in a foreign jurisdiction.(3) Factors identified in cases as justifying a case management stay in the context of parallel proceedings include:

- the risk of inconsistent decisions in different jurisdictions;(4)
- the costs and inconvenience of duplicated proceedings;(5)
- the existence of issues that are more appropriate for determination in the foreign proceedings;(6)
- a greater degree of overlap between the issues in the English and the foreign proceedings;(7) and

- if any prejudice to the party resisting a stay can be adequately compensated by an award of interest.(8)

Section 1 of the State Immunity Act 1978 provides that states are "immune from the jurisdiction of the courts of the United Kingdom". There is an exclusion under Section 9(1) of the State Immunity Act whereby if 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". Further, a state is not immune as regards proceedings in respect of which it has submitted to the UK courts' jurisdiction (Section 2(1) of the State Immunity Act). Under Section 2(3)(b) of the act, a state is deemed to have submitted to proceedings if it "has intervened or taken any step in the proceedings".

Facts

On 18 July 2014 an arbitral tribunal constituted under the Energy Charter Treaty (ECT) and appointed by the Permanent Court of Arbitration in The Hague awarded three former shareholders in OAO Yukos Oil Company (ie, the claimants, each of which had brought separate proceedings which were heard concurrently) over $50 billion in compensation against Russia in respect of measures adjudged to have an effect equivalent to an expropriation of the claimants' investment in Yukos. Cumulatively, the awards were the largest arbitral award ever handed down as at that date.

In January 2015 the claimants issued proceedings in London under the Arbitration Act for the awards' recognition and enforcement.

In September 2015 Russia disputed the Commercial Court's jurisdiction (the jurisdiction application). It contended that:

- it was immune from the jurisdiction of the courts of the United Kingdom pursuant to Section 1 of the State Immunity Act; and
- the exclusion pursuant to Section 9(1) of the State Immunity Act did not apply because it had not agreed in writing to submit the dispute to arbitration.

Russia noted that it had not ratified but only provisionally agreed to apply the ECT, to the extent that such provisional application was not inconsistent with Russian law. In the discussed case, key issues in the dispute involved an assessment of whether Russia's actions in enforcing Yukos's tax liabilities were legitimate. Russian law prohibits the arbitration of disputes involving issues of public law or tax. For this reason, the dispute not only fell outside the ECT's scope (Article 21(1) therein excludes "Taxation Measures of the Contracting Parties" from the application of the treaty) – there could be no provisional application of the ECT at all. Accordingly, Russia argued that there was no consent to arbitrate the dispute and thus no exclusion to its immunity before the UK courts.

In early 2016 the jurisdiction application was listed for hearing in November 2016.

In April 2016 The Hague District Court set aside the awards upon Russia's application. The claimants filed an appeal. In May 2016 Justice Legatt ordered, by consent, a stay of the English High Court proceedings and gave liberty to apply to lift that stay following the anticipated judgment of The Hague Court of Appeal.

In February 2020 The Hague Court of Appeal reinstated the awards, prompting a cassation appeal to the Dutch Supreme Court. The decision of this court is expected in late 2021 or early 2022 unless a referral is made to the European Court of Justice, in which case the proceedings could last three to four years.

In July 2020 the claimants applied for a lift of the stay of the English High Court proceedings.

Notwithstanding the pendency of the appeal to the Dutch Supreme Court, in April 2020 the claimants were granted leave to enforce the awards in the Netherlands. An application to suspend enforcement there was denied by the Dutch Supreme Court in December 2020.

Decision

What legal provisions governed the issue of stay?

Russia argued and the High Court agreed that Section 103(5) of the Arbitration Act was inapplicable in light of the unresolved state immunity objection. The court noted that it was well established that where a question of state immunity arises, it must be decided as a preliminary issue.(9) In these circumstances, the remedies available under the Arbitration Act are available only if and when the court determines that the defendant lacks state immunity. Therefore, the correct legal analysis was that the court was exercising its general case management powers under the CPR in the context of proceedings in which Russia had challenged jurisdiction based on state immunity.(10)

What arguments were there for continuing rather than lifting the stay?
The court accepted that while Section 103(5) of the Arbitration Act did not apply, it was useful as an "analogy or guidance when considering whether or not to lift the Stay".(11)

Accordingly, the court invoked the *IPCO* factors to guide its analysis.

The court considered three of the grounds invoked by Russia in its cassation appeal in the Netherlands:

- an allegation of a fraud on the arbitral tribunal;(12)
- lack of jurisdiction under Article 45 of the ECT;(13) and
- an objection relating to the scope of persons entitled to invoke the ECT.(14)

Henshaw concluded that there was a reasonable prospect that Russia would prevail before the Supreme Court (and perhaps before the European Court of Justice).(15)

Next, the court examined evidence as to whether Russia's challenge of the awards was *bona fide* or a delaying tactic.(16) Henshaw concluded that when taken at face value, Russia's public statements about the matter indicated that it had a strong belief in the merits of its position and that it intended to seek to vindicate it using the legal processes available.(17) However, while the challenge to the awards appeared to have been pursued in good faith, there was a risk that Russia would not accept the result if it lost the legal case.(18) A lack of good faith in that sense might be regarded as one stage further removed from the question of the good faith of the challenge itself but it was a factor that the court could consider as part of its overall assessment of whether to lift the stay.(19)

Thereafter, the court considered the prejudice that each side might suffer as a result of a decision to lift the stay or continue it.(20) As to the claimants, while the court accepted that a delay in the ability to seek to enforce the awards was a form of prejudice, there was force to Russia's counterargument that the likely duration of the proceedings before the Dutch Supreme Court or the European Court of Justice was not inordinate in the context of investor-state arbitration generally or this particular case.(21) In addition, the court was not persuaded by arguments made to the effect that a continuation of the stay would materially increase the risk of Russia dissipating assets in order to avoid ultimate enforcement of the awards.(22) As to Russia, the court considered that the risk of inconsistent judgments, including on the state immunity challenge, was a factor weighing significantly in favour of continuing the stay.(23) This was a concern given the significant overlap between the appeal issues and the state immunity arguments(24) and in light of the arguments that the claimants appeared to be advancing on issue estoppel.(25) In particular, there was a risk of unfairness that would arise if Russia were unable to advance (or failed in) its full case on state immunity as a result of the binding effect of the decision of The Hague Court of Appeal on essentially the same issues, only for that decision to later be reversed by the Dutch Supreme Court.(26) It was also a matter of comity to await the Dutch court's decision.(27) The English High Court was less persuaded by Russia's concern that there was a risk of dissipation of assets should the claimants ultimately be able to enforce the awards in the United Kingdom in circumstances where the awards were later overturned by the Dutch Supreme Court. The court agreed with the claimants' proposal that a solution could be found involving the deposit of all recoveries into court or some sort of escrow arrangement.(28)

Considering matters in the case, the court concluded that the stay should be continued.(29)

What did the court decide regarding security?
The claimant urged the court that if it should otherwise be minded to continue the stay of proceedings, it should order Russia to provide security pursuant to Section 103(5) of the Arbitration Act by paying the accumulated post-award interest of $7 billion into the court.(30) Given that to order security under Section 103(5) of the Arbitration Act at this stage would be an exercise of powers that the court did not have pending an adverse immunity decision, the court declined to do so.(31)

The court distinguished *Soleh Boneh v Uganda Government*(32) on the basis that while the court in that case had ordered security, the outstanding immunity issue was one of procedural immunity rather than state immunity.(33)

The court noted that no recorded example of an order for security under Section 103(5) of the Arbitration Act being refused on grounds of sovereign immunity had been adduced. This, according to the court's assessment, was hardly surprising as a state requesting an adjournment under this provision would risk being deemed to have taken a step in the proceedings otherwise than for the purposes of claiming immunity, leading to a potential waiver within the meaning of Section 2(3)(b) of the State Immunity Act.(34)

In the circumstances of the case, the court could exercise only its general case management powers. Henshaw, in his discretion, declined to order a security payment. He noted that following *Boneh v Uganda*,(35) this would

have been appropriate only if:

- Russia's challenge had only fanciful prospects of success; and
- enforcing the awards was likely to be more cumbersome due to the adjournment.(36)

On the second point, Henshaw found that continuing the stay without security attached was unlikely to "materially increase" the risk that Russia would move assets out of the country so that the awards were harder to enforce against the state.(37) He observed that there was no evidence of any prior dissipation since the initial imposition of the stay even though, having been on notice of the proceedings for six years, Russia had had ample time to do so.(38) Therefore, there was no reason to believe that the claimants would have difficulty enforcing the awards due to the stay, "[r]ather, a requirement for security would probably in effect give the Claimants the bonus of a significant enforcement advantage".(39) As a result, although the stay was upheld, no order for security was made.

Comment

This case is significant for two reasons:

- It confirms that a court's powers under Section 103(5) of the Arbitration Act to order an adjournment of proceedings and the payment of security are not applicable where there is an unresolved state immunity challenge under Section 9(1) of the State Immunity Act.
- It indicates that a court can still use its general case management powers in such a scenario. States seeking to assert immunity from enforcement should, in such circumstances, appeal to the court's powers under the CPR when requesting stays and security, rather than invoking Section 103(5) of the Arbitration Act and thereby risking inadvertently submitting to the proceedings and waiving their immunity.

For further information on this topic please contact Marie Berard or Christina Cathey Schuetz at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or christina.schuetz@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Endnotes

(1) *Hulley Enterprises Ltd v The Russian Federation* [2021] EWHC 894 (Comm).

(2) *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm).

(3) *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37, Paragraph 99, Lord Reed.

(4) For examples, see *Bundeszentralamt v Heis* [2019] EWHC 705 (Ch) 113 and *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm) 155.

(5) For examples, see *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm) 76; *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173; and *Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc* [1991] 1 CMLR 165.

(6) For an example, see *Bundeszentralamt*.

(7) For examples, see *Department of Trade and Industry* and *Prifti v Musini Sociedad Anonima de Seguros y Reaseguros* [2005] EWHC 832 (Comm).

(8) For examples, see *Prifti* and *Reichhold*.

(9) See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 and *ETI Euro Telecom International NV v Republic of Bolivia* [2009] EWCA Civ 880.

(10) *Hulley* at 55.

(11) *Id* at 56.

(12) *Id* at 72 to 83.

(13) *Id* at 84 to 107.

(14) *Id* at 108 to 127.

(15) *Id* at 128.

(16) *Id* at 129 at 166.

(17) *Id* at 168.

(18) *Id* at 169.

(19) *Ibid.*

(20) *Hulley* at 170 to 214.

(21) *Id* at 170 to 175.

(22) *Id* at 176 to 187.

(23) *Id* at 203.

(24) *Id* at 189.

(25) *Id* at 191.

(26) *Ibid.*

(27) *Hulley* at 196, 199 and 201.

(28) *Id* at 212.

(29) *Id* at 214.

(30) *Id* at 215.

(31) *Id* at 229.

(32) *Soleh Boneh v Uganda Government* [1993] 2 LI Rep 208.

(33) *Hulley* at 232.

(34) *Id* at 233.

(35) See *Boneh*.

(36) *Hulley* at 252(vi).

(37) *Id* at 255(iii).

(38) *Id* at 69(viii).

(39) *Id* at 255(iii).

Sarah McCullagh, trainee solicitor, assisted in the preparation of this article.