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Court of Appeal clarifies state immunity and jurisdiction rules

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Introduction

In *London Steam-Ship Owners' Mutual Insurance Association v The Kingdom of Spain*,⁽¹⁾ the Court of Appeal considered the interaction between sovereign immunity and the English courts' jurisdiction. The Court considered:

- an application brought under section 18 of the Arbitration Act 1996 (AA) by the London Steam-Ship Owners' Mutual Insurance Association Ltd (the club) to appoint an arbitrator to determine arbitration claims against Spain and France (the states) (the section 18 application);
- a claim by the club against both states for alleged breach of their obligation to honour the declaratory awards (the awards) rendered by an arbitrator in a previous arbitration claim (the award claims); and
- a claim by the club against both states for breach of their obligation to abide by a High Court judgment which had declared that the states were bound to pursue any claims raised against the club in London arbitration (rather than in the Spanish courts) (the judgment claims).

The Court upheld the first-instance decision that the states were not entitled to state immunity. It also maintained the decision that the English courts had no jurisdiction over the judgment claims on the basis that those claims fell within the insurance carveout in the Brussels Recast Regulation (1215/2012/EU).⁽²⁾ However, the Court overturned the ruling that the English courts had jurisdiction over the award claims, finding that there was no "real issue to be tried".⁽³⁾

The judgment sheds light on the operation and overlap between sections 3(1) and 9 of the State Immunity Act 1978 (SIA), which are two exceptions to the principle of state immunity in the SIA. The judgment also provides helpful guidance on the application of domestic law principles and the Brussels Recast Regulation when considering jurisdiction.

Facts

On 19 November 2002, an oil tanker, *Prestige*, sank and polluted the coastline of northern Spain and southern France. The club had insured the owners of the *Prestige* for pollution liabilities pursuant to an insurance contract (the contract). The contract was made subject to the club's rules, which contained an arbitration clause providing that disputes arising out of or in connection with the contract should be resolved by arbitration in London.

Following the incident, the states pursued the club in the Spanish courts for compensation for the losses caused by the pollution of their coastlines. The states obtained a final judgment against the club (the Spanish judgment). The club issued arbitration proceedings and obtained the awards. However, the states continued to pursue their claims in Spain and sought enforcement of the Spanish judgment.

The club subsequently issued further proceedings against the states:

- The club launched fresh arbitration claims against each state seeking, among other things, declarations that by continuing to pursue its claims in Spain and seeking to enforce the Spanish judgment, the states were in breach of their obligation not to pursue those claims other than through London arbitration (the arbitration claims).
- In respect of the previous arbitration proceedings, the club issued the award claims and the judgment claims. The club also filed the section 18 application for the appointment of an arbitrator.

The states asserted that they were entitled to state immunity in respect of the award claims and the judgment claims. Spain also claimed state immunity in respect of the section 18 application and disputed the English court's jurisdiction. At first instance, the High Court of England and Wales ruled that the states were not entitled to state immunity in respect of any of the claims and that the English courts had jurisdiction to hear the award claims and the section 18 Application. However, it held that the English court had no jurisdiction over the judgment claims.

The states appealed the state immunity ruling and the ruling on jurisdiction in respect of the award claims and the section 18 Application. The club appealed the decision on the judgment claims.

Decision

The Court of Appeal dismissed Spain's appeal on the section 18 application; but allowed the States' appeal in respect of the Award Claims. The Court dismissed the Club's appeal in respect of the Judgment Claims.

State immunity

The club raised four exceptions to the principle of state immunity under section 1(1) of the SIA:

- section 3(1)(a) – proceedings relating to a commercial transaction entered into by a state;
- section 3(1)(b) – proceedings relating to an obligation of a state that by virtue of a contract falls to be performed wholly or partly in



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- section 9 – proceedings relating to the arbitration of a dispute that a state has agreed in writing to submit to arbitration; and
- section 2, in respect of Spain only – proceedings in respect of which a state has submitted to the UK courts' jurisdiction.

The Court determined that the exception under section 3(1)(a) applied, and so it did not go on to consider the other exceptions, save for that under section 9 (in order to avoid any application challenging the arbitrators' jurisdiction under section 67 of the AA).⁽⁴⁾

Section 3(1)(a)

Section 3(1) of the SIA provides that a state is not immune to proceedings "relating to" a "commercial transaction" entered into by the state.

The Court of Appeal upheld the High Court's decision that the commencement and pursuit of the Spanish proceedings was a commercial transaction or activity of a commercial or similar character for the purposes of section 3(3)(c). The Court of Appeal determined that the activity in question involved "the pursuit of civil claims which constituted an attempt to enforce the terms of the insurance contract under a direct action right conferred by Spanish law".⁽⁵⁾ It did not accept that the SIA provided any basis for a restrictive construction of section 3.⁽⁶⁾

Further, the Court held that the proceedings related to that commercial activity, as "seeking monetary compensation by virtue of a commercial contract against the consequences of a commercial misadventure is plainly commercial in character".⁽⁷⁾ The fact that the claims were being heard by a judicial authority did not make them "judicial" in nature.⁽⁸⁾ The commercial activity in pursuing the civil claim seeking compensation in Spain (and Spain's registration of the Spanish judgment) was an "essential" part of the award as well as the judgment claims and central to those causes of action.⁽⁹⁾ This interpretation was consistent with the reasoning of the House of Lords in *Congreso del Partido*.⁽¹⁰⁾ Similarly, the Court considered that the arbitration claims – to which the section 18 application related – were clearly related to the commercial activity of the proceedings because they were the means by which the club sought compensation for the consequences of that activity and that, likewise, the appointment of the arbitrator through the section 18 application to determine those claims was also related to the commercial activity on which they were based.⁽¹¹⁾

Accordingly, the states were not entitled to state immunity.

Commentary on section 9

The Court also considered whether there was an "an agreement in writing" to submit to arbitration for the purposes of section 9 of the AA,⁽¹²⁾ applying the principles arising from cases such as *The Fanti*.⁽¹³⁾⁽¹⁴⁾ The answer to this would depend on whether the dispute raised by the new arbitration claim fell within the scope of the disputes which Spain had agreed to arbitrate by asserting the claim in the Spanish proceedings and registering the Spanish judgment.

In *The Prestige (No 2)*,⁽¹⁵⁾ which dealt with challenges to the awards pursuant to sections 67 and 72 of the AA, the Court of Appeal determined that by bringing the claim in the Spanish proceedings, and refusing to arbitrate, the states had agreed in writing to arbitrate the club's disputed claim for a declaration that the states were bound to arbitrate the claim. In the present proceedings, the Court held that it followed that Spain had also agreed to arbitrate the club's disputed claim for coercive relief in the form of an injunction.⁽¹⁶⁾ To distinguish between a claim for a declaratory relief and a claim for coercive relief, which relied upon identical rights and obligations, "would involve absurd hair-splitting".⁽¹⁷⁾ The Court also held that waiver under article 6 of the European Convention on Human Rights on the right to a public hearing would be found in the application of the conditional benefit principle, and made by the "voluntary assertion of a claim which requires arbitration of all disputes which are sufficiently connected with it".⁽¹⁸⁾

As a result, Spain was not entitled state immunity in relation to the section 18 application through section 9 of the AA (in addition to section 3(1)(a) thereof).

Jurisdiction

Applicable test for jurisdiction

The Court considered that the section 18 application and the award claims fell within the "arbitration" exception set out by the European Court of Justice in *The Atlantic Emperor*.⁽¹⁹⁾ In respect of the section 18 application, it was not disputed that proceedings for the appointment of an arbitrator fell within this exception. In respect of the award claims, the Court considered that the Brussels Recast Regulation explicitly excluded arbitration. As a result, the issue of jurisdiction in respect of both issues would need to be determined by reference to English law principles.

The Court held that the judgment claims were too far removed to fall within the "arbitration" exception because, although the arbitrations and the proceedings under sections 66 and 67/72 of the AA formed part of the background to the judgment claims, "their essential subject matter (or principal focus) is an obligation alleged to arise out of any English judgment, whatever its subject matter". The Court also clarified that the test of essential subject matter or principle' focus "calls essentially for an evaluation of the nature of the claim by the first instance judge". The Court explained that where, as in the case at hand, the judge had made no error of principle in applying the test, the courts would be reluctant to disagree with such findings "except in a clear case".⁽²⁰⁾ Accordingly, the issue of jurisdiction in respect of the judgment claims had to be decided through the prism of the Brussels Recast Regulation.

Section 18 Application

The Court upheld the High Court's decision that the English courts had jurisdiction to appoint an arbitrator on the basis that, among other things:

- the court had jurisdiction to entertain an appeal on the issue of jurisdiction; and
- Spain was not entitled to state immunity.⁽²¹⁾

Award claims

The three limb test for jurisdiction in English law was set out in *Altimo Holdings*.⁽²²⁾ In the present case, the Court determined that only the first limb – whether "there was a "serious issue" to be tried on the merits" – was of relevance.⁽²³⁾

The issue was whether a declaratory award creates any obligation to "honour" the award, the breach of which gives rise to a cause of action for damages or equitable compensation.⁽²⁴⁾

The Court confirmed that the awards were merely declaratory of the parties' existing rights and obligations.⁽²⁵⁾ It also held that there was

no support in any of the authorities that a purely declaratory award is capable of creating any obligation which, when breached, gives rise to a cause of action for damages or equitable compensation (rather, those cases were concerned with the available remedies for failure to perform the obligation arising from the award).⁽²⁶⁾

- First, it is not possible to "honour" or "perform" an award, so there could be no breach of a declaration which merely declares the parties' rights.⁽²⁷⁾
- Second, as established in *Zavarco*,⁽²⁸⁾ a declaratory award or judgment "does not create new obligations or extinguish existing obligations, but merely declares what those existing obligations are" (to determine otherwise could amount to a back door injunction, contrary to section 13(2) of the SIA).⁽²⁹⁾
- Third, there was no need to imply any such obligation because they would continue to exist and could be enforced by a claim for damages.⁽³⁰⁾

As a result, there was no "serious issue" to be tried. The English courts had no jurisdiction over the award claims.

Judgment claims

The Court considered that the judgment claims were "matters relating to insurance" for the purposes of section 3 of Chapter II of the Brussels Recast Regulation, on the basis that "the essential purpose of the claims is to seek compliance with, or redress for non-compliance with, obligations derived from an insurance policy".⁽³¹⁾ The judgment claims' connection with the issue of liability under the contract was "close and obvious" and to treat those claims as anything other than matters relating to insurance would "elevate form over substance".⁽³²⁾ As a result, section 3 of the Brussels Recast Regulation applied.

Article 14.1 (set out in section 3 of the Brussels Recast Regulation) provides that claims by insurers may "only be brought in the courts of the member state in which the defendant is domiciled". This applies irrespective of whether the party "is the policyholder, the insured or a beneficiary". Article 14.1 therefore applied and was subject to only the carveout in article 14.2, which permits claims to be brought in England if they qualified as a counterclaim (which the present claim was not as it was a claim to enforce a judgment, rather than an "original claim" that was the type envisaged in article 14.2).⁽³³⁾

As a result, the court held that the judgment claims should be brought in Spain and France (rather than in England and Wales).

Comment

The Court's ruling on state immunity in the context of the section 18 application follows the principle established by the Supreme Court in *NML v Argentina*,⁽³⁴⁾ that there may be an overlap between the operation of section 3(1)(a) and section 9 of the SIA. This judgment provides an example of such an overlap.⁽³⁵⁾

The judgment also provided helpful guidance on the contours of section 9 of the SIA – namely, that the courts will not distinguish between a claim for declaratory relief and a claim for coercive relief, in the context of the SIA, as to do so would "involve absurd hair-splitting".

The Court set out clarifications on the issue of jurisdiction, in the context of enforcement proceedings – namely, that the test for whether a claim falls within the arbitration exception established by the European Court of Justice in *The Atlantic Emperor* (ie, that of "essential subject matter" or "principle focus") will call for "an evaluation of the nature of the claim by the first instance judge", and that the courts would be reluctant to disagree with such a decision "except in a clear case". Where the principle focus of a case is an obligation alleged to arise out of an English judgment (ie, where the nature of that case is purely concerned with enforcement), this test is unlikely to be met.

For further information on this topic please contact [Melissa Hollenders-Brown](mailto:Melissa.Hollenders-Brown@cliffordchance.com) or [Olivia Johnson](mailto:Olivia.Johnson@cliffordchance.com) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (melissa.hollenders-brown@cliffordchance.com or olivia.johnson@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Endnotes

- (1) [2021] EWCA Civ 1589.
- (2) The Brussels Recast Regulation was applied in this case because the original proceedings were commenced pre-Brexit.
- (3) Paragraph [126].
- (4) Paragraph [59].
- (5) Paragraph [36].
- (6) Paragraph [38].
- (7) Paragraph [36].
- (8) Paragraph [36].
- (9) Paragraph [44].
- (10) Paragraph [45].
- (11) Paragraphs [57] – [58].
- (12) Paragraph [63].
- (13) *The Fanti and Padre Island (No 2)* [1991] 2 AC 1.
- (14) Paragraph [61].
- (15) *London Steam-Ship Owners' Mutual Insurance Association v The Kingdom of Spain* [2015] EWCA Civ 333.
- (16) Paragraph [64].
- (17) Ibid.
- (18) Paragraph [68].

(19) [1991] ILPr 524.

(20) Paragraph [93].

(21) Paragraph [94].

(22) *Altimo Holdings & Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [71].

(23) The second and third limbs are:

- whether there is a good and arguable case that the claim falls within one or more of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B; and
- that the English court must be clearly or distinctly the appropriate forum for the trial of the dispute so that, in all the circumstances, the court should exercise its discretion to permit service of the proceedings out of the jurisdiction. Paragraph [95].

(24) Paragraph [98].

(25) Paragraph [99].

(26) Paragraph [122].

(27) Paragraph [123].

(28) *Zavarco Plc v Nasir* [2021] EWCA Civ 1217.

(29) Paragraph [124].

(30) Paragraph [125].

(31) Paragraph [136].

(32) Paragraph [138].

(33) Paragraph [145].

(34) [2011] UKSC 31; g [2011] 2 AC 495.

(35) Paragraph [69].