Injuncting Foreign Sovereigns in Aid of Arbitration

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A tribunal-ordered injunction may call for enforcement by a national court, or an injunction—particularly a freezing order—may be sought from the court itself (Arbitration Act 1996 s.4). Here, the law of the seat, in the way in which it treats questions of state immunity, will play an important role in arbitrations involving sovereign counterparties. The respondent in Maldives Airports v GMR Male International Airport [2013] SGCA 16—a special purpose vehicle established by investors holding a 25-year concession to rehabilitate the Male International Airport—had sought an interlocutory injunction in aid of Singapore arbitration proceedings. The investor’s purpose was to prevent the new government from interfering with its private law and property rights following an earlier Maldives court judgment declaring the fee structure under the concession to be unlawful. The Maldives pleaded state immunity, but the Singapore Court of Appeal held that there had been a prior, written waiver of immunity to “the giving of any relief or the issue of any process” under s.15(3) of Singapore’s State Immunity Act 1979, a provision identical to s.13(3) of the UK State Immunity Act 1978 (the 1978 Act). This was done by virtue of the Maldives’ broadly worded written consent to waive its immunity to “service of process, suit, jurisdiction, arbitration … or other legal or judicial process or other remedy” in the Concession Agreement. However, the Singapore court ultimately refused to grant the injunction on the basis of the usual balance of convenience test in American Cyanamid Co v Ethicon [1975] A.C. 396. The court also held that, under s.12A(4) of the Singapore International Arbitration Act, an injunction would only be available to prevent interference with such choses in action which (like banks accounts, shares and financial instruments) come close to the conventional meaning of “assets” in that provision (Maldives Airports, at [39]).

Some observers sense a deeper reluctance on the part of the Singapore court. This note draws a comparison between Singapore, English and Hong Kong law. Recent developments in England place the Singapore decision in its proper light, and readers may already be aware that the Hong Kong Court of Final Appeal recently adopted the doctrine of absolute immunity, and has also held that prior
written waivers are no longer sufficient to lift immunity; only waivers “in the face of the court” will suffice: see (2011) 127 L.Q.R. 495; (2012) 128 L.Q.R. 6.

Lord Denning and Lord Wilberforce, speaking during the passage of the UK State Immunity Bill, would have removed state immunity from pre-judgment interlocutory injunctions, including freezing injunctions. The Government rejected the proposed amendment, explaining that even “orders for the detention and preservation of the subject-matter of the litigation” are of a “kind … which is inappropriate against States” (Hansard, HL Vol.389, ser.5, col.1937 (March 23, 1978); H. Fox, The Law of State Immunity, 2nd edn (Oxford: Oxford University Press, 2008), at p.295). One can hardly hold a foreign sovereign in contempt in the event of non-compliance, but this makes it difficult to explain the eventual scheme of the Act. A sovereign which has been adjudged to have consented to “any relief or process” could still refuse to abide by an injunction, and the problem which the Lord Chancellor had identified would remain. The truth is that the 1978 Act’s scheme was the product of compromise. In its original form, cl.14 of the Bill precluded any injunction, order for specific performance, or order for the recovery of property against a foreign state—see s.13(2) of the Act. Section 13(3) was subsequently added by way of amendment, allowing “any relief or … process” (i.e. injunctions) to be awarded where a foreign sovereign had consented in writing. Similarly, the removal of immunity for property in, or intended for, commercial use was the product of a separate amendment, by s.13(4). The difficulty which arises today is that s.13(4) failed to include a power to grant injunctive relief against property which is or is intended for commercial use: A. Dickinson et al, State Immunity (Oxford: Oxford University Press, 2004), at pp.389–392; E.T.I. Euro Telecom v Bolivia [2008] EWCA Civ. 888; [2009] 1 W.L.R. 665 at [110]–[117] per Collins L.J. Unlike s.13(3), the words “any relief”—which is the source of a power to award interlocutory injunctions under s.13(3)—do not appear in s.13(4). In short, an injunction may only be granted where the foreign sovereign has given its “written consent” under s.13(3), whereas s.13(4) removes immunity only from post-judgment attachment (e.g. by way of a third party debt order) of sovereign property used or intended for use for commercial purposes.

There is no contradiction in saying that arbitral awards may be enforced, but that attachment of certain kinds of assets will not be permitted. Under s.14(4), for example, Central Bank accounts are immune from attachment. Similarly, there is no necessary contradiction in permitting some remedies but not others. But is it sound to preclude injunctive relief for the simple fear of imperilling foreign relations? This seems odd when placed alongside a doctrine of restrictive immunity. The restrictive immunity doctrine which applies under English and Singapore law provides that it is the commercial nature of the disputed transaction (or the commercial purpose to which relevant monies have been or been intended to be put) which matters, not the idea that foreign sovereigns may be offended when their commercial adventures result in civil litigation. An absolute immunity doctrine, such as that which Hong Kong has now adopted, would be more consistent with putting the fear of imperilling (China’s) relations with foreign nations above the need to achieve commercial justice.

Injunctions against foreign sovereigns were permitted at common law before the enactment of the 1978 Act: see Hispano Americana Mercantil SA v Central
Bank of Nigeria [1979] 2 Lloyd’s Rep. 277. It was therefore unsurprising that, in the absence of a similar legislative enactment following Hong Kong’s handover, such relief would have been upheld by the Hong Kong Court of Appeal: see (2011) 127 LQR 159. Non-renewal of Hong Kong’s analogue to the UK Act had compelled the Hong Kong Court of Appeal to revert to the common law, and recently the UK Supreme Court, in SerVaas Inc v Rafidian Bank [2012] UKSC 40; [2013] 1 A.C. 595, has cited the Court of Appeal judgment overturned in Hong Kong as being of continued persuasive authority wherever the restrictive theory of immunity applies at common law (at [29]).

The same question now arises in Singapore. Menon C.J., having found prior, written consent to the award of injunctive relief under s.15(3) of Singapore’s State Immunity Act 1979, held that the Singapore courts have the power to grant an injunction prohibiting the appellants from interfering with the respondent’s exclusive use, occupation and peaceful enjoyment of the airport site. In a passage which in future may prove important, Menon C.J. went further to observe (at [31]) that:

“It was not pressed before us that where a possible future Act of State might be the subject of an injunction, the wider principle of judicial abstention or restraint should apply and the court should refrain from adjudicating on the matter (Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888 at 931). It is unnecessary for us to express a view on this, save to say that it would inevitably be a factor which a court will take into consideration when assessing whether an injunction should be granted in such circumstances”.

Under the Act of State doctrine, an English court will not exercise its jurisdiction in a matter which would lead to a pronouncement upon the legality of a foreign sovereign’s acts within its own territory (Duke of Brunswick v Hanover (1848) 2 H.L. Cas 1). Exceptionally, an English court may also treat as non-justiciable certain extra-territorial acts of a foreign sovereign (Buttes Gas, at [831G] per Lord Wilberforce; Yukos Capital SARL v Rosneft Oil Co [2012] EWCA Civ. 855; [2013] 1 All E.R. 223 at [66] per Rix L.J.). Could this mean that, in Singapore, an Act of State analysis is now subsumed within the American Cyanamid test? Or, in the case of a freezing order—which was not in issue in the Singapore case—under the slightly different test which applies to it (S. Gee, Commercial Injunctions, 5th edn (London: Sweet & Maxwell, 2004), Ch.12)?

The Singapore judgment also raises a further question concerning the proper relationship between the immunity and Act of State analyses. In Alfred Dunhill of London v Cuba 425 U.S. 682 (1976), four US Supreme Court justices had famously adopted the view that—as with the law of state immunity—the Act of State doctrine would not apply to commercial activity. An equally narrow view of the Act of State doctrine in commercial disputes has received support in England, in Yukos Capital v Rosneft (above) (at [92]–[94]), where Rix L.J. had considered that: “comity only cautions that the judicial acts of a foreign state acting within its territory should not be challenged without cogent evidence” (at [87]). So the Act of State doctrine has evolved to a point where it might at least be suggested that its overbroad application would tend to go against the tide of modern legal opinion. In that case, the proposition that the doctrine still operates where immunity is
already determined to be unavailable strikes a discordant note. Where immunity is unavailable, ostensibly in accordance with international law, should that not settle the matter in all but the most exceptional cases?

The true questions are two-fold. First, whether the position under English law regarding the unavailability of an injunction absent written sovereign consent reflects Singapore law. Since the Singapore Act is modelled closely upon the UK Act, the answer seems to be “yes”. Secondly, whether written consent to arbitrate could constitute such consent. In the United Kingdom, submission to arbitration, governed by s.9(1) of the 1978 Act, has been held to waive immunity both to the supervisory jurisdiction of the English courts and to enforcement (Fox, *The Law of State Immunity* (2008), at pp.495–501; *Svenska Petroleum AB v Government of the Republic of Lithuania* [2006] EWCA Civ. 1529; [2007] Q.B. 886 at [117]–[121]). It would be a little extreme to suggest that neither waiver could ever amount to consent to the award of an interlocutory injunction. Two cases in particular might suggest such an extreme view. But in the first case, *Svenska*, the Court of Appeal had simply made passing reference to s.13 of the 1978 Act, as the controlling provision in situations involving enforcement by execution on property (see at [117]). As to the second, Collins L.J. in *E.T.I. Euro Telecom* (above) was dealing instead with a freezing injunction *pending execution of the award*, a situation which, it was held rightly or otherwise, did not involve “proceedings which relate to the arbitration” for the purposes of s.9 (see at [113]). To be certain, our argument is not that s.9 “overrides” s.13—the question which Collins L.J. posed—but simply that the written consent required to lift immunity might still be evidenced by an arbitration agreement.

Yet Singapore’s Court of Appeal did not discuss this aspect of immunity under the equivalent Singapore provision to s.9 of the UK Act; it did not have to because of the Maldives’ broad consent to waive its immunity in the Concession Agreement, but had instead suggested that there may also be another objection—based upon non-justiciability—towards awarding a commercial injunction against a foreign sovereign in support of arbitration proceedings. Perhaps the court is simply being cautious in light of English decisions such as *E.T.I. Euro Telecom*. However, in that case the judgment by Collins L.J., with whom Stanley Burnton L.J. and Tuckey L.J. concurred, had refused to grant an injunction in circumstances where the matter had been properly remitted to the jurisdiction of an International Centre for Settlement of Investment Disputes (ICSID) tribunal. ICSID arbitrations present a special case, due to the ICSID Convention’s largely self-contained arbitration procedures: *E.T.I. Euro Telecom* at [99]–[109]. In the case of other types of investor claim touching upon the meaning of bilateral investment treaties, these have instead been held, following an extensive review of the authorities by Mance L.J., to be justiciable before the English courts: see *Occidental Exploration and Production Co v Republic of Ecuador* [2005] EWCA Civ. 1116; [2006] Q.B.432, especially at [41]–[42].

Where states or their entities have submitted to arbitration, interim injunctive relief should not ordinarily be precluded on grounds of non-justiciability or Act of State. Rix L.J.’s judgment in *Yukos Capital*, above, confines non-justiciability to its proper sphere by showing the exceptional nature of treating acts other than those which have taken place in the territory of the foreign state to be
non-justiciable, and by exempting violations of international law from the application of the doctrine. In investment disputes with host states—where some claimants and nations now flee ICSID arbitration—greater resort to the ad hoc arbitration of investment-related disputes could in future lead to a higher incidence of questions of immunity, non-justiciability and Act of State before domestic courts, precisely because of the absence of any debate about the relevant arbitration procedures being self-contained in a similar manner to ICSID arbitration. Moreover, everyday commercial disputes over sovereign bonds, the commercial acts of state-owned enterprises and those of sovereign wealth funds are often likely to raise some involvement with the actions of a foreign sovereign. In such cases, any temptation to give broad rein to the doctrine non-justiciability will be commercially unwelcome.  

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**Barrister**