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KEY DEVELOPMENTS UPDATE

FEBRUARY 2024

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

We were delighted that so many of our colleagues in London were able to attend the Annual Legal Review of 2023 on 23 January 2024, chaired by Lord Thomas of Cwmgiedd with panelists Loukas Mistelis (Clyde & Co/Queen Mary University of Law), Andrea Menaker (White & Case) and Charles Enderby Smith (Carter-Ruck) addressing key issues and themes emerging in the areas of Investment Treaty Disputes, cases involving Public International law before the English Courts and decisions relating to the Arbitration Act 1996. You can access the video **here** and the presentation **here** for the event.

In this update these key areas are reflected in some of the most recent decisions outline below. You can access the full decisions from the links in the summaries.

Best wishes from all of us at McNair.

Should you be interested in any of the headlines below, please click here to see the newsletter in full or visit www.mcnairinternational.com/publications for a full list of our previous publications.

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The following updates are covered in this newsletter:

- **ICSID Tribunal Dismisses Electricity Sector Claims Against Argentina.** *Orazul International España Holdings SL v Argentina (ICSID Case No. ARB/19/25) (Award) (14 December 2023).* An ICSID tribunal rejected Argentina's various jurisdictional objections (including on limitation grounds), but dismissed the substantive claims – including by refusing to allow a Most-Favoured-Nation clause to be used to import an umbrella clause.

- **English Court Finds State Immunity Does Not Apply On An Application To Register An ICSID Award.** *Border Timbers Ltd and anor v Zimbabwe [2024] EWHC 58 (Comm) (19 January 2024).* Declining to follow other recent cases concerning state immunity in the context of registration and enforcement of ICSID awards, the Commercial Court decided (on a particular interpretation of the English statute to which the ICSID Convention is scheduled) that state immunity is simply not relevant to such an application.

- **Court of Appeal Clarifies English Law's "*Iniquity Exception*" To Privilege.** *Al-Sadeq v Dechert LLP and ors [2024] EWCA Civ 28 (24 January 2024)*. Clarifying important aspects of English Law's "iniquity exception" to legal professional privilege, the appellate court held privilege did not apply to various documents in proceedings concerning alleged unlawful arrest/detention, imprisonment and denial of access to legal representation.

- **Employment Tribunal Disapplies Section 4(2)(a) of the State Immunity Act 1978 As Being Contrary To EU Law.** *Spain v Lorenzo [2023] EAT 153 (12 December 2023)*. Holding that Spain was not immune from employment claims brought against, the Employment Appeal Tribunal (applying the UK Supreme Court's decision in *Bekharbouche v Foreign Secretary*) disapplied Section 4(2)(a) of the State Immunity Act 1978 as being incompatible with EU Law.

- **State Immunity Inapplicable Against Psychiatric Injury Claims.** *Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali [2023] EAT 149 (5 December 2023)*. Despite finding that the Employment Tribunal wrongly determined the claimant's employment functions were not sovereign in character, the Employment Appeal Tribunal nevertheless found Saudi Arabia was not immune from psychiatric injury claims brought by a former employee.

ICSID TRIBUNAL DISMISSES ELECTRICITY SECTOR CLAIMS AGAINST ARGENTINA

Orazul International España Holdings SL v Argentina (ICSID Case No. ARB/19/25)

Introduction

On 14 December 2023, an ICSID arbitral tribunal (Inka Hanefeld (chair); David Haigh KC; Alain Pellet) issued its Award in *Orazul International España Holdings SL v Argentina* (ICSID Case No. ARB/19/25).

Background

The dispute concerned the participation of Orazul International España Holdings ("Orazul") in Argentina's electric power sector through its subsidiary "Cerros Colorados", which owned two facilities. In early 2000, Argentina experienced severe economic crisis. In January 2002, Argentina enacted the "Emergency Law", converting electricity payment obligations previously denominated in USD into Argentinian pesos, and temporarily capping electricity prices. In September 2003, Argentina's Government announced an economic recovery. As part of measures to revive the wholesale electricity market, Argentina required providers to participate in two investment programs based on adhesion contracts (FONINVEMEM I and II), which obliged providers to reinvest some of their unpaid earnings into new ventures. Cerros Colorados participated in these programs, but subsequently protested that, even though the FONINVEMEM plants had begun operations, the wholesale electricity market had not been restored. In March 2013, Argentina implemented a new remuneration scheme, based on fixed and variable costs. Although it considered it would adversely impact its investments, Cerros Colorados accepted the new remuneration scheme.

In the arbitration, Orazul claimed Argentina's measures had reduced power generators' revenues, created barriers to their collection, and created a discriminatory pricing regime which contravened their legitimate expectations in breach of the Fair and Equitable Treatment standard in Article IV(1) of the Spain-Argentina bilateral investment treaty ("BIT"). Orazul claimed between US$364.4 and US$667.3 million (plus interest) in compensation for lost profits.

Decision

The tribunal dismissed Argentina's various jurisdictional objections, including that the claims were time-barred. Neither the BIT nor the ICSID Convention provided for any limitation period. The tribunal also allowed the claimant to use the BIT's most-favoured-nation ("MFN") clause to bypass requirement to first litigate in Argentina's courts, ruled that Orazul's "seat" was in Spain, and held there was no abuse of process.

On the merits, the tribunal (by majority) held that Orazul's investment in Argentina's electricity sector was only made after Argentina's emergency measures to address its economic turmoil. It could not be legitimately expected that Argentina would return to its pre-crisis electricity pricing framework for within the specific timeframe allegedly relied upon by Orazul. Given the Argentinian authorities' broad mandate under domestic legislation, the majority concluded overall there was no violation of Argentina's duty to ensure transparency, adhere to due process or act reasonably. The contested measures were not discriminatory in circumstances where neither market newcomers, nor publicly owned entities, were in "*like circumstances*" to Orazul. Departing from earlier investment treaty decisions, distinguishable by the investment's timing, the majority held that the adhesion contracts requiring reinvestment of Orazul's receivables were not compelled by intimidation. Ultimately, the majority dismissed Orazul's invocation of the MFN clause to incorporate an umbrella clause.

Orazul's nominated arbitrator dissented on liability, finding that, given the temporary (and regulatory) nature of the emergency measures, there was a legitimate expectation Argentina would return (within the specific timeframe) to the mandatory pricing mechanisms contained in its legislation.

The decision and the dissenting opinion are available **here**.

ENGLISH COURT FINDS STATE IMMUNITY DOES NOT APPLY ON AN APPLICATION TO REGISTER AN ICSID AWARD

Border Timbers Ltd & anor v Zimbabwe [2024] EWHC 58 (Comm)

Introduction

On 19 January 2024, the Commercial Court ruled on the impact of state immunity on the enforcement of an ICSID award against Zimbabwe. This decision represents a departure from the Commercial Court's 2023 ruling in *Infrastructure Services Luxembourg SARL & anor v Spain* [2023] EWHC 1226 (Comm), against which an appeal is pending (at time of writing).

Background

The claimants secured an ICSID award against Zimbabwe in 2015. In 2018, an ICSID *ad hoc* annulment committee upheld the award. In 2021, Cockerill J ordered that the award be registered and enforced as a judgment of the High Court. Zimbabwe applied to set aside that registration order, and, in late 2023, a hearing took place before Dias J to determine Zimbabwe's invocation of state immunity.

Decision

The judge considered the framework established by the ICSID Convention, the State Immunity Act 1978 and the Arbitration (International Investment Disputes) Act 1966.

(1) Operation of Article 54 of ICSID Convention

The judge began by stressing the distinction between a general waiver of immunity and a submission to the jurisdiction under the State Immunity Act 1978, noting that the two can overlap. Dias J "*concluded that Article 54 is not a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recognising and enforcing the award against Zimbabwe*". However, the judge expressly recognised that this approach "*could be said to run counter to the object and purpose of the ICSID Convention which was to preserve state immunity only in respect of execution while providing for mandatory recognition and enforcement across the board*". Dias J also recognised that her approach ran counter to that of Fraser J in *Infrastructure Services* where he found that Article 54 represents a submission to the court's jurisdiction and removes adjudicative immunity pursuant to both Sections 2(2) and 9(1) of the State Immunity Act 1978.

Dias J then considered whether Section 9 "*requires or permits the English court to re-examine the jurisdiction of the tribunal (whether an ICSID tribunal or any other tribunal) and, secondly, whether ICSID awards fall to be treated differently from other awards in this respect*". In this regard, Dias J relied on the reasoning of Butcher J in *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm) that "*the English court must be independently satisfied that there is an agreement to submit the particular dispute*" to arbitration, irrespective of whether or not any particular points were argued in the arbitration. Despite recognising that "*the ICSID tribunal is the final arbiter of jurisdiction*", this was not sufficient in Dias J's view to establish that Zimbabwe agreed to arbitrate.

(2) Operation of state immunity at the procedural stage of registration of an ICSID award

Having considered the rules for the enforcement of ICSID awards under Rule 62.21 of the English Civil Procedure Rules, Dias J "*that if the application to register an ICSID award did not have to be served [...] the application did not require Zimbabwe to be impleaded with the result that the doctrine of sovereign immunity was not engaged at that stage at all*". By virtue of the specific feature of Section 2 of the Arbitration (International Investment Disputes) Act 1966 (to which the ICSID Convention is scheduled), that an ICSID award creditor is "*entitled*" to registration (subject only to proof of authenticity of the award and other evidential requirements), state immunity does not come into play at the anterior stage of registration because there is a difference between the application for registration and the resulting order. The state was not impleaded by the application for registration (which was not required to be served) but only by the service of the registration order itself. The requirement for a state to be served with the registration and enforcement order (held to be mandatory in *General Dynamics United Kingdom v Libya* [2021] UKSC 22) would afford the state the opportunity to assert immunity before execution against its assets. Thus, according to Dias J, state immunity was simply not relevant to an application to register and enforce an ICSID award in England & Wales.

An appeal is pending against the decision a the time of writings.

The judgment is available **here**.

COURT OF APPEAL CLARIFIES ENGLISH LAW'S "*INIQUITY EXCEPTION*" TO PRIVILEGE

Al-Sadeq v Dechert LLP and ors [2024] EWCA Civ 28

Introduction

On 24 January 2024 in *Al-Sadeq v Dechert LLP* [2024] EWCA Civ 28, the Court of Appeal (Underhill LJ; Males LJ; Popplewell LJ) determined important issues regarding English Law Legal Professional Privilege ("LPP"), in particular LPP's "*iniquity exception*". The principle that only communications with a client's employees/representatives who were authorised to seek and receive legal advice would attract Legal Advice Privilege ("LAP") was held not to apply to Litigation Privilege ("LP").

Background

In 2013, the respondents (a UK law firm and three former partners) were engaged to investigate alleged fraud and misappropriation of assets of the Ras Al Khaimah Investment Authority ("RAKIA") by its former CEO and his associates. In 2014, the appellant (RAKIA's former deputy CEO) was arrested in Dubai, and convicted and imprisoned for fraud in Ras Al Khaimah ("RAK"). The appellant commenced proceedings alleging the respondents had used unlawful means to force him to give evidence (including false evidence) against the conspirators to the fraud/asset misappropriation.

During disclosure, the respondents invoked LPP over certain documents. Under English Law, LPP encompasses both LP (which protects communications between lawyers/clients and third parties for the sole or dominant purpose of obtaining advice or information in connection with existing or reasonably contemplated litigation) and LAP (which protects lawyer-client communications for the purpose of giving or receiving legal advice). English Law also recognises an "iniquity exception" to LPP whereby privilege cannot be asserted over communications made in furtherance of a crime, fraud or equivalent conduct.

The appellant argued the "*iniquity exception*" applied by virtue of his unlawful arrest, the unlawful prison conditions he was held in, and his denial of access to legal representation. The respondents contended their careful privilege review had found no documents engaging the iniquity exception. The appellant challenged the invocation of LP, contending that the litigation relied upon had not been "*in contemplation*", and that the *Three Rivers* principle (that only communications with client employees/representatives specifically authorised to seek and receive advice attracted LAP) did not apply to LP.

Decision

The Court of Appeal held that the "*iniquity exception*" required the party seeking to invoke it to demonstrate that, on the balance of probabilities (save for exceptional cases where a "*balance of harm*" analysis might be justified), the available material showed an iniquity existed. In the instant case, the available material established each of the iniquities the appellant relied upon. Since the iniquity exception was engaged, no privilege attached to documents/communications that came into existence "*as part of or in furtherance of*" the relevant iniquity. The phrase "*as part of or in furtherance of*" included documents that revealed the relevant iniquitous conduct and which the iniquitous conduct brought into existence, but did not extend to include any document that would not have existed 'but for' the iniquity.

However, dismissing the appeal in relation to LP, the Court of Appeal held that the available evidence established that the relevant litigation had been in contemplation at the relevant time. LP extended to proceedings in which the law firm's clients had not been a party, so long as the test for LP was met. The court confirmed the *Three Rivers* principle was inapplicable to LP.

As regards LAP, the court held that, whilst any document created "*purely*" out of the law firm's investigative role would not attract LAP, there was nothing on the available material demonstrating that LAP had been wrongly claimed for the law firm's communications *qua* lawyers that merely "*involved*" the law firm's investigative activities.

The judgment is available **here** .

EMPLOYMENT TRIBUNAL DISAPPLIES SECTION 4(2)(A) OF THE STATE IMMUNITY ACT 1978 AS BEING CONTRARY TO EU LAW

Spain v Lorenzo [2023] EAT 153

Introduction

The claimant was a Spanish/UK dual national originally employed as a personal assistant to the Spanish Ambassador in London. After a "career break" she returned as an Administrative Assistant and later brought employment claims against "The Embassy of Spain". These claims included claims for discrimination under the Equality Act 2010.

Background

In a case management summary, the Employment Tribunal had identified the issues it had to consider as being (A) whether the claims should be struck out because they were barred by diplomatic immunity, pursuant to Article 31 of the Vienna Convention on Diplomatic Relations 1961 ("VCDR 1961"); alternatively (B) State immunity, pursuant to Section 1 of the State Immunity Act 1978 ("SIA 1978"). Each issue was sub-divided into a number of elements. The Employment Tribunal held that: (1) the claimant's claims deriving from the Employment Rights Act 1996 and the Employment Act 2002 would be dismissed; (2) her claims of direct race discrimination, contrary to Sections 13 and 39 of the Equality Act 2010 ("the EQA 2010"), and harassment related to race, contrary to Sections 26 and 39 of the EQA 2010 (in each case reliant upon her British nationality) would proceed to a substantive hearing; and (3) the correct respondent to those claims was "The Kingdom of Spain", rather than, as had been pleaded by the claimant, the "Embassy of Spain".

Decision

On appeal, the Employment Appeal Tribunal considered four issues:

- Issue 1: if an employee of a mission sues the State, can the State rely on diplomatic immunity?
- Issue 2: if State, rather than diplomatic, immunity applies, how is the distinction between sovereign and non-sovereign acts to be applied
- Issue 3: was the Tribunal's finding that the claimant's employment was not sovereign one which was open to it on the facts
- Issue 4: if not a sovereign act, was the Tribunal entitled to disapply Section 4(2)(a) of the SIA 1978?

Issues of customary international law were raised on behalf of Spain. It was argued that, before the SIA 1978 was introduced, customary international law applied the diplomatic immunity of a state's agent to the state itself, and that Section 4(2)(a) of the SIA 1978 which conferred statutory immunity to a state in respect of employment of its own nationals also reflected customary international law.

Issue 1 was determined by construing Articles 1 and 31 of the VCDR 1961, as scheduled to the Diplomatic Privileges Act 1964. Article 31 was clear that the immunity applied to the diplomatic agent and not to the sending state. The Employment Appeal Tribunal also rejected the contention that the customary international law position before the SIA 1978 conferred a state agent's immunity on the sending state.

Issues 2 and 3 were taken together. To overturn the decision that the employment claim did not arise out of an inherently sovereign or governmental act of a foreign state, the Employment Appeal Tribunal would have had to determine the decision was "*perverse*". The Employment Appeal Tribunal held that such a "perversity appeal" required "an overwhelming case" to be made out that the Employment Tribunal's decision was one which no reasonable tribunal would have reached, on a proper appreciation of the evidence, and the law. The Employment Appeal Tribunal was not satisfied that the decision regarding sovereign acts was perverse.

As to Issue 4, the Employment Appeal Tribunal concluded that Section 4(2)(a) was not justified by any binding principle of customary international law, and agreed that the Employment Tribunal was (consistent with the UK Supreme Court's decision in *Benkharbouche v Foreign Secretary* [2017] UKSC 62) entitled to disapply Section 4(2(a) on grounds of incompatibility with EU Law and Article 47 of the Charter of Fundamental Rights.

The judgment is available **here**.

STATE IMMUNITY INAPPLICABLE AGAINST PSYCHIATRIC INJURY CLAIMS

Royal Embassy of Saudi Arabia (Cultural Bureau) v Alhayali [2023] EAT 149

Introduction

The claimant was employed at the Saudi Embassy in their Education and Cultural Affairs office to provide support to Saudi students who were studying, or who were hoping to study, in the United Kingdom. She alleged among other things that the Embassy had caused her psychiatric injury. The Employment Tribunal had to decide whether the claims were precluded by state immunity.

Background

Although the Embassy's solicitors had at first accepted the Employment Tribunal's jurisdiction over the claims that derived from EU Law, the Embassy sought to reassert state immunity by producing a stamped (but unsigned) certificate to the effect that its solicitors had not had authority to waive state immunity. The Employment Tribunal held that there had been a waiver of Saudi Arabia's state immunity. Further, the Employment Tribunal held that the personal injury claims fell within the exception to state immunity contained in Section 5 of the State Immunity Act 1978 ("SIA 1978"), which provides:

"A State is not immune as respects proceedings in respect of— (a) death or personal injury; or (b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom."

Decision

Before the Employment Appeal Tribunal, the issues were whether the Employment Tribunal had erred: (i) by not giving due weight to the Embassy's certificate and as such should have found that there had not been a waiver of state immunity; (ii) by failing to have proper regard to the context in which the claimant had carried out her duties; and (iii) by not considering that the functions the claimant was required to carry out fell within the sphere of sovereign activity (having regard to *Benkharbouche v Embassy of Sudan* [2017] UKSC 62 and the State of Immunity Act 1978 (Remedial) Order 2023).

Benkharbouche had concerned employment law claims by employees of foreign embassies. The central question was whether the provisions of the SIA 1978 were incompatible with the right of access to a court under Article 6 of the European Convention on Human Rights ("ECHR"). Lord Sumption explained in that case that provisions giving immunity to foreign states would be incompatible with Article 6 of the ECHR unless they were justified because they gave effect to requirements of customary international law. Thus, a foreign state would have immunity from employment claims which arose out of their inherently sovereign or governmental acts. The Employment Appeal Tribunal found that the Employment Tribunal had failed properly to address the question of state immunity and waiver and referred the case to a different tribunal for these issues to be reconsidered.

As to the Embassy's certificate, the Employment Appeal Tribunal considered that at least some weight should have been given to it by the Employment Tribunal, even though it was not strictly either a certificate of the Secretary of State (for the purposes of Section 21 of the SIA 1978) or a certificate under Section 13(5) of the SIA 1978 given by the Head of the Diplomatic Mission concerning property used or intended to be used for state purposes.

The Employment Tribunal had erred in its consideration of the functions performed by the claimant and whether were within the sphere of sovereign activity. On a correct analysis, the claimant's functions involved participating in the Embassy's public service, not merely as part of its private administration. Properly considered, her functions were sovereign in character and attracted state immunity.

However, the Employment Appeal Tribunal went on to uphold the Employment Tribunal's finding that the claims fell within the 'personal injury' exception to state immunity. In a previous case (*Nigeria v Ogbonna* [2012] 1 WLR 139), it had been concluded correctly that claims for psychiatric injury were to be considered personal injury claims for the purposes of Section 5 of the SIA 1978.

The judgment is available **here**.