

**DISCHARGE OF FREEZING ORDER PROVISIONS ON GROUNDS OF STATE  
IMMUNITY**

*Thai-Lao Lignite (Thailand) Co Ltd & Anor v Government of the Lao People's Democratic Republic [2013] EWHC 2466 (Comm)*

**Introduction**

In a decision published on 8 August 2013 in *Thai-Lao Lignite (Thailand) Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2013] EWHC 2466 (Comm), the High Court severed and discharged those provisions of a freezing order relating to accounts in the name of The Bank of the Lao People's Democratic Republic ("the Central Bank") on the grounds that the Central Bank was not a party to the proceedings in connection with which the freezing order was made and was immune to its execution under the State Immunity Act 1978.

**Background**

Thai-Lao Lignite (Thailand) Co Ltd and Hongsa Lignite (Lao PDR) Co Ltd ("the Claimants") entered into a project development agreement with the government of the Lao People's Democratic Republic ("the LPDR") to mine lignite coal reserves and develop an on-site power plant in Laos. The agreement contained an express waiver by the LPDR of its right to state immunity in relation to any disputes arising from the agreement.

Following disputes between the parties, the LPDR purported to terminate the agreement. Under the terms of the agreement, the matter was referred to arbitration and the Claimants were granted an award which they sought to enforce worldwide, including in England. Meanwhile the LPDR issued successful proceedings in Malaysia to set the award aside.

The Claimants applied, without notice to either LPDR or the Central Bank, for a freezing order which was granted by Simon J. The freezing order applied to assets in England and Wales, up to a value of US\$74.5 million, including any bank account in which the LPDR had a beneficial interest. The freezing order also contained a provision restraining activity in any account maintained in the name of the LPDR. Pursuant to this order, two London accounts of the Central Bank were frozen resulting in losses to the Central Bank of approximately US\$4.5 million.

The Central Bank applied to discharge the order on the grounds that it enjoyed sovereign immunity; and alleged that the Claimant was in breach of its duty of full and frank disclosure.

**Judgment**

The High Court discharged that portion of the order pertaining to the Central Bank on the grounds of sovereign immunity, but held that discharge of the entire order, even in the face of a failure of full and frank disclosure by the Claimants, would be disproportionate.

## State Immunity

Popplewell J. held that the “novel and far-reaching” provision contained in the freezing order for a blanket freezing of accounts in the name of the Central Bank should never have been made because the Central Bank’s property had immunity from execution under Sections 13 and 14 of the State Immunity Act 1978 (the “1978 Act”).

Section 13 of the 1978 Act provides that the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award without written consent, unless that property was in use or intended for use for commercial purposes.

Section 14(4) provides that property of a State's central bank or other monetary authority shall not be regarded for the purposes of Section 13 as in use or intended for use for commercial purposes; *and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.*

It was common ground that for the purposes of the freezing order, the Central Bank had separate juridical personality and was a separate entity from the Government within the meaning of Section 14 of the 1978 Act. The Central Bank carried on traditional central bank functions, was capable of holding its own property, and of suing and being sued.

Accordingly the Central Bank was entitled to rely on the provisions of Sections 13 and 14 of the 1978 Act. As it had not given its written consent, it was therefore entitled to enjoy the benefit of state immunity. Whether or not the LPDR Government had given its written consent was immaterial since such consent could not affect the Central Bank’s immunities and privileges as a separate entity.

Consequently, any order for execution targeting property in the Central Bank’s name would be permissible only if the Central Bank itself had no substantive interests in that property of a legal, equitable or contractual kind. It was clear that the Central Bank had such interests in the accounts in question and so they could not be the target of an execution order.

## Full and Frank Disclosure

As the Claimants had made the application without notice, they had a duty to investigate facts and matters relevant to the application, and fairly to present evidence and submissions to the Court in relation to it. The Claimants should have disclosed fully to the Court all matters relevant to the application, including all matters, whether of fact or law, which were, or may have been, adverse to it.

The Claimants’ application for the order had been presented on the basis of an inadequate and misleading exploration of relevant authorities relating to state immunity. In particular, there had been serious failures fairly to explain and justify the relief sought against bank accounts in the Central Bank's name, and it should have been apparent that any potential interference with a central bank carrying out its central bank functions required careful consideration and justification.

However, these breaches of the duty of full and frank disclosure were not deliberate and it would not be just for the Claimants to be deprived of all injunctive relief. The breaches related solely to those parts of the order which related to the Central Bank and were separable from the rest of the freezing order, which could therefore continue in force minus those paragraphs relating to the Central Bank.

For access to the judgment, see:

<http://www.bailii.org/ew/cases/EWHC/Comm/2013/2466.html>

1<sup>st</sup> October 2013