

IMPROPER SERVICE AND SERIOUS NON-DISCLOSURE LEADS TO SETTING ASIDE OF TRIBUNAL'S ORDERS

PCL & Ors v The Y Regional Government of X [2015] EWHC 68 (Comm)

Introduction

In a decision handed down on 23 January 2015 in *PCL & Ors v The Y Regional Government of X* [2015] EWHC 68 (Comm), the English Commercial Court set aside two without notice orders granted by an LCIA tribunal on the grounds that the service of an arbitration claim form and other documents on the defendant territory had not been carried out in compliance with the requirements of Section 12 of the State Immunity Act 1978.

Background

The claimant companies and the defendant constituent territory of a federal state were parties to a contract for the exploitation of hydrocarbons within the defendant territory. The claimants commenced LCIA arbitration proceedings against the defendant alleging non-payment for petroleum products that had been sold.

The tribunal made a peremptory order compelling the defendant to pay to the claimants US\$100 million. When the defendant did not comply with the peremptory order, the tribunal made a without notice order allowing the claimants to apply to the English courts for enforcement of the peremptory order under Section 42 of the Arbitration Act 1996. The tribunal gave an order allowing the claimants to serve an arbitration claim form and other documents on the defendant's UK solicitors ("the First Order"). The tribunal also ordered that the time period for the defendant to file an acknowledgment of service should be abridged to three days ("the Second Order").

Upon receipt of the arbitration claim form, the defendant's UK solicitors asserted that Section 12 of the State Immunity Act 1978 ("the 1978 Act") applied, and that the claimants had failed in their duty to disclose state immunity issues to the court.

Section 12 of the 1978 Act provides that documents required to be served for instituting proceedings against a state shall be served by transmission through the UK Foreign & Commonwealth Office to the Ministry of Foreign Affairs of that state. Furthermore, Section 12 provided for a mandatory minimum time period of two months for the defendant state to file an acknowledgment of service.

The Defendant's Application

The defendant applied to the court to set aside the First and Second Orders.

The defendant contended:

(1) the arbitration claim form was "instituting proceedings" for the purposes of Section 12 of the 1978 Act;

- (2) the defendant's earlier agreement to accept service on its solicitors had only been in respect of documents in the arbitration;
- (3) the defendant's filing of an acknowledgment of service in order to allow it to challenge the jurisdiction of the English courts did not amount to a waiver of the right to rely on Section 12 of the 1978 Act;
- (4) the claimants' failure to draw Section 12 of the 1978 Act to the attention of the courts was non-disclosure so serious as to justify setting aside the First and Second Orders.

The Decision

The English Commercial Court (Hamblen J) granted the defendant's application and set aside the First and Second Orders.

The proceedings instituted by the arbitration claim form were distinct and separate from the main arbitration (notwithstanding the fact that they were ancillary proceedings). Serving the arbitration claim form constituted "instituting proceedings" for the purposes of Section 12 of the 1978 Act.

Court proceedings brought in support of arbitration proceedings were not to be viewed as arbitration proceedings themselves, or extensions of arbitration proceedings. Accordingly, the defendant's UK solicitors' refusal to accept service of arbitration claim form was valid, and their previous acceptance of service related only to documents in the arbitration.

The defendant had not yet "appeared" in the proceedings as it had filed an acknowledgment of service and had applied to contest the jurisdiction of the courts within the specified time limits. Accordingly, it had not waived its state immunity.

There was publicly available information detailing that the defendant was a self-governing region with its own sovereign powers and legislature. Although it was not necessary to determine the dispute, Hamblen J held that the non-disclosure of Section 12 of the 1978 Act was so serious that it would have justified setting aside the First and Second Orders to mark the court's disapproval.

Concluding Remarks

The decision highlights how fundamental due diligence is where the defendant is likely to be defined as a 'state' or 'state entity' within the State Immunity Act 1978 as well as the importance of ensuring that service is properly effected, particularly where service out of the jurisdiction is required.

Parties should be well aware of the consequences of non-disclosure before the English courts, but also that in international arbitration against a state it is essential to determine whether a defendant is likely to fall within the provisions of national state immunity legislation.

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