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STATE IMMUNITY – ENFORCEMENT OF AWARDS BEFORE THE ENGLISH COURTS – UPDATE

PAO Tatneft v Ukraine [2018] EWHC 1797 (Comm)

Introduction

By a decision handed down on 13 July 2018 in *PAO Tatneft v Ukraine* [2018] EWHC 1797 (Comm), the English Commercial Court rejected an application by Ukraine to set aside an order for the enforcement of an arbitral award in favour of the Russian company Tatneft on the basis that Ukraine had lost its state immunity to enforcement by virtue of the submission to arbitration contained in the applicable Russia-Ukraine BIT.

Background

Tatneft had previously been a shareholder in Ukrtatnafta (a Ukrainian company), as had Seagroup International Inc (a US company) and AmRuz Trading AG (a Swiss company). In October 2007, the Ukrainian courts declared that the share purchase agreements by which Seagroup International Inc and the AmRuz Trading AG had acquired their shares were invalid. Those shares were returned to Ukrtatnafta and were then sold to a third party. In December 2007, Tatneft purchased significant shareholdings in both Seagroup International Inc and AmRuz Trading AG. Further decisions from the Ukrainian courts in 2008 and 2009 declared that the share purchase agreements by which Tatneft had acquired its shares in Ukrtatnafta were also invalidated. Tatneft's shares in Ukrtatnafta were returned to Ukrtatnafta and subsequently sold to a third party.

On 21 May 2008, Tatneft served Ukraine with a Notice of Arbitration under the UNCITRAL Rules as provided for by the Russia-Ukraine BIT dated 27 November 1998 claiming that Tatneft had been effectively deprived of its entire shareholding in Ukrtatnafta as a result of unlawful measures in which Ukraine was complicit. An arbitral tribunal seated in Paris (Professor Francisco Orrego Vicuna; Charles N. Brower; Marc Lalonde QC) confirmed its jurisdiction by a partial award dated 28 September 2010 and decided by an award dated 29 July 2014 that Ukraine had committed a breach of the obligation under the Russia-Ukraine BIT 1998 to afford Tatneft fair and equitable treatment ("FET").

On 13 April 2017, Tatneft applied to the English courts for permission for enforcement under Section 101(2) of the Arbitration Act 1996. That application was successful. Ukraine then filed an application before the English Commercial Court seeking to set aside the order for enforcement of the arbitral award on the basis that the English court did not have jurisdiction over Ukraine by virtue of the fact that Ukraine (as a foreign sovereign state) still benefitted from state immunity afforded by Section 1 of the State Immunity Act 1978. Ukraine contended that it had not lost its state immunity by the operation of Section 9 of the State Immunity Act 1978 because its agreement to submit disputes to arbitration did not cover the disputes in respect of which the award had been made.

Decision

The Commercial Court (Butcher J) rejected Ukraine's application for the setting aside of the enforcement order.

Butcher J dismissed the contention that Ukraine was no longer able to raise arguments as to state immunity having not raised those arguments before the arbitral tribunal. Butcher J held that there was no provision similar to that of Section 73 of the Arbitration Act 1996 (whereby a party may be taken as having lost the right to raise a certain objection) concerning the state immunity provided by the State Immunity Act 1978.

Ukraine contended that the FET claim was not a claim that fell within the scope of its agreement to arbitrate under Article 9 of the Russia-Ukraine BIT 1998. Butcher J held that this was a point that went to the merits of the case. It was not a point going to the arbitral tribunal's jurisdiction (which engaged the issue of whether Ukraine had submitted to arbitration for the purposes of Section 9 of the State Immunity Act 1978). The issue of whether a FET duty was owed by Ukraine fulfilled the jurisdictional requirements of Article 9 of the Russia-Ukraine BIT 1998, being a "*dispute…in connection with investments…*".

Ukraine also contended that, as regards Tatneft's purchase of shares in Seagroup International Inc and AmRuz Trading AG, there was no qualifying "*investment*" such as to satisfy the jurisdictional requirements of Article 9 of the Russia-Ukraine BIT 1998, on the basis that those share purchases had not involved any contribution or capital/resources into the Ukrainian economy. Butcher J found that the definition of "*investment*" provided in the Russia-Ukraine BIT 1998 did not require an active commitment as canvassed by Ukraine. Instead, the essence of the definition was that all lawfully acquired assets of the investor within Ukraine would constitute "*investments*".

Ukraine also contended that its offer to arbitrate only extended to the period of time after a qualifying "*investment*" was made – and that Tatneft's share acquisitions in Seagroup International Inc and AmRuz Trading AG thus were not within the scope of that agreement to arbitrate. Butcher J held that the relevant breach alleged was (at the earliest) in late 2008 – after Tatneft's acquisition of shares in Seagroup International Inc and AmRuz Trading AG.

Ukraine also contended that Tatneft's claim was abusive and that its agreement to arbitrate did not extend to cover abusive claims. The alleged abuse lay in Ukraine's allegation that it

had been reasonably foreseeable at the time of Tatneft's acquisition of shares in Seagroup International Inc and AmRuz Trading AG that a dispute would arise regarding the shareholding that they in turn had in Ukrtatnafta. Therefore, Tatneft's share acquisitions had only been done in order to benefit from the protections of the Russia-Ukraine BIT 1998. Butcher J held that it was not possible to read into the agreement to arbitrate (as contained in Article 9 of the Russia-Ukraine BIT 1998) a limitation to Ukraine's consent such as would exclude "*abusive*" claims. Furthermore, the issue of abuse of rights was a matter of admissibility, not of jurisdiction, and was therefore a matter for the arbitral tribunal itself to consider and determine.

Concluding Remarks

This judgment provides a sharp demonstration of the importance of States entering into bilateral or multilateral investment treaties to be aware of the full scope (and ramifications) of their consent to arbitrate disputes.

Furthermore, also in July 2018, an English company solely owned by a company wholly owned by the Indian Government secured the discharge of a third party debt order made against it in the course of attempts to enforce an arbitral award against the Republic of India (*Hardy Exploration and Production (India) Inc v India* [2018] EWHC 1916 (Comm)) and the English court granted an application to dispense with service against the State of Libya in the course of a claim to enforce an arbitral award against Libya as a judgment of the English High Court (*General Dynamics United Kingdom Ltd v Libya* [2018] EWHC 1912 (Comm)). As States continue to litigate and arbitrate internationally, it is increasingly important for foreign State officials and advisors to be aware of English court procedure regarding the enforcement of awards/judgment against State assets.