

DIFC Court addresses State Immunity & Riyadh Convention

In the largest claim hitherto brought before the DIFC Courts (in excess of USD 2 billion), the DIFC Courts gave an important decision on both waiver of state immunity in the DIFC and service via international treaties (***Pearl Petroleum Company Limited & Others v The Kurdistan Regional Government of Iraq [2017] DIFC ARB 003***). The DIFC Court of First Instance (Justice Sir Jeremy Cooke) decided that the Defendant, the Kurdistan Regional Government (“the **KRG**”) had effectively waived any immunity it might have against recognition and enforcement (and execution) of two LCIA arbitral awards. However, the Court also decided that the provisions of the Riyadh Convention (a treaty governing, inter alia, service of process, to which both Iraq and the UAE are party) were both mandatory in their application and, importantly, were applicable domestic law in the DIFC. Accordingly, an order for alternative service of the recognition and enforcement order on KRG’s London solicitors should be set aside as incompatible with the treaty.

The DIFC Court’s order recognising and enforcing the two arbitral awards remained in force but the order would have to be validly served on the KRG in accordance with the Riyadh Convention.

Background

Three arbitration awards had been issued in favour of the Claimants against the KRG in relation to a contract for the development, production and sale of petroleum and liquid petroleum products from fields in the Kurdistan Region of Iraq (the “**KRI**”). Over USD 2 billion remained unpaid under the two monetary awards and the Claimants were seeking to enforce the awards in England, the District of Columbia and the DIFC.

The Claimants obtained *ex parte* orders in the DIFC Court: (1) recognising and enforcing the two monetary awards; and (2) permitting alternative service of the order on the KRG’s London solicitors who had acted for them in the arbitration. The KRG subsequently applied to set aside these orders and to set aside the enforcement proceedings on the ground that the DIFC Court had no jurisdiction to make such orders.

The two major issues before the Court were:

1. The KRG’s claim to sovereign or state immunity from the proceedings; and
2. The KRG’s claim that service could only legitimately have been effected under the terms of the Riyadh Convention and not by the Court ordering alternative service.

State or Sovereign Immunity

The KRG’s main contentions in relation to state immunity were that:

1. Because the law of state immunity had to be the same in DIFC as in the UAE as a whole, issues of state immunity were matters for the UAE to determine and not for the courts of Dubai or the DIFC;
2. Such matters were for the executive or legislature under Article 120 of the UAE Constitution;
3. If there was doubt as to the organ responsible for such determination, the Union Supreme Court had to decide where the responsibility lay.

The parties had agreed (at least by the end of the hearing) that, subject to these contentions, the doctrine of state immunity was a matter of procedural law.

The Court concluded that the KRG had effectively waived any immunity it might have (while not deciding whether or not the KRG was entitled assert immunity). The Court reasoned as follows:

1. It is for the Court to determine procedural issues and, where waiver is concerned it is for the Court to determine contractual rights. Like the enforcement of a judgment, the enforcement of an award as a result of a waiver of immunity is based on consensual obligations undertaken in a commercial contractual context;
2. If the Court decides there is, on the proper view of the contract and in accordance with its own procedural rules, a waiver of any immunity, it is hard to see how any public policy issues can arise and none were suggested here. These are not matters for the UAE executive, the UAE legislature or for the Union Supreme Court;
3. The KRG had specifically agreed to waive its rights to immunity in the arbitration clause in the contract and in Annexure 2 in relation to both suit and execution in any court of competent jurisdiction;
4. The waiver of immunity did not have to be made in the face of the court and refer specifically to the court and matter in question (contrary to what was thought to be the position in English law prior to the State Immunity Act 1978 – which position Justice Sir Jeremy Cooke regarded as “*an outdated and superseded rule of English procedural law which was, since 1920, founded on a mistake*”);
5. Accordingly, it was not necessary for the Court to decide whether or not the KRI should be recognised as a state or whether the KRG should be considered an arm or constituent part of a state;
6. Nor was there any need to decide whether the law of the UAE, Dubai or the DIFC include the concept of state or sovereign immunity.

Service

In relation to service under the Riyadh Convention, the Court decided that the order for alternative service must be set aside as incompatible with the Riyadh Convention, which formed part of DIFC law. More particularly:

1. The Court said that it would have found that there were “exceptional circumstances” here sufficient to justify an order for alternative service under English law even in circumstances where the applicable service treaty of convention is exclusive (rather than permissive) in its application;
2. However, there was a crucial distinction between the position in England and the DIFC in relation to the treatment of international treaties. In England, treaties do not form part of English domestic law but constitute factors to be taken into account. By contrast, in the DIFC international conventions entered into by the UAE achieve the force of law by ratification and are deemed to be part of the applicable domestic law in the DIFC;
3. The terms of Article 6 of the Riyadh Convention were “*self-evidently mandatory in respect of the documents to which it refers*”. Since the *ex parte* recognition and enforcement order had, as a matter of DIFC procedural law, to be served on the KRG, Article 6 required it to be served in accordance with the Riyadh Convention;
4. There was no room for circumvention of the terms of the Riyadh Convention by alternative service or dispensing with service, whether there were “exceptional circumstances” or not.

Wider implications

The case was settled before any appeal. The question remains outstanding whether the law of the UAE, Dubai or the DIFC include the concept of state or sovereign immunity and, if so, under the UAE Constitution, the entity with jurisdiction to determine its nature, scope and application.

The judgment does however have important implications for service of DIFC proceedings where the Riyadh Convention applies or there is another applicable service treaty to which the UAE is a party.

Pearl Petroleum Company Limited & Others v The Kurdistan Regional Government of Iraq [2017]
DIFC ARB 003

Tom Montagu-Smith QC, instructed by Gibson, Dunn & Crutcher LLP, appeared for the Claimants.

Michael Black QC and Arshad Ghaffar, instructed by Addleshaw Goddard (Middle East) LLP, appeared for the Defendant.

Case report by Tom Stewart Coats.

All of XXIV Old Buildings