United states?

Khawar Qureshi QC considers the enforcement of a foreign judgment against a sovereign state

IN BRIEF

Republic of Argentina and NML Capital Limited:

- Foreign judgments against states must pass through the State Immunity Act 1978 gateway.
- Enforcement of a foreign judgment against a state will only be possible if the state has expressly submitted to the jurisdiction of the UK courts.

In *Republic of Argentina and NML Capital Limited* [2010] EWCA Civ 41 (NML) the Court of Appeal granted an appeal from the order of Blair J dated January 29 2009. Blair J had confirmed that a hedge fund was entitled to bring an action in England to enforce a summary judgment obtained on May 11 2006 in the US courts against Argentina for the sum of around US$284m.

The claim arose from default on bond payments by Argentina in the aftermath of its financial crisis in late 2000. NML had acquired the rights arising under the bond instruments and, at first instance, Argentina had, inter-alia, argued but failed to persuade Blair J that NML should not be granted any relief because entities such as NML (sometimes called "vulture funds") existed solely to acquire distressed sovereign debt and to pursue claims aggressively—some form of "public policy" contention appears to have underpinned Argentina's argument in this regard. However, the nature of NML and its business rationale were held to be irrelevant for this purpose, and it would appear that this point was not pursued before the Court of Appeal.

Instead, the Court of Appeal was required to consider "novel points of English procedural law concerning claims against sovereign states, on the correct construction of provisions in the Civil Jurisdiction and Judgments Act 1982 and on the relationship of those provisions with the State Immunity Act 1978" (para 1 of the judgment).

Core questions

The core questions were whether NML could properly serve (or had properly served) Argentina out of the jurisdiction, and whether Argentina has submitted to the UK jurisdiction by virtue of provisions in the bond instruments/financial documents.

In essence, the decision of Aikens LJ (with which the remainder of the court agreed) accepted all of Argentina's arguments**.** The three key elements of the decision are summarised below.

(i) NML could not change their basis for seeking to serve out of the jurisdiction by way of amendment, but had to make a new application. The different arguments being relied upon by NML were not matters of procedure but substance (namely the existence of jurisdiction), and could not be dealt with by way of amendment to the claim form. NML needed to show a good arguable case that Argentina was not immune from suit.

> **"The court's approach places emphasis upon the need for an express written submission to the jurisdiction of the English court"**

NML initially relied upon cl 22 of the Fiscal Agency Agreement as providing a waiver, and also asserted that the "commercial exception" per s 3(1)(a) of the State Immunity Act 1978 (SIA 1978) was engaged. However, cl 22 effects a waiver only respect of proceedings in the courts of New York or Argentina. In addition, SIA 1978, s 3(1)(a) did not apply because NML's claim before the English court was not brought on the commercial transactions (namely the bond instruments), but rather was based upon the New York judgment.

Before Blair J, NML changed its position and argued instead that Civil Jurisdictions and Judgments Act 1982 (CJJA 1982), s 31(1) provided the jurisdictional basis for service out, or alternatively, the terms of the bonds contained an effective submission to jurisdiction. Blair J had given leave to amend the claim form on the basis that he accepted that these two arguments were well founded. The Court of Appeal held that leave to amend the claim form should not have been granted.

(ii)Section 31(1) of the Civil Jurisdictions and Judgments Act 1982 (CJJA 1982) had to be read subject to SIA 1978. ss 1–11. The English court thus had to be satisfied that Argentina had: (i) waived immunity for execution purposes in the UK (SIA 1978, s 1(2); (ii) submitted to the jurisdiction of the courts of the UK by a prior written agreement (SIA 1978, s 2(1)(2)).

Section 31(1) CJJA provides as follows: "31. Overseas judgments given against states, etc. A judgment given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognized and enforced in the United Kingdom if, and only if:

(a) it would be so recognized and enforced if it had not been given against a state; and

(b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to

such matters in the United Kingdom in accordance with SIA 1978, ss 2–11."

Disagreement

The Court of Appeal disagreed with Blair J, who had endorsed the view expressed in *Dicey & Morris* to the effect that CJJA 1982, s 31 provided a comprehensive jurisdictional code for UK courts in relation to the recognition and enforcement of judgments of foreign courts against states.

First, on the basis that CJJA 1982, s 31 could not diminish the applicability of SIA 1978, ss 1-11, without clear language/express amendment of SIA 1978 to signify this result, the court held that s 31(1) (b) was not a jurisdictional provision but rather, was directed towards establishing the conditions to be fulfilled by the foreign court's judgment (namely its legal system contained an equivalent to SIA 1978, ss 2–11 dealing with submission to the jurisdiction of that court, and an equivalent connection with that state) (para 78 of the judgment).

Second, the court held that if CJJA 1982, s 31(1) was intended to be a jurisdictional provision, it would have been expressed in terms of giving the English courts the "power" to recognize and enforce foreign judgments against a state as opposed to using the imperative "shall" (para 89 of the judgment).

On this basis, (and it has to be said, a very narrow reading of CJJA 1982, s 31) the court made it clear that it was not prepared to accept that CJJA 1982, s 31 required the English court to recognise and enforce a judgment against another state in a foreign court, even though that state had not submitted to the jurisdiction of the UK courts, nor had that state agreed in any treaty or convention to a further limitation on its immunity in this regard (para 91 of the judgment). Thus the court held that UK jurisdiction would only be engaged if one of the exceptions to immunity in SIA 1978, ss 2–11 was applicable—the main one in such circumstances being s 2 (written submission to jurisdiction).

(iii) SIA 1978, s 2 was not engaged because the terms of the bonds did not constitute a submission to the jurisdiction of the English courts.

The fact that a related judgment (vis default on bonds) had been obtained from one of the specified courts (New York) was in itself not enough.

The relevant text in the bonds was not precise enough for the purposes of SIA 1978, s 2 , namely "such a related judgment…shall be conclusive and binding…and may be enforced in any specified court or any other courts to the jurisdiction of which Argentina is or may be subject".

Waiver

The second paragraph of the relevant provision in the bonds stated as follows: "To the extent that Argentina…shall be entitled...in any jurisdiction...in which any…other court is located in which any suit, action or proceedings may at any time be brought solely for the purposes of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of such court…and to the extent that there shall be attributed such an immunity, Argentina has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction".

The court held that the language in the first paragraph "is or may be subject" did not constitute a waiver of immunity or submission to the jurisdiction of the English courts (para 102 of the judgment).

The court held that the second paragraph constituted a waiver of immunity only, and, at most constituted a submission to the jurisdiction in respect of the enforcement jurisdiction of the English court (as an "other court") but not a submission in respect of the "adjudicative jurisdiction" (para 103 of the judgment).

The court drew attention to what it saw as the omission in the second paragraph which was "very careful not to say that Argentina submits to the jurisdiction of any court in which the fiscal agent or a holder of securities in the bonds brings proceedings to enforce or execute a 'related judgment' that has been obtained in a 'specified court'" (para 104 of the judgment).

The court contrasted this with the first paragraph "where Argentina expressly submits to the jurisdiction of the 'specified courts' in respect of 'related proceedings'". This led the court to conclude (at para 104 of the judgment) that "the decision not to go so far as that in the second paragraph must have been a deliberate one, the result of hard bargaining between the parties. Under New York Law the wording relating to waiver of immunity has to be construed strictly".

Observations

The court's approach (if sustained on any possible appeal to the Supreme Court) places emphasis upon the need for a clear and express written submission to the jurisdiction of the English courts. The court's interpretation of CJJA 1982, s 31 proceeds on the basis that the conditions stated therein are intended to deal with the merits of enforcement of a foreign judgment against a state. The question of the English court's jurisdiction to entertain an application in this regard is a separate question to be addressed with reference to SIA 1978, ss 1–11.

The judgment of the court is rooted in what some may say is an understandably conservative approach to sovereign immunity (as reflected in Aikens J (as he then was) earlier decision in *AIG v Kazakhstan*). Some observers comment that this is undoubtedly informed by "practical considerations"—not least of which include ramifications for the financial markets if the UK becomes a hub for enforcement of judgments against sovereign states/sovereign assets.

Section 31 of CJJA 1982 can thus only be made sense of (vis a vis the approach in the judgment) on the basis that the English court has first to be satisfied that the foreign court operates on a equivalent basis vis-à-vis state immunity (on the question of the merits of recognition and enforcement of its judgment against a foreign state) and, in addition, that UK state immunity requirements are complied with for the English court to possess jurisdiction in this regard.

This two-stage approach means in practice that foreign judgments are most unlikely to be enforceable against a foreign state before the English courts absent a clear and express written submission to the jurisdiction of the English courts (or a very comprehensive submission clause). NLJ

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