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ENGLISH COURT UPHOLDS ENFORCEMENT OF ARBITRATION AWARD DESPITE "SERIOUS" FAILURE TO MAKE FULL AND FRANK DISCLOSURE

Introduction

In a decision handed down on 2 February 2016, the English High Court declined to set aside an order for enforcement of a US$713million ICSID arbitration award on state immunity grounds, but criticized the claimant's counsel for non-disclosure in seeking the order for enforcement of the award.

Background

The background to this matter is set out in our previous mailing on the ICSID decision in *Gold Reserve Inc v The Bolivarian Republic of Venezuela* **here**. In summary, on 22 September 2014, an ICSID tribunal (comprising Professor Piero Bernadini (President), Mr. David A.R.Williams QC and Professor Pierre-Marie Dupuy) ordered Venezuela to pay approximately US$713 million in respect of breaches of the Venezuela/Canada BIT concerning mining concessions and mining rights in Venezuela.

Gold Reserve applied to the English High Court for leave to enforce the ICSID award. On 20 May 2015, Phillips J. made the requested order *ex parte* on documents alone.

The present proceedings concerned an application by Venezuela to set aside the order. Venezuela's position was that the English courts had no power to make an order against Venezuela because, by reason of state immunity, Venezuela is immune from the jurisdiction of the English courts and had not lost that immunity because it had not agreed to arbitrate with Gold Reserve; that the arbitration claim form ought to have been served pursuant to section 12 of the State Immunity Act 1978 (and had not been); and that there was non-disclosure of material matters by Gold Reserve when applying ex parte with the result that the court's order should be set aside.

Decision

The High Court (Mr Justice Teare) declined to set aside the order, but on the circumstances of the case made an appropriate order as to costs.

In respect of each of the positions taken by Venezuela, the High Court found as follows:

State Immunity

Venezuela had lost its right to rely upon state immunity in these proceedings.

It was common ground that Venezuela was entitled to state immunity pursuant to section 1 of the State Immunity Act of 1978 unless it agreed in writing to submit a dispute to arbitration

in which case it was not immune as respects proceedings in the courts of the United Kingdom which relate to arbitration (section 9 of the 1978 Act).

The key disputed issue was whether Gold Reserve was an "investor" for the purposes of the Venezuela-Canada BIT – while the ICSID tribunal had already found that it was, the High Court was entitled to review this. Mr Justice Teare, having considered the relevant provisions of the BIT and the application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, held (in agreement with the ICSID tribunal) that Gold Reserve was an investor within the meaning of the BIT and therefore party to an agreement in writing with Venezuela to arbitrate its claim against Venezuela. Accordingly, pursuant to section 9 of the 1978 Act, Venezuela had lost its right to rely on state immunity.

Service pursuant to the State Immunity Act 1978

Section 12(1) did not require the arbitration claim form to be served on Venezuela.

Non-disclosure

Gold Reserve had failed to make full and frank disclosure but in the particular circumstances of this case the court decided to maintain the order.

In particular, Gold Reserve should have drawn attention to the possibility of the state immunity defence that Venezuela may have raised, and the arguments that it had made before the ICSID tribunal (which Venezuela had subsequently relied upon in proceedings in Paris and Luxembourg). It was particularly important given that the application was being decided on documents alone, in circumstances where the judge may well have been "considering the application after a busy day in court dealing with other matters".

Mr Justice Teare's view was that had Gold Reserve given full and frank disclosure with regard to the state immunity defence, he had no doubt that an ex parte order would not have been made. On the basis that there had been a failure to give full and frank disclosure with regard to the likelihood that Venezuela would rely upon state immunity and with regard to two aspects of procedure the court must decide whether to set aside the ex parte order or allow it to stand but marking the failure to give full and frank disclosure with an appropriate order as to costs.

In the present case, the failure to make full and frank disclosure was serious (and, in a sense, deliberate) and resulted in judgment being given for a very substantial sum against a sovereign state. Contrary to the Gold Reserve's position, it would not be wholly disproportionate to set aside the order, and indeed there was a strong case for doing so. However, on the facts of the present case (and given that the Court had determined the state immunity issue), Mr Justice Teare determined it was one of those rare cases where it was appropriate, notwithstanding a serious failure to give full and frank disclosure, to maintain the order but to mark the claimant's failure with an appropriate order as to costs.

1st March 2016