ENGLISH HIGH COURT REJECTS CLAIM FOR STATE IMMUNITY BY KURDISTAN REGIONAL GOVERNMENT AND ORDERS PAYMENT OF US$100 MILLION

Introduction

In a decision handed down on 20 November 2015 in Pearl Petroleum Company Ltd & Ors v The Kurdistan Regional Government of Iraq [2015] EWHC 3361, the English High Court declined to grant state immunity to the Kurdistan Regional Government of Iraq and instead ordered it to comply with an peremptory order under which it was to pay to the Claimants the sum of US$100 million.

Background

By Heads of Agreement between the Respondent and, initially, Dana (which subsequently transferred 50% of its interest in the Contract to Crescent, following which Dana and Crescent transferred their interests to Pearl, a Special Purpose Vehicle owned between them), the parties agreed to the exploitation by the Claimants of two gas fields known as Khor Mor and Chemchemal, which are situated in the Kurdistan Region of Iraq, of which the Respondent is the Government. The Respondent is a constituent region of the Federal Republic of Iraq, and as such it is common ground that it is not itself a State, but is a separate entity within the meaning of s.14 of the State Immunity Act 1978 ("SIA") (and no Order in Council has been made giving it immunity as if it were a State pursuant to s.14(5) of the SIA).

Disputes arose in about 2009 between the parties relating to the nature and extent of the Claimants' rights in relation to the two fields and the prices payable to the Claimants by the Respondent for condensate and LPG produced at Khor Mor and sold to the Respondent. The Claimants contended that by September 2013 the Respondent had underpaid for product produced and lifted in a sum of US$1.12 billion.

In 2013 the Claimants initiated mediation proceedings in accordance with clause 16 of the Heads of Agreement, and when the Respondent declined to participate in it, the Claimants commenced arbitration proceedings.

On 10 July 2014 (following an application for an interim measures order by the Claimants), the Tribunal ordered that the Respondent be ordered to resume payments for product lifted, pending the resolution of the parties' disputes. Following non compliance with this order, on 17 October 2014, the Tribunal ordered, on the Claimants' application for a peremptory order, that the Respondent pay to the Claimants the sum of US$100 million within 30 days.

No payment was made within 30 days, and so in accordance with the terms of the 17 October Order the peremptory order took effect. The Claimants sought and obtained, against opposition from the Respondent, the Tribunal's permission pursuant to s.42(2)(b), to make the application to enforce the peremptory order.

The issues before the Court were:

1. Was the peremptory order properly made within the jurisdiction of the Arbitrators vested in them by s.41 of the 1996 Act and Article 25 of the LCIA Rules, and therefore does the Court have jurisdiction to make an order under s.42 of the 1996 Act?
2. Does the Respondent have immunity pursuant to the SIA?
3. Whether in the exercise of the Court's discretion the order sought should be made: it is common ground that the Court does not "act as a rubber stamp on orders made by the tribunal" (Emmott v Michael Wilson & Partners Ltd [2009] EWHC 1 (Comm) at paragraph 59 per Teare J).

Decision

Mr Justice Burton, giving the decision of the High Court, held that the Respondent could not claim state immunity and granted the Claimants' application made under section 42.

Taking each of the issues in turn:

Jurisdiction under Section 42

The Tribunal did have jurisdiction to make their ruling, and the High Court had jurisdiction to make a section 42 order to enforce it. The Tribunal's Order was neither intended to nor did prejudge the merits, but it was effectively preserving the subject matter of the arbitration, namely the rights under the 25 year contract which the parties were disputing – when that order was not complied with, it was plain that a further order was required for the same purpose, and that the order and compliance with it were required for the "proper and expeditious conduct" of the arbitration.

State Immunity

On state immunity, the Respondent submitted that it was entitled to such immunity as a separate entity of the State and consequently denied that the Claimants were entitled to any relief against it (and sought a declaration to this effect). Mr Justice Burton considered that this raised a number of issues, including:

a) Did the proceedings relate to anything done by the Respondent in the exercise of sovereign authority (s.14(2) SIA).

b) If so, was it an exercise of sovereign authority of the State (the Republic of Iraq) or of the Respondent as a separate entity.

c) If so, were the circumstances such that a State would have been immune (s.14(2)(b) SIA)? In particular, had the Respondent submitted to the jurisdiction within s.14(3) by virtue of s.9, such as to retain the benefit of s.13 SIA; and even if so, do s.42 proceedings fall within s.9 and are they covered by s.13(2)(a)?

d) Whether the Respondent has waived its immunity in respect of s.14(2) and, assuming it is entitled to such immunity, that granted by s.13(2)(a) by reference to s.13(3) SIA.

On the above points, Mr Justice Burton found:

- On balance, the Respondent entered into the Heads of Agreement in the exercise of sovereign immunity – those were not simply a contract for the sale of gas by a government to a commercial party, but the assignment of rights granted to the Respondent under the Constitution to a third party.
- However, the exercise of sovereign authority was that of the Respondent and not of the Federal Government of Iraq – accordingly, the Respondent, as a separate entity from the Federal Government of Iraq, did not have the protection of s.14(2) of the SIA.
- In contrast to the decision in NML Capital Ltd v Republic of Argentina [2011] 2 AC 495 (which concerned proceedings for the enforcement of a foreign judgment which itself related to a commercial transaction), the present application was an application to enforce a peremptory order of Arbitrators who are in the process of resolving the dispute relating to the rights of the parties under the Heads of Agreement, and therefore was related to an exercise of sovereign authority.
- It was plain that the section 42 proceedings in this case were proceedings which related to the arbitration, within the meaning of section 9 of the SIA – the proceedings were initiated with the permission of the Arbitrators and pursuant to the Arbitration Act 1996 and in order to enforce an order of the Arbitrators.
- The application for a s.42 order is not an application for an injunction, such that s13(2)(a) would not have applied.
- If the Respondent had been entitled to immunity, the waiver contained in the Heads of Agreement (which provided "The KRG waives on its own behalf and that of the KRG any claim to immunity for itself and assets") was sufficient to waive immunity.

Exercise of the Court's discretion

- While the Learned Judge had discretion as to whether he made the order, he saw no reason not to grant the application under section 42.

We previously reported on an earlier decision of this case when it was anonymised in *PCL & Ors v The Y Regional Government of X* [2015] EWHC 68 (Comm) – for further information, see our mailing **here**.

8 December 2015