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Interim relief in aid of arbitration against a sovereign

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Interim relief in aid of arbitration against a sovereign

Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd
[2013] SGCA 16

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In *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] SGCA 16, the Singapore Court of Appeal discharged an interim injunction in aid of arbitration granted by the High Court against, *inter alios*, the Government of the Republic of Maldives. In doing so, the Court of Appeal not only gave helpful guidance on the granting of interim relief under s 12A of the International Arbitration Act, it also touched upon issues of public international law.

The facts and ruling of the case have been covered elsewhere. The focus of this note is on the jurisdictional objections that Maldives raised but were ultimately dismissed by the Court. The two unsuccessful objections were:

> (a) that an injunction could not be granted against a State by reason of s 15(2) of the State Immunity Act; and
>
> (b) that granting of an injunction against a State would offend the act of state doctrine.

The Singapore Court of Appeal denied the first objection because of an express waiver of immunity by Maldives that includes waiver of immunity in relation to reliefs sought. The waiver is enforceable even if one party challenges the validity of the contract as a whole.

Since the publication of the Court's grounds of decision, it has been suggested elsewhere that s 11 of the State Immunity Act, which the Court of Appeal did not discuss, is another basis upon which the first objection could be dismissed.[1]

Section 11 of the State Immunity Act provides as follows:

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[1] *See* Shaun Lee, "Case Update: GMR and Male Airport Dispute," available online at http://singaporeinternationalarbitration.com/2013/02/25/case-update-gmr-and-male-airport-dispute/ (last accessed 11 March 2013); Paul Tan, "Clear waters on claims to sovereign immunity", SLW Commentary, Issue 1/Mar 2013.

> "*Arbitrations*
>
> *11.—(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.*
>
> *(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.*"

By way of s 11 of the State Immunity Act, the Singapore courts have jurisdiction to entertain a claim against a foreign State, provided it is related to an arbitration involving that State. The presence of an arbitration agreement binding on a foreign State would mean that the Singapore courts have jurisdiction to entertain a claim against that State in relation to the arbitration. Put another way, there is a waiver of jurisdictional immunity in favour of the Singapore courts as the curial court of the arbitration. But the question of what *relief* may then be granted against that foreign State is not a straightforward one, and may depend on whether the State had waived immunity in relation to the relief sought.

Sections 15(2) and (3) of the State Immunity Act provide that relief shall not be given against a foreign State by way of injunction or order for specific performance or for the recovery of land or other property *unless* that State has given written consent. A provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of sections 15(2) and (3) of the SIA. Consequently, in the absence of specific written consent, s 15 of the State Immunity Act may bar the Singapore courts from granting an interim injunction in aid of an arbitration involving a foreign State.

The English courts have considered the interaction between the corresponding provisions in the English State Immunity Act 1978. In *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, a party sought a freezing order against a State pending execution of an arbitral award. The English Court of Appeal held that even if a foreign State had agreed to submit a dispute to arbitration for the purposes of s 9 of the English State Immunity Act (*in pari materia* to our s 11), there was nothing in s 9 which overrode the prohibition against injunctive relief in s 13 of the English State Immunity Act (*in pari materia* to our s 15).

Collins LJ (as he then was) took the view that proceedings for a freezing order to preserve the position pending execution of an award were within s 13 of the English State Immunity Act and were not "proceedings which relate to the arbitration" for the purposes of s 9 of the English State Immunity Act.

He cited *Svenska Petroleum Exploration AB v Government of the Republic of Lithuani*a [2006] EWCA Civ 1529. In that case, the court held (at [117]) that the effect of s 9 of the English State Immunity Act was that state immunity did not prevent an application for leave to enforce an arbitral award as a judgment under the English Arbitration Act 1996, because that was one aspect of its recognition and was the final stage in rendering the arbitral procedure effective. On the other hand, any enforcement by execution on property belonging to the state would trigger s 13 of the English State Immunity Act.

In summary, both sides of the argument may be described as follows. Even in the absence of specific written consent, an interim injunction in aid of arbitration against a foreign State may be granted under s 11 of the State Immunity Act because the purpose of an interim injunction arguably serves to support and aid the arbitral process, analogous to the situation in *Svenska*. The counter-argument, however, is that the clear language of s 15 of the State Immunity Act allows injunctive relief against States only on limited grounds. Mere consent

to the jurisdiction of the curial court (by way of the arbitration agreement) without more may not be sufficient.

Arising out of the foregoing discussion is an important drafting point — these complexities can be avoided if, as in the present case, the State had expressly waived immunity over the reliefs sought.

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