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Content:

Svenska Petroleum Exploration AB (Schweden) vs. Government of the Republic of Lithuania & AB Geonafta (Lithuania)

Facts
The facts of this case are also reported in Yearbook XXX (2005) at pp. 701-703 (UK no. 68). On 28 April 1993, Svenska Petroleum Exploration AB (Svenska) entered into a Joint Venture Agreement (JVA) with AB Geonafta (Geonafta) and, allegedly, with the Government of the Republic of Lithuania (the State) for the purpose of exploiting certain oilfields in Lithuania. The JVA was governed by the law of Lithuania. Art. 35 of the JVA contained a waiver of sovereign immunity; Art. 9 provided for ICC arbitration of disputes in Copenhagen, Denmark.

In June 2000, a dispute arose between the parties that was referred to ICC arbitration in Copenhagen pursuant to the clause in the JVA. In the arbitration, the State objected to the jurisdiction of the arbitral tribunal, alleging that it was not a party to the JVA or to the arbitration clause therein. On 21 December 2001, the arbitral tribunal issued an interim award on jurisdiction (the Interim Award), holding that the State was a party to the JVA and was bound by the arbitration clause. The State did not challenge the Interim Award before the Danish courts and continued to participate in the arbitration. On
30 October 2003, the arbitral tribunal issued a final award on the merits (the Final Award), directing the State and Geonafta to pay Svenska US$ 12,579,000 plus interest and costs. The State did not challenge the Final Award; on the contrary, it passed a Resolution dated 11 February 2004, stating that "(1) []It is not expedient to apply to a court for annulment of the award of the Arbitration Tribunal of the International Chamber of Commerce in the case considered in Copenhagen on 30 October 2003" and resolving "(2) to commission the state enterprise State Property Fund to notify [Svenska] or its representatives of the position of the [State] or its representatives of the position of the [State] on the award referred to in Clause 1”.

On 2 April 2004, Svenska sought enforcement of the Final Award in the Commercial Court at the Queen's Bench Division of the High Court in London against the State and Geonafta (collectively, the defendants). On 7 April 2004, the High Court, per Morison, J, granted enforcement. On 31 August 2004, the State applied to set aside the enforcement order, arguing that it enjoyed sovereign immunity. On 11 January 2005, the High Court, per Nigel Teare, QC, denied Svenska's application to have the State's application dismissed (this decision is reported in Yearbook XXX (2005) at pp. 701-722. (UK no. 68)).

By the present decision, the High Court, per Gloster, DBE, rejected Svenska's argument that the State waived immunity under the State Immunity Act of 1978, which provides for certain exceptions to the general principle of sovereign immunity. First, the court held that the State did not waive its immunity under Sect. 2 of the 1978 Act by submitting to the jurisdiction of the English courts. Although it found that the waiver of immunity in Art. 35 of the JVA also applied to the State and not, as alleged, to Geonafta only, the court held that it was purely a waiver of the State's immunity* and did not amount to a submission to the English courts.

Second, the court found that the State did not waive sovereign immunity under Sect. 3 of the 1978 Act - which provides that a state waives immunity by participating in a commercial transaction - because Sect. 3 did not apply here. While the JVA was indeed a commercial transaction to which the State was a party, as required by Sect. 3, the present proceedings related to the Danish award and its enforcement rather than to the commercial transaction itself, as also required by Sect. 3. Hence, Svenska could not rely on the exception to immunity in Sect. 3 of the Act.

Third, the court dealt with Svenska's argument under Sect. 9 of the 1978 Act, which provides that a state waives immunity by entering into a written arbitration agreement. The court considered at the outset whether the decision rendered by the arbitrators in the Interim Award that the State was a party to the arbitration clause in the JVA could estop the State from arguing that it was not a signatory to the arbitration clause in the enforcement proceedings. The court concluded that it could, dismissing the State's argument that the Interim Award could not give rise to an issue estoppel because it was not final. Based on the evidence on Danish law before it, the court held that the Danish courts would likely find the Interim Award to be final, as they would deem that the State had forfeited its right to challenge it by not bringing an action within "reasonable time" as required by Danish law. The court then dismissed the State's argument that Sect. 9 does not apply in proceedings for the enforcement of a foreign award, as "there is no linguistic or other basis for construing the language used in Sect. 9 of the Act...as excluding enforcement proceedings". Hence, the exception in Sect. 9 of the 1978 Act applied to rule out the State's sovereign immunity.

The court reasoned that it should reach an independent conclusion on the issue whether the State was a party to the arbitration clause in the JVA. Although the State was estopped from raising it in the present enforcement proceedings, this issue would still be relevant if the court were wrong in finding that the State was estopped by the determination in the Interim Award. The court considered that Lithuanian law applied, as in the absence of exceptional circumstances the law applicable to an arbitration agreement "is the same as the law governing the contract of which it forms a part". The arbitration clause in the JVA provided for arbitration of disputes "between the founders", "the founders" being the collective definition set out in the preamble to the JVA of Geonafta and Svenska. The court noted that Lithuanian law requires that the court take into account "a far wider range of factual material then would be permissible under English law" - in casu, the parties' pre-contractual negotiations and the JVA drafts - in order to establish the parties' subjective intentions. The court conducted an extensive examination of this evidence and concluded that there was a "common intention of the State, Geonafta and Svenska that their disputes (including those involving the State) should be settled by arbitration and that the dispute resolution provisions of Art. 9 of the [final version of the]
JVA should apply to disputes between the State and Svenska, notwithstanding the inappropriate use of the words 'Founders' and other words in that Article". The court also dismissed the State's contention that the dispute was not arbitrable because it concerned "oil works" that were allegedly not arbitrable under the 1996 Lithuanian Law on Commercial Arbitration and the 1995 Lithuanian Law on Sub-Soil Exploitation. The court agreed with Svenska’s expert on Lithuanian law that neither Act was retroactive and that the Provisional Rules of Oil Prospecting, Exploration, and Production in the Republic of Lithuania of 16 March 1992 made clear "that disputes involving 'Oil works' might be arbitrated".

Excerpt

(...)

1" [Sect. 1 of the State Immunity Act 1978 (the Act)] provides:

'A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.'

Shortly stated, the State's argument is that none of the various exceptions contained in Part I of the Act apply. In particular, the State contends that it has not submitted to the jurisdiction of the English Court (Sect. 2); that the proceedings do not relate to a commercial agreement (Sect. 3); and that the State has not agreed in writing to submit a dispute which has arisen to arbitration (Sect. 9).

2" 'On the other hand, Svenska contends that: (i) the State has expressly waived any entitlement to rely on State Immunity and has agreed to submit to the Court's jurisdiction; accordingly it falls within the exception contained in Sect. 2 of the Act; (ii) it was party to a commercial transaction and the present proceedings relate to that transaction; accordingly it falls within the exception contained in Sect. 3 of the Act; (iii) it was a party to the arbitration agreement contained in Art. 9 of the JVA, alternatively is estopped from denying that fact by virtue of the Interim Award; accordingly it falls within the exception contained in Sect. 9 of the Act.'

(...)

I. WAIVER OF IMMUNITY BY SUBMITTING TO JURISDICTION OF ENGLISH COURTS (SECT. 2 OF THE STATE IMMUNITY ACT 1978)

3" 'The first issue for my determination is whether the State falls within the exception contained in Sect. 2 of the [State Immunity Act 1978]...'

4" 'One of the terms of the JVA was Art. 35, which provided as follows:

'Governing Law and Sovereign Immunity. 35.1 GOVERNMENT and EPG hereby irrevocably waives [sic] all rights to sovereign immunity. 35.2 This Agreement shall be governed by the laws of Lithuania supplemented, where required, by rules of international business activities generally accepted in the petroleum industry if they do not contradict the laws of the Republic of Lithuania.'

5" 'However, the State contends that, on its true construction (as allegedly demonstrated by evidence as to the purpose of Art. 35, given by a Professor Katuoka and corroborated by a Mr. Zukovskis), Art. 35 amounted to a waiver of Sovereign Immunity in respect of Geonafta only (Geonafta being at the time of entry into the JVA a state enterprise), and that all that the State was doing under the terms of the clause was to give its consent to Geonafta's own waiver.

6" 'The JVA contains no express submission to the jurisdiction of the English Court. Art. 9 of the JVA does contain an arbitration agreement referring disputes between the two 'Founders' (which is the collective definition set out
in the preamble to the JVA of Geonafta and Svenska) to inter alia ICC arbitration and is in the following terms:

'9.1 Disputes between the Founders concerning the performance or interpretation of this Agreement are settled through negotiations between the Founders. 9.2 In the event that disputes cannot be settled within 90 days of the receipt of the written notice by either Founder about the existence of such disagreement, the disputable matter shall be submitted upon agreement of the Founders for consideration to: (a) the Court of the Republic of Lithuania; or (b) independent arbitration in Denmark, Copenhagen, to be conducted in accordance with International Chamber of Commerce Rules of Arbitration in the English language. In case the Founders do not reach agreement on the institution where the dispute is to be settled, the disputable matter shall be submitted for consideration to an independent arbitration provided in sub-paragraph (b) of this paragraph.'

7" "The State contends - and it is a critical plank of its case - that, because it is not a 'Founder', it is not a party to the agreement to arbitrate. This is an issue to which I will have to turn later in this judgment in the context of the submissions on Sect. 9 of the Act. It submits that even if, contrary to its primary contention, the State itself agreed to waive its own, as opposed to Geonafta's, sovereign immunity under Art. 35, that waiver under Art. 35 did not per se amount to a submission to the English Court's jurisdiction for the purposes of Sect. 2; accordingly, Art. 35 cannot assist Svenska unless the State is also found to have agreed that it would be a party to arbitration proceedings under Art. 9 of the JVA.

8" "Therefore the questions which, as I see it, I have to decide under this head are as follows: (i) on the true construction of Art. 35, did the State waive its own sovereign immunity thereunder, or did Art. 35 amount to a waiver of Sovereign Immunity in respect of Geonafta only; (ii) if the former, did the waiver of the State's immunity in Art. 35.1 amount to a submission to the jurisdiction of the English court, irrespective of whether the State was a party to the arbitration agreement contained in Art. 9 of the JVA.

9" "If the answer to sub-issue (ii) is that the waiver of the State's immunity contained in Art. 35.1 amounts to a submission to the jurisdiction of the English court only if the State was in fact a party to the arbitration agreement under Art. 9 of the JVA, because only in that event would the Court have jurisdiction to enforce the Award, then there is no separate or free-standing issue under Sect. 2 of the Act, since in reality the issue falls to be decided under Sect. 9.

10" "Subject to the points referred to below, it was common ground that the JVA had to be construed in accordance with its governing law, namely Lithuanian law, and that the relevant principles of construction were contained in Arts. 6.193-5 of the Lithuanian Civil Code as elaborated in a commentary by a Professor Mikelenas (the Commentary). However, the parties were not in agreement as to the relevance and importance of the principal text of the contract or whether Art. 6.193 represents a complete statement. In addition, the State relied on 'international law and practice', which Mr. Shackleton [counsel for the defendants] identified as 'the interpretations of similar situations by other arbitral tribunals and by the courts of the United States, France and Switzerland where these issues have arisen'. It was also common ground that, although the expert as to foreign law has to provide the English Court with the relevant foreign principles and rules of construction, in relation to a contract it was for the English Court, in the light of those principles and rules to determine the meaning of the document; see Dicey and Morris, The Conflict of Laws (2000) (13th Edition) at paras. 19-019 and 32-188-9; the Fourth Supplement thereto (2004) at p. 26 and authorities there cited; and Rouyer Guillet & Cie v. Rouyer Guillet & Co Ltd. [1949] 1 All ER 244 (CA). Accordingly, both parties correctly accepted that the views, given by their respective experts as to the true interpretation of the contract, were not admissible evidence. Likewise, the subjective views of Mr. Zukovskis as to the interpretation of Art. 35 were not legitimate aids to my determination.

11" "Arts. 6.193 - 5 of the Lithuanian Civil Code and the relevant comment (excluding footnotes) are as follows:

'Art. 61. A contract must be interpreted in accordance with good faith. In interpreting a contract, it is necessary primarily to.193: determine the parties good intentions and not rely only on a literal interpretation of the text of the contract. In the Rules event the real intentions of the parties cannot be established, the contract must be interpreted in accordance with on Int the meaning that reasonable persons analogous to the parties would have attributed to it in the same erpretcircumstances.

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Art. 6. Where a contract is drawn up in two or more languages and all texts of the contract have equal legal force, in the case of discrepancy between the versions, preference shall be given to the text which was drawn up first.

Language Discrepancies.

Art. 6. Where parties leave certain matters unagreed, which are necessary for the performance of the contract, the court, at the request of a party, may fill in such gaps in the contract by establishing appropriate conditions, taking into account non-mandatory legal norms, the intentions of the parties, the purpose and essence of the contract, in standards of good faith, reasonableness and justice.'

Gaps of a Contract.

The Commentary:

1. The Article commented on repeats Arts. 4.1-4.6 of the UNIDROIT Principles. The contract has to be interpreted when a dispute arises between the parties concerning its validity, type, nature, amendment, termination, true meaning of one or another condition, etc.

2. Referring Principles:
   - IV.5.1 - Intentions of the parties
   - IV.5.3 - Interpretation in favor of effectiveness of contract
   - IV.5.4 - Interpretation against the party that supplied the term
   - IV.5.9 - Linguistic Discrepancies