Enforcement of Foreign Judgments and State Immunity

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Background

By 2001 Argentina was in serious financial, social and political difficulties. There was a huge withdrawal of capital from Argentina, both internally and by foreign investors. On 24 December 2001 Argentina was compelled to declare a moratorium on interest and principal on all its debt, including its sovereign debt, which thus included its bonds. The result of the collapse in confidence in Argentina's ability to pay on its sovereign debt was that the market value of the bonds fell considerably.

On 11 May 2006, a New York granted NML a motion for summary judgment against Argentina on NML's claim under the bonds. On 18 December 2006, the judge entered judgment against Argentina and in favour of NML for US$284,184,632.30 plus continuing interest compounded annually.

NML brought proceedings to enforce the judgment in England and won at first instance. An appeal to the Court of Appeal was successful.

The case then went to the English Supreme Court which gave judgment on 6 July 2011 in *NML Capital Limited v Republic of Argentina* [2011] UKSC 31.

The decision of the Supreme Court makes it easier to enforce foreign judgments against foreign states.

Lord Phillips, giving the leading judgment in the Supreme Court stated:

> "The Plaintiff had to establish that a number of conditions were satisfied in order to claim successfully on the foreign judgment. In particular, he had to establish that the foreign court had had jurisdiction over the defendant in accordance with the English rules of private international law and the judgment had to be final and conclusive on the merits."

State Immunity

The State Immunity Act 1978 provides at Section 3(1)

> "A State is not immune as respective proceedings relating to – (a) a commercial transaction entered into by the State".

Permission to serve proceedings out of the jurisdiction

Permission to serve Argentina out of the jurisdiction was obtained on the basis that the action to enforce the New York judgment was a "proceeding relating to a commercial transaction". It was conceded that this basis was not open to NML prior to reaching the Supreme Court because of two previous decisions. This compelled NML to accept that for the purposes of Section 3(1)(a), the action was a proceeding "relating to" the New York judgment and not to the transaction to which that judgment related.

The first of the two cases was *AIC Limited –v- Central Government of Nigeria* [2003] EWHC 1357 (QB).

In that case Stanley Burnton J stated:

> "In my judgment, the proceedings resulting from an application to register a judgment relate not to the transaction or transactions underlying the original judgment, but to that judgment. The issues in such proceedings are concerned essentially with the question of whether the original judgment was regular or not."

In *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No.2)[2005] EWHC 2437(Comm), the relevant issue was whether a claim to enforce an arbitration award constituted "proceedings relating to" the transaction that gave a rise to the award for the purposes of section 3(1)(a). The judge at first instance followed Stanley Burnton J's findings that it did not. Although the decision was not part of the main reason for the decision, it received reasoned approval in the Court of Appeal [2006] EWCA 1529. The Court stated:

> "In our view the expression "relating to" is capable of bearing a broader or narrower meaning as the context requires. Section 3 is one of a group of sections dealing with the court's adjudicative jurisdiction and it is natural, therefore, to interpret the phrase in that context as being directed to the subject matter of the proceedings themselves, rather than the source of the legal relationship, which has given rise to them."

The Supreme Court also held that a century old rule to the effect that if permission to serve proceedings out of the jurisdiction is given on one basis and for some reason permission could have been given on another basis, the claimant will be precluded from relying on other grounds should no longer be applied (the rule was from the case of *Parker v Schuller* (1901) 17 TLR 299).

As Lord Phillips observed,

> "Procedural rules should be the servant not the master of the rule of law."

The Supreme Court Decision

The bonds contained provisions as follows,

> "Argentina unambiguously agreed that a final judgment on the bonds in New York should be enforceable against Argentina in other courts in which it might be amenable to a suit on the judgment."

> "To the extent that the republic … shall be entitled, in any jurisdiction … in which any … other court is located in which any suit, action or proceeding *may at any time be brought* solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court … from execution of a judgment or from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction … solely for the purpose of enabling … a holder of securities of this series to enforce or execute a related judgment."

Lord Phillips who gave the leading judgment in the Supreme Court, found,

> "The object of bringing these proceedings is to enforce the New York judgment. … The only issue is whether Argentina is immune from the claim. Whether a state is immune from such a claim should, under the restrictive doctrine of state immunity, depend upon the nature of the underlying transaction that has given rise to the claim, not upon the nature of the process by which the claimant is seeking to enforce the claim. When considering whether a state is

> entitled to immunity in respect of a claim to enforce a foreign judgment the question "does the claim constitute proceedings relating to a commercial transaction?" can only be given a meaning that is sensible if "relating to" is given a broad, rather than a narrow, meaning. The proceedings relate both to the foreign judgment and to the transaction underlying that judgment, but in the context of restrictive state immunity it only makes sense to focus on the latter."

His judgment continues,

> "A waiver of immunity does not confer jurisdiction where, in the case another defendant, it would not exist. If, however, state immunity is the only bar to jurisdiction, an agreement to waive immunity is tantamount to a submission to the jurisdiction. In this case Argentina agreed that the New York judgment could be enforced by a suit upon the judgment in any court to the jurisdiction of which, absent immunity, Argentina would be subject. It was both an agreement to waive immunity and an express agreement that the New York judgment could be sued on in any country that, state immunity apart, would have jurisdiction. England is such a country, by reason of what, at the material time, was CPR 6.20(9). The provision in the first paragraph constituted a submission to the jurisdiction of the English courts.
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> …
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> The words "may at any time be brought" which I have emphasised once again constitute Argentina's agreement that the waiver of immunity applies in respect of any country where, immunity apart, there is jurisdiction to bring a suit for the purposes of enforcing a judgment on the bonds. England is such a jurisdiction. Thus the second paragraph constitutes an independent submission to English jurisdiction. Both jointly and severally the two paragraphs amount to an agreement on the part of Argentina to submit to the jurisdiction of the English (no doubt among other) courts."

Lord Mance agreed with the decision, but reached it using section 31 of the Civil Jurisdiction and Judgments Act 1982, rather than section 3 of the State Immunity Act 1978.

Lord Collins and Lord Walker also agreed with the decision and rested their conclusion on section 31 of the 1982 Act as well. Lord Clark agreed with Lord Phillips.

Commentary

The effect of the decision is that the English Courts must look at the circumstances in which the foreign judgment was obtained, such as whether or not the claim arose out of commercial dealings or other *acta res gestionis* (non-sovereign acts) as opposed to *acta jure* imperii (sovereign acts, such as running an army), rather than just the technicalities of whether the foreign court had jurisdiction according to English private international law rules (including questions of state immunity).

For more background on the issue see Disputes with States.

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Steven Loble is a partner in the litigation department. He specialises in international and commercial litigation with a particular sector focus in government and political cases, finance, and private and public international law.

Steven Loble is described as being "extremely knowledgeable and efficient".

Legal 500 Clients' Guide to the UK Legal Profession 2010

"Steven Loble has many overseas clients and is frequently involved in preparing for and enforcing foreign judgments. Sources praise his "extraordinary depth of experience and ability to manage multiple legal systems." He was recently involved in obtaining UK evidence for a securities class action in New York. He speaks German, French and Italian."

Chambers & Partners Clients' Global Guide to the Legal Profession 2011

Steven has been in practice as a solicitor in London for over 25 years, during which time he has been involved in over 50 reported cases and has gained wide experience in international and commercial litigation.

He has been involved in a number of the leading cases on enforcing foreign judgments, obtaining evidence for foreign proceedings, privilege, interest rate swaps, legal costs, and financial disputes.

Steven has particular expertise in the use of the latest technology, to manage cases with large numbers of documents, both efficiently and cost-effectively.

Many of Steven's clients are based outside the United Kingdom. With years of experience acting for overseas clients, he has substantial expertise in dealing with the issues which arise in cross-border litigation - e.g. choice of law, jurisdictional disputes, enforcement of judgments, obtaining evidence, dealing with questions of foreign law and sovereign immunity. Steven also has significant experience in dealing with claims relating to derivatives and other complex financial products.

Steven is a frequent speaker at conferences and is fluent in German, French and Italian.

Steven has also written Guides to Obtaining Evidence in England for Use in Proceedings in the United States of America and Enforcement of Foreign Judgments in England.

Recent work:

Recent experience includes advising:

- Steven assisted Citigroup in obtaining vital evidence in England in connection with an $8 billion claim against it by Guy Hand's Terra Firma private equity group arising out its purchase of EMI music.
- Going to trial in a case which clarified the rules on Part 36 offers to settle.
- Steven is currently working on obtaining evidence in a number of cases brought against banks in the United States for facilitating terrorism by maintaining accounts for terrorist organisations.
- Advising a foreign regulator in relation to a case against an English company which is alleged to be in breach of the regulations of the foreign country.