The Resolute: Court of Appeal confirms injunctions cannot be granted against foreign states

Poonam Melwani KC and Jamie Hamblen

15 January 2024

In a unanimous judgment of Sir Geoffroy Vos MR, Lord Justice Popplewell and Lord Justice Phillips dated 20 December 2023, the Court of Appeal has confirmed that injunctions and orders for specific performance are unavailable against foreign states. Such orders are, the Court of Appeal holds, outlawed by s.13(2)(a) of the State Immunity Act 1978 which section is not an unjustifiable infringement of Article 6 of the European Convention of Human Rights.

The underlying proceedings arose out of the total loss of a Venezuelan navy patrol vessel, the BVL Naiguatá GC-23, in early 2020, following a collision with the RCGS Resolute, a cruise liner engaged in tourism to Antarctica. Following the collision, Venezuela brought civil proceedings against the owners of the Resolute and the party believed to be vessel's insurers, the UK P&I Club, in both Venezuela and Curacao. The relevant contract of insurance included a "pay to be paid clause" and an arbitration agreement in favour of London arbitration.

In March 2021 the Club were granted an *ex parte* anti-suit injunction against Venezuela by HHJ Pelling QC sitting in the High Court, on the grounds that: (a) Venezuela was bound to arbitrate its claims against the insurers named in the foreign proceedings, applying the conditional benefit analysis (b) there was no immunity from jurisdiction pursuant to the State Immunity Act 1978 and (c) s.13(2)(a) of the 1978 Act, which would otherwise preclude the granting of injunctive relief, fell to be read down pursuant to s.3 of the Human Rights Act 1998, following the approach in ***Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*** [2017] UKSC 62, as the proceedings related to a commercial transaction and not a sovereign act by Venezuela.

The *ex parte* injunction was challenged by the undersigned on behalf of Venezuela before Sir Ross Cranston in the High Court. The Judge affirmed that Venezuela was bound by the arbitration agreement, but set aside the anti-suit injunction, on the grounds that s.13(2)(a) of the State Immunity Act 1978 was compatible with Article 6 of the European Convention of Human Rights, by reference to international law and domestic policy, and in any event s.13(2)(a) was not capable of being read down pursuant to s. 3 of the Human Rights Act 1998. The Club were granted permission to appeal by Sir Ross Cranston.

Following an appeal hearing in December 2023, the Court of Appeal has issued a unanimous judgment which upholds the decision and reasoning of Sir Ross Cranston. In particular, the Court of Appeal held that:

1. ***Benkharbouche*** is not authority for the proposition that an immunity provided by the State Immunity Act to foreign states or heads of state can only be justified by a binding and applicable rule of customary international law requiring the grant of such an immunity, or a tenable view that such a principle of customary international law existed. In the absence of a binding rule of customary international law which precludes the granting of immunity, rules of state immunity which infringe Article 6 ECHR rights can be justified if they fall "*within the range of possible rules consistent with international practices*", and s.13(2)(a) is within such a range ([27-43]).

2. There is no rule of customary international law which classifies injunctions or anti-suit injunctions as part of a state's adjudicative jurisdiction, (which in turn would mean that the restrictive doctrine of state immunity governs and immunity is only available where the proceedings relate to acts of a sovereign rather than private nature per ***Benkharbouche***) ([43-51]).

3. In any event, s.13(2)(a) of the State Immunity Act 1978 can be justified purely by reference to domestic policy, rather than international law ([53-56]).

4. In any event, on the footing that section 13(2)(a) of the State Immunity Act 1978 would otherwise be incompatible with Article 6 of the European Convention of Human Rights, it was not within the competence of the Courts to recraft s.13(2)(a) to permit the award of injunctions against states under to s.3 of the Human Rights Act 1998 ([57-60]).

Following the Court of Appeal's judgment, practitioners can proceed on the basis that s. 13(2)(a) of the State of Immunity Act 1978 stands, and neither injunctions nor orders for specific performance are available against foreign states. The same is likely to be true in arbitrations subject to the Arbitration Act 1996, unless the parties have specifically agreed otherwise, following the judgment of Mr Justice Butcher in ***London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain*** [2023] EWHC 2473 (Comm) at [338-363] (an appeal is outstanding on that point).

The Judgment offers importance guidance as to limits of ***Benkharbouche***, which will inform any future cases dealing with the question of whether other privileges and immunities provided by the State Immunity Act 1978 fall to be read down pursuant so s.3 of the Human Rights Act 1998.

Poonam Melwani KC and Jamie Hamblen appeared on behalf of Venezuela at first instance, instructed by Rasmita Shah of Roose + Partners. Poonam and Jamie prepared the appeal skeleton on behalf of Venezuela referenced at [23] of the Court of Appeal Judgment. Venezuela did not instruct counsel to appear at the appeal hearing itself.

@QuadrantLaw Quadrant Chambers Quadrant Chambers QuadrantChambers

Poonam Melwani KC

"Sagacious, very easy to work with, discerning and clear sighted." (Legal 500, 2024)

Poonam Melwani KC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories and is shortlisted for Shipping, Commodities & Aviation Silk of the Year 2023 at the Legal 500 Bar Awards. She was also shortlisted for Shipping Silk of the Year at the Chambers & Partners UK Bar Awards 2020.

> view Poonam's full profile poonam.melwani@quadrantchambers.com

Jamie Hamblen

"Jamie punches well above his weight in terms of years' call from a technical perspective and is very responsive and user-friendly." (Legal 500, 2024)

Jamie has a wide-ranging commercial practice, with extensive experience of maritime, commodities, international trade, public and private international law, international arbitration, energy, and general commercial disputes. In 2022 Jamie was ranked as a 'Rising Star' by Legal 500 in both Shipping and Commodities. In 2023 Jamie was ranked as 'Up and Coming' by Chambers and Partners in Shipping & Commodities.

> view Jamie's full profile jamie.hamblen@quadrantchambers.com