

Factsheet: State immunity case Court of Appeal win

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Following a landmark case in Jersey's Royal Court earlier this year, Collas Crill has once again acted for the winning party in a case on State Immunity when the respondent appealed the decision to the Court of Appeal.

Dispute resolution partner at Collas Crill, Elena Moran, twice represented Tepe, a construction company based in Turkey, when its contracts were unlawfully terminated by crude oil and natural gas pipelines and trading company, Botaş.

Background

The case originated when Tepe entered into two contracts with Botaş, to assist with the construction of the Baku-Tbilisi-Ceyhan (BTC) Pipeline. The BTC pipeline transports crude oil from oilfields in Azerbaijan through Georgia and Turkey to the Ceyhan terminal on the Turkish coast.

The principal activity of Botaş, which is wholly owned by the Republic of Turkey, is the transportation of crude oil and natural gas by pipeline in Turkey.

Botaş terminated both contracts with Tepe which were governed by English Law and provided for disputes to be arbitrated in Paris under the rules of the International Chamber of Commerce (ICC). The Arbitral Tribunals awarded Tepe damages, costs and interest in the sum of circa US\$100m.

Facts of the case

Botaş failed to satisfy the arbitral awards and so Tepe sought to enforce the awards by arresting the shares in two Jersey registered subsidiary companies of Botaş called Turkish Petroleum International Limited (TPIC) and Botaş International Limited (BIL). The former is an integrated oil and gas company with extensive interests worldwide and the latter is the operating company for the BTC pipeline in Turkey. If arrested, the shares can be sold by the Viscount and the proceeds used to satisfy the debts owed under the awards.

The Republic of Turkey argued that the shares in TPIC and BIL are important strategic assets of the Republic and cannot be arrested as they are protected by the international law doctrine of state immunity. The doctrine of state immunity, which is enshrined into Jersey law via the State Immunity (Jersey) Order 1985, states that property of a State is immune from execution, except in some limited circumstances.

The central legal issue in the case is whether the Republic has sufficient interest in or control over the shares to make them the property of the Republic. Had TPIC and BIL been directly owned by the Republic, this would not have been in dispute. However, the shares were legally and beneficially owned by Botaş. The interest in/control over the shares claimed by the Republic came from a raft of Turkish laws and governmental decrees the effect of which is to prevent Botaş from selling or transferring the shares

without the permission of the Republic. Furthermore, the Republic can at any time pass a decree that would require Botaş to transfer the shares to the Republic or another third party for no money. The Republic argued that this control over the transfer of the shares was sufficient to bring them within the definition of property of a state.

The Royal Court of Jersey Decision

The Royal Court disagreed and found that the Republic had insufficient interest in or control over the shares to render them immune from enforcement. Botaş appealed to the Court of Appeal seeking to overturn that finding. The Court of Appeal sat for two days to hear the appeal and reserved judgment.

The Court of Appeal Decision

In a decision published today (Monday 8 August), the Court of Appeal upheld the decision of the Royal Court, rejecting the argument that an ability to direct Botaş to transfer the shares amounts to sufficient control: until the Republic actually exercises that right the shares remain the property of Botaş and not the property of the Republic. An analogy is drawn by the Court of Appeal with the right of governments to requisition ships. The fact that a government has the power to requisition a ship or can direct how it should be used does not make the ship property of the state in question. This only happens when the ship is actually requisitioned and the government takes actual control of the ship. Anything short of actual control via a requisition would not render the ship protected by the doctrine of state immunity and, therefore, it remains available to satisfy the debts of the ship's owners.

Lessons learnt

This case is an important protection for creditors of state owned enterprises. Had the Republic been successful in its claims many state owned enterprises would be able to claim state immunity over their shares in foreign owned subsidiaries.

The Court of Appeal has recognised that, while the doctrine of state immunity is an important one, the protection it affords should not be extended to the assets of state owned entities. These entities, which are often trading entities, are separate from the states that own them. In the same way that the entities are not liable for the debts of the parent states, the parent states should not be able to use state immunity to protect the entities from paying their debts.

Both the Royal Court and the Court of Appeal gave lengthy judgments in what is a difficult area of law. The fact that these important principles of international law are being determined by the Jersey Courts is a reflection of the wide range of businesses that choose to base their offshore operations in Jersey.