The LMA sovereign immunity clause and enforcement proceedings

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Key points

- Recent cases highlight the legal and practical importance of potential sovereign immunity claims in proceedings to enforce arbitral awards and foreign court judgments.
- The Loan Market Association's (LMA) sovereign immunity clause is part of a suite of standard-form provisions designed to reduce lenders' exposure to such claims.
- While the LMA clause is mostly clear and effective, it lacks express reference to adjudicative immunity, opening the door to unwelcome immunity disputes, particularly in proceedings to enforce arbitral awards. Adding explicit language (either in the LMA's standard forms, or failing that in individual contracts) could strengthen creditors' enforcement position.

Introduction

State immunity in enforcement proceedings is having a moment — in the last few years, Spain has consistently claimed immunity in resisting worldwide enforcement of a flurry of ICSID awards arising out of reforms to its renewable energy sector; and similar multi-jurisdictional enforcement efforts have been defended on the same basis by Zimbabwe (also in relation to ICSID awards), Russia (UNCITRAL awards sought to be enforced under the New York Convention) and India (UNCITAL and the New York Convention again).

These disputes have been fertile ground for the development of the case law, but also highlight the practical significance of State immunity at the enforcement stage. Immunity is a classical incident of international sovereignty, and states can reasonably be expected to claim it whenever available. Attempts by a judgment or award creditor to defeat such a claim can (at the least) add very substantially to both the time and cost involved in seeking to monetise success on the merits.

The award creditors of Spain, Zimbabwe, Russia and India did not have any opportunity to manage enforcement risk at the outset. They were claimants in treaty-based arbitral proceedings lacking privity of contract with the respondent States, and investment treaties only infrequently address sovereign immunity. But parties contracting with States or State-related parties do have that opportunity, through contractual immunity clauses. The recent international proliferation of immunity cases presents an opportunity to consider how these clauses work in practice, and their likely efficacy when subjected to the microscope of a contested immunity claim in enforcement proceedings.

A useful specimen for that analysis is the Loan Market Association's sovereign immunity clause. As a standard clause found in widely-used model facility agreements it sits somewhere between the systemic treaty provisions in the ICSID and New York Conventions, and individually-negotiated contractual arrangements. The LMA's standing as the leading industry body for the EMEA debt markets also means that any refinement of the standard clause following recent case law can be expected to be reflected in market practice more widely.

The remainder of this article considers how that clause operates in a number of scenarios, including most importantly in proceedings seeking to enforce an arbitral award or court judgment abroad (that is, in a jurisdiction other than that from which the award or judgment originated). Enforcement in England and Wales is used as a convenient case study, because it is both the source of much of the recent case law, and an important enforcement jurisdiction.

The LMA sovereign immunity clause and its scope of application

The LMA's sovereign immunity clause reads:

"***Waiver of immunity***

(a) Each Obligor waives generally all immunity it or its assets or revenues may otherwise have in any jurisdiction, including immunity in respect of:

(i) the giving of any relief by way of injunction or order for specific performance or for the recovery of assets or revenues; and

(ii) the issue of any process against its assets or revenues for the enforcement of a judgment or, in an action in rem, for the arrest, detention or sale of any of its assets and revenues.

(b) Each Obligor agrees that in any proceedings in England this waiver shall have the fullest scope permitted by the English State Immunity Act 1978 and that this waiver is intended to be irrevocable for the purposes of the English State Immunity Act 1978."

That waiver usually appears as part of a suite of clauses, with the clear commercial rationale of minimising lenders' risk of recovery being foiled by an immunity claim. The other elements of that suite are:

- A 'no immunity' warranty, by which the borrower warrants that "[i]n any proceedings taken in its jurisdiction of incorporation … it will not be entitled to claim for itself or any of its assets immunity from suit, execution, attachment or other legal process".
- A 'commercial acts' warranty, by which the borrower warrants that the financing transaction and its performance "constitutes … private and commercial acts done and performed for private and commercial purposes".
- An arbitration or jurisdiction agreement, submitting disputes in relation to the financing transaction to the selected forum. (The LMA's standard forms recommend LCIA arbitration as the default, coupled with a lender's option to require litigation in England, but this clause is the most likely to be subject to individual negotiation of all those described above, and in practice loan contracts may provide for litigation and/or arbitration in any identified jurisdiction).

At first blush the warranties appear to be important provisions in a judgment or award creditors' arsenal in staving off a potential immunity claim. But their significance is in truth very limited, for a number of reasons.

- First, the 'no immunity' waiver on its terms applies only in the debtors' jurisdiction of incorporation. That may well not be the location of (most of) its assets.
- Secondly, although the 'commercial acts' warranty goes to the existence of a common exception to sovereign immunity allowing proceedings on the merits against a State (the so-called 'commercial acts' exception, by which a State can be sued in respect of commercial transactions), the warranty does not defeat an immunity claim in relation to the enforcement of a judgment or an award following such proceedings (at least in England). That is because the Supreme Court held in *NML Capital Ltd v. Argentina* [2011] 2 AC 495 that the commercial acts exception (in English law, found in section 3 of the State Immunity Act 1978, hereafter the "SIA") "did not extend to proceedings for the enforcement of a foreign judgment which itself related to the commercial transaction", because enforcement proceedings relate to the judgment rather than to the underlying obligations.
- Thirdly, and most fundamentally, the obligors' warranties do not in and of themselves surrender an available immunity. A successful claim to immunity may give rise to a breach of warranty, but that would be subject to determination in the forum selected by the jurisdiction or arbitration agreement, and therefore provides cold comfort if the target is the debtor's assets abroad.

A jurisdiction or arbitration agreement is therefore the direct route to jurisdiction over the creditor's substantive claim against a State or State-related debtor in the chosen forum. It founds curial (in the case of a jurisdiction agreement) or arbitral (in the case of an arbitration agreement) jurisdiction, just as it does also in relation to non-State defendants; and a jurisdiction agreement also functions as a waiver or submission and therefore constitutes an exception to what is referred to as 'immunity from jurisdiction' or 'adjudicative immunity' — that is, a State's immunity from the exercise of court jurisdiction over it.

That leaves the sovereign immunity clause quoted above to come into its own after a lender has obtained an award or judgment in its favour, when an award or judgment creditor's legal team turns to enforcement proceedings seeking to 'collect' on that award or judgment. In that context, a State may enjoy adjudicative immunity, but it will also be able to claim a separate and distinct immunity by which its individual assets are immune from particular execution measures (attachment, forced sale, et cetera). That immunity is often referred to as 'immunity from execution'.

We may therefore assess the LMA sovereign immunity clause's role and efficacy along two axes: (i) in relation to the enforcement of arbitral awards, and the enforcement of court judgments; and (ii) in relation to immunity from jurisdiction, and immunity from execution. The various permutations are considered in turn below: first, immunity from jurisdiction in relation to the enforcement of awards; second, immunity from jurisdiction in relation to court judgments; and third, immunity from execution (which is the same regardless of whether an award or a judgment is sought to be enforced).

Arbitral awards: immunity from jurisdiction

In common law legal systems, an arbitral award is not self-executing: it functions something like a form of debt or chose in action, and the award creditor must therefore obtain some form of court order or judgment which is then the basis for measures of execution against assets (by way of attachments, orders for sale, et cetera). At common law, that 'conversion' of the award into a court judgment requires fresh substantive proceedings relying on the common law claim of an action on the award, and for foreign-seated New York Convention awards there is now a summary statutory mechanism which leads to an order allowing enforcement of the award as if it were a judgment.

In either case, the initial step of converting an award into a court judgment or order engages the State's adjudicative immunity — i.e. is the court able to exercise jurisdiction

over the State? That hurdle must be overcome before any particular step is taken to enforce against State assets. The existence of that initial jurisdictional hurdle was confirmed as a matter of principle in relation to the statutory registration of foreign court judgments (which functions similarly to section 101 of the Arbitration Act) in *AIC Ltd v. Nigeria* (2003) 129 ILR 571 (QB) at [18], and recently endorsed by the Court of Appeal in relation to arbitral awards in *Infrastructure Services Luxembourg S.à.r.l. v. Spain* [2024] EWCA Civ 1257 (heard jointly with the appeal in *Border Timbers Ltd v. Zimbabwe*) at [37]–[39].

Of course, in many if not all cases, an award creditor faced with a claim by a State to adjudicative immunity at the stage of converting an arbitral award to a court judgment or order will seek to rely on the so-called 'arbitration exception' to a State's immunity in section 9 of the SIA, which disapplies immunity in respect of arbitration-related court proceedings "[w]here a State has agreed in writing to submit a dispute … to arbitration". However, at least as English law currently stands, reliance on that exception opens the door to a de novo review of whether the arbitral tribunal in fact had jurisdiction: see *PAO Tatneft v Ukraine* [2018] 2 CLC 290 at [35] (in other words, regardless of what the arbitral tribunal may have found, the Court applying section 9 may find there was not in fact arbitral jurisdiction, so the exception is not available). That is a potential impediment to enforcement (and a delay and additional expense) which an award creditor may well wish to avoid. A prior contractual waiver of a State's adjudicative immunity which functions as a submission to the jurisdiction of the enforcement courts (in English law, pursuant to section 2 of the SIA) would therefore be of real value, avoiding the potential for a messy section 9 re-hearing on whether the arbitral tribunal had jurisdiction.

The question therefore is: does the LMA's standard sovereign immunity clause constitute a submission to the adjudicative jurisdiction under section 2 (and therefore, in English law, engage the section 9 arbitration exception)?

The language of "all immunity" (in subclause (a)), and "the fullest scope permitted by the English State Immunity Act 1978" (in subclause (b)) may suggest an affirmative answer, but the case law gives rise to real doubt, which provides at least an opening for a State wishing to resist or even delay enforcement to argue that adjudicative immunity is outside the scope of the standard-form waiver.

The argument begins again with the language of the clause, and goes something like: despite the reference to "all immunity" in the opening part of subclause (a), the examples given (immunities in respect of injunctive relief and measures against assets) are manifestations of immunity from execution (in English law, found in section 13 of the SIA), such that the waiver should be construed as restricted to that sub-category of sovereign immunity; and the clarificatory statement in subclause (b) that the waiver "shall have the fullest scope permitted by [the SIA]" cannot itself expand the coverage of subclause (a).

Clear support for that argument may be found in the judgment of Gloster J (as she then was) in *Svenska Petroleum v. Lithuania (No. 2)* [2006] 1 All ER 731 (Comm) at [37], in which it was held that a waiver in general terms to "all rights to sovereign immunity" did not amount to a submission to the English courts for the purposes of section 2. The Court of Appeal agreed: [2007] QB 886 (CA) at [124]–[128]. More fundamentally, that result may be defended as a sound application of the basic rule that waivers of immunity must be express rather than implied, a principle reaffirmed most notably by the House of Lords in *Pinochet (No. 3)* [2000] 1 AC 147. It also bears note that the Court of Appeal in *ISL v. Spain*, appears to have approved Gloster J's reasoning in Svenska, even if it did so in the course of distinguishing the case on the issue of whether the ICSID Convention amounted to a submission: see at [97].

Given that case-law landscape, it can fairly be said that the LMA sovereign immunity clause is not as clear as it could be.

There is, however, an easy solution: to insert an express waiver of "immunity from the jurisdiction of the courts of any such [enforcement] jurisdiction" (or words to similar effect). That sort of language was a feature of the contractual provision in issue in *NML v. Argentina*, which the Supreme Court found to be an effect submission for the purposes of section 2 of the SIA, and would be a modest but effective addition to the LMA's standard form.

Court judgments: immunity from jurisdiction

Happily for prospective judgment creditors, the situation in relation to foreign judgments in English law is more straightforward. The Supreme Court in *NML v. Argentina* confirmed that the SIA is effectively bypassed in relation to the enforcement of foreign judgments by section 31(1) of the Civil Jurisdiction and Judgments Act 1982. That section provides that foreign court judgments shall be enforced "if and only if" (i) the judgment would be enforced were it not against a State (that is, there must be some available enforcement mechanism, such as the common law action on a judgment, or a statutory or treaty regime for registration of judgments from particular jurisdictions); and (ii) the foreign court "would have had jurisdiction in the matter if it had applied rules corresponding to" the SIA — in other words, a kind of double-actionability analysis of the sovereign immunity position in the foreign court, asking 'would the State be immune or not applying the SIA?'

Enforcement in England of foreign court judgments in favour of lenders on the LMA standard forms will therefore invariably not face a viable claim to sovereign immunity, as long as the jurisdiction of the foreign court was founded on a contractual jurisdiction agreement.

However, section 31(1) is a somewhat idiosyncratic feature of English law: as a matter of general common law principle, proceedings to register foreign judgments against States do engage their adjudicative immunity (see *AIC Ltd v. Nigeria*, mentioned above). The sort of express provision for waiver of adjudicatory immunity suggested above in relation to arbitral awards would therefore also be a useful addition to the LMA immunity clause in relation to the enforcement of court judgments (including English judgments) in common law jurisdictions other than England.

Immunity from execution

The common law has been crystal clear since at least The Cristina [1938] AC 485 that the adjudicative immunity of foreign States is separate and distinct from their immunity from execution against property. The latter is dealt with by section 13 of the SIA, and is subject to much narrower exceptions than immunity from jurisdiction. One of those exceptions is consent, including by prior written agreement (section 13(3)). However, that consent must be separate from a submission to either curial jurisdiction (in the words of section 13(3) itself, "a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection") or arbitration (see the Court of Appeal in *Svenska Petroleum v. Lithuania* at [117]).

Here, there can be no doubt that the LMA sovereign immunity clause is clear and effective, in particular by virtue of the express reference in the second listed example in subclause (a) of "the issue of any process against its assets or revenues for the enforcement of a judgment". There may recently be detected a trend towards a more liberal approach to State consent to execution against assets (see for instance the judgment of HHJ Pelling KC in *General Dynamics v. Libya* [2024] EWHC 472 (Comm)), but regardless of that trend "no special or particular words are required in order to satisfy the requirement of SIA, s.13(3) that the state concerned should have provided its written consent", and the LMA drafting is clearer than the clauses in issue in many of the decided cases.

Conclusion

The LMA's sovereign immunity clause more or less does what it says on the tin.

However, to ensure that it fully insulates lenders from the sort of extensive litigation of immunity issues seen recently in the investor–State field, this article has suggested a modest addition to the clause, expressly waiving adjudicative immunity in enforcement proceedings.

Even if it is not adopted by the LMA, lenders would be well justified in seeking to include such an express waiver when negotiating individual loan contracts. It would close off a potential basis for recalcitrant State or State-aligned debtors to resist enforcement by claiming adjudicatory immunity in proceeding to convert an award (or foreign judgment, depending on the jurisdiction) to a judgment in the enforcement jurisdiction. In turn, that could well avoid additional cost and delay in lenders' enforcement efforts, if not outright failure if adjudicative immunity were to be properly claimed and found to be applicable.

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