Neutral Citation Number: [2024] EWHC 472 (Comm)

Case No: CL-2018-000422

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/03/2024

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

GENERAL DYNAMICS UNITED KINGDOM LIMITED — **Claimant**

- and –

THE STATE OF LIBYA — **Defendant**

- -
- -

Daniel Toledano KC and **James Ruddell** (instructed by **Alston & Bird (City) LLP**) for the **Claimant**
Lucas Bastin KC and **Freddie Popplewell** (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendant**

Hearing dates: 21 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the hearing of an application by the claimant ("GDUK") for a final charging order over a property owned by the defendant ("SoL") located at 7 Winnington Close, London, N2 0UA ("Property"), following the making of an interim charging order on 24 February 2023 ("ICO"). SoL applies for an order discharging the ICO on the basis that the Property is immune from execution by operation of s.13(2)(b) of the State Immunity Act 1978 ("SIA"). GDUK maintains that this is wrong because SoL has provided written consent waiving its right to assert such an immunity within the meaning of SIA, s.13(3).

Factual Background and Parties' Contractual Relationship

2. By an agreement in writing made on 5 May 2008, the parties entered into an agreement for the supply by GDUK to SoL of a Tactical Communication and Information System at a price in excess of £84m ("Contract"). The parties agreed that the Contract would be " … *exclusively governed and construed in all aspects in accordance with the Laws of Switzerland*…" – see clause 33.1 – and by clause 32 that:

> "**Disputes/Arbitration**
>
> The Parties will attempt to resolve any differences or disagreements by mutual agreement. All disputes in which mutual agreement cannot be reached arising out of or in connection with the present Contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one (1) or three (3) arbitrators. The award will be final and binding upon the Parties. The seat or legal place of arbitration shall be Geneva, Switzerland. The language to be used in the arbitral proceedings shall be English. The arbitrators shall have no authority to award aggravated or punitive damages and shall be bound by any limits on the PURCHASER's and SELLER's liability as set out in this Contract. The Parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right. Both parties agree that the decision of the arbitration panel shall be final, binding and wholly enforceable." [Emphasis supplied]

3. A dispute developed between the parties, the detail of which does not matter for present purposes, which was referred to arbitration under the ICC Rules in accordance with the arbitration agreement between the parties contained in clause 32 of the Contract. By an Award published on 5 January 2016, GDUK was awarded £16,114,120.62. On 18 July 2018, Teare J gave GDUK permission under s.101 of the Arbitration Act 1996 ("AA") to enforce the Award as if it was a judgment. Following difficulties with service, there was a challenge to the s.101 order that was dismissed on 11 March 2022 and GDUK

became entitled to enforce the Award as if it was a judgment of the High Court unconditionally from 2 April 2022.

4. On 22 April 2022, GDUK applied for the ICO, contending that either (a) SoL had given written consent by clause 32 of the Contract to enforcement against its property including the Property under SIA, s.13(3) or (b) the Property was in use or intended for use for commercial purposes within the meaning of SIA, s.13(4). This last mentioned argument was abandoned on 16 December 2022 and on 24 February 2023 I made the ICO following a without notice hearing in accordance with CPR r.73.10A(3), on the basis that GDUK had established a realistically arguable case that SoL had given its consent to enforcement against its assets of any award made in a reference to arbitration pursuant to the arbitration agreement contained in clause 32 of the Contract. On 4 December 2023, SoL issued its discharge application, which it now advances exclusively on the basis of the immunity against execution conferred by of SIA, s.13(2)(b).

Applicable English Law Principles

5. The SIA is a complete code and now the sole source of the English law of state immunity. The scheme of the SIA is to create a general immunity conferred by SIA, s.1(1) for the governmental acts of states, subject to the express exceptions set out in later sections of the SIA – see Benkharbouche v Embassy of the Republic of Sudan [2019] AC 777, *per* Lord Sumption at paragraph 39. The SIA draws a clear distinction between a court's adjudicative jurisdiction (which is the subject of SIA, ss.2-11) and its enforcement jurisdiction (which is the subject of SIA, ss.13(2)-(6) and 14(3)-(4)) – see Alcom Ltd. V. Republic of Colombia [1984] AC 580 *per* Lord Diplock at 600F-H, where the point is also made that voluntary submission to the court's adjudicative jurisdiction does not of itself imply any submission to its enforcement jurisdiction; and General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22; [2022] AC 318 *per* Lord Lloyd-Jones at paragraph 30. This distinction means, in relation to arbitral awards, that SIA s.9 applies to applications under AA s.101(2) because " … *leave to enforce an award as a judgment is, as subsection (1) recognises, one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective. Enforcement by execution on property belonging to the state is another matter, as section 13 makes clea*r" – see Svenska Petroleum Exploration v Lithuania [2007] QB 886 *per* Moore-Bick LJ at [117].

6. Turning to SIA, s.13, subsections (2) and (3) respectively provide (in so far as is material for present purposes):

> "(2) Subject to subsections (3) and (4) below—
>
> …
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained

> in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection."

7. GDUK submits that the final sentence within clause 32 of the Contract – "… (b)*oth parties agree that the decision of the arbitration panel shall be final, binding and wholly enforceable*" – and in particular the words "…*and wholly enforceable*…" constitutes the "…*written consent of* …" SoL to the enforcement of a judgment or Award against its property, which is " … *contained in a prior agreement*…" , being the Contract.

8. GDUK places significant reliance on comments within various authorities to the broad effect that no particular form of words is required to satisfy SIA, s.13(3) and that the construction of contractual provisions that are said to fall within the scope of SIA, s.13(3) should not be construed restrictively but "… *be construed in like manner to the rest of the contract in accordance with the ordinary principles of construction for commercial contracts, by looking at the bargain as a whole in its context and giving the words used, if capable of bearing them, a construction which accords with commercial common sense*…" – see A Co. Ltd. v. Republic of X [1990] 2 Lloyds Rep 520 per Saville J as he then was at 523 (RHC).

9. Two points need to be made about formulations such as this. Firstly, the statement was made in the context of a contract governed by English law, whereas this one is governed by Swiss law. Secondly, the clause in issue in A Co. Ltd. v. Republic of X (ibid.) was more explicit than the final sentence of clause 32 of the Contract. It provided that the "… *Ministry of Finance hereby waives whatever defence it may have of sovereign immunity for itself or its property (present or subsequently acquired)*…". Given the language used, it was reasonably straightforward for Saville J to arrive at the conclusion Saville J reached namely that as a matter of English law "… *read in the context of what was undoubtedly a commercial bargain between the parties, the intent and purpose of the clause is quite clear, namely, to put the State on the same footing as a private individual so that neither in respect of the State nor its property would any question of sovereign immunity arise in connection with the State's obligations to the plaintiffs under the agreement…*". That said, I accept that at any rate in the context of an agreement such as the Contract, 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.

10. I do not accept that Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq [2016] 4 WLR 2 is authority for any narrower proposition. That case was not concerned with an application to enforce an Award – see paragraph 40 – nor with the immunity against execution – see paragraph 42. The comment at paragraph 42 that a waiver must be construed "*strictly and sensibly"* is therefore *obiter*. In any event Burton J appears to have considered there was merit in distinguishing that case from A Co. Ltd. v. Republic of X (ibid.) on the basis that Saville J considered the latter to be "… *undoubtedly a commercial bargain between the parties…*" – see paragraph 42(i).

Construction of the Contract

11. The first task that arises in this case is to construe the words used by the parties in accordance with the applicable principles of Swiss law. The claimant's solicitor Mr Brocklesby summarises the principles on the basis of advice that he has received from a Swiss lawyer (Dr Christian Oetiker of Vischer AG) as being:

> "(a) As a starting point, the interpretation must first be based on the wording of the language that is in question. Swiss law will apply the general and ordinary usage of the words as a matter of language.
>
> (b) In addition to the wording, the entire circumstances of the particular language must be taken into account, this includes:
>
> (i) pre-contract negotiations of the parties;
>
> (ii) the surrounding circumstances at the time of the conclusion of the contract;
>
> (iii) the purpose of the contract; and
>
> (iv) the conduct of the parties after conclusion of the contract.
>
> (c) In light of the above, a Swiss Court will perform a subjective interpretation, based on the evidence, as to what the true and common intention of the parties was. If that is conclusive, that interpretation will be binding.
>
> (d) If that subjective interpretation is not conclusive, the principle of good faith will be invoked, and the Swiss Court will then perform an objective interpretation as to what meaning the parties could and should have given, in good faith, to their mutual expressions of intent in light of all the circumstances"

He adds that there is no principle of Swiss law that requires commercial contracts with a state to be construed differently from any other commercial agreement. SoL accepts that Mr Brocklesby's summary reflects accurately " … *the current status of the law in Switzerland*…" – see paragraph 40 of the third statement of SoL's solicitor, Ms Tsikata.

12. Some reliance was placed by SoL on a proposition of Swiss substantive law that a contract which is alleged to waive state immunity as a matter of Swiss state immunity law must be clearly expressed. In my judgment the role of Swiss law in this dispute is to provide the rules by which the meaning of the agreement is to be ascertained. Once that exercise has been completed it becomes a question of English law whether the parties' agreement takes effect in England and Wales as such a waiver. As to that, as I have said already, and as is common ground, no special words are required in order to satisfy the written consent requirement of SIA, s.13(3).

13. It is common ground that there is no evidence from which conclusions can be reached concerning the subjective intentions of the parties when adopting clause 32 or for that

matter any other aspect of the Contract. It follows that clause 32 must be construed by giving the words used the meaning the parties in good faith could and should have given to their agreement in light of all the circumstances. This begs the question of what is meant by "*good faith*" in this context. There is no evidence as to what this concept requires as a matter of Swiss law. With some hesitation, since this is a concept not generally applied by English lawyers when construing a contract, I conclude that it requires the Court to arrive at a conclusion as to what the parties meant by asking what a reasonable person with the knowledge of the parties as summarised in paragraph (b) of Mr Brocklesby's summary would in the circumstances conclude was intended by the language the parties have used to express their bargain.

14. There was some discussion in the course of the submissions concerning whether and if so to what extent the clause can be construed in a manner that suggests some of the wording may be surplus or repetitive. Neither party has served any evidence of Swiss law that addresses the impact of this issue as a matter of Swiss law. Even in English law such a point is of limited significance in the context of commercial agreements – see by way of example The Eurus [1998] 1 Lloyds Rep 351 *per* Staughton LJ (as he then was) at 357, where, in approving Royal Greek Government v. MoT (1949) 83 Ll.L.R 228 per Devlin J (as he then was) at 235 and Chandris v. Isbrandtsen-Moller Co Inc [1951] 1 KB 240 per Devlin J at 245, he commented that "*…(i)t is well established law that the presumption against surplusage is of little value in the interpretation of commercial contracts*…". It strikes me as implausible that a court applying the Swiss principles I have summarised above would consider an argument based on surplusage to be decisive of itself and in any event such a point is unlikely to assist where each interpretation contended for by the parties involves a degree of surplusage. In any event, for reasons that I explain below, I consider the suggestion of apparent surplusage to be illusory in the circumstances of this case.

Meaning and Effect of Clause 32

15. Turning now to the language used by the parties, it is necessary to start with the obvious point that from first to last the Contract was a commercial agreement between the parties. Applying the Swiss law principles summarised earlier I conclude that a reasonable person with all the relevant knowledge of the parties and applying the good faith principle would conclude that the intention of the parties was that each should be able to enforce its obligations against the other in accordance with the terms of their agreement and that included obligations resulting from an award by arbitrators appointed to resolve any differences between the parties under the arbitration agreement contained in clause 32 of the Contract.

16. SoL contends that on its true construction, the final sentence of clause 32 means simply that any award is wholly enforceable to the extent permitted by the law of the jurisdiction in which it is being enforced and thus in England enforcement is subject to the immunity from enforcement set out in SIA, s.13(2)(b). In my judgment this reasoning is circular and should be rejected because it adds nothing to the agreement of the parties in the third sentence of clause 32 that the award of an arbitral tribunal in an arbitration between the parties would be "*… final and binding upon the parties …"*. No other meaning is offered other than that contended for by GDUK.

17. In the final sentence of clause 32 the parties agreed that "*… the decision of the arbitration panel shall be final, binding and wholly enforceable*". Clearly the reference to the award being final and binding in the third sentence of clause 32 and the reference to the decision of the arbitrators being "*final, binding* …" in the final sentence are arguably repetitive and to that extent the latter are surplus. However, different considerations apply to the phrase "*… and wholly enforceable*" in the final sentence. If SoL is correct and that phrase applies only to SoL's adjudicative immunity, then the entire final sentence is surplus because it adds nothing to what the parties have expressly agreed in the third sentence of clause 32 of the Contract. In my judgment, construing the final sentence of clause 32 as being devoid of all content is unlikely to give effect to the intention of the parties viewed from the point of a view of a reasonable person with all the relevant knowledge applying the good faith principle. In any event, as I explain below, I do not accept that the words final and binding in the final sentence are surplus in any relevant sense.

18. Although it is submitted by SoL that the phrase "*wholly enforceable*" in the final sentence of clause 32 can apply only to adjudication immunity, I do not agree. In England that is not so because the issue is covered by SIA, s.9 and in any event is the effect of the agreement of the parties (contained in the third sentence of clause 32) that the Award will be final and binding between them. The phrase "*wholly enforceable*" must apply to something else. That is important contractual context because viewed in isolation I accept that the word "*enforceable*" is capable of applying to both the process by which an award is made enforceable in any particular jurisdiction and enforcement by execution against assets.

19. SoL's reliance on the absence of any mention of SIA, s.13 in the Contract as supporting its construction takes matters no further. It is highly improbable that a contract of this sort would refer specifically to the SIA or any other national law concerning state immunity. By definition agreements concerning enforceability of awards against states must be expressed in general terms in the hope that the words used will have the same effect in whatever state one of the parties seeks to enforce an award against the other. Whilst I accept that a consequence of this is that an award may be enforceable by GDUK anywhere against assets belonging to SoL, ultimately whether that is so will be a question of national law for the country in which it is sought to enforce the award.

20. By the same token, although it is submitted on behalf of GDUK that its construction is supported by use of the word in the latter sense in SIA, s.13, I do not consider that is so. The Contract was drafted on the basis that it was governed by Swiss law not English law and there is no evidence of an intention that any award would be enforceable only in England and Wales.

21. Leaving those points to one side, in my judgment a key consideration is that the distinction between adjudicative and enforcement immunity is one that is generally drawn as matter of public international law – see Jurisdictional Immunities of the State (Germany v Italy) [2012] ICJ Rep 99 at [113] where the Court held that:

> "… the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered

> against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question."

and thus is a distinction that is likely to have informed the terms of the parties' agreement, particularly in the context of a purely commercial agreement such as the Contract.

22. In my judgment the use of the word "*wholly*" emphasises an intention on the part of the parties that the word "*enforceable*" was not to be regarded as limited in effect, particularly given the inclusion of the words final and binding that precede it, which in my judgment were included as words of emphasis rather than merely to repeat needlessly what had gone before. Using the word "*wholly*" is obviously inapposite if the intention was to confine the meaning of enforceable in the way contended for by SoL. Indeed, in my view to attempt to construe the clause in the manner adopted by SoL is likely to defeat what is required by a good faith approach to the true meaning and effect of the agreement when the alternative – that the sentence is concerned with waiving adjudicative immunity alone – makes little sense given (a) what the third sentence of clause 32 appears to achieve and (b) that in any event an Award made by a tribunal sitting in Switzerland applying Swiss law would be and it is reasonably to be inferred would be known to the parties and their advisors to be adjudicatively enforceable in most states by reference to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

23. I accept GDUK's submission that the phrase "*both parties agree…*" in the final sentence of clause 32 adds little to the construction exercise. I do not accept that its use negatives the construction for which GDUK contends, as was submitted by SoL. As GDUK submits, both parties to a commercial agreement such as the Contract would want to ensure that each was in the same position as regards the other in relation to the enforcement of awards. The circumstances in which the parties might each be able to avoid enforcement may differ and be different in different jurisdictions but in a commercial agreement of this nature there is no reason why one should be in a more favourable position than the other. The construction for which GDUK contends gives effect to the intention of the parties that clause 32 would provide an effective means of resolving differences between them – that is the reason why the arbitration agreement emphasises that such disputes will be finally resolved by arbitration, that all arbitral awards would be final and binding and that they would be fully enforceable.

24. Finally, SoL submits that immunity from enforcement against its assets is a valuable right. I accept that is so, not least because it is not disputed. SoL submits that in consequence clear words will be required before a court will hold that a state has waived such a right. In my judgment that does not assist in the circumstances of this case. Firstly, as SoL accepts in its skeleton, "… *there is no single prescribed form of wording that would amount to 'written consent' for the purposes of s.13(3) SIA*…". Secondly, whether the words used have the effect of removing a state's immunity from enforcement depends not simply on the words used when read in isolation but what effect the words used have when read in their correct legal and factual context and in

this case when applying Swiss principles of construction. In this case, applying those principles, I have come to the conclusion that the parties' intention was to enable an award made pursuant to the parties' arbitration agreement contained in the Contract to be enforceable in the same way as such an award could be enforced in any commercial agreement between non-state actors. No other meaning has been identified for the final sentence of clause 32 other than that it applies only to adjudicative immunity. However that is a meaning to be rejected for the reasons set out earlier.

25. In those circumstances, it is not necessary for me to consider GDUK's "*Creighton Argument*". However, there is no evidence that this was something the parties or their advisors considered and in any event was concerned with a conclusion reached by the Cour de Cassation of France applying French law. There is no reason to suppose that it would have been considered by parties negotiating a contract between SoL and a UK-based company that was being made subject to Swiss law. It is difficult to see what effect the ruling would have had on such a negotiation. I do not consider it would be safe to assume that a reasonable person with the knowledge of the parties as summarised in paragraph (b) of Mr Brocklesby's summary referred to above would have knowledge of the decision, nor is it at all clear what such a person would conclude applying the good faith principle assuming that he or she had such knowledge. Accordingly, had it been necessary for me to resolve this point I would have resolved it against GDUK.

26. In the result, I conclude that the effect of the final sentence of clause 32 was to waive SoL's immunity from enforcement against its assets and that in those circumstances the ICO should be made final.