State-Entities and Veil Piercing: Seek or hide the assets

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Kyiv, 18 November 2011

CAN I COLLECT FROM A SOVEREIGN STATE?
Arbitral Awards against States and State Entities

- Awards directed at States (procurement contracts with the government, concessions, treaty awards, sovereign bonds);

- Awards directed at State entities (contracts with State agencies and State-owned companies).

TOO EARLY TO UNCORK CHAMPAGNE: THEY ARE NOT PAYING!
Reasons for enforcement of awards against State entities elsewhere

- Doubts about the independence of the judiciary in a debtor State;
- Immunities from execution extended to State agencies under domestic law, e.g. Article 37(15) of Ukrainian Enforcement Proceedings Law;
- Refusal to enforce an arbitral award by the courts of a debtor State;
- Availability of a debtor State's assets in other countries.

WE ARE AFTER THE ASSETS
Locating assets that may be attached and enforced against

- Normal practice is to apply for recognition of an award in jurisdictions where a debtor State is likely to have assets (London, New York, etc.);
- It is important, if difficult, to differentiate between the assets that may be attached and seized and those that are absolutely immune from seizure under applicable law (e.g., Embassy's premises and funds, military property);
- Likely targets are merchant ships/aircraft, funds on foreign bank accounts, proceeds from securities.

WHO IS THE MASTER?
Two main questions

- Is determination of a true debtor a substantive or a procedural issue?
- Does an enforcing court have jurisdiction to determine the identity of the debtor at an enforcement stage?

WHO IS THE DEBTOR?
Three different approaches to jurisdiction of an enforcing court to determine who is the genuine debtor across Atlantic

- A "mechanistic" approach espoused by English High Court in *Norsk Hydro ASA v State Property Fund of Ukraine* [2002] EWHC 2120 (Comm) (2002);
- An "equitable" approach espoused by U.S. courts stemming from the landmark decision of the U.S. Supreme Court in *First National City Bank v Banco Para El Comercio Exterior de Cuba (Bancec),* 462 U.S. 611 (1983)
- A "procedural" approach espoused by the Federal Court of Canada in *TMR Energy Ltd v State Property Fund of Ukraine* 2003 FC 1517 (2003)

NORSK HYDRO APPROACH: ENFORCE, NOT EXPAND

- An arbitral award rendered by an SCC tribunal against, *inter alia*, "*the Republic of Ukraine, through the State Property Fund*";
- The claimant, Norsk Hydro, applied for and was provisionally granted enforcement of the arbitral award in the U.K. against (1) the State Property Fund of Ukraine and (2) the Republic of Ukraine;
- In furtherance of this award the order was issued to attach the monies due to Ukrainian bondholders;
- Ukraine applied to set the enforcement order aside under the Sovereign Immunities Act 1978

NORSK HYDRO APPROACH: ENFORCE, NOT EXPAND

- The English High Court (Justice Gross) set aside the order to enforce the Norsk Hydro award against “the Republic of Ukraine”;

- the court departed from the premise that as a matter of policy underlying English Arbitration Act 1996 “*the task of the enforcing court should be as "mechanistic" as possible”;*

- the court went on to hold that it would be wrong to enforce an award made against one party against two distinct parties since *“**enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions***”

EFFECTS AND IMPLICATIONS OF THE *NORSK HYDRO* APPROACH

- The enforcing court is viewed as a mere executor of the award;
- No further determination of the relationship between a State entity and a State such as alter ego, agency, etc. is allowed as that would amount to a court taking on the role of an arbitrator;
- The *Norsk Hydro* ruling was never appealed as Norsk Hydro and Ukraine agreed to “a ceasefire” pending an annulment application in Stockholm – its authority remains uncertain;
- However, the *Norsk Hydro* ruling has been cited with approval by the British Columbia Court of Appeal in *Pan Liberty Navigation Co Ltd. & Anr v World Link (H.K.) Resources Ltd.* (2005) BCCA 206;
- Would the result have been any different had the application been filed against the State Property Fund only or the issue arisen at a later stage of execution?

BANCEC APPROACH: EQUITY ABOVE THE LAW?

- The case concerned the jurisdiction of the U.S. courts and application of the alter ego doctrine to liability of foreign States and their instrumentalities in the context of litigation in the United States;
- In 1961 Bancec, a Cuban entity owned by the Cuban Government, filed a suit against First National City Bank (**Citibank**) for recovery of a letter of credit issued in 1960;
- Citibank filed a counter-claim seeking to set off the value of its branches nationalised by Cuban Government in 1960 against the value of the letter of credit;
- Bancec asserted sovereign immunity under the Foreign Sovereign Immunities Act (**the FSIA**) and legal separateness from the Cuban Government.

BANCEC APPROACH: EQUITY ABOVE THE LAW?

- The U.S. Supreme Court held that the FSIA rules on sovereign immunity of instrumentalities do not apply to determination of their substantive liability;
- The Court went on to cite its own case law, the case law of British courts and the ICJ(!) to hold that equity warrants the corporate form to be disregarded where (1) an entity is so closely controlled that an agency-principal relationship is created; or (2) to do so would "work fraud or injustice"; or (3) defeat legislative policies;
- The Court concluded by stating that its ruling provided "*no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded*".

BANCEC: EFFECTS AND IMPLICATIONS

- The *Bancec* case, perhaps inadvertently, has proved to provide a conceptual framework for determining all sorts of issues (jurisdiction, immunities, liability, enforcement) involving alleged “instrumentalities” of foreign states, even those that fall to be decided under the FSIA;

- The application of *Bancec* test does not even imply posing a question, central to *Norsk Hydro* approach, whether an enforcing court is a right forum to address the identity of the debtor at the execution stage

BANCEC AND ENFORCEMENT: DID U.S. COURTS GET IT RIGHT?

The *Bancec* analysis was subsequently extended to enforcement cases against foreign states by U.S. federal courts holding that:

- "*A creditor seeking execution against an apparently separate entity must prove "the property to be attached is subject to execution." The evidence submitted…does not reveal abuse of corporate form of the nature or degree that Bancec found sufficient to overcome the presumption of separate existence*" (*Letelier v Republic of Chile* 748 F.2d 790 (2d Cir. 1984));

TMR APPROACH: IT IS NEVER TOO LATE TO FIND OUT

- An arbitral award rendered by an SCC tribunal against "*the State Property Fund, organ of the State of Ukraine*";
- The claimant, TMR Energy Ltd., applied for and was granted enforcement of the arbitral award in Canada against the State Property Fund of Ukraine (**the SPF**);
- In furtherance of the award a cargo aircraft held in the right of "full economic management" by Antonov, a Ukrainian State-owned company, was seized;
- Both Antonov and Ukraine intervened to have the seizure set aside (1) under the *Sovereign Immunities Act* and (2) since Antonov, SPF and Ukraine were all distinct entities

TMR APPROACH: IT IS NEVER TOO LATE TO FIND OUT

- The Court (Prothonotary Tabib) endorsed the seizure of the Antonov aircraft dismissing motions of both Antonov and Ukraine;
- The Court took note of the *Norsk Hydro* approach, but found nonetheless that the determination of the award debtor identity was, in effect, a procedural issue within the purview of the enforcing court;
- SPF was found to be an "administrative sub-division" indistinguishable from the State of Ukraine;
- The aircraft seized was found to be owned by the State of Ukraine, the Antonov's right of full economic management not precluding the enforcement of the award against it.

TMR APPROACH: EFFECTS AND IMPLICATIONS

- The *TMR* ruling was eventually overturned due to serious procedural irregularities (want of authority to register an award, failure of disclosure of the true debtor, lack of notice under the Sovereign Immunities Act);
- Asserted authority to identify the debtor at the enforcement stage;
- Modified the *Norsk Hydro* analysis by treating the debtor identity analysis a purely procedural matter rather than a substantive one;
- Did not apply “alter ego” or “agency” doctrines, but focused on application of the Ukrainian substantive rules in the context of Canadian procedural laws to ascertain the genuine debtor and the genuine owner of the aircraft;
- TMR ruling clearly distinguished the immunity analysis and the liability analysis;
- Did not pierce the corporate veil as such.

THREE APPROACHES: CONCLUDING REMARKS

- No harmonised system of enforcement rules against States exists;
- All three approaches are based on the case law and are highly fact-specific;
- It is advisable to raise the alter ego or other similar arguments before the arbitral tribunal, if possible, rather than before the enforcing court;
- The debtor should be clearly (and broadly?) defined in an arbitral award;
- Do we need a harmonised system of enforcement rules against States?