New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part II)

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Recently, the issue of foreign sovereign immunity became a hot topic in India due to the new judgment of the Delhi High Court ("DHC") in the case of (*KLA Const Tech v. Afghanistan Embassy*). The previous part of the blog post analyzed the decision of the DHC. Further, the post focused on the relevance of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The post also explored the interplay between state immunity and diplomatic immunity.

This part focuses on two further issues which emanate from the decision of the DHC. Firstly, the post deals with the impact of the consent to arbitrate on immunity from enforcement. Then, the post explores the issue of attachment of state's property for satisfying the commercial arbitral award against a diplomatic mission.

Consent to Arbitrate: Waiver Of Immunity From Enforcement?

As highlighted in the last post, one of the main arguments of the KLA Const Technologies ("claimant") was that the Embassy of the Islamic Republic of Afghanistan's ("respondent", "Embassy") consent to arbitrate resulted in the waiver of the sovereign immunity. The DHC accepted the argument and ruled that a separate waiver of immunity is not necessary to enforce an arbitral award in India as long as there is consent to arbitrate. The DHC also stated that this position is in consonance with the growing International Law principle of restrictive immunity while referring to the landmark English case (*Trendtex Trading Corp. v. Central Bank of Nigeria*).

However, there's more to the issue than what catches the eye. First of all, the *Trendtex* case was decided before the English Sovereign Immunity Act ("UKSIA") came into effect. Therefore, the DHC could have examined the relevant provisions under UKSIA and the more recent cases to track the jurisprudential trend on sovereign immunity under English law. For example, Section 13(2) of the UKSIA recognizes the difference between jurisdictional immunity and immunity from enforcement and requires an express waiver of immunity from enforcement. Even the ICJ has noted the requirement of an express waiver of immunity from enforcement in the *Jurisdictional Immunities* case. (para 118).

Furthermore, there was an opportunity to undertake a more detailed cross-jurisdictional analysis on the issue. In fact, the issue of arbitral consent as a waiver of immunity from enforcement was dealt with by the Hong Kong Courts in *FG Hemisphere v. Democratic Republic Of The Congo*. Reyes J, sitting in the Court of First Instance, ruled that consent of the state to arbitrate does not in itself imply the waiver of immunity from enforcement. The ruling on the issue was confirmed by the majority decision of the Court of Final Appeal. The position has also been confirmed by scholars.

However, this position is not the settled one. The DHC's decision is in line with the approaches adopted in France (*Creighton v. Qatar*), Switzerland (*United Arab Republic v. Mrs. X*) that no separate waiver of immunity from enforcement would be required in the existence of an arbitration agreement.

However, the decision made no reference to the reasoning of the cases from these jurisdictions. Regardless of the conclusion, the DHC's decision could have benefited from this comparative analysis, and there would have been a clearer answer as to the possible judicial approaches to the issue in India.

Attachment of State's Property for Satisfying an Award Against A Diplomatic Mission

In the current case, the DHC ordered the respondent to declare not only its assets and bank accounts in India but also all its commercial ventures, state-owned airlines, companies, and undertakings in India, as well as the commercial transactions entered into by the respondent and its state-owned entities with the Indian companies.

It is not entirely clear whether the Islamic Republic of Afghanistan's

("Afghanistan") properties and commercial debts owed by private Indian companies to the state-entities of Afghanistan would be amenable to the attachment for satisfying the award against the Embassy. To resolve the issue of attaching Afghanistan's property to fulfill the liability of the Embassy, a critical question needs to be considered – while entering into the contract with the claimant, was the respondent (Embassy) acting in a commercial capacity or as an agent of the state of Afghanistan?

The contract between the claimant and the respondent was for the rehabilitation of the Afghanistan Embassy. The DHC found that the respondent was acting in a commercial capacity akin to a private individual. Additionally, there's no indication through the facts elaborated in the judgment that the contract was ordered by, or was for the benefit of, or was being paid for by the state of Afghanistan. In line with these findings, it can be concluded that the contract would not be a sovereign act but a diplomatic yet purely commercial act, independent from the state of Afghanistan. Consequently, it is doubtful how the properties of state/state-entities of Afghanistan can be attached for fulfilling the award against the Embassy.

The attachment of the state's property to fulfill the liability of the Embassy would break the privity of contract between the claimant and the respondent (Embassy). According to the privity of contract, a third party cannot be burdened with liability arising out of a contract between the two parties. Therefore, the liability of the Embassy cannot be imposed on the state/state-entities of Afghanistan because they would be strangers to the contract between the claimant and the respondent.

That said, there are a few well-known exceptions to the principle of privity of contract such as agency, third party beneficiary, and assignment. However, none of these exceptions apply to the case at hand. It is accepted that an embassy is the agent of a foreign state in a receiving state. However, in this case, the contract was entered into by the Embassy, in its commercial capacity, not on behalf of the state but in the exercise of its diplomatic yet commercial function. Afghanistan is also not a third-party beneficiary of the contract as the direct benefits of the contract for the rehabilitation of the Afghanistan Embassy are being reaped by the Embassy itself. Additionally, there is no indication from the facts of the case as to the assignment of a contract between the state of Afghanistan and the Embassy. Therefore, the privity of contract cannot be broken,

and the liability of the Embassy will remain confined to its own commercial accounts and ventures.

In addition to the above, there also lacks guidance on the issues such as mixed accounts under Indian law. Regardless, the approach of the DHC remains to be seen when the claimant can identify attachable properties of the respondent. It also remains to be seen if the respondent appears before the DHC and mounts any sort of defence.

Conclusion

There remains room for growth for Indian jurisprudence in terms of dealing with issues such as immunity from the enforcement of arbitral awards. An excellent way to create a more conducive ecosystem for this would be to introduce stand-alone legislation on the topic as recommended by the Law Commission of India in its 176^{th} report. Additionally, the issues such as the use of state's properties to satisfy the commercial liability of diplomatic missions deserve attention not only under Indian law but also internationally.

(*The views expressed by the author are personal and do not represent the views of the organizations he is affiliated with. The author is grateful to Dr. Silvana Çinari for her feedback on an earlier draft.*)