Spain

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It is a well-known fact that a favourable judgment or award does not necessarily mean a successful outcome. If the judgment or award cannot be enforced for some reason, the winning party will have won a moral victory, but no real compensation, which, when all is said and done, is what commercial litigation is mostly about.

This problem is particularly acute when the losing party is a sovereign state. In addition to the difficulties of enforcing resolutions against private parties, the immunities and privileges of nation states often present further complications, namely: is it possible to enforce the resolution? ('immunity of jurisdiction') and against which assets can this resolution be enforced? ('immunity of execution').

Before the enactment of the State Immunities and Privileges Act (the SIPO Act)[1] in October 2015, state immunity was only briefly mentioned in the Spanish Judiciary Act (LOPJ), which establishes the jurisdiction and competences of the Spanish courts, and in the Spanish Civil Procedure Act (LEC). Both statutes established that the Spanish courts have jurisdiction to decide on disputes taking place within Spanish territory involving Spanish and foreign nationals, except in the cases of immunity of jurisdiction and immunity of execution provided for by Public International Law regulations (article 21.2 LOPJ and article 36.2.1a LEC).

In the absence of any other regulation, both the work of scholars and case law made worthy efforts to establish certain limits on the general rule for state immunity, as well as to fill in some of the gaps within this matter. However, there are still doubts on some issues, as well as contradictory opinions and court decisions on others.

Considering this background, the enactment of the SIPO Act is most welcome, as well as long overdue. The SIPO Act does not differ greatly from the general tendencies of the Spanish courts, nor does it answer all of the questions raised. However, it does, at least, record in black and white some of the core issues, settle some of the conflicting positions and lay down certain procedural rules regarding the application of state immunity, thus offering a greater measure of legal certainty to individuals or companies seeking the enforcement of a judgment in Spain or, more often than not, an arbitral award, against a foreign sovereign state.

Restrictions on state immunity

Throughout the last two decades or so, the general trend in public international law has been to restrict sovereign immunity. That is to say that state immunity should not be absolute, but should rather be limited to the extent that it protects the independence and equal rights of both states involved (ie, the state against whom a legal action is brought and the state where such legal action is pursued) when undergoing lawsuits or enforcements.

In particular, scholars and case law both generally agree that state immunity should be limited to acts iure imperii and that immunity should be denied for acts iure gestionis. While this distinction is well appreciated theoretically and conceptually, state practice and commentators have yet to establish a framework that uniformly distinguishes between acts iure imperii and acts iure gestionis, in any given case. Despite this, the authors mostly agree that, in international law, it is not only the purpose of the act of the state but the nature of the act - either public law or private law – that truly determines its character as iure imperii or iure gestionis.[2]

Since the enactment of the SIPO Act, the previously mentioned trend has reached statutory rank in Spain. The reason for this is that the SIPO Act expressly foresees limiting state immunity in both of its facets (ie, immunity of jurisdiction and immunity of execution), even if the general rule is still that foreign states are protected by immunity in Spain.

The SIPO Act put in writing the conceptual distinction between acts iure imperii and acts iure gestionis. Indeed, article 9 of the SIPO Act denies immunity of jurisdiction in connection with processes dealing with 'commercial transactions'.[3] Likewise, as regards immunity of execution, article 17.2 of the SIPO Act foresees that the Spanish courts can order enforcement measures against assets that are located in Spain and owned by foreign states, provided that these assets are not being used, nor are they intended to be used, for non-commercial public purposes.[4]

In addition to the general exception to immunity regarding both acts iure gestionis and assets not destined for non-commercial public purposes, the SIPO Act also establishes other exceptions to immunity of jurisdiction. Specifically, foreign states cannot claim immunity of jurisdiction in proceedings dealing with certain employment agreements (article 10 SIPO Act), damage to property or injuries (article 11 SIPO Act), certain property rights (article 12 SIPO Act), IP rights (article 13 SIPO Act), participation in corporations and other legal entities (article 14 SIPO Act), the exploitation of state-owned ships or their cargo, provided that they are not used for non-commercial public purposes (article 15 SIPO Act) or arbitration agreements (article 16 SIPO Act). Notwithstanding the above, in order for the Spanish courts to have jurisdiction in these cases, certain connections must exist between the case and Spain (eg, when they relate to companies incorporated under Spanish law or to IP rights protected under Spanish legislation, or if the action that caused the damages was carried out in Spain, etc).

State immunity and central banks

Investors in possession of a judgment or award rendered against a sovereign state can usually explore the possibility of enforcing such resolutions against the assets of the central bank of that state. In this regard, there are a small number of court cases in Spain dealing with the immunity of foreign central banks. However, existing case law has tended to follow the general trend and, therefore, has denied immunity from enforcement measures when the claim has dealt with acts iure gestionis.[5]

Following this trend, section c) of article 20.1 of the SIPO Act extends immunity from enforcement measures to the assets of central banks (and other state monetary institutions) which are designated for purposes that are characteristic of these kinds of entities. On the contrary, it could be surmised that assets belonging to central banks that are not used, or intended to be used, for the those purposes will not be covered by immunity of execution and can, therefore, be seized within the framework of enforcement proceedings.

Notwithstanding the above, attempting to enforce a resolution against the assets of a central bank may still be problematic if the resolution was not rendered against the central bank itself; that is to say, when the enforcement is sought against an entity that was not a party to the proceedings or arbitration where the resolution was rendered. Note that article 542.1 of the LEC establishes that judgments and awards cannot be enforced against individuals or entities that may be joint and several guarantors of the main debtor (or other debtors against whom the judgment or award was rendered) unless they were a party to the proceedings where the resolution was rendered.[6]

In this scenario, it would be essential to determine whether the central bank has its own legal personality, independent from that of its state, in accordance with the legislation of said state. In the event that the central bank does not have an independent legal personality, the enforcement would present fewer difficulties given that the assets of the central bank could be deemed to be assets of the state itself.[7] However, if the central bank does indeed have an independent legal personality, the enforcement could not, in theory, be sought against the assets of the central bank.[8]

Immunity and state vessels

Other assets traditionally pursued by creditors in their attempt to enforce resolutions against states are vessels or aircraft owned by the state. First, they are valuable assets and are reasonably easy to track down, however, most importantly, due to their moveable nature they allow creditors to go forum shopping. That is to say, if the vessel or aircraft cannot be enforced in a given venue, the creditors can try to seize the asset in a different place, where local legislation allows it.[9]

Evidently, warships and military aircraft are out of the question, as these assets fall without a doubt under the umbrella of iure imperii – one might go as far as to say that they are essential to the concept of iure imperii. Other vessels, however (such as training ships, whose military nature is not so clearly defined), may not be covered by immunity when they are used for acts iure gestionis.

In this regard, article 2 of the SIPO Act includes a definition of state ships and aircraft,[10] as well as a definition of warships,[11] in order to help the courts assess if a given vessel is covered by state immunity. Moreover, when doubts exist regarding whether a vessel is being used for non-commercial purposes, article 15.3 of the SIPO Act establishes that a certificate issued by the chief of the diplomatic mission accredited in Spain (or, when there is no diplomatic mission, by the competent authority of the foreign state) shall provide full proof of the use of the vessel.

State immunity and arbitration

Among the exceptions that the SIPO Act sets forth regarding the immunity of jurisdiction, article 16 of the SIPO Act establishes certain relevant exceptions to immunity with regard to arbitration proceedings.

According to this provision, a state that has entered into an arbitration agreement with an individual or legal person may not claim immunity before the Spanish courts dealing with the validity, construal or application of an arbitration clause, the arbitration procedure (including the judicial appointment of arbitrators), the confirmation or revision of awards, set aside actions or exequatur of foreign awards.

Therefore, this exception, which should be considered a very positive addition, aims to impede sovereign states that have entered into arbitration agreements from artificially shielding themselves from a potentially harmful award by alleging immunity of jurisdiction. Moreover, this provision is consistent with the spirit and principles of international arbitration, as included in the most relevant international instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965).

Procedural issues

Finally, the SIPO Act also sets forth certain procedural rules on the application of state immunities and international litigation between private parties and sovereign states.

The SIPO Act establishes that state immunities can be applied ex officio by the Spanish courts or, alternatively, alleged by the state (articles 49 and 50 SIPO Act). In the latter case, article 50 of the SIPO Act establishes that the state must allege its immunity by means of a demurrer of jurisdiction regulated by article 63 et seq of the LEC. It must be noted, however, that article 50 of the SIPO Act establishes that the term to file a demurrer of jurisdiction established by article 64 LEC (which is 10 business days after receiving notice of the claim) will not apply in this case, although it does not establish the length of the term to do so.

The SIPO Act also includes the possibility for sovereign states to expressly or tacitly waive their immunities - both for jurisdiction (articles 5 to 7) and for enforcement (article 18). Such waivers can be revoked by the state in question, but only before proceedings have been initiated in Spain (articles 8 and 19 SIPO Act).

As regards communications, article 52 of the SIPO Act expressly refers to the procedures set forth in the recent International Judicial Cooperation in Civil Matters Act.[12]

The last relevant procedural issue considered by article 56 of the SIPO Act is the possibility for a sovereign state to be judged and sentenced in absentia. This can occur, provided that the relevant formalities regarding the service of the claim have been fulfilled and that at least four months have elapsed since the claim was duly served on the foreign state.

Conclusion

The SIPO Act does not answer all of the questions currently surrounding state immunity, and we have yet to see how the Spanish courts will implement it. However, it is definitely a welcome novelty and a useful tool, insofar as it increases legal certainty for both foreign states and private parties regarding the immunities and privileges of sovereign states in Spain.

Notes

1 'Ley Orgánica 16/2015, de 27 de octubre, sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España'.

2 Article 2.2 of the United Nations Convention on Jurisdictional Immunities of States and their Properties provides qualified support for this view. See also REMIRO BROTÓNS ET AL 'Derecho Internacional' (Madrid, 1997), p. 799-808.

3 Another welcome feature of the SIPO Act is the inclusion of a list of transactions that shall be deemed as 'commercial transactions'. Specifically, pursuant to section n) of article 2 SIPO Act, commercial transactions shall include any agreement or transaction dealing with the sale and purchase of goods, the rendering of services, loans and other financial agreements – including guarantees and indemnities related to said loans or financial agreements. Additionally, article 2 also establishes that the main element to assess if a given transaction is a 'commercial transaction' shall be its nature, while its purpose shall only be considered when expressly established in the agreement or transaction or when considering so is the practice of the state involved in the agreement.

4 Article 20 of the SIPO Act establishes a list of assets that shall be deemed to be allocated to non-commercial public purposes, namely: the assets (including bank accounts) allocated to fulfil the functions of diplomatic missions and consulates; military assets; the assets of central banks assigned to fulfil the purposes of such institutions, assets included in the cultural patrimony/heritage or infused with cultural, scientific or historic interest (provided that they are not destined to be sold), and state vessels (as defined by article 2, sections g) and i) SIPO Act).

5 For instance, in 2000, the Madrid Court of Appeals heard a case in which a German company applied for the enforcement of a recognition of debt document granted by the National Bank of Cuba before a Dutch notary. The Court stated that the bank could not allege immunity of enforcement in its condition as state bank because it was clear that, when granting the recognition of debt, it was acting as a private entity and not vested with state prerogatives (See Madrid Court of Appeals decisions dated 10 April 2000 [AC 2000, 2362] and 19 June 2000 [AC 2000, 2544], where the Court decided on appeals filed by the National Bank of Cuba against orders issued by the lower court which was deciding on the exequatur proceedings).

6 See the decision of the Madrid Court of Appeals dated 16 May 2005 [AC 2005, 156261], in which the Court denied the claimant's request to extend an enforcement against the Cuban state, in addition to the enforcement granted against the National Bank of Cuba on the grounds that, under Spanish law, it is not possible to enforce a decision against a party other than the party that was actually sentenced.

7 The inclusion of the assets of central banks within the assets of the state destined for non-commercial public purposes in article 20 SIPO Act would strengthen this construal.

8 Article 9.2 SIPO Act must also be considered at this point, given that it expressly establishes that a state shall not be deemed a party to a commercial transaction when the transaction or agreement was entered into by a state owned company, provided that such company has its own legal personality and capacity to sue or be sued and to acquire assets.

9 This was the case of 'Libertad', the training vessel of the Republic of Argentina, which creditors managed to seize in Ghana in 2012, after several attempts in other jurisdictions (even though the frigate was finally released after a unanimous decision by the International Tribunal regarding the Law of the Sea).

10 Those owned or used by a foreign state for non-commercial public purposes.

11 Those attached to the state's military forces, bearing distinctive emblems of said state's army, which are under the command of a duly appointed official and subject to military discipline.

12 'Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil'.

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Guillermina joined Pérez-Llorca in 2005, after practising law for five years in the litigation and arbitration department of a major US law firm. In January 2010 she was named partner. Guillermina is an expert in complex civil and commercial litigation and arbitration matters. She has advised both national and international companies in pre-litigious and litigious matters (before tribunals of all instances) and has participated in national and international arbitrations of a commercial and investment nature.

Her experience encompasses dealing with disputes related to distribution agreements, construction defects, financial derivatives, corporate conflicts, reps and warranties, syndicated credit facilities, energy, telecommunications, real estate, state investment, civil liability and all types of contractual disputes in general. With regard to arbitration, Guillermina formed part of the legal team that represented Spanish companies against Latin American governments before the ICSID, regarding arbitration claims filed for an infringement of bilateral investment treaties.

Guillermina regularly writes articles for national and international publications. She contributed to the Arbitration Code ('Código de Arbitraje', Aranzadi, second edition, 2009), a volume compiling and commenting on statutory materials and rules on arbitration. In addition, Guillermina regularly lectures for courses on procedural law and arbitration, as well as postgraduate programmes.

Guillermina is also a member of the Spanish Arbitration Club.

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Luis joined Perez-Llorca in October 2008, after obtaining his joint honours degree in law and business management. Luis has extensive professional experience in both commercial and civil litigation, as well as national and international arbitration. He has participated in litigations and arbitrations related to disputes on banking contracts, mechanical engineering turnkey contracts (in the oil and gas, aeronautical, iron and steel industries), civil engineering contracts, distribution contracts and intellectual property and copyright, among others. He has also advised on the exequatur of arbitral awards rendered in a number of jurisdictions.

In addition, Luis has written several articles published by the national and international press. He is also a lecturer on procedural law and arbitration for various postgraduate programmes.

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Established in 1983, Pérez-Llorca has become one of the leading independent Spanish law firms due to the solid legal background, experience and continuous training of its lawyers, as well as their dedication to quality and efficiency. With offices in Madrid, Barcelona, London and New York, the firm advises both national and international clients, including major banks, public and private companies, national and regional government authorities, national and international investors and funds, and prestigious foreign law firms.

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