

Arbitration: BVI considers issues of enforcement upon a state

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In December 2020, Tethyan Copper Company (TCC) obtained an *ex-parte* order against the Islamic Republic of Pakistan (**Pakistan**), Pakistan International Airlines Corporation (**PIA**) and various of its subsidiaries, recognising and enforcing a US\$6 billion ICSID (Arbitration) Award (the **Award**) which TCC had obtained against Pakistan (the **Registration Order**). TCC also sought, and obtained, a Provisional Charging Order over the BVI assets of PIA, purportedly under the provisions of the BVI Charging Orders Act, 2020 (the **2020 Act**), which (despite the contrary *ex parte* submission put forward by TCC) had not been brought into force.

PIA owed no liability to TCC, however TCC submitted that the effect of the 2020 Act was to enable the BVI Court to bypass the separate corporate personality of PIA, and thereby enforce against its subsidiaries. TCC further relied on the jurisdiction recognised by the Judicial Committee of the Privy Council in *La Générale des Carrières et des Mines v. FG Hemisphere Associates LLC* [2012] UKPC 27 (Gécamines), arguing that PIA was so closely associated with Pakistan that its assets were consequently amenable to execution in support of the Award.

In May 2021, following a four day return date hearing, the BVI Commercial Division of the Eastern Caribbean Supreme Court set aside the Registration Order. At this *inter partes* hearing, the Court heard (amongst other things) evidence that PIA's shares were traded on an international stock exchange, and that it had a body of independent shareholders. To no great surprise, at this hearing, the Court confirmed that the jurisdiction recognised by Gécamines could have no application to such a company, which on these facts could never be treated as "*assimilated into the State for all purposes*".

The Court went on to find that TCC's application at the *ex-parte* hearing was seriously deficient on several factual and legal grounds, namely (i) a failure to properly address the Court on questions of State Immunity and the procedural privileges afforded to a State on questions of service, (ii) that it proceeded on the basis that the 2020 Act was in force, (iii) TCC's failure to highlight the limits of the jurisdiction in Gécamines - specifically its failure to draw the Court's

attention to the “*strong presumption*” that the separate corporate personality of PIA was to be respected, and (iv) that TCC failed to adequately explain the evidence relevant to the improbability of a publicly traded company having “*no separate effective existence.*”

The case is the first in the BVI dealing with recognition and enforcement of an ICSID Award, the procedural requirements for service on a foreign state under the Eastern Caribbean CPR following the English Court decision in *General Dynamics v Libya* and the circumstances in which state-owned corporations can be assimilated to the state to meet the state’s obligations under an arbitration award.

The substantive matter is listed for an appeal in January 2022. A stay application by TCC has already been refused by an appeal panel led by Her Ladyship Dame Chief Justice Pereira (see BVIHCMA2021/0014).

Ogier Partner Grant Carroll and Senior Associate Sarah Latham instructed Vernon Flynn QC, Lucas Bastin, Cameron Miles, Angeline Welsh and Mubarak Waseem.

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