ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/12/1

TETHYAN COPPER COMPANY PTY LIMITED V. ISLAMIC REPUBLIC OF PAKISTAN

JUDGMENT OF THE HIGH COURT OF JUSTICE OF THE BRITISH VIRGIN ISLANDS

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25 May 2021

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Judgment of the High Court of Justice of the British Virgin Islands

1. **WALLBANK, J:** On 27th to 29th April 2021 there came before the Court the substantive return date in respect of ex *parte* orders granted to the Claimant ('TCC') on 10th December 2020.

BACKGROUND

2. On 20th November 2020, TCC simultaneously filed two separate urgent applications on a without notice basis seeking, *inter alia,* by way of a first application:

   (1) a provisional charging order pursuant to section 3(1) of the Charging Orders Act 2020 and/or rule 48.5(1) Civil Procedure Rules 2000 ('CPR');

   (2) injunctive relief against registered agents and the Registrar of Corporate Affairs, and the Third to Fifth Respondents, who are PIA Investments Limited, Minhal Incorporated, and PIA Hotels Limited (together, the BVI Companies);

   (3) a receiver to be appointed;

   (4) an order to seal the Court file.

3. Then TCC also filed a second application and, by that, it sought the following relief:
   (1) permission to register and recognise and enforce an International Centre for Settlement of Investment Disputes ('ICSID') arbitration award pursuant to section 1(2) of the UK Arbitration (International Investment Disputes) Act 1966, as extended to the BVI and amended by the UK Arbitration (International Investment Disputes) Act 1966, Order (SI 1967/159), or alternatively, to sections 81 and 82 of the Arbitration Act 2013;

   (2) orders that service of the Claim Form on the Defendants, being the First and Second Respondents (the Islamic Republic of Pakistan and Pakistan International Airways Corporation Limited) be dispensed with.

4. The two applications were accompanied by a certificate of urgency. TCC sought an urgent hearing, and TCC explained the basic situation as follows.

5. On 12th July 2019, after nearly eight years of arbitration under the auspices of ICSID and incurring over US$62 million in fees and disbursements, TCC was granted an arbitration award against the Islamic Republic of Pakistan for a sum in excess of US$6.2 billion.

6. TCC observed, as an aside, that these applications appear to represent the first occasion where an ICSID award has been sought to be registered and enforced in the BVI.

7 . TCC had liberty to enforce up to 50 percent of the value of the award, that is, US$3.1 billion. TCC seek to register and enforce that part of the award in this jurisdiction. They do so because TCC has identified that the Second Respondent ultimately owns large shareholding stakes in two valuable city centre hotels in New York and Paris respectively. The Second Respondent ('PIA Pakistan') owns those through the Third to Fifth Respondents, which are companies incorporated in this jurisdiction.

8. TCC contends that PIA Pakistan is, in effect, a government department of the First Respondent ('Pakistan'), and in consequence, PIA Pakistan's assets are amenable to enforcement by TCC towards satisfaction of the debt owed by Pakistan to TCC.

9. The reason why the application was said to be urgent was because TCC had ascertained the following:
(1) a commercial mortgage in respect of the New York hotel had recently been acquired by the National Bank of Pakistan, giving Pakistan, which ultimately owns and controls the National Bank of Pakistan, the ability to foreclose on the hotel and thereby to shield it from enforcement action; and

(2) a Certificate of Good Standing had been issued for the Third Respondent, suggesting a possible re-domiciliation and/or asset or share transfer could be imminent.

10. TCC explained that these two events coincided with developments in relation to the arbitration, suggesting a risk of dissipation. TCC described these as two worrisome events.

11. The application came on for hearing on 3rd December 2020 and continued on 10th December 2020, when I made the orders sought. The following ex *parte* orders were made: granting permission to register and recognise and enforce an ICSID arbitration award dated 12th July 2019 in the Applicant's favour against Pakistan; dispensing with service of the Claim Form on Pakistan and PIA Pakistan, dispensing with a Statement of Claim or affidavit pursuant to CPR 8.2(1)(a); provisional charging orders to secure a sum of US$3,114,339,607.50 over the issued share capital of the BVI Companies; injunctive relief against the Seventh and Eighth Respondents, namely the BVI registered agents, from allowing dealings in shares up to that sum and allowing re-domiciliation out of the BVI, and also against the Registrar of Corporate Affairs from allowing re-domiciliation outside the BVI. But the BVI Companies were expressly permitted to deal with their assets in the ordinary course of business.

12. A receiver was appointed over the shares and the business and the assets of the Third and Fifth Respondents to protect and preserve their assets, and the Receiver was empowered to receive their rents and profits, to recover and take over their assets and to vote any shares held by the Third and Fifth Respondents in any of their subsidiaries.

13. On 7th January 2021, a return date hearing was held. This was a procedural directions hearing. The orders were continued pending a substantive return date. The Respondents indicated that they

intended to seek discharge of the orders. The substantive return date was set down for April 2021.

14. At the substantive return date, the Respondents expected to apply for the ex *parte* orders to be set aside on grounds, *inter alia,* of

(1) a breach of duty on the part of the Applicant to give full and frank disclosure and fair presentation;

(2) state immunity on the part of the First Respondent;

(3) in respect of the Second to Fifth Respondents, that they are not to be treated as the First Respondent's assets; and

(4) no solid evidence of a real risk of dissipation.

CHARGING ORDER

15. That was what was anticipated for the return date and so it transpired.

16. Matters did not start well for TCC. TCC's Counsel had to concede, and wisely did so, that the statutory provision upon which TCC had relied, in part, in order to obtain the ex *parte* charging order, that is, the Charging Orders Act 2020, was not yet in force.

17. TCC had made its provisional charging order application pursuant to section 31(1) and section 4(2) of the Charging Orders Act, 2020, and/or CPR 48.5(1), to secure the sum of about US$3.1 billion by way of a provisional charge over the shares in the Third to Fifth Respondents.

18. TCC's Counsel had not been the only ones to have been caught out by the fact that this Act has not yet come into force. TCC's Counsel observed that some prominent BVI jurists have made the same error and obviously I had not picked up on it myself. This, though, raises a question whether the provisional charging order can nonetheless be continued under CPR 48.5(1).

19. Counsel for PIA Pakistan submitted that it cannot. He made two contentions in this regard:
(1) TCC has not advanced a pleaded case for provisional charging order relief on any basis other than the Charging Orders Act 2020; and

(2) The statutory basis for the Court's jurisdiction to make provisional charging orders is Part XIV of the English Judgments Act 1838, as imported into the Territory of the Virgin Islands ('BVI') by section 7(1) of the Eastern Caribbean Supreme Court Act, Cap 80. Counsel for PIA Pakistan submitted that that scheme does not help TCC because it engages in respect to the property of a person 'against whom any judgment shall have been entered in any of Her Majesty's Superior Court'. That is not PIA Pakistan.

20. In the BVI, a charging order can operate only over the beneficial interest of the judgment debtor in

a particular asset, i.e., the beneficial interest in assets of Pakistan. This makes TCC's case that PIA Pakistan should be treated as assimilated into or with Pakistan particularly important. I shall address this further shortly.

STATE IMMUNITY

21. At the substantive return date, the first assault upon the ex *parte* orders was launched by Mr. Vernon Flynn, QC on behalf of Pakistan. Mr. Flynn concentrated upon the issue of state immunity. This goes directly to whether permission to register and recognise and enforce an ICSID arbitration award should be set aside or sustained.

22. Mr. Flynn ventured the following arguments with which I ultimately agreed.

23. TCC first raised immunity as a potential issue at the ex *parte* stage. Its treatment of the matter at the ex *parte* hearing was described by Mr. Flynn as cursory at best and incomplete.

24. Lawrence Collins LJ described the treatment of immunity at an ex *parte* hearing in **ETI Euro Telecom International NV v Republic of Bolivia & Anor**[1] at paragraph 110, as being 'of the greatest importance'.

25. TCC addressed only enforcement immunity and ignored the vital prior question of adjudicative immunity. This had the potential to put the United Kingdom in breach of its international law obligations. In light of the fact that TCC knew, at this ex *parte* stage, that Pakistan was pursuing arguments on adjudicative immunity in two other jurisdictions (about which the Court was also not told), it was incumbent upon TCC to bring this issue to the Court's attention.

26. In relation to state immunity, it is worth pointing out that it is a complicated area of law and I will not recapitulate the considerable number of authorities cited by Counsel. The following summary I think suffices.

27. Section 1 of the State Immunity Act ('SIA'), provides:
"(1) A state is immune from the jurisdiction of the Courts of the BVI, except as provided for in the following provisions of this Part of the Act.

(2) The Court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

28. By section 1(1) of the SIA, Pakistan is, on the face of it, immune from the Court's jurisdiction. That immunity is displaced only if TCC can establish that an exception to such immunity applies. By section 1(2) of the SIA, the Court is obliged to extend this immunity to Pakistan even though Pakistan is not before the Court; for instance, when TCC appeared before the Court on an ex *parte* basis.

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[1] [2009] EWCA Civ 880.

29. Part 1 of the SIA encompasses not one, but two immunities, both of which must be dealt with by a claimant if a Court is to pronounce judgment against a sovereign state and then enforce that judgment against the state's assets. The first is immunity from the Court's adjudicative jurisdiction, 'being the jurisdiction to adjudicate upon claims against foreign states' and, thus, the state would have immunity from suit. The second type of immunity is immunity from the Court's enforcement jurisdiction, being the jurisdiction to enforce by legal process, judgments pronounced and orders made in the exercise of the Court's adjudicative jurisdiction.

30. The distinction between the two concepts and their relationship is spelled out by Dr. Yang in his chapter on 'Immunity from Execution' in the Research Handbook on Jurisdiction and Immunities in International Law.[2] What Dr. Yang says under the heading 'Immunity from Execution as Distinct from Immunity from Suit' is the following:

> A defining feature of the current law on state immunity is the distinction between and the separate treatment of immunity from adjudication (in other words, the court's hearing a case and taking a decision on the merits) and immunity from enforcement or execution (in other words, the court's taking a forcible measure either before or during the adjudication, or following and in execution of a judgment), with the consequent principle that loss of immunity from adjudication whether due to a waiver of immunity by the defendant foreign state or because of a denial of immunity by the Court, does not entail loss of immunity from enforcement or execution.

31. The point, says Mr. Flynn, correctly, is a simple one. The Court has jurisdiction to enforce an order or judgment pursuant to its enforcement jurisdiction if, and only if, that order or judgment has first been produced through valid exercise of the adjudicative jurisdiction.

32. So, section 2(1) of the SIA provides that:
A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the Courts of the BVI.

33. By section 3(1)(a) of the SIA:
A State is not immune as respects proceedings relating to [...] a commercial transaction entered into by the State.

And section 9(1) of the SIA:

> Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the Courts of the [BVI] which relate to the arbitration.

35. The words 'as respects proceedings' is used in the first sentence of each subsection apart from section 10 of the SIA, which deals with admiralty. Section 10 uses slightly different language, but it is still plainly in respect to proceedings.

36. These are all discrete exceptions to a state's immunity from proceedings (that is, from claims)

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[2] Orakhelashvili: Research Handbook on Jurisdiction and Immunities in International Law (1st edn., Edward Elgar 2015).

setting out the scope of the adjudicative jurisdiction of the Court. Then, if we move past section 11 of the SIA, we see a new segment which is entitled 'Procedure'. After that we see section 12 of the SIA which is headed 'Service of process and judgments in default of appearance'. That is an important procedural privilege and the foundation of Pakistan's argument that it has not been properly served.

37. Then we can see at section 13 of the SIA, which is the provision on which TCC relied ex *parte,* subtitled 'Other procedural privileges' (which is to say procedural privileges additional to immunity from adjudicative jurisdiction set out in sections 2 to 11 of the SIA). There are a number of things to note about section 13. The first is section 13(2)(b), which is at the core of TCC's case. That provides:

Subject to subsections (3) and (4) below [...] the property of a State shall not be subject to any process for the enforcement, and

not recognition or registration, but solely enforcement of a judgment or arbitration award.

38. Then we see section 13(3) of the SIA, which is also important. That provides:
"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."

39. The point there is that the last clause in that provision is a direct counterpoint to section 2(1) of the SIA, which provides that a state is not immune in proceedings to which it has submitted. So, even if a state is amenable to the adjudicative jurisdiction of the Court under sections 2 to 11 of the SIA, a claimant also needs to establish separate consent or submission by the state to the Court's enforcement jurisdiction, in order to enforce an order or judgment produced by the exercise of that adjudicative jurisdiction, whether by written waiver under section 13(3), or because the property is in commercial use or intended for commercial use under section 13(4) of the SIA.

40. To put it another way, merely because a state is subject to the adjudicative jurisdiction of the Court does not mean that its assets are subject to the enforcement jurisdiction of the Court. Conversely, just because certain state assets could be subject to enforcement does not mean that the state has consented to the exercise of the Court's adjudicative jurisdiction that is essential for enforcement to take place.

41. In sum, TCC needs to show both that Pakistan is subject to the adjudicative jurisdiction of the Court and that Pakistan consented to the BVI Court having enforcement jurisdiction. These distinctions are fundamental to the operation of the SIA.

42. In light of the fact that TCC knew that Pakistan was pursuing arguments on adjudicative immunity in two other jurisdictions, it was incumbent upon TCC to bring this to the Court's attention. This is clear from the decision of Teare J in the English High Court case of **Gold Reserve Inc v Bolivarian Republic of Venezuela.** [3] I should also add, that even if TCC had advanced a case at the ex *parte* stage

that there was submission by agreement by reason of the ICSID Convention, this was not a matter which TCC could unilaterally decide was so hopeless that they had no need to mention it to the Court under its obligation of full and frank disclosure.

43. Had the Court been told that Pakistan was pursuing arguments on adjudicative immunity in other jurisdictions, then the Court would have asked what point was being taken and why. The arguments were not advanced by TCC, and they were not even adverted to. That is important because the legislation applicable to state immunity is not necessarily the same in the United Kingdom as elsewhere. The Court should have been told about the arguments as part of the obligation of full and frank disclosure. This is the case for any legal argument of this kind, but particularly so because the issue is one of state immunity and in the context of a very intrusive ex *parte* order against a friendly state.

44. It also bears observing that TCC had not identified an exception to sections 2 to 11 of the SIA which went to the Court's adjudicative jurisdiction. This entails that the Court might not have adjudicative jurisdiction. In light of this, TCC then advanced its case on immunity on an entirely different basis, namely, that Pakistan, by its conduct, had submitted to the jurisdiction of the Court. But in making this submission, TCC failed to particularise this allegation. At the hearing, TCC tried to make good this case, but TCC's arguments were unconvincing. Those arguments concerned steps which the First Respondent is said to have taken in respect of these proceedings.

45. I need to set out what constitutes a 'step' for the purposes of section 2(3)(b) of the SIA. Leading authorities on the point are the English Court of Appeal cases of **Kuwait Airways Corporation v Iraqi Airways Company & Anor,** [4] and **Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd.** [5]

46. We can turn first to the **Kuwait Airways** case, and the judgment of Lord Justice Nourse. He adopts there the test of Lord Denning MR in **Eagle Star.** The Court of Appeal then set out a few crucial quotes from **Eagle Star.** First, there is the following:

> What then is a 'step in the proceedings'? It has been discussed in several cases. On principle it is a step by which the defendant evinces an election to abide by the Court proceedings and waives his right to ask for an arbitration. Like any election, it must be an unequivocal act done with the knowledge of the material circumstances.

47. So, an unequivocal act is required. In other words, no room for doubt. Then:
> On these authorities, it seems to me that in order to deprive a defendant of his recourse to arbitration a 'step in the proceedings' must be one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration.

48. So again, all that is required is a clear act that shows the state is determined to engage on the merits and has so engaged. Further:

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[3] [2016] EWHC 153 (Comm).
[4] [1995] 1 Lloyd's Report 25.
[5] [1978] 1 Lloyd's Report 357.

Applying this principle, the defendants here were presented with a writ endorsed with a statement of claim which was very defective. They applied, quite properly, to strike it out. That was not an affirmation of the correctness of the proceedings. Quite the contrary. It was a disaffirmation of them. It was not a 'step in the proceedings' such as to debar the defendants from applying for a stay.

49. Pulling these strands together: first, in order to find that Pakistan has taken a step in the proceedings, it must have unambiguously affirmed the correctness of these proceedings; and, secondly, an application that does not directly concern immunity but touches and concerns the merits is not a step. Pakistan has resolutely and consistently opposed the correctness of the proceedings, and nothing they have done herein in my view connotes a submission to the jurisdiction. This argument was a desperate afterthought and does not succeed.

50. TCC advanced a new case at the substantive return date that there was a submission by agreement in the ICSID Convention itself. This is said to be clear from all the textbooks and the case law. However, the ICSID Convention is a treaty that can have no effect under domestic law in and of itself. That includes, for present purposes, the United Kingdom position on state immunity, which is set out in the SIA.

51. Moreover, Article 54(1) of the Convention imposes on Pakistan, as a contracting state, an obligation to allow recognition and enforcement of the award before its own courts. Article 54(1) places no obligation on Pakistan, at all, before the BVI courts and so it cannot constitute a waiver by Pakistan of its immunity or anything else.

52. TCC's ex *parte* presentation adverted only to potential issues of enforcement immunity. It ignored potential issues of adjudicative immunity. That was a significant failure of TCC's duty of full and frank disclosure and fair presentation. As Burnton LJ in **E.T.L Euro Telecom International N.V. v Bolivia et al.**[6] said at paragraph 128:

"Any claimant who wishes to bring proceedings against a state must be in a position to address the issue as to the jurisdiction of the Court when he seeks to invoke the jurisdiction of the Court. If he seeks an injunction against the state on an application without notice he must do so then. The Court must then consider the question of state immunity. Since it is required by section 1, subsection (2) of the 1978 Act, to give effect to the immunity, even if the state does not appear, where injunctive relief is sought the claimant must deal both with the immunity from the adjudicative jurisdiction of the Court and with the immunity from enforcement. It is simply not open to such a claimant to complain that he is not in a position to deal with such jurisdictional issues on its application without notice, and this is even more so on an application on notice. In a case such as the present, the Court must consider and decide the question of state immunity at as early a stage on the proceedings as practicable."

53. As Mr. Flynn said, by now the scale of the problem confronting TCC should be clear. It needs to deal with two clear and distinct issues. First, before any judgment or award can be enforced, the claimant must bring an action for recognition of that judgment or award. That claim has nothing to do with section 13 of the SIA, and the Court's enforcement jurisdiction. It is an exercise of the Court's

[6] [2008] EWCA Civ 880.

adjudicative jurisdiction and so regulated by sections 2 to 11 of the SIA.

54. Second, it is only once this first hurdle has been cleared, and the foreign judgment or award converted into a judgment of the BVI Court, that the claimant can enforce the BVI judgment against a state's assets. It is at that point, and not before, that the Court turns to section 13 of the SIA and asks the separate question as to whether or not the assets are immune from enforcement. This course of proceedings was not done at the ex *parte* hearing. That, and the failure of TCC to comply with its duty of full and frank disclosure, entail that the registration order should be set aside.

55. What TCC has to do is to persuade the Court that one of the exceptions to adjudicative immunity set out in sections 2 to 11 of the SIA applies. The Court's conclusion on that issue is that TCC has failed to raise adjudicative immunity and has failed to establish that adjudicative immunity did not apply. The order for registration of the award ought therefore to be set aside.

SERVICE

56. I now turn to service, quite briefly. Issues of service can best be put in terms of whether or not the need to dispense with service of the Claim Form had been made out.

57. TCC had submitted that service was not necessary because, first, our CPR envisages that an ex *parte* application is to be supported by an affidavit in order to achieve registration and subsequent enforcement of an arbitration award and, secondly, there are two English cases, General Dynamics United Kingdom Ltd v State of Libya[7] and Union Fenosa Gas SA v Arab Republic of Egypt[8] which support a proposition that service is not required.

58. I am satisfied by Pakistan that TCC is mistaken in this regard. Their mistake comes down to the fact that the English CPR is different from our CPR. In England, service of an originating process is not required by dint of a specific exemption and our CPR has no such exemption. In short, the position under the English CPR is this. A claim form is not required to be served, but only the permission order which is not a document instituting proceedings. It was on this basis that section 12 of the SIA was not engaged. Had the Court taken the view that a claim form needed to be served, then it would have been obliged to follow section 12 of the SIA in the usual way. It would have been mandatory to serve the claim form through the diplomatic route and there would be no discretion for the judge to dispense with service. To find the opposite would be to override the statutory scheme, which is impermissible.

59. Furthermore, regardless of the position with respect to service of the claim form, service by an alternative method cannot be used where the defendant is a state, and the normal period of two months for response under section 12 of the SIA must be given as a matter of course, even where section 12 of the SIA does not apply. Finally, even when the claim form is not required to be served, to dispense with service on a state requires exceptional circumstances, regardless of whether or not the Court's general discretion has been engaged.

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[7] [2019] EWCA Civ 1110.

[8] [2020] EWHC 1723 (Comm).

60. Critically for these proceedings, the position under the CPR here is materially different to the provisions applicable under the English CPR in this respect. In particular, they are different in that our CPR requires service of a claim form in a case like the present. CPR 43.10 deals with general provisions on enforcement of awards. CPR 43.10(3) provides:
The general rule is that an application -

(a) for permission to enforce an award; or

(b) to register an award;

may be made without notice but must be supported by evidence on affidavit."

61. And then, tracking down to CPR 43.10(5):
"The applicant must -

(a) exhibit to the affidavit the award or a copy of it;

(b) give an address for service on the person against whom the applicant seeks to enforce the award; and

(c) (if the award is for the payment of money) certify the amount remaining due to the applicant."

62. Unlike the English CPR provisions that were relied on in **General Dynamics** and **Union Fenosa,** this rule includes no provisions as to what documents must be served and, more importantly, it does not excuse service of any document.

63. TCC submitted that, unlike under the English CPR, under our CPR no claim form is required to be issued and served, and, secondly, an advocate is not expressly required under the CPR to serve the registration order. Thus, unrealistically, it has to be said, TCC suggests that no document is required to be served at all under our CPR. That position is simply not tenable. There would be no proceedings if a claim form were not to be issued.

64. Even under the English CPR, a claim form must be issued, and even TCC appears to accept this as a procedural necessity. The only reason why, per **General Dynamics** and **Union Fenosa,** a claim form did not need to be served in an equivalent case under the English CPR such that section 12 of the SIA is not engaged, was because there is a rule in England which expressly relaxes the requirement to serve the claim form.

65. Having sought permission to serve the claim form out of the jurisdiction on Pakistan, TCC was required to serve the claim form in accordance with section 12 of the SIA. It did not, and therefore service was not validly effected on Pakistan.

66. One can go further, and I do, and say that the formal act of service is also required in order for the Court take jurisdiction over a defendant. That comes out of the English case of **Deutsche Bank AG v Sebastian Holdings Inc & Anor**[9] which was approved by our Court of Appeal in **Rogalskiy v JSC MCC Eurochem.**[10] This is necessary in order for the Court and all concerned to be able to ascertain when

[9] [2014] EWHC 112 (Comm).

the 'bright line' has been crossed, in terms of the exact point from which time runs for the taking of further steps or the entry of judgment. The reference to a 'bright line' comes from the case of **Barton v Wright Hassall LLP.**[11]

ASSIMILATION OF PIA PAKISTAN WITH PAKISTAN

67. Following Mr. Flynn, QC, the Court heard extensive submissions from Mr. Willins on behalf of PIA Pakistan. Mr. Willins concentrated his efforts upon his contention that TCC had not given full and frank disclosure and a fair presentation of English law authorities concerning the circumstances where corporate entities can be treated as part of a state.

68. This is pertinent because it is part of Pakistan's and PIA Pakistan's case that PIA Pakistan and its subsidiaries are not to be treated as assets of the state amenable to enforcement.

69 . TCC argued that PIA Pakistan and its subsidiaries should indeed be treated as Pakistan's assets for the following reasons.
(1) There is documentary evidence that the Government of Pakistan treats PIA Pakistan and subsidiaries as national assets.

(2) The Government of Pakistan is recorded as holding at least 92 percent of the shares in PIA Pakistan and possibly more than 94 percent.

(3) Its CEO is an Air Marshall of the Pakistan Air Force. Although he is now reportedly retired from that post, he combined the role of acting CEO with his senior military service.

(4) Several other Pakistan Air Force officers are senior members of PIA Pakistan's management team, and senior members of the Government of Pakistan and civil servants serve as directors of PIA Pakistan.

(5) PIA Pakistan is reportedly dependent upon government financial support to maintain itself as a going concern, with 'constant support' being given.

(6) It is said that it still operates as a government department, and that, too, as a highly bureaucratic one.

(7) PIA Pakistan is run on manifestly uncommercial lines, with a disproportionately large personnel complement compared to the number of working aircraft.

(8) There is evidence of reference to constant interference by political superiors of those charged with running PIA Pakistan.

(9) There is evidence that decisions are taken in relation to the business of PIA Pakistan by politicians without reference to those who are supposed to be running it.

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[10] BVIHCMAP 2017/0007.

[11] [2018] UKSC 12 at paragraph 16 (Sumption LJ).

(10) PIA Pakistan has a hundred percent controlling interest in the Third Respondent. The Third Respondent is the sole shareholder in the Fifth Respondent. PIA Pakistan is reported to have a hundred percent effective ownership and voting power in respect of the Fifth Respondent.

(11) PIA Pakistan's 2017 board minutes have described the two hotels, that is, the one in Paris and the one in New York, which are ultimately held through the BVI Companies, as 'national assets', and that PIA Pakistan is not at liberty to sell or borrow against those assets.

(12) Possible dealings in the hotels were required to be submitted to a Pakistan cabinet body on privatisation, suggesting that they are *de facto* public assets.

(13) TCC observes that the hotel properties are held through vertical multi-jurisdictional holding structures which have no apparent commercial or tax reasons.

70. I accept that these are all indicators of the airline being part of the state of Pakistan, but there are also other factors which point in the opposite direction, and which were readily ascertainable by TCC ahead of the ex *parte* hearing. For instance, PIA Pakistan is a publicly listed company with the shares being traded on the Pakistan Stock Exchange. Then, whilst the state owns at least 92 percent of its shares, there are same 56,000 other shareholders. Moreover, it is a trading company in the business of operating a commercial airline. It indirectly has ownership interests in real property outside Pakistan in the tourism/business travel sector such as the two hotels in question. This therefore brings into sharp focus what the legal test is for a company to be treated as part of a state.

71. Both sides rely in this regard upon the Privy Council case of La Générale des Carrières et des Mines v FG Hemisphere Associates LLC,[12] **('Gécamines').** This case specifically addresses the approach the Court should take when considering whether or not assets of a state or assets of state entities are to be treated as amenable to enforcement. It is important to consider what the Court was, and was not, told about **Gécamines** at the ex *parte* hearing on 3rd December 2020.

72. First, the Court was told that TCC 'can establish ownership of the assets of PIA Pakistan as a result of **Gécamines'.**

73. Secondly, the Court was told that **'Gécamines** represents a very high test of whether or not there should be assimilation of a state body to the state, and only if that test is satisfied, namely, they are to be treated as one, can you ignore the separation of the two'.

74. Thirdly, TCC's leading Counsel said that TCC recognised **Gécamines** sets a high test but 'the facts of this case are very egregious' as far as the separation between Pakistan and PIA Pakistan is concerned.

75. The Court was not told what the 'very high test' in fact was. Nor was the Court taken through **Gécamines.** This would have been particularly important because:

(1) cases such as the present, where creditors seek to enforce against state-owned entities, are rare

[12] [2012] UKPC 27.

in this Jurisdiction;

(2) a superficial reading of **Gécamines** gives the impression that the test may be somewhat more flexible than it in fact is; and

(3) it is a long decision which differentiates previous authority and weaves together principles of company law and international law.

76. However, as we shall see, this omission would probably not have made any difference, because when TCC explained at the substantive return date what its interpretation of the case was, it was not a correct interpretation. But we are getting ahead of ourselves.

77. Mr. Willins took the Court at the substantive return date hearing through the case. From the report the following is apparent. The key paragraphs are 29, 30 and 54. These contain pronouncements by Lord Mance. At paragraph 29, Lord Mance said the following:

Separate juridical status [of an entity] is not however conclusive. An entity's constitution, control and functions remain relevant: paragraph 25 above. But constitutional and factual control and the exercise of sovereign functions do not without more convert a separate entity into an organ of the State. Especially where a separate juridical entity is formed by the State for what are on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected and that it and the State forming it should not have to bear each other's liabilities. It will in the Board's view take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence. But for the two to be assimilated generally, an examination of the relevant constitutional arrangements, as applied in practice, as well as of the State's control exercised over the entity and of the entity's activities and functions would have to justify the conclusion that the affairs of the entity and the State were so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa. The assets which are (subject to waiver and to the commercial use exception in section 13(4) of the 1978 Act) protected by State immunity should be the same as those which against the State's liabilities can be enforced. This was, rightly, recognised by Pleming JA in the Court of Appeal at paragraph 255.

78. And paragraph 30:

"There may also be particular circumstances in which the State has so interfered with or behaved towards a state-owned entity that it would be appropriate to look through or past the entity to the State, lifting the veil of incorporation. But any remedy should in that event be tailored to meet the particular circumstances and need. That is the position under domestic law (as to which see Munby J's final point in his paragraph 164 quoted in paragraph 23 above). It must equally be so in the Board's view under international law. Merely because a State's conduct makes it appropriate to lift the corporate veil to enable a third party or creditor of a state-owned corporation to look to the State does not automatically entitle a creditor of the State to look to the state-owned corporation. Lifting the veil may mean that a corporation is treated as part of the State for some purposes, but

not others."

79. And paragraph 54:

"Those in day-to-day charge of Gécamines' affairs were vulnerable to having any important decisions which they took, reviewed and vetoed by other State authorities. But that does not mean that Gécamines had no real existence as a separate entity, or that it should be viewed for all purposes as assimilated to the DRC."

80. I pause here to note that it was not explained to the Court at the ex *parte* hearing that there is a strong presumption that an entity's separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities. Nor was it explained that it would take quite extreme circumstances to displace this presumption. The presumption will be displaced if in fact the entity has, despite its juridical personality, no effective separate existence.

81. The Privy Council's decision shows also that the true position of an entity in relation to the State requires close and detailed scrutiny of a considerable number of factors, going beyond merely superficial indicators. For example, the entity's constitution warrants scrutiny to see whether directors and management are external to the State. Also, for instance:
(1) Is the entity wholly owned by the State?

(2) Where does the entity's income flow from?

(3) How much power and potential control is given to the state in the entity's articles of incorporation?

(4) Do government actors have a power of veto over decisions to dispose of or deal in the entity's property?

(5) Is the entity subject to separate accounting audits?

(6) Is it treated as a separate entity by tax authorities?

(7) What is the origin of the entity's assets?

(8) How do the entity's accounts treat its assets and activities?

(9) How are loans to the entity treated?

(10) Is the entity a sham entity?

(11) Is it a real and functioning corporate entity?

(12) Has it substantial assets?

(13) Has it a substantial business?

(14) Has it its own budget and accounting?

(15) Has it its own borrowing, its own debt, its own tax and other liabilities?

(16) Has it its own differences with government departments?

82. The Court was not told that it was such an in-depth investigation that would be required before a conclusion could be formed that there is, in reality, identity between the entity and the State. These questions go to the question whether, as expressed at paragraph 74 of Gécamines, the circumstances proved show that its juridical personality and its, apparently separate, commercial assets and business are so far lacking in substance and reality as to justify assimilating the entity and the State for all purposes.

83. The Privy Council also cautioned against according too much weight to the characterisation of politicians, and it is reasonable to suppose, other laymen, that an entity's assets are the State's assets, when legally they are not. See, for example, paragraph 69 in Gécamines.

84. In relation to lifting the corporate veil to look through the entity to the state for enforcement purposes, on the grounds of state interference, there is paragraph 77 of Gécamines. Lord Mance said:

The alternative way in which Hemisphere puts its case is to submit that, if Gécamines is otherwise accepted as a separate juridical entity, the facts found justify the lifting of the corporate veil to enable Hemisphere to pursue Gécamines as well as the State. In the Board's view, this involves a misapplication of any principles upon which the corporate veil may be lifted under domestic and international law. Assuming for the sake of argument that the unceremonious" subjecting of Gécamines to the controlling will of the State involved a breach by the State of its duty to respect Gécamines as a separate entity, that might conceivably justify an affected third party, possibly even an aggrieved general creditor of Gécamines, in suggesting that the corporate veil should be lifted to make the State, which had deprived Gécamines of assets, liable for Gécamines' debts. The Board need express no further view on that possibility. It represents the inverse of the present situation. There is no basis for treating the State's taking or Gécamines' use of Gécamines' assets for state purposes, at which Hemisphere directs vigorous criticism, as a justification for imposing on Gécamines yet further and far larger burdens in the form of responsibility for the whole of the debts of the DRC. In international law as in domestic law, lifting the corporate veil must be a tailored remedy, fitted to the circumstances giving rise to it."

85. In other words, just because a state might treat assets of the entity as available to the state does not of itself mean that the entity should be treated as liable for all the debts of the state.

86. Moreover, in paragraphs 23 to 27 of Gécamines, the Privy Council explained that 'there may not always be a precise equation between factors relevant to the lifting of the corporate veil under domestic and international law'. The Privy Council noted, at paragraph 23, the basic propositions

pertaining to lifting the corporate veil in domestic law, as conveniently summarised in the case of **Ben Hashem v Ali Shayif.**[13] As is trite, the corporate veil is not lifted lightly. The circumstances in which the Court will do so are very narrow. They basically require five conditions to be satisfied:

(1) sufficient ownership and control;

(2) there has to be some impropriety;

(3) the impropriety must be linked to use of the corporate structure to avoid or conceal liability;

(4) the company must be used by the wrongdoers of the impropriety in question at the time of the relevant transactions as a device or facade to conceal their wrongdoing; and

(5) the veil will be lifted only so as to provide a remedy for the particular wrong in question.

87. The Privy Council in **Gécamines** did not spell out criteria that would need to be satisfied before the Court would lift the corporate veil in an international law context. The Privy Council left this unexplored. What the Privy Council did not do, was to hold that the test for lifting the corporate veil in the international law context is any less stringent than in it is in domestic law, or that the domestic law principles simply do not apply.

88. The Privy Council did not hold that mere interference and government control would be sufficient to justify the lifting of the corporate veil. The Privy Council did not acknowledge lifting the corporate veil to be an easier route, a shortcut, if you will, around the strong presumption in favour of separation between a corporate entity and the state. That is how TCC now wishes to use the potential remedy of lifting the corporate veil. That is contrary to the authority of **Gécamines** and conceptually wrong.

89. At the ex *parte* hearing, TCC did not explain its case on lifting the corporate veil. TCC also did not attempt to explain the law on it. It is apparent that reliance upon a corporate veil lifting remedy was an afterthought that had occurred to TCC's Counsel for the purposes of the substantive return date, as a way of saving its case, in light of the very serious criticisms of unsustainability levelled against its primary position.

90. TCC, at the substantive return date, tried to argue that it satisfied the **Gécamines** test by showing that PIA Pakistan is referred to, and treated in some quarters, as and like a Pakistan government department. With respect, it is now clear to me that this is not sufficient to fulfil the extreme circumstances required to displace the strong presumption of separate existence. Indeed, the requirement that an entity should have no effective separate existence and that it should be seen to be assimilated with the State for all purposes makes it extremely improbable, if not entirely impossible, that PIA Pakistan should be treated as assimilated with the State for all purposes. I shall explain why.

91. Since PIA Pakistan is a publicly listed company, whose shares are publicly traded, bought and sold by private shareholders, for those purposes PIA Pakistan is not treated as assimilated with the State. It therefore cannot be said that PIA Pakistan is to be assimilated with the State ***for all purposes.*** That

[13] [2008] EWHC 2380 (Fam).

is fatal to TCC's case for enforcement against PIA Pakistan and its submissions on ground of alleged assimilation of the airline with the state.

92. If that is insufficient to end the matter, the requirement for a detailed investigation into the constitution, organisation, accounting, trading and tax treatment of PIA Pakistan means that the various indicators, or red flags, if you will, identified and relied upon by TCC, are themselves not enough to fulfil the requirement for extreme circumstances that would displace the strong presumption of separateness.

93. In a nutshell, at the ex *parte* hearing, TCC did not give full and frank disclosure or a fair presentation of the law and the facts. The Court was led into error. The Court was given the incorrect impression that the test for assimilation between entity and state entailed a lower threshold than it actually does. The Court was also led into error in thinking that the various red-flag factors identified might of themselves be sufficient to establish assimilation between the entity and the state when that is not so. A further, far more thorough enquiry could and should be required.

94. Even without such a more detailed enquiry, there is the more fundamental difficulty that PIA Pakistan's status as a publicly listed company, with private shareholders, appears to mean that it simply cannot be treated for all purposes as assimilated to the State. This apparent difficulty was not explored at the *ex parte* hearing.

95. Principles concerning the duty of full and frank disclosure and fair presentation, and the Court's approach to breach thereof, are not in issue. Somewhat tritely I could set out here the very well-known summary given by Gibson LJ in the English Court of Appeal decision of **Brink's Mat Limited v Elcombe & Ors.**[14] It is a very well-known passage. In the interest of brevity, I will not set it out here. I would, however, dwell some more on the principle of materiality.

96. The test for materiality has been expressed in authorities in several ways, and helpful formulations of the test for materiality can be found, for example, in the English High Court case of **Alliance Bank JSC v Zhunus & Ors**[15] at paragraph 65, per Cooke J, where it was stated that 'a fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made', and also in the English High Court case of **National Bank Trust v Yurov & Ors**[16] at paragraph 18, where Males J explained that a fact is material 'if it is one which the judge would need (or wish) to take into account when deciding whether to make the freezing order'.

97. Moreover, in considering whether to continue an injunction or other ex *parte* order despite material non-disclosure the 'overriding consideration will always be the interests of justice', per **National Bank Trust v Yurov,** Males J at paragraph 18. Moreover, when deciding the interests of justice:

    It is necessary to take account of all the circumstances of the case including (without attempting an exhaustive list): (i) the importance of the facts not disclosed to the issues which the judge making

[14] [1988] 1 WLR 1350 at pages 1356F to 1357G.
[15] [2015] EWHC 714 (Comm).
[16] [2016] EWHC 1913 (Comm).

the freezing order had to decide; (ii) the need to encourage proper compliance with the need for full and frank disclosure and to deter non-compliance; (iii) whether or to what extent the failure to disclose was culpable; and (iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free, for example, to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts.[17]

98. So those are the principles. There has been a manifest failure on the part of TCC to give full and frank disclosure and a fair presentation at the ex *parte* hearing in relation to the **Gécamines** case. We must, therefore, ask ourselves, what does this failure go to? In terms of the matters pleaded in the Claim Form, the most pertinent paragraph is paragraph 22. There the claim is expressed to be against Pakistan and PIA Pakistan, for a registration order, registering and recognising and/or granting permission to enforce the award so that it may be enforced as if it were a judgment or order of the Court under the 1966 Act and the 1967 Order, alternatively pursuant to sections 81 and 82 of the Arbitration Act 2013. What is also sought is judgment in favour of TCC in accordance with those provisions, alternatively a claim at common law based upon an unpaid foreign arbitration award.

99. It should be immediately clear that since PIA Pakistan was not a party to the arbitration in question, PIA Pakistan's eventual liability can only be established if TCC can succeed in having PIA Pakistan treated as assimilated into the State for all purposes, or somehow under a corporate veil lifting exercise. In other words, TCC can only succeed with a claim against PIA Pakistan if it satisfies the **Gécamines** test.

100. In relation to ex *parte* relief sought and obtained, the satisfaction of that test goes to the heart of the following:

(1) the provisional charging orders over the shares in the BVI Companies;

(2) the injunctions against the BVI Companies and the Sixth, Seventh and Eighth Respondents;

(3) the receivership order over the shares in the Third and the Fifth Respondents;

(4) the application that service on PIA Pakistan of the Claim Form and further documents in these proceedings be dispensed with; and

(5) the application for permission to serve the Claim Form on PIA Pakistan out of the jurisdiction and by way of alternative service.

101. As a matter of principle, therefore, those orders should therefore be set aside.

102. As it appears that TCC has not yet come so far as to be able to establish that PIA Pakistan is to be assimilated into Pakistan, and indeed there appear to be fundamental difficulties for it to do so, given the PIA Pakistan’s nature as a publicly listed company with many private shareholders, this would militate against a regrant on the material presently before the Court. I do not exclude the possibility that TCC might be able to improve its position with further evidence and try again.

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[17] [2016] EWHC 1913 (Comm) at paragraph 18 (Males J).

RISK OF DISSIPATION

103. In relation to the risk of dissipation, it was argued before me that none of the alleged factors relied upon by TCC amount to a risk of dissipation. I would have to agree with that, but the risk of dissipation in complex matters lies not so much in how things are shown to be upon their surface, as in the attitudes underlying them. There is a fine line between a precise insistence upon rights and the running of arguments, even weak or bad arguments, and the risk of underhand sharp practice calculated to frustrate enforcement and the making of recoveries. I must say, with the greatest of respect, that there does appear to this Court to have been quite a strong suggestion of such sharp practice in this case, at least in relation to the conduct complained of by TCC in the arbitration.

104. TCC says there is a risk of dissipation. TCC points to the conduct in respect of which Pakistan was found liable in the arbitration award, which could be described as dishonourable:
(1) refusing to grant a mining lease to TCC after TCC and/or its predecessor had spent upwards of about US$250 million in prospecting for mineral deposits, with such refusal allegedly constituting breach by Pakistan of its fair and equitable treatment obligations under a treaty;

(2) unlawful expropriation of TCC's investment, as well as unlawful impairment of TCC's investment, and using TCC's work product as its own.

105. Importantly, also, TCC argues, Pakistan, after participating fully in the arbitration, refused to provide security as a condition of the stay of the award. Also, importantly, Pakistan refused to give an undertaking that it would comply with the award by way of prompt, unconditional and irrevocable payment.

106. Furthermore, TCC argued, Pakistan has not satisfied any of its payment obligations under the award. Pakistan has taken extensive steps to avoid service of proceedings in respect of the award. Pakistan has deployed a myriad of highly technical arguments in efforts to get out of the liability that the award imposes. Pakistan has reportedly stated that 'it shall vigorously pursue proceedings initiated by TCC in any jurisdiction', affirming 'its commitment to protecting national assets, wherever they may be located'.

107. In short, TCC argues that Pakistan has both the will and the ability to ensure that the award is not enforced. TCC argues that there is therefore a real risk that Pakistan will take steps to place assets beyond the reach of TCC in order to frustrate enforcement of the award.

108. In my respectful judgment however, in terms of enforcement of the arbitration award, the steps taken by Pakistan can be classified as a precise insistence upon the State's rights, at least up until the time of the ex *parte* hearing. Thus, as at the ex *parte* hearing, I accept that there was no solid evidence of a risk of dissipation in order to frustrate enforcement.

109. Subsequently, there are grounds for having greater unease. If it is right that agencies of Pakistan have conducted a fishing raid on TCC's offices without properly obtaining warrants, as I understand to be alleged has happened since the ex *parte* hearing, then that would indicate that Pakistan is

prepared to use sharp practice to avoid honouring its obligations under the arbitration award. The appropriate course would, therefore, in my respectful judgment, be for this Court not to discharge the ex *parte* orders on grounds of no solid risk of dissipation, but to leave it open that there is or may indeed be such a risk. In other words, to take no decision on this issue at present.

CONCLUSION

110. Where that leaves the matter is that the ex *parte* orders fall to be discharged, without being regranted, and ordinarily costs would follow the event, but I will hear Counsel further in relation to costs.

111. TCC argued for a stay pending appeal. Whilst I refused a stay, in order to afford TCC a reasonable but limited opportunity to seek further relief from the Court of Appeal, I thought it apposite to delay the discharge of the ex *parte* orders for a time.

112. The Court accordingly applies the following disposition, with the precise terms of the order needing to be settled at a further hearing:
(1) The orders of 10th December 2020 are set aside with effect from 4pm on 4th June 2021, save that the receivership order over the shares of the Third and the Fifth Respondents is discharged immediately.

(2) The parties have leave to appeal, save in respect of the Charging Orders Act 2020.

(3) The incidence and quantum of costs is to be addressed at a further hearing.

113. This judgment was originally delivered ex *tempore* on 25th May 2021. Following hand down, I directed that learned Counsel for Pakistan convert the transcript of that hearing into a draft judgment for approval, pursuant to CPR 42.5(1)(c). TCC's Counsel has also assisted. The Court expresses its gratitude to Counsel for their assistance, which has significantly expedited production of this written judgment.

114. To the extent that there is any substantive inconsistency between this written judgment and the transcript of the hearing at which the ex *tempore* judgment was delivered, the transcript is to prevail.