



YAR

YOUNG ARBITRATION REVIEW

Under40 International Arbitration Review

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THE IMPOUNDED BOEING 737 – THE SAGA CONTINUES

By Vanina Sucharitkul and Gregory Travaini



Following our previous article in YAR, “The Impounded Boeing 737”, the judicial saga of *Water Bau AG v The Kingdom of Thailand* remains a hot topic of discussion as Thailand continues its vigorous efforts to resist enforcement of the EUR 30 million-arbitration award in multiple jurisdictions. While most investment arbitration awards rendered against States are complied with voluntarily¹, recent notable cases have resulted in multijurisdictional challenges to thwart their execution.

1. PREVIOUSLY, ON WALTER BAU V THE KINGDOM OF THAILAND...

On 1 July 2009, an ad hoc arbitral tribunal seated in Geneva found that the Thai authorities’ failure to increase tolls as contemplated in the concession agreement with Walter Bau AG² (“Walter Bau”), a German construction company, amounted to a breach of the 2002 Germany-Thailand BIT. Consequently, the tribunal ordered Thailand to compensate the latter over EUR 30 million. The Thai government refused to comply and has

since then challenged enforcement of the award in Switzerland, Germany, and the United States.³ In a drastic attempt to execute the award against the recalcitrant State, Walter Bau obtained a court order to seize the personal Boeing 737 of Thailand’s Crown Prince in Munich in July 2011.⁴

2. CONNECTING FLIGHTS TO...

2.1 Germany

Schneider, as the insolvency administrator of Walter Bau filed a motion to order enforcement of the arbitral award in Germany, to which Thailand objected on the basis that Walter Bau’s claims did not fall within the scope of the 2002 BIT as its investments was not an “approved investment” as required by the BIT.

On 4 June 2012, the Berlin Court of Appeal granted the request for a “declaration of enforceability” of the award, holding that Thailand was estopped from challenging the validity of the

arbitration agreement. It found that Thailand had waived its sovereign immunity from jurisdiction on the basis that it had consented to arbitration in the 2002 Germany-Thailand BIT and that enforcement would not be against public policy.⁵

On 30 January 2013, the German Federal Court of Justice disagreed with the lower court. The Court considered that the prior instance should have first dealt with the disputed question whether the investment in question came within the scope of the 2002 BIT, therefore whether the arbitral tribunal had jurisdiction.⁶ According to the decision, if an arbitral tribunal erroneously accepts its own competence, then the State party cannot be considered to have waived its immunity from jurisdiction.⁷ Also, the fact that the State party did not appeal the award on jurisdiction does not constitute waiver of its sovereign immunity from jurisdiction, nor does it prevent that party from claiming it in subsequent proceedings.⁸

The German Federal Supreme Court referred the case back to the lower court to determine whether the subject matter in dispute was properly covered by the 2002 BIT and its arbitration clause.

2.2 The United States of America

The U.S. federal courts adopted a different approach to the court's review of the scope of the arbitration agreement and the arbitral tribunal's jurisdiction. In parallel to the German proceedings, the insolvency administrator also sought confirmation of the arbitral award before the District Court of the Southern District of New York in 2010. Thailand moved to dismiss the petition on the basis that the tribunal lacked jurisdiction because Walter Bau did not make an "approved investment."⁹ The District Court found that the arbitration award did not require a *de novo* review as the question of approved investments was an issue of arbitration agreement scope, not formation. The Court then conducted a deferential review of the tribunal's jurisdiction under the Federal Arbitration Act and confirmed the award.¹⁰

Thailand appealed the decision, but the U.S. Court of Appeals, Second Circuit, held that because Walter Bau and Thailand "clearly and unmistakably agreed to arbitrate issues of arbitrability – including whether the tollway project involved 'approved investments' – [was] not entitled to an independent judicial redetermination of that same question."

2.3 Switzerland

Thailand also attempted to set aside the award at the seat of arbitration, Geneva (Switzerland), two years after the award was rendered. Thailand asserted that an award issued in 2011 in another set of proceedings involving Walter Bau and its business partners found that Walter Bau's insolvency administrator breached his obligation to withdraw the company's BIT claims in the first case.¹¹ On 14 August 2012, the Swiss Federal Tribunal found that Thailand did not uncover any new evidence that would justify the untimely application to set aside the award and dismissed its petition.

In the end, although Thailand has not been able to challenge the award despite numerous attempts to challenge, Walter Bau has not been able to enforce¹² the award rendered more than 5 years ago either. Thus, the saga is bound to continue...

3. CROSSING A ZONE OF TURBULENCE

The case of *Water Bau v Thailand* is far from being an isolated one. Other cases of awards rendered against States have resulted in judicial turbulences notably, *Mr. Franz Sedelmayer v The Russian Federation* and *NML Capital Ltd v The Republic of Argentina*.

3.1 Russian Flight Delayed for 13 years

Franz J. Sedelmayer, a German citizen and sole owner of the Sedelmayer Group of Companies International, specializing in security services, signed a contract with the Saint Petersburg Police establishing a joint venture. Mr. Sedelmayer ran the joint venture until he was evicted as part of the privatization process in the Russian Federation. All movable assets, such as furniture and office equipment, were seized in January 1996.¹³

Subsequently, Mr. Sedelmayer filed a Request for Arbitration before the Stockholm Chamber of Commerce in Sweden under the 1989 BIT between the Federal Republic of Germany and the USSR. On 7 July 1998, an arbitral tribunal awarded Mr. Sedelmayer USD 2,35 million plus interest in damages for expropriation of his business.¹⁴

Yet, Mr. Sedelmayer endured 13 years of battle to enforce the award against the Russian Federation. It is said that nearly 80 legal proceedings throughout the world were initiated. For instance, he tried (i) to impose an arrest on Russia's exhibit items displayed at the International Aerospace Exhibition in Berlin, but private security guards did not allow the bailiffs into the premises, (ii) to seize a Russian house in Berlin but could not for State immunity reasons, and (iii) to impound Lufthansa's payments for overflights of Russian airspace but this was denied by the German courts as Russia threatened to cancel the overflights.¹⁵

He had to wait the decision of the Swedish Supreme Court of 1 July 2011 confirming the order issued by the Stockholm District Court on 11 October 2010 to seize a USD 4,7 million property owned by Russia in Sweden.¹⁶

3.2 Landing Clearance On-Hold

As regards Argentina, a major downturn in its economy in the early 2000s caused the fall of the government and default on the country's foreign debt. NML Capital Ltd ("NML"), one of Argentina's creditors, initiated proceedings to recuperate the funds it had invested in Argentina.

NML sought to enforce the decision against Argentina notably in the USA and France but faced and is still facing significant hurdles. In the USA, NML filed eleven claims against

Argentina in the District Court of the Southern District of New York seeking payment for the defaulted debt. It obtained in 2006 a judgment for USD 284 million.¹⁷ NML then initiated enforcement proceedings in Europe, especially in France against funds deposited on bank accounts used by Argentinian embassies. The French Cour de Cassation refused enforcement for State immunity reasons. Subsequently, NML filed other proceedings, this time focused on non-diplomatic assets, i.e., monies related to tax, social security and oil royalty claims owed by French companies to Argentina through their local branches. Yet again, NML failed as the French Cour de Cassation held that those assets were held for public purposes and would thus be immune from execution provided that Argentina had not waived its sovereign immunity. The Supreme Court held that a waiver of immunity from execution had to be express and specific by mentioning the assets or the category of assets over which the waiver is granted. As it was not the case, Argentina's immunity from execution was upheld.¹⁸

NML is still battling.

4. TRAVELLER'S CHECKLIST

In light of all the above, private investors should consider how to minimise their risks when dealing with States or State entities. To that effect, investors ought to pay attention to:

- the structure of the investment to ensure protection

under the applicable BIT;

- the scope of the arbitration clause in the BIT;
- strict compliance with the laws of the State, especially as to procedures to ensure that the contract including the arbitration agreement and the waiver of sovereign immunity are valid and enforceable;
- the drafting of waivers of sovereign immunity from execution;
- identifying the commercial assets of the State that could potentially be seized in other States; and
- identifying local approaches as regards waivers of sovereign immunity from execution, assets that can be seized, and assets which can be considered commercial in States where awards could be executed.

In any event, if States are unwilling to comply and persist in resisting enforcement of arbitral awards against them, should arbitration be even considered in the first place?

Vanina Sucharitkul and Gregory Travaini

1. According to a study by Queen Mary University, interviews showed a high degree of voluntary compliance with arbitral awards at 90%, 2008 International Arbitration Study, Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards.

2. Walter Bau is currently subject to insolvency proceedings.

3. V. Sucharitkul and G. Travaini, *The impounded boeing 737*, *Young Arbitration Review*, 10 January 2013, pp.7 et seq.

4. The aircraft was subsequently released on the basis that it is personally owned by the Crown Prince and not a sovereign asset.

5. A. Jan van den Berg, Germany No.147, *Werner Schneider as liquidator of Walter Bau A.G.vThe Kingdom of Thailand*, Higher Regional Court of Berlin, case No.20 Sch 10/11, 4 June 2012 and Federal Court of Justice of Germany, Case No. III ZB 40/12, 30 January 2013, *Yearbook Commercial Arbitration*, Volume 38, p.3-4.

6. R. Kreindler, *The insolvency administrator of Walter Bau AG v The Kingdom of Thailand*, Federal Court of Justice, 30 January 2013, A contribution by the ITA Board of Reporters, Kluwer law International.

7. K. Eichler, R. Happ, R-A. Hirth, and G. Scherpf, *A review of German Arbitration law in 2012 and 2013*, *The European, Middle Eastern and African Arbitration Review* 2014.

8. K. Eichler, R. Happ, R-A. Hirth, and G. Scherpf, *A review of German Arbitration law in 2012 and 2013*, *The European, Middle Eastern and African Arbitration Review* 2014.

9. Thailand also moved to dismiss on the ground of forum non conveniens but it did not appeal the district court's ruling on this defense.

10. C. Amirfar and B. Goldstein, *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (in liquidation) v The Kingdom of Thailand*, US Court of Appeals, second Circuit, 8 August 2012, A contribution by the ITA Board of Reporters, Kluwer Law International.

11. L.E. Peterson and J. Hepburn, *Noose Tightens on Thailand as Swiss Court Declines to Set Aside a Still-Unpaid 2009 BIT Award*, *IA Reporter*, 2 September 2012.

12. To the best of the authors' knowledge.

13. I. Smeureanu and L. Druetta, *Sedelmayer v Russia (State Immunity - Local Decision)*, *International Arbitration Case Law*.

14. <http://www.italaw.com/cases/982>.

15. Y. Kryvoi, *Chasing the Russian Federation*, CIS Arbitration Forum at <http://www.cisarbitration.com/2011/07/13/chasing-the-russian-federation>.

16. http://www.sccinstitute.com/filearchive/2/21315/franz_sedelmayer_russian_federation.pdf.

17. E. Kleiman and J. Spinelli, *NML v Argentina: Supreme Court Tightens Waiver of Sovereign Immunity Test*, *International Law Office*, 2 July 2013.

18. G. Travaini, *State 1 – Investor 0: Recent French Decisions regarding Sovereign Immunity from Execution*, *Kluwer Arbitration Blog*, 27 August 2013; *Société NML Capital (Iles Caïmans) v Etat d'Argentine*, Cour de Cassation (1ère Chambre Civile), n° 10-25.938, 11-10.450 and 11-13.323, 28 March 2013.