

Collas Crill wins landmark case on State Immunity

January 2016

Collas Crill has acted for the winning party in a decision issued by Jersey's Royal Court in a landmark case on state immunity.

Collas Crill Partner Elena Moran acted for Tepe, a construction company based in Turkey.

Tepe entered into two contracts with the defendant, Botaş, to assist with the construction of the Baku-Tbilisi-Ceyhan ("BTC") Pipeline. The BTC pipeline transports crude oil from oilfields in Azerbaijan through Georgia and Turkey to the Ceyhan terminal on the Turkish coast.

Botaş is wholly owned by the Republic of Turkey. Its principal activity is the transportation of crude oil and natural gas by pipeline in Turkey.

Botaş terminated the contracts with Tepe. Both contracts were governed by English Law and provided for disputes to be arbitrated in Paris under the rules of the International Chamber of Commerce ("ICC").

The Arbitral Tribunals found the terminations to be unlawful and made a number of awards in favour of Tepe and against Botaş in the total sum of approximately US\$101m. Botaş appealed the arbitration awards to the French Courts, but none of the appeals were successful. Despite having exhausted all avenues of appeal Botaş failed to make any payments under the arbitration awards.

Under Jersey Law an arbitration award can be enforced as if it is a judgment of the Jersey Court.

Botaş has two Jersey subsidiary companies called Turkish Petroleum International Company Limited ("TPIC") and Botaş International Limited ("BIL"). BIL operates the Turkish section of the BTC pipeline and provides marine services at the Ceyhan Marine Terminal. TPIC is an integrated oil and gas company with offices in Turkey, Azerbaijan, Kazakhstan, Iran, Georgia and Colombia.

Tepe obtained ex-parte interim arrests over Botaş' shares in TPIC and BIL. If confirmed an arrest would allow the Viscount to sell the shares in TPIC and BIL and use the proceeds to satisfy the outstanding debts owed to Tepe.

Botaş objected to confirmation of the arrests on the ground that the Republic of Turkey is entitled to claim state immunity in relation to the shares.

Jersey law on state immunity mirrors English law. Botas argued that the law on state immunity prevents enforcement against assets in which a state has a sufficient interest in and/or control unless those assets are held for commercial purposes. The interest/control was said to arise from certain provisions of Turkish law claimed to impact on TPIC and BIL. Tepe argued that state immunity only arises where the state has a legal or beneficial interest in the shares.

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The Royal Court received written reports and oral evidence from Turkish law experts. In broad terms the Court accepted the level of control asserted by Botaş. Despite this, the Court concluded that the interest and / or control was not sufficient to satisfy the test for state immunity.

The Royal Court noted that following the decision of the Privy Council in the case of *La Generale des Carrières et des Mines v F G Hemisphere Associates LLC*, the assets of a separate legal entity which is wholly owned by a state are quite separate to the assets of the state itself.

Day to day control of the shares rests with Botaş, which is the legal and beneficial owner of the shares. The fact that the Republic could direct Botaş to dispose of assets (including the shares) was beside the point. If that was sufficient the Republic would be able to claim immunity over all of the assets of Botaş, yet it was accepted that the Republic had no claim to immunity over any other assets of Botaş.

As the Royal Court highlighted, if Botaş was successful a state would be able to claim immunity over the shares in virtually any indirectly owned subsidiary.

The Royal Court had no hesitation in rejecting the claim of state immunity and ordered that the arrest of the shares be confirmed. Subject to a successful appeal this means that the shares of TPIC and BIL will be sold by the Viscount.

Collas Crill Partner Elena Moran said: "This is the first time that a Court has considered whether state immunity attaches to the shares of an indirectly owned state entity. The case is important because a wider interpretation of state immunity would leave judgment creditors of state owned entities with limited enforcement options. An inevitable impact will be that organisations are more reluctant to contract with state owned entities."

Collas Crill was assisted in the case by Pinsent Masons LLP, which also represented Tepe in the ICC arbitration proceedings and the French appeals.

A full copy of the Judgement can be accessed at www.jerseylaw.je.