



Neutral Citation Number: [2023] EWHC 1942 (Comm)

Case No: CL-2019-000303

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN LCIA ARBITRATION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, WC4A 1NL

Date: 28 July 2023

Before :

MR JUSTICE BRIGHT

Between :

Deutsche Bank AG, London Branch

Claimant

- and -

Receivers Appointed by the Court

Receivers

- and -

Central Bank of Venezuela

Defendant

Anna Dilnot KC (instructed by Allen & Overy LLP) for the Claimant

Adam Zellick KC and Jonathan Miller (instructed by Zaiwalla & Co.) for the Maduro Board

Mark Tushingham (instructed by Arnold & Porter Kaye Scholer (UK) LLP) on behalf of the Guaidó Board

Hearing date: 21 July 2023

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Bright:

1. This application has been heard in public but involves some materials that are confidential. For practical reasons, and to reconcile the public interest in open justice with the parties' interests in the confidential materials remaining private, in this judgment I shall be deliberately sparing in setting out the terms of the underlying documents. I am confident that this will not make my judgment incomprehensible to any member of the public who does not have access to the documents.

Introduction

2. This is a long-running matter which arises out of transactions involving gold bullion swaps between the Claimant ("DB") and the Defendant ("BCV") from 2015, and out of the sanctions imposed on BCV by the Government of the United States on 17 April 2019.
3. The effect of the termination of the swap transactions was that substantial sums were payable by DB to BCV, but there were practical difficulties about how, where and to whom this payment should be made. The swap transactions were subject to arbitration under the rules of the London Court of International Arbitration ("LCIA") and thus fell under the Arbitration Act 1996. DB applied to this Court in May 2019 for the appointment of receivers, and an Order to this effect was made by Robin Knowles J on 13 May 2019 ("the Receivership Order"). Since then, the proceeds of BCV's contractual rights to the sums payable have been held by the receivers, under the terms of that Order.
4. Much legal water has flown under the bridge since then, most of it not of immediate relevance. However, the consequence is that the receivers have incurred expenses and become entitled to remuneration, for which they have from time to time been reimbursed by DB, as provided for in the Receivership Order and pursuant to the arrangements set out in that Order.
5. DB wish to alter those arrangements in two respects:
 - i) They wish to be reimbursed for much (not all) of the payments they have made to the receivers ("Past Receivership Costs"), out of the funds held by the receivers.
 - ii) They wish to alter the arrangements going forward, so that the receivers' expenses and remuneration will be paid by DB who will then be reimbursed regularly out of the funds held by the receivers.
6. DB's application suggests specific procedures to be followed, aimed at ensuring that all interested parties will have a proper opportunity to scrutinise and challenge the propriety of the sums in question. These arrangements are to be subject to the necessary licence(s) being obtained from the US authorities.
7. At a hearing on Friday 30 June 2023, I heard submissions from all the relevant parties about the procedures to be followed. I have since received a slightly revised draft order setting out such procedures. I am content with its terms.

8. Shortly before the hearing on 30 June 2023 it became apparent that one of the interested parties, known for convenience as “the Maduro Board”, objected to the application as a matter of principle, on sovereign immunity grounds. The basis of the objection was not fully articulated prior to the hearing and I was concerned that it would not be possible (i) to do proper justice to the parties’ submissions or (ii) to complete the hearing within the time estimate, if I heard and determined the sovereign immunity issues at that hearing. I therefore adjourned the sovereign immunity points to today.
9. Now that the relevant parties – i.e., DB and the Maduro Board – have been able to set out their respective positions more fully, and I have been better able to consider them, I do not consider that they raise any real difficulty. There is no arguable case of sovereign immunity in relation to the order that DB asks me to make.

The parties’ positions before me

10. The primary argument made by Ms Dilnot KC, on behalf of DB, was that BCV had waived its immunity so as to permit the Court to make the order sought, by the written terms of the swap transactions. This was so notwithstanding that the receivership funds are (or might be) the property of BCV.
11. The response to this of Mr Zelic KC, on behalf of the Maduro Board, was that the terms relied on by Ms Dilnot KC only waived immunity in respect of enforcement against BCV’s property if an arbitral award had been issued; or, possibly, if there were a judgment. Without an award (or judgment), the Court cannot make an order that would alienate any of the BCV’s property.
12. Ms Dilnot KC had an alternative argument, that my order (or, if necessary, some subsequent order) would be a judgment that satisfied Mr Zelic’s test. Mr Zelic KC did not accept this.
13. Ms Dilnot KC also had a fall-back argument, that the Receivership Order was inconsistent with the state immunity contended for by the Maduro Board, and the Maduro Board’s solicitors had said in a letter of 10 March 2023 that this Order should be left in place, without variations. She said that the letter of 10 March 2023 therefore constituted a written waiver. Mr Zelic KC contested Ms Dilnot KC’s interpretation of that letter.
14. I also received submissions from Mr Tushingham, on behalf of the Guaidó Board, agreeing with DB on Ms Dilnot KC’s primary argument.
15. I raised a further point with the parties, as to whether the terms of the Receivership Order meant that the sovereign immunity issues simply do not arise.

The State Immunity Act 1978

16. A sovereign state is generally immune to legal proceedings, and its property, including the property of its central bank, is generally protected from enforcement, under the State Immunity Act 1978. Apart from the general

immunity conferred by s. 1, of particular relevance are s. 9(1) and (2), and s. 13(1), (2) and (3):

“9 Arbitrations.

(1) 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 United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.”

“13 Other procedural privileges.

(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below—

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(2A)...

(3) Subsections (2) and (2A) above do 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.”

17. The State Immunity Act 1978 was summarised in *Alcom Ltd v Republic of Colombia* [1984] 1 AC 680, per Lord Diplock at 600F:

“... the Act ... draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. Sections 2 to 11 deal with adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction.”

Arbitration in England and the role of the Court

18. Arbitrations conducted in England are subject to the Arbitration Act 1996, which confers supervisory and ancillary powers to the English Court, as an aid to arbitration.
19. If a State contracts on terms providing for disputes to be resolved in arbitration, it necessarily thereby confers jurisdiction on the arbitration tribunal to deal with those disputes. The effect of s. 9(1) of the State Immunity Act 1978 is that the agreement to arbitration also constitutes a waiver of immunity in relation to proceedings in the Courts of England, in relation to such arbitration proceedings, under the Arbitration Act 1996. See *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2006] EWCA Civ 1529, per Moore-Bick LJ at [117] to [123]; *NML Capital v Argentina* [2011] UKSC 31, per Lord Mance at [89].
20. The role of the Court under the Arbitration Act 1996 includes a host of powers, which can arise before, during or after the arbitration proceedings. They often lead to the Court making orders that will affect the parties, and which may be capable of being enforced against their property.
21. The most obvious example is an order for enforcement of an award under s. 66 of the Arbitration Act 1996 (cf. s. 101, for foreign New York Convention awards). By definition, this can only arise after the award. *Svenska Petroleum* and *NML Capital v Argentina* were enforcement cases, although the points arising in those cases in relation to the enforcement of foreign arbitration awards are not relevant here.
22. Another obvious example is an order that one party should pay costs to the other. This can arise at any stage of the arbitration proceedings, and from proceedings in Court that have nothing to do with any award.
23. Also of great practical importance are the powers granted under s. 44(2)(c) and (d) of the Arbitration Act 1996 that are exercisable in support of arbitration proceedings in relation to property. They are very often invoked so that the Court will make an order for a party's property to be inspected, photographed, preserved, detained, sampled, experimented on (which in practice can include the destructive testing of a sample) or even sold. This generally happens at an early stage, long before any award. Such orders assist (in the broadest sense) the adjudicative process that will be conducted by the arbitrator, but they themselves affect, and can be enforced or executed against, property.
24. S. 44(2)(e) gives the Court the power of "granting an interim injunction or the appointment of a receiver". It was s. 44(2)(e) that was relied on by DB in its application of 13 May 2019, and which was exercised by Robin Knowles J when he made the Receivership Order.

Receivership under s. 44(2)(e) Arbitration Act 1996

25. The power of the Court in relation to receivers has been considered in several important judgments, two of the most significant in recent years being *Capewell*

v Revenue & Customs Comrs [2007] UKHL 2, [2007] 1 WLR 386 per Lord Walker of Gestingthorpe at [18]-[21] and *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 per Lord Toulson at [44]. It is clearly established that:

- i) At common law, the receiver is entitled to look for payment of his proper expenses and remuneration out of the assets placed by the Court in his control, and he has a lien over those assets for that purpose.
 - ii) Statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation expressly provides otherwise.
26. The Arbitration Act 1996 expressly gives this Court the power to make an order for the appointment of receivers. It says nothing else about the Court's jurisdiction or about the rights, responsibilities and powers of receivers appointed under s. 44(2)(e).
27. It follows that the Court's power under s. 44 in support of the LCIA arbitration proceedings included the power not only to appoint receivers, but to make provision for the payment of their expenses and remuneration from the receivership funds.

The contractual terms

28. When a State enters into a contract that provides for LCIA arbitration (as here), it thereby is inescapably engaging with the Arbitration Act 1996. While s. 9(1) of the State Immunity Act 1978 addresses the basics of this engagement, s. 9(2) permits the contracting parties to choose precisely what waiver of immunity the agreement to arbitration is intended to bring about. It is, moreover, often sensible for the parties to go further in spelling out their intentions, in particular in respect of enforcement against property, having regard to Lord Diplock's distinction between adjudicative jurisdiction and enforcement jurisdiction (which is sometimes difficult to apply in practice). That was evidently the view of DB and BCV in this case.
29. The swap transactions were on written terms, paragraph 11 of which was the agreement to LCIA arbitration.
30. The preceding provision, paragraph 10, was headed "Waiver of Immunity". It was divided into four sub-paragraphs.
31. Sub-paragraph 10(i) provided that there was no waiver apart from the exceptions provided below.
32. The provision immediately below was sub-paragraph 10(ii), providing as follows – n.b., I have highlighted in bold the two critical phrases:

“(ii) Notwithstanding sub-paragraph (i) above of this Master Confirmation, [BCV] irrevocably and unconditionally waives its right to immunity under the State Immunity Act 1978 (the “Act”) from **execution or enforcement or other legal or judicial process** brought

against [BCV] within the United Kingdom **in respect of, or relating to an arbitral award or any other order, judgment, or other relief arising out of or in relation to an arbitration pursuant to paragraph 11 (Arbitration)**, including without limitation for the avoidance of doubt consent to any service of process, any enforcement or execution against any property or revenues of [BCV] (irrespective of its use or intended use), or any action in rem, arrest, detention, sale or attachment (but only after and not before judgment or arbitral award) of any property or revenues of [BCV]. For the avoidance of doubt, the waiver described herein (a) shall not be construed as a general waiver of immunity and shall constitute a waiver of immunity under Section 2(2) and Section 9(1) of the Act, and a consent under Section 13(3) of the Act in each case only to the extent consistent with the provisions of this sub-paragraph (ii); and (b) shall not constitute a consent to any enforcement against any property of [BCV], or any action in rem, arrest, detention or sale of any property of [BCV] in each case to the extent that the value of such property exceeds the lesser of (a) an amount denominated in US Dollars equal to 90 per cent of the [DB] Initial Exchange Amount plus Costs and (b) the amount of the arbitral award that is being enforced”

33. Most of the submissions before me related to the meaning and effect of sub-paragraph 10(ii).
34. Sub-paragraph 10(iii) stated that the waiver of immunity in sub-paragraph 10(ii) was given solely for the purposes of the contract and for the sole benefit of DB. This was not of direct relevance to the issues before me, this being an application by DB for an order that would permit payments from the receivership funds in favour of DB.
35. Sub-paragraph 10(iv) provided a definition of “Costs” in sub-paragraph 10(ii).

Analysis of sub-paragraph 10(ii)

The correct approach to construction

36. The parties agreed that, in construing sub-paragraph 10(ii), the Court should engage in the usual process of contractual interpretation, as a unitary exercise, considering the provision as a whole so as to reach the correct intended meaning, taking into account the relevant surrounding circumstances. No special rules apply merely because what is being construed is a waiver of immunity under the State Immunity Act 1978.
37. In this context DB referred me to *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA 1643, at [25] where Waller LJ referred to *A Company v Republic of X* [1990] 2 Lloyd’s Rep 5230, as follows:

“The clauses under construction were different, but Saville J rejected an argument that in some way a restrictive operation should be adopted to clauses dealing with waiver of immunity since one of the parties is a State; where the case concerns an ordinary commercial transaction, there is no good reason why the clause in question should not be construed in

accordance with the ordinary principles of construction for commercial contracts “giving the words used, if capable of bearing them, a construction which accords with commercial common sense.” ”

First sentence, up to the end of the emphasized text

38. The emphasized text in the first sentence of paragraph 10(ii) includes “execution or enforcement”, as well as other legal process; and this could relate not only to an arbitral award but also to “any other order, judgment, or other relief” arising out of or in relation to the LCIA arbitration pursuant to paragraph 11.
39. This text naturally would include an application to enforce any award made by the LCIA arbitration tribunal, under s. 66 of the Arbitration Act 1996. However, the words “any other order, judgment or other relief” extend to the myriad of other arbitration claims that could potentially be brought in relation to the LCIA arbitration, under the Arbitration Act 1996.
40. Some of these would necessarily follow an award: for example, a challenge to the award under s. 67, s. 68 or s. 69. If such a challenge were made, and were to fail, there would very likely be an adverse costs award against the unsuccessful challenger, which would fall within the scope of this waiver of immunity and so could be enforced against BCV’s property.
41. Many other forms of order, judgment or relief in proceedings under the Arbitration Act 1996 would be likely to arise before an award. This certainly applies to any order, judgment or relief granted under s. 44 of the Arbitration Act 1996. Taken by itself, the emphasized text appears to waive immunity from execution or enforcement in relation to any such order, judgment or relief.

Remainder of the first sentence

42. Mr Zellick’s answer to this focussed on the examples that follow, in the remainder of the first sentence.
43. It is notable that these examples are expressly given “without limitation”. I therefore find it difficult to accept that they were intended to narrow the apparent width of the waiver that precedes them.
44. The first example given is “any service of process”. It is not obvious how or why this would, could or must come only after an award. As already noted, arbitration claims under the Arbitration Act 1996 often have to be made before the award. In such cases, process must be served before the award. Sometimes, indeed, all this happens before the arbitration has even been commenced – for example, with an arbitration claim to extend time under s. 12 or for the appointment of an arbitrator under s. 18.
45. The second example is “any enforcement or execution against any property or revenues of [BCV]”. These words are followed by the parenthetical phrase “(irrespective of its use or intended use)”.
46. The final example given is that of “any action in rem, arrest, detention, sale or attachment”. In rem proceedings are often relevant in the context of sovereign

immunity, because state-owned ships are high-value, mobile assets which are often engaged outside the State's territorial limits and, therefore, represent tempting targets for enforcement. Ships receive special attention in s. 10 of the State Immunity Act 1978 (one of the provisions dealing with adjudicative jurisdiction). It therefore is no surprise that, when the Act comes to deal with enforcement jurisdiction, in rem proceedings are specifically addressed in s. 13(2)(b) of State Immunity Act 1978, which this third example in sub-paragraph 10(ii) undoubtedly tracks.

47. Mr Zellick argued that the parenthetical reservation that follows – “(but only after and not before judgment or arbitral award)” – was intended to qualify not only this third example, but also both the previous examples; with the result (he said) that immunity was only waived in relation to “any enforcement or execution against any property or revenues of [BCV]” after a judgment or award.
48. I cannot accept this submission.
- i) It is inconsistent with the first part of this sentence, as already discussed.
 - ii) It ignores the words “without limitation”, which precede all three examples.
 - iii) The qualification “(but only after and not before judgment or arbitral award)” cannot sensibly be applied to the first example, “any service of process”.
 - iv) It is structurally inconsistent with the presence of a parenthetical qualifier that is already applicable to the second example.
 - v) By contrast, the need for in rem remedies to be available only after a judgment or award is comprehensible: if (for example) a valuable ship were to be sold by the Admiralty Marshal even before liability were established (as can happen under CPR 61.10), this could have drastic consequences.
 - vi) I therefore have no doubt that the parenthetical reservation “(but only after and not before judgment or arbitral award)” is intended to apply only to “any action in rem, arrest, detention, sale or attachment”.

Second sentence, up to semi-colon

49. The second sentence begins with a statement that sub-paragraph 10(ii) is not a general waiver of immunity. This, I take for granted.
50. It then confirms that it is a waiver under ss. 2(2), 9(1) and 13(3) of the State Immunity Act 1978, to the extent consistent with its provisions. The express acknowledgment of s. 9(1) is of interest. It confirms that the scope of sub-paragraph 10(ii) is not confined to awards and their enforcement.

Second sentence, after semi-colon

51. The effect of this provision is that sub-paragraph 10(ii) is not a consent to any enforcement against BCV's property, or any action in rem (etc.), to the extent that the value of such property exceeds the lesser of two values, (a) and (b). Of these, (b) is defined as "the amount of the arbitral award that is being enforced."
52. Mr Zellick KC said that, if no award has yet been published, the amount of the arbitral award was zero, therefore there could be no enforcement at all. That seems strained. The more realistic reading is that, if the case does not involve the enforcement of an arbitral award, the limit to enforcement that would otherwise be derived from value (b) cannot be applied. I do not read this provision as indicating that sub-paragraph 10(ii) only waives immunity under the State Immunity Act 1978, in relation to enforcement of property (or an action in rem) if there is an arbitral award and if what is sought is the enforcement of that award. That reading would not be consistent with the first sentence of sub-paragraph 10(ii), which expressly waives immunity from the execution or enforcement not only of arbitral awards but also of "any other order, judgment or other relief arising out of or in relation to" the LCIA arbitration.
53. Ms Dilnot KC had a further point, that receivership is a form of injunctive relief (or quasi-injunctive relief), citing *Kerr & Hunter on Receivership and Administration* (21st ed.) at §2-50:

"In all cases, the remedy of the appointment of a receiver is an interim measure and operates by way of injunction. The injunction operates negatively by restraining the respondent from dealing with the asset in question, but operates positively by authorising the receiver in respect of the same assets. As in the case of a freezing order, the court therefore exercises control over the assets in question by enjoining the individual holding the asset, rather than effecting any change to the asset itself. The appointment does not have a proprietary effect."

54. On this basis, Ms Dilnot KC said that receivership is not a form of "enforcement against property" and noted that, in the State Immunity Act 1978, injunctions are dealt with under s. 13(2)(a), whereas enforcement against property is dealt with under s. 13(2)(b). I am not persuaded by this point. While the mere appointment of receivers, in and of itself, may enjoin only the persons holding the assets, the effect of an order of this Court that the receivers should pay some of the receivership funds to DB would certainly effect a change to those funds and would have a proprietary effect. That is the effect of the order I am asked to make. It goes considerably further than the mere appointment of receivers.

Conclusion on the primary argument

55. BCV contracted on terms that provided for LCIA arbitration (thus engaging both s. 44 of the Arbitration Act 1996 and s. 9 of the State Immunity Act 1978).
56. Against that background, the express language of the first part of the first sentence of sub-paragraph 10(ii) seems to me clear. BCV has waived immunity

from execution or enforcement in respect of any order, judgment or other relief arising out of or in relation to the LCIA arbitration.

57. I see nothing in the remainder of sub-paragraph 10(ii) that indicates a contrary intention.
58. This means that the Court is empowered to order and permit the receivers to pay sums from the receivership funds to DB in respect of the funds that DB will have paid in respect of the receivers' expenses and remuneration.

DB's alternative argument: this is a judgment within SIA 1978

59. Ms Dilnot KC's alternative argument was predicated on her primary argument being rejected because of Mr Zellick KC's submission concerning the words in parentheses near the end of the first sentence of sub-paragraph 10(ii) – i.e., his argument that the waiver of immunity was in respect of enforcement or execution against any property of BCV “only after and not before judgment or arbitral award.” Because of my decision on the primary argument, rejecting Mr Zellick KC's submission, this does not arise.
60. Ms Dilnot KC submitted that my decision in DB's favour on this application would, itself, be a judgment, such that the payments to be made thereafter, by the receivers to DB, would be after a judgment within the words relied on by Mr Zellick KC.
61. If I had accepted Mr Zellick's submission as to the effect of the parenthetical phrase, I would have accepted Ms Dilnot KC's submission in part. However, that would not have been sufficient for me to grant the application.
 - i) As regards past expenses and remuneration, my decision in favour of DB in relation to that element of the application is a judgment within the meaning of s. 13(2). It is not a judgment that calls for enforcement in the conventional sense; rather, it requires and entitles the receivers to deal with the funds in a particular manner. However, in so far as Mr Zellick KC is right to treat this as an order for enforcement under s. 13(2), such enforcement will be enforcement of my judgment within the meaning of the words relied on by Mr Zellick KC, that judgment having itself been made in the course of proceedings in this Court that relate to the LCIA arbitration proceedings within the meaning of s. 9(1).
 - ii) As regards future expenses and remuneration, the order that I am asked to make will have no immediate effect on the funds held by the receivers. The proposals made by DB will involve the receivers submitting statements to the interested parties in respect of the sums said to be payable for expenses and remuneration, which the interested parties will be entitled to challenge.
 - iii) If there is a challenge, and it remains unresolved, the challenge will be determined by the Court. That determination will be a judgment within the meaning of the words relied on by Mr Zellick KC.

- iv) However, if there is no challenge, the interested parties will be taken to have approved the receivers taking the appropriate amount from the funds and paying it to DB. In other words, the receivers' right/obligation to pay will arise, in relation to a quantified sum, without any further decision from the Court. In this situation, payment out of the receivership funds will take place without there being a judgment within the meaning of the words relied on by Mr Zelic KC.
- v) Ms Dilnot KC suggested that, if I were to make the order sought by DB, that order, and this judgment, would itself satisfy the words "but only after and not before judgment or arbitral award". I do not agree. Those words must connote a judgment (or, possibly, an order) for the specific amount in question, which is to be enforced or executed. I do not think they can mean a judgment which (as this judgment does) decides some points of principle but cannot be enforced or executed until a further process of quantification has been completed, not by the Court but by the receivers. If the receivers' accounting statements are not challenged, payment by the receivers will stand as the enforcement and/or execution of their own assessment of the quantum of expenses and/or remuneration – not an assessment made by the Court.
62. Accordingly, if Mr Zelic KC were right on his argument that the parenthetical phrase near the end of the first sentence of sub-paragraph 10(ii) means that, in all cases, enforcement or execution must follow a judgment or arbitral award, I would not consider the proposals made by DB appropriate and I would consider myself bound to dismiss the application, at least in relation to future costs. However, because I have not accepted this argument from Mr Zelic KC, that is not the conclusion I have reached.
63. I would add that Ms Dilnot KC's argument on this point did not address Mr Zelic's third argument, i.e., that the words "... the arbitral award that is being enforced" in the final limb of sub-paragraph 10(ii) mean that the sub-paragraph as a whole only applies where an arbitral award is being enforced. However, as I have not found in favour of Mr Zelic KC on that argument, this does not matter.

DB's fall-back argument

64. Ms Dilnot KC's final argument was that, even if there was not a sufficient waiver of immunity within the contractual terms of the swap transactions, the Maduro Board gave "written consent" within the meaning of s. 13(3) of the State Immunity Act 1978, by a letter from its solicitors, Zaiwalla & Co., dated 10 March 2023.
65. That letter was sent in the lead-up to this application. At the time, DB's proposal was that the receivers' expenses and remuneration should be paid directly from the receivership funds, rather than paid by DB, with DB being paid from the receivership funds later (following the process of scrutiny and challenge now provided for). Zaiwalla & Co. objected, their letter concluding that "the fairest course of action is to leave the Receivership Order as it stands."

66. Ms Dilnot KC suggested that, by endorsing the Receivership Order, Zaiwalla & Co.'s letter was inconsistent with the position now taken by the Maduro Board on sovereign immunity, in that, in some circumstances – albeit, not in the manner now proposed by DB in its application – the receivers were entitled to use the receivership funds to pay their own expenses and remuneration.
67. I accept that there is some tension between the terms of the Receivership Order and the high-watermark of some of Mr Zellick KC's submissions before me (although the most significant instance of this was something that Ms Dilnot KC was reluctant to broach – see below). However, s. 13(3) is concerned with written consent to “the giving of any relief or the issue of any process”. To succeed on the basis of subsequent written consent, Ms Dilnot KC would need to show that the Maduro Board had consented, on behalf of BCV, to the relief that DB is applying for.
68. I do not see how this can be conjured from a letter whose entire *raison d'être* was to oppose that relief. The position set out by Zaiwalla & Co. in their letter was summarised in a statement made in support of the application by Ms Sarah Garvey of DB's solicitors, Allen & Overy LLP, as follows:
- “Zaiwalla & Co has indicated that the Maduro Board now opposes this Application, claiming the relief sought causes “*significant prejudice*” and instead suggests the status quo continues, i.e., Deutsche Bank continues to fund the Receivers.”
69. I infer that Ms Garvey's witness statement was written before Ms Dilnot KC had identified the letter from Zaiwalla & Co. as the lifeline that she now suggests, but Ms Garvey's characterisation of the letter seems to me more accurate than Ms Dilnot KC's.
70. I should also record Mr Tushingham's objection that, whatever one might make of the letter from Zaiwalla & Co., his client's position was that it could not be consent on behalf of BCV, because the Maduro Board does not represent BCV.
71. I cannot accept that the letter from Zaiwalla & Co. is “written consent” such as is required by s. 13(3) of the State Immunity Act 1978. However, as Ms Dilnot KC's submissions did not require her to succeed on this point, this is of no consequence.

Discretion

72. I should note that the effect of the proposals advanced by DB would be, in a sense, provisional. In relation to past expenses and remuneration, the proposed order allows for these to be challenged hereafter. More broadly, the Receivership Order is supported by an undertaking given by DB that, if the Court later finds that the order (i.e., the appointment of receivers) has caused loss to BCV for which BCV should be compensated, DB will comply with any order the Court may make.
73. I accept Mr Zellick KC's point that, even so, the funds held by the receivers will have been affected in the meantime. However, if (as I hold, for the reasons

given above) I have in principle the jurisdiction to make the order proposed by DB, it is relevant to my discretion that it seems unlikely that what is proposed can cause any prejudice to BCV; or, therefore, to the Maduro Board (if, as it says but Mr Tushingham's client resists, the Maduro Board represents the BCV).

Are the receivership funds the property of BCV?

74. Finally, Mr Zelic KC's objections are predicated on the funds held by the receivers being the property of BCV (and, thus, of the State of Venezuela).
75. This was not challenged by Ms Dilnot KC, I think for tactical reasons to do with not wishing to rock the receivership boat. However, this was a point I considered myself bound to raise with the parties.
76. It is undeniable that, prior to the Receivership Order, the contractual right to receive the payments due under swap transactions was the property of BCV.
77. However, that Order included the following paragraph, in Schedule A (which contains its principal substantive provisions):

“6. The Receivership Property shall be the property of the Receivers for the duration of the Receivership. If the Court or any court, tribunal or law orders or requires that the Receivership Property be transferred to any person, the Receivers shall have a lien in relation to their remuneration and any costs or expenses, such lien to take effect prior to any other rights over the Receivership Property (whether secured or unsecured) and whether such rights belong to the Parties or any third party.”
78. The express effect of the Order was, therefore, that the funds that were to be received by the receivers, and which they now hold, should be the property of the receivers for the duration of the receivership. It provided elsewhere that the receivers were to and do manage those funds in the name of BCV. Nevertheless, for so long as the Receivership Order remains in force, the position as a matter of English law is that the funds are not the property of BCV. They are the property of the receivers, because that is what a Judge of this Court has ordered.
79. The Receivership Order was applied for on notice of over 72 hours. It provided for a return date (which ultimately took place on 19 July 2019), and provided that BCV could apply at any time for it to be varied or discharged (on notice to DB). The interest of the Maduro Board is said to be that it is, or represents, BCV – as outlined in letters that it sent to this Court prior to the return date hearing. Neither at the return date, nor in the four years that have passed since then, has the Maduro Board challenged the terms of the Receivership Order or applied for it to be varied or discharged. On the contrary, they have repeatedly insisted that it should remain in place, unvaried, as illustrated by Zaiwalla's letter of 10 March 2023.
80. I do not know whether this is because the Maduro Board and its advisers are content with the specific provision in that Order that the funds held by the

receivers are the property of the receivers, or because the significance of that provision for the purposes of the State Immunity Act 1978 was not apparent to them until recently.

81. However, unless and until paragraph 6 of the Receivership Order is challenged, it means that the State Immunity Act 1978 cannot apply.
82. In any event, this point was not necessary to my decision. However, it should really have been the first point to be considered, not the last, and certainly not a point raised only by me.
83. I raise it again in this judgment because I am conscious that these parties have already visited the Court of Appeal more than once. Should this particular application also grace the Court of Appeal, it may be that paragraph 6 ought to feature more prominently in the submissions from counsel before that tribunal.

Conclusion

84. I will make the order sought by DB, subject to further discussion of the precise terms.