Brian Kolenda
416-865-2897
bkolenda@litigate.com

June 29, 2016

Recent Decisions Create Uncertainty in State Immunity from Enforcement in Ontario

Foreign states are rarely sued in domestic courts. In Canada, that is generally so for a single, good, reason: the *State Immunity Act,* ("SIA"). That statute, implementing the international law doctrine of state immunity into Canadian law, grants virtually all states immunity in respect of (most) non-commercial dealings.

However, even where a party has a judgment against a state (for instance, in respect of a commercial matter), enforcing that judgment in Canada can be a practical impossibility. The SIA also grants most of property of foreign states in Canada immunity from attachment or execution. That protection is absolute in respect of "diplomatic property" of a foreign state, an immunity also protected under the *Foreign Mission and International Organizations Act* ("FMIOA").

However, several recent Ontario decisions have (1) illustrated the limited bases on which enforcement proceedings against foreign states can succeed and (2).

In closely-watched proceedings underlying the recent decision of *Tracy v The Iranian Ministry of Information and Security*, Justice Hainey confirmed that recent amendments to the SIA have limited the doctrine of state immunity in Canada – at least in regards to the (thus far) two designated state sponsors of terrorism under the SIA: Iran and Syria. In *Tracy*, plaintiffs with American judgments against Iran arising from acts of terrorism could enforce those awards against a number of Iranian assets in Canada.

The decision in *Tracy* (and the underlying SIA amendments) have been controversial on a number of grounds, including that they do nothing about foreign state immunity for claims arising from other heinous acts, like torture (an immunity confirmed only two years ago by the Supreme Court of Canada in *Kazemi Estate v. Iran*).

However, in an aspect of the *Tracy* decision significant to both commercial and non-commercial litigation against states, Justice Hainey held that certificates issued by the Canadian Minister of Foreign Affairs under the FMIOA are dispositive of the issue of whether or not assets are diplomatic property.

Justice Hainey expressly declined to follow the decision of Justice Braid in *Canadian Planning and Development Canada Ltd. (CPDC) v. Libya et al.*, which was to the contrary. In that case, a Canadian creditor under an International Chamber of Commerce arbitral award did not succeed in its claim to execute against bank accounts controlled by the government of Libya.

The conflicting decisions in *Tracy* and *Canadian Planning* now create some uncertainty in Ontario as to the scope of foreign state assets that “count” for the purposes of diplomatic immunity. Iran has publicly suggested that it will appeal the decision in *Tracy* and the matter will hopefully be resolved by the Court of Appeal for Ontario.