ARTICLE

THE STATE IMMUNITY SIESTA

Australia's top court renews Spain's understanding of ICSID

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In a recent decision, the High Court of Australia has ruled that an ICSID arbitration award between the Kingdom of Spain and a company from Luxembourg, Infrastructure Services Luxembourg S.à.r.l, can be recognised and enforced, but not the subject of execution. Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor provides clarity around the application of State immunity and develops an understanding on how the ICSID Convention can be interpreted.[1]

The ICSID Convention

In 1994, the Kingdom of Spain (**Spain**) became a signatory to the ICSID Convention, an institution attached to the World Bank. The goal of ICSID is to assist with the resolution of any potential dispute between the investor, and the State in which they placed their investment. As there needs to be mutual consent by the parties for the use of the ICSID Agreement, that option is often contained in bilateral or multilateral agreements.

1 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [2023] HCA 11.

The State immunity siesta

The High Court of Australia explored the reach of State immunity within the ICSID Convention.

The International Energy Charter

Spain and Luxembourg were both original signatories of the 2015 International Energy Charter and all its previous iterations dating back to 1991 (the **ECT**). This gave the option of arbitration if an investment taken under the direction of the treaty was disturbed by the host State, which was the case following the global financial crisis in 2008 when the Spanish government decided to stop its own investments in renewable energies. This decision has proven to be a constant headache for Spain as it bears the brunt of multiple awards against it, all filed under the ECT.[1]

In the belief that Spain had disrupted the investment of Infrastructure Services Luxembourg Sàrl (**Eiser**), the company sought an arbitral award under the ICSID Convention. The ICSID arbitrators found in favour of Eiser, awarding it €101 million.

Decisions of the Federal Court

Finding itself without a cent from Spain, Eiser sought to have the arbitration award enforced through the Australian courts. Eiser argued that section 35(4) of the *International Arbitration Act 1974* (Cth) permits the enforcement of a foreign award. Spain, meanwhile, centred *States Immunities Act 1985* (Cth) (the **Act**) in its argument, highlighting that the purpose of the Act was to grant State immunity.

In the Federal Court, Justice Stewart affirmed that the Act provided exceptions to the cover of State immunity, a crucial one being that application would not occur where the State had submitted to the jurisdiction by agreement. As a party to ICSID, Spain had also agreed to Articles 53, 54, and 55 of the ICSID Convention. This meant that Spain had waived its immunity from recognition and enforcement

1 Spain has now commenced the formal process of leaving the ECT. Publicly, this is because the Spanish government views the ECT as an obstacle to stopping climate change. However, what has been omitted is that many of these disputes, in which Spain is the target, are occurring because Spain has withdrawn from investments in renewable energy.

of the award. Justice Stewart made orders against Spain and held that it pay the applicants the full €101 million. However, Spain's immunity from execution of the award remained.

The investors appealed to the Full Court of the Federal Court, where it was again held that immunity from a proceeding for recognition was waived because of Spain's signing of the ICSID Convention. In these proceedings, Spain had also argued that Eiser had initially brought proceedings against Spain for both recognition and enforcement. Enforcement, it argued, was not distinguishable from execution. If execution could receive State immunity, then State immunity existed for the entire proceedings. Like Stewart J, the Full Court did not disagree with Spain that State immunity existed for execution. However, the Full Court rejected Spain's arguments on the grounds that:

- at Art 54(1) and (2) of the ICSID Convention a party can seek recognition without seeking enforcement; and
- this had in fact been the case in the initial proceedings.

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Decision of the High Court

The issues for the High Court (the **Court**) to consider were whether:

- Spain waived any foreign State immunity from the jurisdictional reach of the Australian courts as a result of its acceptance of Articles 53, 54, and 55 of the ICSID Convention;
- Spain's potential subjection to the Australian courts has limitations; and
- the lower courts' orders could be considered enforcement.

On the first point, the Court found against Spain. Spain had made itself subject to the ICSID Convention and in doing so, fell under the jurisdiction of the Australian courts.

Regarding the second two points, the Court held that this waiver of State immunity extended itself to both recognition and enforcement of awards. This answer was partially reached through an analysis of some of the key terms of ICSID. Definitions were provided on these crucial concepts:

- **recognition** represents a court's finding that an international arbitral award is permitted to be considered binding;
- **enforcement** is the legal process in which an international award is limited to a judgment of a court, wherein that international award enjoys the same status as any judgment of that court; and
- **execution** is the process and means in which a judgment enforcing an international arbitral award is given effect.

Spain had also submitted an argument (one, which the Court added, was not *fully developed*) concerning the decision of the Court of Justice of the European Union in *Republic of Moldova v Komstroy LLC*.[2] The decision suggested that the investor-State arbitration clause within the ECT could not apply to intra-EU investment disputes. However, that did not change the fact that Spain had also agreed to the ICSID Convention. It was that, not the ECT, which would subject Spain to the jurisdiction of Australia.

Lost in translation

One of the arguments raised by Spain was that the Spanish and French versions of the text differed substantially. The Court considered Spain's description on how French and Spanish do not distinguish between "enforcement" and "execution". If true, an important distinction because the French and Spanish versions of the text hold equal weight.

Although the Court held that there was in fact no conflict between the texts, the Court theorised about what ought to occur if it were the case. Accordingly, the meaning that should be selected is the one which best reconciles the texts, centring upon the object and purpose of the ICSID convention. In that event, the Spanish and French versions would have to correspond with the English version. "Enforcement" and "execution", therefore, will always have to be treated as different concepts.

Limits of State immunity in New Zealand

Although the decision does not comment on similar case law in New Zealand, parallels can be drawn with the recent New Zealand High Court decision of *Sodexo Pass International SAS v Hungary*.[3] In that case, the High Court similarly reviewed Articles 53 to 55 of the ICSID Convention. The High Court found it was clear and unambiguous that the ICSID Convention intended to waive State immunity for proceedings concerning recognition of an award but maintain it for those concerning execution. Unlike Australia, the existence of State immunity in New Zealand is primarily found in case law. The *Sodexo* decision built on *Young v AG*,[4] a decision which held that there are real limits to State immunity in New Zealand.

Conclusion

The Court's decision should largely be seen as a victory for investors. In reading Articles 53 to 55 the way it did, the Court reaffirmed Australia as a jurisdiction favourable to arbitral awards. However, while the decision was emphatic in its rejection of State immunity in places where the ICSID Convention marks its presence, the decision does embrace the concept for the crucial step of execution. This will prove to be difficult for any investor coming against a State determined to run faster than the bulls.

2 *Republic of Moldova v Komstroy* LLC [2021] 4 WLR 132.

3 *Sodexo Pass International SAS v Hungary* [2021] NZHC 371.

4 *Young v Attorney-General* [2018] NZCA 307.