Courts Grapple with State Immunity as Spain Resists Enforcement of Arbitral Awards

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A number of courts in different jurisdictions have recently issued decisions considering Spain's entitlement to State immunity in proceedings seeking to enforce arbitral awards against it. The latest instalment in the long-running saga of investment treaty arbitrations against Spain sees domestic courts critically examining whether Spain can rely upon State immunity to preclude proceedings seeking recognition and enforcement of ICSID awards.

Background

Many readers will be familiar with Spain's decision over a decade ago, in July 2013, to terminate certain renewable energy tariffs. That decision sparked a wave of over 50 investment treaty cases against Spain, primarily under the Energy Charter Treaty (the "ECT"). Over two-thirds of these cases have resulted in awards in favour of investors, who are now attempting to enforce the awards in courts across the world. Spain has, so far, consistently resisted enforcement, including on grounds of State immunity. Spain currently has outstanding obligations in excess of $1.4 billion in respect of ICSID awards alone.

We look, in turn, at judgments of the English Commercial Court, the Australian High Court and the U.S. District Court for the District of Columbia ("D.C. District Court") that have considered Spain's immunity defence.

The English Commercial Court

In *Infrastructure Services Luxembourg S.A.R.L. and Energia Thermosolar v Kingdom of Spain* [2023] EWHC 1226 (Comm), the claimants sought to enforce a 2018 ICSID award rendered in *Antin Infrastructure Services v Spain* (ICSID Case No. ARB/13/31), awarding damages of approx. €112 million to the claimants (exclusive of interest). The ICSID tribunal in *Antin* found Spain liable for breaching Article 10 of the ECT, which provides for the fair and equitable treatment of investors.

After successfully resisting Spain's application for annulment, the claimants applied to register the award in England and Wales, on an *ex parte* basis, under the Arbitration (International Investment Disputes) Act 1966 (the "1966 Act"). The 1966 Act provides that a "*person seeking recognition or enforcement of [an ICSID Convention] award shall be entitled to have the award registered in the High Court*". The ICSID Convention regime significantly limits the bases upon which domestic courts may refuse recognition and enforcement of an authenticated ICSID award. The English courts are therefore precluded from re-examining awards unless certain exceptional circumstances apply.

As confirmed by the UK Supreme Court in its 2020 decision in *Micula and others v Romania* [2020] UKSC 5, the English courts cannot refuse to recognise an ICSID award:

- on grounds of public policy;
- on the basis that the ICSID tribunal did not have jurisdiction; or
- because of contentions that the ICSID tribunal improperly conducted the arbitral proceedings.

The *Antin* award was registered in June 2021. Spain applied to set aside the order granting registration, including because it claimed entitlement to immunity from the jurisdiction of the English courts. On immunity, Spain argued that:

- The Court of Justice of the European Union (the "CJEU") had held in *Achmea* and *Komstroy* (discussed previously here and here) that the ECT contravened the law of the European Union ("EU"). Therefore, notwithstanding Spain's status as a State party to the ECT (and the ICSID Convention), Spain could not have consented to arbitrate intra-EU disputes. In this case, the investors were companies based in the Netherlands and Luxembourg. The ICSID tribunal did not, therefore, have jurisdiction to hear the dispute. Spain and other EU countries have raised this argument in a number of ECT cases and this has become known in recent years as the 'intra-EU' objection.
- In the absence of valid consent to arbitrate, Spain, as a sovereign State, was entitled to adjudicative immunity in the English courts under section 1 of the UK State Immunity Act 1978 (the "SIA 1978").

The claimants resisted this, arguing that Spain had either submitted to the English courts' jurisdiction on the basis of a prior written agreement waiving immunity (pursuant to s 2(2) of the SIA 1978); or that Spain had given its consent in writing to arbitrate disputes arising between the claimants and Spain (thereby waiving immunity pursuant to s 9 of the SIA 1978). The claimants relied, as evidence of Spain's submission or consent, on (i) Article 26 of the ECT, which provides for the

settlement of disputes under the ECT through investor-State arbitration under the ICSID Convention; and (ii) Article 54 of the ICSID Convention, which provides that each State party to the ICSID Convention is required to recognise arbitral awards as final and binding, and to enforce that award "*as if it were a final judgment of a court in that State*".

Fraser J agreed with the claimants, and rejected Spain's immunity defence, making two key findings:

- **Spain's intra-EU objection did not "trump" the United Kingdom's treaty obligations**: The CJEU's judgments in *Achmea* and/or *Komstroy* only reflected the CJEU's stance, as a matter of EU law, on the question of validity of intra-EU ICSID awards. They did not override or "*dilute*" the United Kingdom's own international treaty obligations under the ICSID Convention, including the obligations to recognise and/or enforce international arbitration awards.

- **Spain had waived its State immunity**: Fraser J agreed with the claimants that Article 54 of the ICSID Convention and Article 26 of the ECT constituted a "*prior written agreement*" of Spain's submission to the English jurisdiction for the purposes of section 2 SIA 1978. The same provisions also amounted to an agreement in writing to submit disputes to arbitration and, therefore, a waiver of immunity under section 9 SIA 1978.

Fraser J further noted that if an ICSID annulment committee had already considered and dismissed objections regarding the award, then there would be "*no grounds for repetition or rehearing of those in the [English] Court. [] To do so would be contrary to the ICSID Convention and the 1966 Act, and is exactly what international arbitration is designed to avoid.*" Fraser J has made it clear that, absent some exceptional circumstance, it is not open to Spain to reargue that the awards are not valid or binding against Spain. The decision sets out in clear terms that the English courts will recognise an ICSID arbitration award obtained against Spain, notwithstanding a series of unsuccessful objections raised by Spain.

The Judgment of the Australian High Court

In parallel to the English proceedings, the same claimants also commenced enforcement proceedings in Australia. In *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11, Spain sought to resist enforcement on the basis that it was immune from recognition and enforcement proceedings under the Australian Foreign States Immunities Act 1985 (the "1985 FSIA"). Similar to the United Kingdom's SIA 1978, section 10 of the 1985 FSIA provides that a State will be taken to have waived immunity and submitted to the jurisdiction of the Australian court by, for example, agreeing so under an international treaty.

As before the English court, the claimants argued that Articles 53-55 of the ICSID Convention constituted an express or implied waiver of immunity by which Spain had submitted to the Australian court's jurisdiction.

Each of the Australian courts—the first instance court, the appellate Full Federal Court, and the High Court (Australia's highest appeals court)—rejected Spain's plea of immunity, agreeing with the claimants that Spain's accession to the ICSID Convention amounted to an implied waiver of Spain's State immunity under the 1985 FSIA. The Australian courts held that the waiver encompassed both the recognition and enforcement of the ICSID award in the Australian jurisdiction but did not extend to the State's immunity from execution (which, in any event, was preserved under Article 55 of the ICSID Convention).

A Split Approach in the United States?

Separate decisions issued in the D.C. District Court signal a less unified approach under the U.S. Foreign Sovereign Immunities Act (the "US FSIA") in awards issued for different investor-claimants.

In February 2023, Judge Chutkan upheld the D.C. District Court's jurisdiction to enforce arbitral awards against Spain in the decisions of *9REN v Kingdom of Spain* and *NextEra v Kingdom of* Spain. In doing so (and as discussed in a prior update), the D.C. District Court rejected Spain's intra-EU jurisdictional defence as "*a question of arbitrability and therefore an issue of the award's merits*" and stated that Article 54 of the ICSID Convention prevented the court from re-examining the tribunals' jurisdictional findings.

However, a month later, a different judge, Judge Leon, took a contrary stance in the context of another intra-EU arbitral award against Spain. In *Blasket Renewable Invs. LLC v Kingdom of Spain* ("*Blasket*"), the investor-claimants contended that there was a valid arbitration agreement, and that there was a corresponding waiver of Spain's immunity under the US FSIA. The court considered that it could not defer to the underlying tribunal's decision regarding the existence of a valid arbitration agreement. Instead, the court considered that it was required to undertake a substantive inquiry into the existence of that arbitration agreement for the purposes of the US FSIA. That case did not concern an ICSID award, but one convened under the UNCITRAL rules and seated in Geneva, Switzerland.

As part of that inquiry and in considering the text of the ECT, which required arbitrators to interpret its provisions in accordance with "*applicable rules and principles of international law*", Judge Leon accepted Spain's argument that EU law was part of the rules of international law applicable to EU Member States parties to the ECT. Diverging from the stance taken by the English and Australian courts and

the earlier D.C. District Court decisions, the judge also upheld Spain's argument that the decisions of the CJEU in *Achmea* and *Komstroy* stood for the proposition that, as a matter of international law, EU Member States had not consented to arbitrating disputes with investors domiciled in other EU Member States under investment treaties such as the ECT.

Both U.S. decisions are currently pending appeal before the U.S. D.C. Circuit Court of Appeals.

Comment

The conclusion of the arbitral process and obtaining a favourable award is often not the end of a claimant's mission, and difficulties can sometimes arise during the recognition and enforcement process.

Because State immunity is, in most jurisdictions, a bar to any form of legal proceedings (unless waived), States may invoke pleas of immunity before domestic courts in enforcement proceedings. The above decisions illustrate that domestic courts will critically examine these defences. In the case of enforcement proceedings for awards rendered under the ICSID Convention regime and given the express provisions of the ICSID Convention, it is unlikely that such immunity pleas will succeed. Ultimately, States explicitly consent to arbitral proceedings under the ICSID Convention regime and that consent includes an agreement to recognise and enforce final awards rendered under that regime.

However, in disputes where there are no treaties with express provisions on immunity, parties should be cognisant of the relevant State immunity protections. In those circumstances, counterparties to States should endeavour to include the appropriate waivers for enforcement in contractual arrangements.

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