AUSTRALIAN COURT SIGNALS RESTRICTIVE APPROACH TO SOVEREIGN IMMUNITY IN ENFORCEMENT ACTION AGAINST SPAIN

In the first decision of its kind, an Australian court has temporarily stayed the enforcement of a €101 million international arbitral award against the Kingdom of Spain[1],confirming Australia as an increasingly favourable site for the enforcement of arbitral awards against foreign states. The stay was requested by the award creditors and, somewhat counter-intuitively, opposed by Spain (the award debtor). The issues before the Court included a claim by Spain to sovereign immunity from the jurisdiction of the Australian courts.

Key issues

- Australia has long been seen as a favourable jurisdiction for the enforcement of foreign arbitral awards in commercial matters.
- With a combination of modern, "*pro-arbitration*" law, a clear "*pro-enforcement*" bias in judicial practice and a restrictive approach to sovereign immunity, Australia is increasingly seen as a favourable site for the enforcement of arbitral awards against foreign States.
- For investors with claims or arbitral awards against European States under intra-EU investment treaties, Australia may be an attractive alternative for enforcement.
- The *Infrastructure Services* enforcement action is on hold, pending outcome of Spain's annulment application at ICSID, but if it resumes it should provide important guidance to investors in this situation.

THE AWARD

The case concerns a 2018 investment arbitration award rendered by a 3-member tribunal constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention**). The award in question forms part of a series of unfavourable awards against Spain, arising out of legislative reforms to its energy sector between 2012 and 2014.[2] These legislative reforms have given rise to approximately 40 investment claims against Spain to date.[3]

On 1 November 2013, Infrastructure Services Luxembourg S.A.R.L. and Energia Solar Luxembourg S.A.R.L (together, the **Investors**) initiated arbitral proceedings against Spain at the International Centre for Settlement of Investment Disputes (**ICSID**), under the Energy Charter Treaty (**ECT**). On 15 June 2018, the ICSID arbitral tribunal found Spain liable for breaching the fair and equitable treatment standard of the ECT[4] and awarded the Investors €112 million in compensation.

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[1] Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220.

[2] UNCTAD Investment Policy Hub, "Spain: Reforms energy subsidies", accessed 13 August 2019, https://investmentpolicy.unctad.org/investment-policy-monitor/measures/2347/reforms-energy-subsidies .

[3] UNCTAD Investment Policy Hub, "Spain: Cases as Respondent State", accessed 13 August 2019 https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain

[4] ECT Article 10(1).

Approximately one month later on 24 July 2018, Spain challenged the quantum of the award and requested rectification of the award under Article 49 of the ICSID Convention.[5] In response, the Investors filed for enforcement of the award in Washington DC on 27 July 2018.

In the US enforcement action, the Investors sought enforcement and Spain sought a stay of proceedings (the reverse of the position Spain would later take in Australia). Spain premised its stay application on its recent rectification request, while the Investors argued that rectification requests were entirely different from other types of post-award relief and as such, did not warrant a stay of proceedings.[6] The outcome of these US proceedings is not yet clear.

ICSID Annulment Proceedings

Spain filed for annulment of the award on 23 May 2019. Because the award was issued under the ICSID Convention, this annulment application was made to ICSID, rather than a national court. In exercising its right under Article 52(1) of the ICSID Convention, Spain also requested the provisional stay of enforcement proceedings until the annulment proceedings were completed. ICSID registered Spain's request on the same day, provisionally staying enforcement of the award pursuant to Article 52(5) of the ICSID Convention.

Australian Enforcement Proceedings

In advance of Spain's request for annulment and stay of proceedings, the Investors initiated proceedings in Australia for enforcement of the ICSID award and filed for enforcement on 17 April 2019 in the Federal Court of Australia.[7] The case was brought before Stewart J.

On 23 May 2019, Stewart J ordered Spain to file and serve a notice of appearance and to outline its basis for opposing enforcement. In response, Spain asserted that it enjoyed immunity from the jurisdiction of Australian courts pursuant to section 9 of the Foreign States Immunities Act 1985 (Cth) (**Immunities Act**) and further, that its appearance was only conditional for the purposes of asserting the same.[8] Stewart J set a final hearing date for 29 October 2019 to determine Spain's claim for immunity.

On 15 July 2019, the Investors requested that the Court temporarily stay its application so that they would be able to comply with ICSID's provisional stay orders, noting that they would seek to continue the enforcement proceedings once the ICSID stay of proceedings had lifted. Since Spain's claim of foreign immunity formed part of the Australian proceedings, it followed that the 29 October 2019 hearing would be stayed as well.

Spain opposed the Investors' application for a stay, arguing that the provisional stay in the ICSID proceedings did not impact the Court's ability to determine its foreign immunity claim. In response, the Investors argued that if the stay was not granted, they would be placed in a difficult position — if they participated in the foreign immunity hearing, they would be in breach of the provisional stay order issued by ICSID; if they did not, they would be in breach of the Federal Court's orders. The Investors argued that the only solution was

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[5] Spain was partially successful in this application — on 29 January 2019, the award was adjusted from €112 million to €101 million.

[6] Infrastructure Services Luxembourg SARL et al. v. Kingdom of Spain, Case number 1:18-cv-01753, in the U.S. District Court for the District of Columbia, https://www.italaw.com/sites/default/files/case-documents/italaw9877.pdf .

[7] The ICSID Convention has the force of law in Australia pursuant to section 32 of the International Arbitration Act 1974 (Cth).

[8] Spain exercised this right in accordance with section 10(7) of the Foreign States Immunities Act 1985 (Cth).

for the Court to grant the stay of the whole enforcement proceeding and vacate the 29 October hearing in the interim.[9]

Foreign State Immunity

In Spain's view, the Investors' application for a stay was an "*impermissible attempt to implead*" Spain into proceedings undertaken by a court from whose jurisdiction Spain was immune.[10] Spain asserted that the Investors could either discontinue enforcement proceedings or defer their request for a stay until after 29 October 2019, by which time Spain's foreign State immunity claim would have been decided.[11] As Stewart J observed, Spain's insistence appeared to be heavily motivated by the fact that, in similar proceedings elsewhere, the exact same foreign immunity issue was to be determined on the same day (29 October 2019)[12].

The Investors proceeded with their stay application. Spain did not appear in the Federal Court on 1 August 2019 when the matter was heard, ostensibly to avoid submitting to the jurisdiction of the Court.[13]

Federal Court Decision

On 1 August 2019, Stewart J granted a stay of the Australian proceedings. In delivering his decision, Stewart J considered the following questions:

1. does the automatic provisional stay of the ICSID award pending an annulment decision conflict with Australia's obligation as a Contracting State to enforce the award?
2. must the Court first resolve the issue of the grant of stay or Spain's claim of foreign immunity?; and
3. does the Court have jurisdiction to order the stay?

In answer to the first question, Stewart J noted the apparent conflict between Article 52(5) (automatic provisional stay pending decision on annulment) and Article 54(1) (obligation of State to enforce an award) of the ICSID Convention.[14] His Honour concluded that, read and understood together, the only logical way of reading these two provisions in harmony was to determine that the suspension of a party's obligation to comply with the award (as a result of the provisional stay) necessarily suspended the obligation of the Contracting State (in this case, Australia) to enforce the award.[15]

In answering this question, Stewart J relied on ICSID jurisprudence to inform his decision and in doing so, adopted the decision of the *ad hoc* Committee in *Maritime International Nominees Establishment v Republic of Guinea*[16]. In that case, the ICSID Annulment Committee contemplated the interplay between Articles 52 and 54 and held that Contracting States were to be

9 [2019] FCA 1220 at [19] to [25].
10 [2019] FCA 1220 at [21].
11 [2019] FCA 1220 at [23].
12 [2019] FCA 1220 at [22].
13 [2019] FCA 1220 at [25].
14 [2019] FCA 1220 at [27] to [28].
15 [2019] FCA 1220 at [29] to [30].
16 ICSID Case No. ARB/84/4, Interim Order 1, 12 August 1988: see [2019] FCA 1220 at [29] to [30].

reasonably relieved of their obligations to enforce when enforcement was temporarily suspended by operation of a stay order under Article 52.[17]

In answer to the second question and the third question, Stewart J considered Spain's submissions that Australian courts had no jurisdiction by virtue of section 9 of the Immunities Act.[18] His Honour held that despite Spain's conditional appearance and assertion of foreign immunity, the Court was not obliged to determine Spain's claim before deciding the stay order.[19] Referring to the decision of the High Court of Australia in *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*,[20] Stewart J held that ordering a stay of proceedings did not implead Spain in any way or make it a party to a legal proceeding against its will.[21]

In considering PT Garuda Indonesia, Stewart J noted the case of *Zhang v Zemin,*[22] which the High Court identified as contrasting with its decision in PT Garuda Indonesia in certain instances. In *Zhang*, the New South Wales Court of Appeal held that courts were to decide questions of foreign State immunity before rendering any *"judgment, order or process".*[23] However, in Stewart J's view, an interlocutory order granting a stay of proceedings was not within the class of *"judgments, orders or processes"* against which Spain could assert foreign State immunity, because a stay would not impose a duty upon Spain. Accordingly, the Court considered that Spain's claim of foreign State immunity could be resolved after the grant of a stay order.

In relation to Spain's claim that the Court lacked *"jurisdiction"*, Stewart J clarified that under section 23 of the *Federal Court of Australia Act 1976* (Cth), the Federal Court was empowered with subject matter jurisdiction. In the Court's view, this power enabled it to consider and determine procedural issues (such as stays) even when foreign State immunity had been made out. Spain's defence and reliance on section 9 of the Immunities Act was therefore inapplicable.

The Court ultimately granted the Investors' request to stay the proceedings.

Implications of the Decision

Even though this was merely a procedural decision, it should still be of comfort to investors.

First, it shows that Australian courts understand the key role national courts play as enforcement authorities in the investor-State dispute settlement system of the ICSID Convention and that, where appropriate, they will look to international jurisprudence where questions regarding procedures under the ICSID Convention arise.[24]

Second, it confirms that investors from across the globe are increasingly identifying Australia as a favourable jurisdiction for the enforcement of arbitral awards against foreign States. The decision shows that Australian courts will

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17 *Maritime International Nominees Establishment v Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order 1, 12 August 1988, at [10].

18 [2019] FCA 1220 at [30] to [33].

19 [2019] FCA 1220 at [37].

20 [2012] HCA 33.

21 [2019] FCA 1220 at [37], citing PT Garuda at [17].

22 [2010] NSWCA 225.

23 [2010] NSWCA 225 at [33] to [37].

24 For a detailed discussion of the law and practice of enforcement of treaty arbitration awards in Australia, see Devendra, I., Greenberg, S., Luttrell, S., Weeramantry, R., "Australia", in Fouret, J. (ed), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law & Business, 2015), pp. 137-154.

properly perform their role as enforcing authorities even where the award in question is unrelated to Australia. The enforcement proceedings in this case were brought apparently on the sole basis that Spain held assets in Australia, against which the Investors could enforce their ICSID award – far away from the effects of the *Achmea* decision.

Third, though the issue of sovereign immunity remains open in substance, the Federal Court's ruling that a stay can be granted pending a ruling on sovereign immunity suggests that the Court may be inclined to take a narrow view of immunity from jurisdiction where the enforcement of an investor-State award is at issue. Spain's application for annulment at ICSID remains pending but enforcement proceedings before the Australian courts will likely resume if the award survives. It may be assumed that, if the enforcement proceedings resume, Spain will renew its claim to foreign State immunity, on the slightly different basis that enforcement of an award would implead Spain or make it a party to a legal proceeding against its will. Given the nature of the ICSID Convention and the system for the enforcement of arbitral awards it contains, the Federal Court may well be disinclined to accept this reasoning. The Court may take the view that an order for enforcement of an arbitral award, like an order staying enforcement proceedings, does not implead a respondent State or make it a party to a legal proceeding against its will, as the State has expressed its will to be a party to enforcement proceedings by consenting to arbitration and the legal consequences it produces (including adverse awards and enforcement proceedings in national courts). If Spain is held not to be immune from the jurisdiction of the courts of Australia, and enforcement is granted, the question will presumably become whether Spain's property in Australia is immune from execution of the award.

This is, therefore, a case to watch. If this award is enforced in Australia, this will be the first successful attempt by European parties diverting enforcement to Australia to circumvent the effects of *Achmea* and the declaration of the European Commission's Competition Office that any compensation paid by Spain to foreign investors over its renewable energy cases constitute unlawful state aid.

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