

A BOOMERANG BLOW TO THE ENFORCEMENT OF ARBITRAL AWARDS AGAINST SPAIN. THE HIGH COURT OF AUSTRALIA ALLOWS THE "RECOGNITION" AND "ENFORCEMENT" OF A MULTIMILLION ICSID AWARD TO RENEWABLES INVESTOR INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L. BUT ITS "EXECUTION" IT'S LEFT FROM THE LEGAL DISCUSSION, FRUSTRATING AN APPARENT VICTORY.

Arbitration analysis: In a judgment dated 12 April 2023, the Australian High Court has dismissed the appeal lodged by the Kingdom of Spain ("Spain") and upheld the recognition and enforcement of the €101 million ICSID award favourable to renewable energy investor Infrastructure Services Luxembourg S.À.R.L. ("Respondent"). The court considered that the State had effectively waived its regime of sovereign immunity from the Australian jurisdiction under Part II of the Foreign States Immunities Act 1985 ("FSIA"). However, immunity from jurisdiction to execute the award, a crucial and distinct from "recognition" and "enforcement" included in Part IV of the FSIA, remains intact for Spain, representing a significant setback against the Respondent.

By interpreting the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), the High Court of Australia concluded that "recognition" refers to a binding requirement to recognise an award before the domestic courts, while "enforcement" relates to the financial obligations imposed by the arbitral award to be enforced as if it was a final judgment issued by a domestic court. These two concepts sensibly defer from "execution", which refers to how a judgment enforcing an international arbitral award is given effect, commonly through specific measures against the executed party's assets within the court's domestic jurisdiction.

However, although Spain had effectively waived its immunity against "enforcement" and "recognition", immunity from "execution" still protects the State from the practical executive actions against its assets in the Australian jurisdiction. Therefore, although the judgment of the High Court rejected the Spanish appeal confirming the lower courts decisions, these only concerned the recognition and enforcement of the ICSID Award, not its execution, to the despair of the Respondent, who will no doubt not be so interested in terminological discussions but in the actual payment.

Written by Josep Galvez, English Barrister, Del Canto Chambers (London) and Spanish Abogado, Litigo Partners (Barcelona).

Kingdom of Spain v Infrastructure Services Luxembourg S.A.RL. & Anor [2023] HCA 11

What are the practical implications of this case?

The decision by the High Court of Australia is indeed a blow to the Respondent's interests and others claimants against Spain, particularly given the abundant almost identical proceedings still pending in various common law jurisdictions such as the US or the UK. Although the appeal lodged by Spain was declined, this last decision by the Australian highest court in this long-lasting litigation is far from the effective enforcement ("execution") against Spanish assets in the Australian jurisdiction. On the contrary, it will probably bring more ammunition to the State's defence.

Indeed, as the judgment by Australia's apex court points out, a waiver by a foreign State of its immunity against "enforcement" and "recognition" does not strictly mean it has also waived its immunity against "execution", a terminological aspect with very relevant consequences.

Accordingly, although the appeal was dismissed, confirming that the State waived the general regime of sovereign immunity from jurisdiction concerning the "recognition and enforcement", it left Spain immune from jurisdiction to "execute" the award, i.e. the inexistence of action leading to force the country to payment of the € 101 million ICSID award.

Therefore, professionals in the legal arena advising when potential investments are projected in a particular country should look prudently at the exact extension of the State's waiver of

immunity and its implications in the latter and most critical stage of any cross-border arbitration proceedings: the execution of the arbitral award. Even further, the different translations of legal terms under other legal traditions can lead to situations such as this one, where a particular case of lost in translation is resolved to the detriment of the apparent winning party to the dispute, with its consequent extenuation and frustration as the payment is still far from becoming a reality.

What was the background?

Like many others against the country, the case stems from the renewable energy incentives reversed by the Spanish government, allegedly in breach of the Energy Charter Treaty (ECT) and initially implemented to attract investors during the early 2000s decade.

The Respondent brought arbitral proceedings against Spain under the ICSID, and in June 2018, it obtained the ICSID €101 million Award. In April 2019, the Respondent brought an action before the Federal Court of Australia seeking the ICSID Award enforcement under section 35(4) of the International Arbitration Act 1974.

Spain filed a conditional appearance opposing the enforcement, arguing it had sovereign immunity under the Foreign States Immunities Act 1985, which provides that a foreign State is immune from the jurisdiction of the courts of Australia, except as provided by that same Act. In particular, one crucial circumstance where this immunity does not apply is where the foreign State has submitted to the court's jurisdiction, including a treaty such as the ICSID Convention. Accordingly, the Australian courts had to consider whether Spain had submitted itself to its jurisdiction by signing the ICSID Convention.

The relevant aspect brought by Spain as a defence to the enforcement was based on a terminological issue. According to the country, the English terms 'recognition', 'enforcement' and 'execution' have different meanings in Spanish ("reconocimiento" y "ejecución"), concluding that Spain did not waive its sovereign immunity for the "execution" proceedings.

In the first instance, Justice Stewart rejected Spain's plea for immunity, concluding that Spain consented to the jurisdiction of the Australian courts due to its agreement with both the ECT and the ICSID Convention arbitration mechanisms, ordering the country to pay the ICSID Award.

In March 2020, Spain challenged the decision before the Full Federal Court, arguing that the action brought by the Respondent should be characterised as "recognition" and "enforcement" but not "execution". The Full Federal Court (Allsop CJ, Perram and Moshinsky JJ) rejected the allegations by Spain but considered that the first instance decision had wrongly required it to pay as proceedings could not be for 'recognition' and 'enforcement' but simply 'recognition' alone. Nonetheless, the Full Federal Court considered the award binding on Spain and that a "judgment be entered" for the €101 million. Still, it significantly concluded that the order should be construed as derogating from the effect of any law relating to immunity from "execution".

Spain appealed the decision before Australia's apex court, the High Court.

What did the court decide?

In a single, joint judgment, the High Court of Australia held that Spain's agreement to the ICSID Convention amounted to waiving its immunity from recognition and enforcement of the award.

However, the High Court ascertained that the terms used in the ICSID Convention. "recognition" and "enforcement", carry distinct meanings to "execution", which belongs to the formal proceeding through which a judgment giving effect to the award's enforcement is effectively executed against the debtor.

Accordingly, the High Court concluded that the orders made by the lower courts were adequate as orders for recognition and enforcement, and on that basis, Spain cannot claim immunity. Therefore, the primary matter sought by the Respondent, i.e. the actual payment of the ICSID Award, is outside the scope of the legal discussion taken to the highest judicial instance, as it is

a separate issue ("execution") to the absolute defeat of the proceedings commenced in the Australian jurisdiction.

Case details

- Court: High Court of Australia
- Judges: Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ
- Date of judgment: 15 March 2023