

Kluwer Arbitration Blog

Recognition, Enforcement or Execution? The Full Federal Court's Nuanced Examination of Foreign Awards in Australia

Frank Bannon, Stephanie Khan, Xara Kaye (Clayton Utz) · Tuesday, August 3rd, 2021

The International Convention on the Settlement of Investment Disputes (**ICSID Convention**) contains two provisions regulating compliance with arbitral awards. Article 53(1) provides that an award shall be binding on the parties. Article 54(1) requires each contracting State to recognise an ICSID award as binding. In this regard, it is common for parties to comply with ICSID awards without the need for court intervention.¹⁾ However, States do sometimes seek to resist their Convention obligations, in which case the matter may end up before a domestic court. In *Kingdom of Spain v Infrastructure Services Luxembourg* [2021] FCAFC 3 (**Judgment**), the Full Federal Court of Australia allowed an appeal in relation to the application of the **Foreign States Immunities Act 1985 (Cth) (FSIA)** to ICSID awards rendered against contracting States to the ICSID Convention. Doing so, it confirmed that no defence of sovereign immunity will be available to a State seeking to resist recognition of an ICSID award. It also laid down clear principles for the recognition of awards made under the ICSID Convention.

First Instance Decision

The two ICSID disputes at issue in the Australian court proceedings related to the investment of EUR 139,500,000 in solar power generation projects, and a series of financial incentives which the investors had relied upon when investing in Spain. The investors successfully obtained two ICSID awards against Spain for its failure to accord fair and equitable treatment of the investors, in breach of Art 10(1) of the Energy Charter Treaty. The **Australian Federal Court** granted the applicant investors leave for the recognition and enforcement of the awards. This decision was appealed by Spain. The principal issue upon appeal remained sovereign immunity, and whether ratifying the ICSID Convention constituted submission to jurisdiction.

Decision on Appeal

The Full Federal Court allowed the appeal. Doing so, it distinguished between “recognition” and “enforcement” of the awards, noting that the orders to which the applicant was entitled were those that reflected the outcome of a recognition proceeding, not one of enforcement.

The Court held that, as a general concept, recognition refers to the formal confirmation by a court that an arbitral award is authentic and has legal consequences under municipal law. In essence, the purpose of recognition is for the award to be recognised as binding. Enforcement, however, goes a step further, and refers to the process by which a successful party seeks the municipal court's assistance in ensuring compliance with the award (as recognised) and obtaining the redress to which it is entitled. Execution refers to the formal process by which enforcement is carried out (at para 26).

Despite this broad outline, which the Court acknowledged was "simplistic", the Court concluded that the proceeding was one of recognition. This is not a straightforward conclusion, as the ICSID Convention does not prescribe how to make an application for recognition; this is left to the domestic law of a contracting State.

In the Australian context, the [International Arbitration Act](#) (Part IV, and particularly s35) governs ICSID awards. The Court acknowledged that interpretation of section 35 is not without difficulty (at para 43). While it is headed 'Recognition of awards', this section does not explicitly confer an entitlement on a party to seek recognition of an award, it instead refers only to enforcement. The Court concluded that a construction that gives effect to Australia's international obligations should be preferred, and as such "enforced" should be read as including "recognised" in the International Arbitration Act.

Whether Spain could rely on a defence of State immunity in response to an application for recognition required analysis of the text of Articles 54 and 55 of the ICSID Convention.

In its analysis of Articles 54(1) and (2) of the ICSID Convention, the Court concluded that two distinct applications are contemplated. If the term enforcement in Article 54(2) were synonymous with recognition, this distinction would be redundant (at para 27). A party may seek recognition of an award without seeking its enforcement. Article 54(2) also provides for a party to apply for enforcement of an award without first applying for its recognition (at para 29).

The question then was whether Articles 54(1) and (2) constituted a submission to jurisdiction. If execution were read as including recognition in Article 55, the qualification of State immunity would consume the entire operation of Article 54. The recognition procedure in Article 54(2) would never be available against a State, rendering the obligation for a contracting State to recognise an award in Article 54(1) obsolete (at para 33). The Court held that such a conclusion would be perverse; Article 55 does not refer to recognition and there can be no warrant for reading it as if it did.

The Court concluded that Spain had agreed to submit to the jurisdiction of the Federal Court by virtue of those Articles in relation to a recognition proceeding, and Article 55 could have no impact on that conclusion. The Full Court thus held that sovereign immunity did not prevent parties from seeking recognition of an ICSID award, but made no decision as to the defence of sovereign immunity from enforcement proceedings.

Comments

The decision of the Full Court draws a clear distinction between recognition and enforcement of ICSID awards, and leaves open the extent to which a foreign State can rely on its immunity to

defeat enforcement proceedings and execution against its assets. The position in Australia is that Article 54(2) constitutes a submission to jurisdiction for the purpose of recognition. There are distinct questions remaining as to how the Court would settle the issues of State immunity from jurisdiction for the purpose of enforcement proceedings, and immunity from execution against foreign State property.

The orders for recognition made in relation to *Kingdom of Spain* were [published on 25 June 2021](#). These shed light on what is contemplated by recognition. The Court made an order that:

The Court hereby and in these orders recognises as binding on the respondent (the Kingdom of Spain) the award of the International Centre for Settlement of Investment Disputes... and pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth) the Court orders that judgment be entered in favour of the applicants against the respondent for the pecuniary obligations under the Award...

The orders go on to explicitly state that “Nothing in Order 1(a) shall be construed as derogating from the effect of any law relating to immunity of the respondent from execution.” These orders clarify that the Court sees its role in recognition proceedings as being limited to acknowledging the binding nature of ICSID awards on the parties (including State parties). The question of whether a State could claim a form of immunity (from execution or jurisdiction) against an attempt to compel compliance is expressly reserved and would be a matter for future consideration if the respondent did not voluntarily comply with the award (as recognised).

The recognition and enforcement of judgments made by foreign courts in Australia under the [Foreign Judgments Act 1991 \(Cth\)](#) (**Foreign Judgments Act**) faces similar hurdles. In *Firebird Global Master Fund II Ltd v Republic of Nauru* [No 2] [2015] HCA 53, the High Court of Australia held that foreign State immunity does not prevent proceedings to register a foreign judgment in circumstances where that judgment concerns a commercial transaction.

In that case, Nauru applied to have registration and garnishee orders (made by the Supreme Court of New South Wales) set aside, claiming, amongst other things, that proceedings to register a judgment invoked “*the jurisdiction of the courts of Australia in a proceeding*” within the meaning of section 9 of the FSIA, and Nauru was accordingly entitled to immunity from jurisdiction. The High Court held that Nauru was not immune from jurisdiction because the proceedings “*concerned a commercial transaction*” and therefore fell within an explicit exception to immunity in section 11 of the FSIA. Notably, the High Court dismissed the argument put forward by Firebird, that proceedings for registration of a judgment were not captured by section 9 of the FSIA; section 9 would have applied, but for the exemption.

Following the decision in the High Court, we know that a sovereign State’s immunity against suit extends to the registration of a foreign judgment under the Foreign Judgments Act, but can be lost where there is a statutory exception in the FSIA. The text of the Foreign Judgments Act clearly contemplates that enforcement (as defined in that Act) will follow registration. However, whether a judgment can be executed will depend on whether a State could then claim immunity of assets; as was the case in Firebird; this involves an assessment of whether State property in the jurisdiction can be classified as “in use” for “commercial purposes”.

With regard to guidance on recognition and enforcement of ICSID awards from other jurisdictions,

courts in the UK have repeatedly affirmed the primacy of the UK's obligation to recognise and enforce awards under the ICSID Convention. However, they have not drawn or considered a distinction between recognition (known in the UK as registration) and enforcement.

The [Arbitration \(International Investment Disputes\) Act 1966 \(UK Arbitration Act\)](#), and the Civil Procedure Rules 1998 part 62.21 outline a procedure for registration and enforcement of ICSID awards in the UK that reinforces a non-interventionist regime. The UK legislation expressly sets out how parties may apply for registration of an award and prescribes the effect of registration; a registered award “as respects the pecuniary obligations which it imposes, [shall] be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court”. The UK Arbitration Act goes on to explain that proceedings may be taken on the award, interest will accrue, and the High Court has control of execution. While there is greater clarity as to the process for applying for registration and enforcement in the UK, the same issues of State immunity from jurisdiction and immunity of State property could arise if investors seek to execute ICSID awards in the UK, as the State Immunity Act 1978 would apply.

So where do we go from here? In relation to ICSID awards, sovereign immunity defences will only be available to a State at the point that the creditor seeks to enforce and execute that ICSID award against assets located in Australia. In earlier recognition type proceedings, Article 54(2) will be considered a submission to the jurisdiction of the courts of Australia as a contracting State to the ICSID Convention. In distinguishing recognition from enforcement and execution, the Court has clarified what recognition in relation to ICSID awards entails. The orders made by the Federal Court on June 2021, unlike those at first instance, do not grant leave for the applicant to enforce the award, rather they are limited to an acknowledgment of the binding nature of the ICSID award and recording a judgment in favour of the award creditor for amounts payable under the award. Recognition of an award by another contracting State may apply some pressure on a debtor State to comply with its obligations under the ICSID Convention. However, if there is further recalcitrance an investor may have to combat arguments of State immunity in relation to enforcement and execution.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please [subscribe here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



References

?1 ICSID Convention, Regulations and Rules, ICSID/15 April 2006.

This entry was posted on Tuesday, August 3rd, 2021 at 8:38 am and is filed under [Australia](#), [Enforcement](#), [ICSID](#), [ICSID Convention](#), [International Investment Arbitration](#), [Sovereign Immunity](#), [State Immunity](#), [UK](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.