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Australia as a Recognition and Enforcement Jurisdiction? The High Court of Australia's Reasoning in Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11 and Likely Implications

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In June 2018, an International Centre for Settlement of Investment Disputes (ICSID) tribunal issued an award against Spain under the Energy Charter Treaty. The successful claimants then commenced proceedings in Australia seeking recognition and enforcement under the ICSID Convention. Spain responded that it had not submitted to, and therefore had immunity from, the jurisdiction of Australian courts, even though both it and Australia were States parties to the ICSID Convention. The proceedings made their way to the High Court of Australia (High Court) which handed down its judgment on 12 April 2023. The main issue of principle was whether Spain had submitted to the jurisdiction of the Australian courts by "agreement," including by treaty. If so, then Spain had no immunity from recognition and enforcement proceedings. This post considers the key aspects of the High Court's analysis and makes some observations in relation to its impact for Australia as a recognition and enforcement destination.

Background

Spain was unsuccessful both before the primary judge and Full Federal Court (as covered in a prior blog post). It has now lost its final appeal. Ultimately, by a process that involved both the interpretation of Australian domestic legislation (the *Foreign States Immunities Act 1985* (Cth)) and Articles 53-55 of the ICSID Convention, the High Court gave effect to the policy of mitigating sovereign risk that underpins the ICSID Convention (see esp. [34], [40] and [71]-[73] of the judgment (Reasons)).

The unanimous Reasons: 1) elucidate the test for waiver of immunity generally following on from decisions of other apex courts and of the International Court of Justice; and 2) apply that test in the specific context of Articles 53-55 of the ICSID Convention. As such, it stands to provide valuable assistance to other courts faced with questions of waiver, particularly in the context of Articles 53-55, which govern the recognition and enforcement of ICSID awards.

Notably, barely six weeks later, the Commercial Court of England and Wales delivered judgment arising out of the same underlying arbitration (as covered in this blog post). The Commercial Court cited the High Court's judgment (see [114]-[116]), finding it "persuasive" and considering it to

provide “separate free-standing support” for its own analysis. Like the High Court, the Commercial Court, on questions of immunity and waiver, also found that Spain’s entry into the ICSID Convention relevantly amounted to waiver (see at [91]-[125]). Other commentators have described both these recent decisions as “investor-friendly.”

The question that arose before the High Court was whether Spain’s agreement to Articles 53-55 of the ICSID Convention involved a waiver of immunity. The High Court addressed that question in two parts, as discussed below.

Issue 1: Waiver in Point of Principle

Articles 53-55 do not state, in terms, that the States parties waive or intend to waive immunity. As such, Spain argued that international law required waiver of immunity to be “express,” compelling the conclusion that it did not waive immunity through Articles 53-55.

The High Court accepted at [19]-[22] that any waiver, at international law, had to be express. However, it went on to explain, at [23]-[24], that:

> “Properly understood, express meaning can include implications, which constitute the unexpressed content of a statement or term and which are identified by inference.
>
> An express term of an agreement involves words that are ‘openly uttered’ either orally or in writing. The meaning of an express term is derived primarily from the content of the words expressed. It contrasts with an implied term, the meaning of which is derived primarily by inference from the conduct of the parties to the agreement and the circumstances in light of the express terms.” (emphasis added, citations omitted)

The High Court:

- explained that the various authorities “that insist upon express waiver of immunity in a treaty should not be understood as denying the ordinary and natural role of implications in elucidating the meaning of the express words of the treaty” (at [24]);
- accepted that implications are invariably contained in the words of a treaty, but cautioned that any inference of waiver can only be drawn “with great care” (at [26]); and
- emphasised that a “high level of clarity and necessity are required” before drawing such an inference, since waiver “is so unusual, and the consequence is so significant” (at [28]).

This elucidation of the meaning of “express” might appear counter-intuitive. However, it looks to the substance and content of the wording, read contextually and purposively, in order to draw a conclusion as to its legal effect. In so doing, it avoids the formalism of, effectively, requiring the word “waive” as a necessary precondition to any waiver of immunity. This aspect of the Reasons involved the interpretation of domestic legislation against the background of international law (at [27]).

The High Court concluded at [29] that this “aligns” with the U.S. approach. The stated alignment

appears to be one of principle rather than textual, since the *Foreign Sovereign Immunities Act of 1976* (28 USC §1604 and 1605(a)(1)) – in contrast to the Australian statute – provides for waiver "either explicitly or by implication." Nonetheless, the relevant waiver here was found to be "unmistakeable" (at [29]).

Issue 2: Did Agreement to Articles 53-55 Involve any Waiver?

On this second issue, the High Court answered "Yes," by reference to:

- the *travaux préparatoires* to, and structure of, the ICSID Convention;
- the established principles of treaty interpretation; and
- the textual meaning of recognition, enforcement, and execution (see Reasons at [30]-[58]).

As to the last of these points, the High Court observed at [43]-[44] that the English text of Articles 53-55 clearly distinguished between:

- "Recognition" (which involved an obligation to recognise the award "as binding");
- "Enforcement" (of the pecuniary obligations imposed by the award); and
- "Execution" (which, by Articles 54(3) and 55, is a matter to be governed by domestic law).

The principal counter-argument arose from the French and Spanish texts of Articles 53-55. Those texts use the same word (respectively, *exécution* and *ejecución*) where "enforcement" and "execution" are used in the English text. The High Court accepted at [60] that a purely literal comparison might suggest that enforcement and execution were synonymous in the French and Spanish texts, such that those texts would conflict with the English, but ultimately rejected this argument, on the basis that (at [62]) the French and Spanish texts must be read in light of the civilian process of *exequatur* such that, properly understood, there was "no real difference" (at [66]) between the various language versions.

This process of interpretation was informed by the object and purpose of the ICSID Convention. The High Court at [34] noted the "primary purpose" of the Convention was to promote the flow of private capital to sovereign nations by conferring on investors an arbitral remedy in the event of default, providing certainty and mitigating sovereign risk. Articles 53-55 were described as a "central plank" in giving effect to this "primary object" ([40]). The object of Article 54 was to achieve parity between the obligations of Contracting States and private investors, it being "assumed that participating nation states would abide by arbitral outcomes" ([71]).

The High Court's ultimate conclusion ([8]) was that Spain's agreement to arbitrate through Articles 53-55 of the ICSID Convention amounted to a waiver of immunity from the Australian courts to recognise and enforce the award. No question of waiver of immunity to execute arose.

Postscript

Two observations might be made by way of postscript.

First, the High Court at [78]-[79] made short shrift of the judgments of the Court of Justice of the

European Union (CJEU) in *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132 and *Slovak Republic v Achmea BV* [2018] 4 WLR 87, holding that the relevant agreement (for the purpose of submission to the jurisdiction of the Australian courts) arose from Spain's entry into the ICSID Convention, and that CJEU decisions rendering inapplicable the agreement to arbitrate as a matter of EU law did not affect Spain's agreement to arbitrate under the ICSID Convention. An EU Member State court, bound by EU law, would certainly be required to consider the question in more detail. It is worth noting that this point was addressed, and dismissed, in the (post-Brexit) English law context in *Infrastructure Services Luxembourg S.à.r.l. v Kingdom of Spain* [2023] EWHC 1226 (Comm) at [67]ff.

Second, in terms of the implications of the decision, there are at least four extant applications in the Australian courts to recognise and enforce ICSID awards against Spain.[1)] It has been reported that, as recently as May 2023, Spain has indicated that it continues to refuse to submit to the jurisdiction of Australian courts, notwithstanding its loss before the High Court (Cindy Cammerone, "Spain to Revive Immunity Claims in Latest Suits to Enforce $166.7M Arbitration Awards", Lawyerly, published 23 May 2023.). Despite this foreshadowed contest, the High Court's decision as it stands signals Australia's position as a key recognition and enforcement jurisdiction, and the ramifications of this decision will no doubt continue to be played out.

The High Court's decision is also likely to have significant implications for the related Australian applications against Spain that remain on foot. Additionally, as observed by counsel for the successful investors in this case, it will also have implications for proceedings against other sovereign States, "whether under the ICSID Convention or the 1958 New York Convention." It is also likely to have implications in other jurisdictions: indeed in the United States, Spain has taken the point on appeal (*NextEra Energy Global Holdings B.V. v Kingdom of Spain; 9REN Holdings S.A.R.L. v Kingdom of Spain, Case Nos. 23-7031 and 23-7032, U.S. Court of Appeals for the District of Columbia Circuit*); hearings have yet to be scheduled but undoubtedly those proceedings and any judgment will be closely watched.

References

?1 These are: *9REN Holding S.A.R.L v Kingdom of Spain*, ICSID award dated 31 May 2019, recognition and enforcement proceedings no. NSD365/2020 in the Federal Court of Australia; *NextEra Energy Global Holdings B.V. & Anor v Kingdom of Spain*, ICSID award dated 31 May 2019, recognition and enforcement proceedings no. NSD415/2023 in the Federal Court of Australia; *RREEF Infrastructure (GP) Limited & Anor v Kingdom of Spain*, ICSID award dated 11 December 2019, recognition and enforcement proceedings no. NSD2169/2019 in the Federal Court of Australia; *Watkins Holdings S.A.R.L. & Anor v Kingdom of Spain*, ICSID award dated 21 January 2020, recognition and enforcement proceedings no. NSD449/2020 in the Federal Court of Australia.

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