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What Next for Sovereign Immunity in ICSID Disputes? A Short Review of Border Timbers Ltd v Republic of Zimbabwe and Infrastructure Service Luxembourg Sarl v Spain

Adam Riley (3 Hare Court) · Saturday, March 30th, 2024

On 19 January 2024, the High Court of Justice of England and Wales gave judgment in *Border Timbers Ltd v Republic of Zimbabwe* [2024] EWHC 58 (Comm). The decision of Dias J considered, in detail, the application of the UK State Immunity Act 1978 ("SIA") to the registration, enforcement, and execution of ICSID arbitral awards before and by the English courts. The court declined to follow another recently decided case *Infrastructure Services Luxembourg Sarl v Spain* [2023] EWHC 1226 (Comm), as well as international practice across the broader common law world. Permission has been given to appeal the decision in *Border Timbers* to the Court of Appeal. The proceedings in *Border Timbers* and *Infrastructure Services Luxembourg* deserve close attention.

Background: *Infrastructure Services Luxembourg*

In this case, the Claimants, a Luxembourg company and its Dutch subsidiary, were investors in energy infrastructure projects in Spain relating to solar power installations. There were tariff advantages for such projects, but Spain had reduced, and then removed, those advantages. The Claimants alleged that Spain had thereby breached its obligations of fair and equitable treatment under the Energy Charter Treaty 1994 ("ECT") and commenced an ICSID arbitration pursuant to Article 26 of the ECT.

Spain unsuccessfully challenged the jurisdiction of the tribunal, which issued an award in favour of the Claimants totalling approximately €120 million. Spain subsequently applied, unsuccessfully, to annul the award under the procedure in the ICSID Convention.

Spain's position, in seeking to set aside the award, so far as sovereign immunity was concerned, was that it was entitled to state immunity and that it had not agreed to ICSID arbitration. The court ruled that Spain was not immune because Article 26 of the ECT, incorporating the provisions of the ICSID Convention, constituted a prior written agreement to arbitrate for the purposes of sections 2(2) and 9 of the SIA, applying *Svenska Petroleum Exploration AB v Lithuania (No. 2)* [2006] EWCA Civ 1529.

Reasoning: *Infrastructure Service Luxembourg*

In summary, Fraser J noted that the SIA provides express exceptions to state immunity, including under sections 2(2) and 9 of the SIA. The former section causes a state to lose its adjudicative immunity if, by prior agreement, it has submitted to the jurisdiction of the English courts. Spain challenged the Claimants' reliance on Article 54 of the ICSID Convention, as the Claimants had averred that the article was sufficient to constitute a prior agreement to submit to the English court's jurisdiction.

Spain submitted that only an express submission, or waiver, by the State to the jurisdiction was sufficient to amount to submission for the purposes of section 2(2) of the SIA, relying on the principle in *R v Bow Street Magistrates, ex parte Pinochet (No. 3)* [2000] 1 AC 147. Article 54 was said by Spain not to come close to meeting that threshold, because it was not framed as a waiver or submission by Spain to the jurisdiction of any domestic court bar its own. It was argued, further, that "as a matter of historical record, Article 54 of the ICSID Convention was never understood as containing a waiver by states of their adjudicative immunity in this jurisdiction", and that, had it been, it "would have been discussed by Parliament in those terms when the ICSID Convention was being ratified".

Fraser J ruled that these submissions were misplaced because, so it was held, they ignored the "content and effect of the ICSID Convention, the terms of the 1966 Act and also the ratio of [the United Kingdom Supreme Court's decision in *Micula & Ors v Romania (European Commission Intervening)* [2020] UKSC 5)]". It was not necessary to address what Parliament had turned its mind to, because the terms of the Arbitration (International Investment Disputes) Act 1966 ("1966 Act") were clear, and the ICSID Convention was itself a schedule to the Act (the Judge appears to have declined to have regard to the relevant Parliamentary proceedings on the basis the strict test in *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 was not satisfied). It was said that Article 54 of the ICSID Convention and, separately, Article 26 of the ECT, constituted a "prior written agreement" for the purposes of section 2(2) of the SIA. As to section 9(1) of the SIA, the Judge held at paragraph 101:

> "In my judgment, and this is consistent with the cases including *Micula*, the ICSID Convention–a schedule to the 1966 Act–satisfied the requirements of section 9(1) of [the SIA] and is an agreement in writing by all the Contracting States to submit disputes with investors from other states to international arbitration. The same applies to the ECT for that matter, which expressly incorporates ICSID in article 26. The 1966 Act concerns only awards under the ICSID Convention, and therefore the claimants' application to register the Award qualifies as "proceedings in the courts of the United Kingdom which relate to the arbitration" under section 9(1) [of the SIA]"

Background: *Border Timbers*

The case in *Border Timbers* arose out of an arbitration award dated 28 July 2015 made pursuant to the ICSID Convention. The arbitration was brought by the Claimants against the Republic of Zimbabwe and concerned the latter's alleged expropriation of the Claimants' land in that country pursuant to Zimbabwe's Land Reform Programme. The case is, in that respect, a brief chapter in a

much longer story.

Zimbabwe was ordered to pay the Claimants an award of approximately US $124 million with interest, together with a further US $1 million in moral damages and costs.

Zimbabwe applied to have the award annulled by an ICSID annulment committee. That application was dismissed on 21 November 2018. The Respondent did not voluntarily comply with the award and, on 15 September 2021, the Claimants applied to the English court without notice under Civil Procedure Code Part 62.21 for registration and entry of judgment on the award in England pursuant to section 2 of the 1966 Act. This application was granted on 8 October 2021, and the resulting enforcement order was served on Zimbabwe on 27 May 2022.

Reasoning: *Border Timbers*

On 25 July 2022, Zimbabwe applied to set that order aside on the basis that Zimbabwe was immune from the jurisdiction of the English courts by virtue of section 1(1) of the SIA. In response, the Claimants argued that Zimbabwe fell within one or both of the exceptions to immunity set out in sections 2 and 9 of the SIA.

The Claimants argued, consistent with the decision in *Infrastructure*, that, for the purposes of section 2 of the SIA, the provisions of the ICSID Convention, in particular Article 54, amounted to a prior written agreement by which Zimbabwe submitted to the English court's jurisdiction for enforcement purposes. Alternatively, the Claimants argued that Zimbabwe had agreed to submit the dispute to arbitration within the meaning of section 9 of the SIA. Zimbabwe's argument before the tribunal and annulment committee that the dispute did not fall within the relevant arbitration agreement had failed and, so the Claimants argued, the tribunal's decision that it had jurisdiction was final and binding on the English court.

Dias J found against the Claimants on both points. Dias J reasoned that there is a conceptual distinction between a general waiver of immunity and a submission to the jurisdiction of the English courts. In the instant case, Article 54 of the ICSID Convention did not contain any express submission by a Contracting State to the jurisdiction of, for example, "the courts of any other Contracting State called upon to enforce an award against it". In the premises, it was concluded that Article 54 did not amount to a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recognising and enforcing the award against Zimbabwe (applying *ex parte Pinochet*).

In so doing, Dias J recognised that her ruling was inconsistent with that reached by Fraser J in *Infrastructure Services*. In particular, Fraser J had distinguished *Pinochet*, deciding that:

> "The *Pinochet* case post-dates the 1978 Act, and concerned attempts by Spain to extradite General Pinochet from the United Kingdom for human rights abuses including torture whilst he was the head of state of Chile, having seized power in 1973 in a military coup. He was arrested in London in the late 1990s, having travelled there for medical treatment. None of these authorities assists Spain on this application in its assertion that the High Court has no adjudicative jurisdiction to make an order for recognition of an ICSID award under the 1966 Act".

As to the exception in section 9 of the SIA, Dias J concluded that the enforcing court was required to make its own determination whether there was a valid arbitration agreement, and there was no reason to treat ICSID awards differently from other arbitral awards. An ICSID tribunal's decision that it had jurisdiction was not, for the purposes of the SIA, binding. The SIA scheme, which provided for general state immunity from the jurisdiction of the courts of English courts, except as provided for in that Act, required such an approach.

Conclusion

There is a clear tension between the decisions in *Border Timbers* and *Infrastructure Services*, and therefore uncertainty as to whether and in what circumstances a foreign State will be held to have submitted to the jurisdiction of the English courts for the purposes of executing a duly registered and enforceable ICSID award, as well as the status and applicability of the rule in *ex parte Pinochet*. The resolution of this ambiguity across these two leading first-instance decisions is eagerly anticipated.

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