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# UK and Australian Courts Confirm No Sovereign Immunity from Recognition of ICSID Arbitral Awards Against Sovereign States

Client Alert | May 31, 2023

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**1. Introduction and Overview**

In the past few weeks, the highest court of appeal in Australia[1] and the UK's Commercial Court[2] have each issued important decisions in the context of enforcement of arbitral awards against sovereign States. Specifically, the High Court of Australia and the UK's Commercial Court have each considered the recognition and enforcement of arbitral awards rendered under the auspices of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the "**ICSID Convention**" and "**ICSID**"). Both judgments arise from the same arbitral proceedings, with Spain as the respondent State.

Both decisions confirm, on similar bases, that it is not open to a sovereign State to plead sovereign immunity in opposition to an order for recognition of an ICSID award. The judgments clarify the approach to the distinct concepts of recognition, enforcement and execution in relation to ICSID awards, where such relief is sought before the national courts of a Contracting Party to the ICSID Convention. Both courts have held that a State's accession to the ICSID Convention constitutes a waiver of sovereign immunity from adjudicative jurisdiction in respect of the recognition of an ICSID award, although a State may still be entitled to plead immunity from execution measures taken against its assets.

These are investor-friendly decisions, demonstrating the commitment of both courts to investor-State arbitration. The decision of the UK Commercial Court is particularly notable in the context of the continuing debate of the "intra-EU objection", arising out of the CJEU's decision in *Achmea* and subsequent cases (discussed further below). In contrast to the approach adopted by the CJEU and certain national courts within the EU, the UK Commercial Court has affirmed the primacy of the UK's pre-existing international law obligations, including under the ICSID Convention, which the decisions of the CJEU cannot and do not override. The decision thus re-affirms the UK's status as a hospitable jurisdiction for the enforcement of investor-State awards, even while certain national courts within the EU (and the CJEU) are heading in the opposite direction.

In this client alert, we discuss the approaches taken by both courts; together, they present significant obstacles for States seeking to challenge ICSID award recognition orders on grounds of State immunity in the English, Australian, and other Commonwealth jurisdictions. While the UK Commercial Court's decision may be the subject of an appeal, there is no further avenue of appeal available in Australia.

**2. Background to the Judgments**

### Related People

Doug Watson

Piers Plumptre

Theo Tyrrell

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The award creditors obtained an arbitral award worth EUR 101 million (the "**Award**"), rendered pursuant to the ICSID Convention for Spain's violations of the Energy Charter Treaty (the "**ECT**") stemming from Spain's changes to its renewable energy subsidy scheme. The award is part of a larger group of over 20 awards issued against Spain relating to the same regulatory changes, worth in excess of USD 1 billion.

The applicants commenced proceedings in, *inter alia*, the UK and Australia, seeking to have the Award recognised and declared enforceable in those jurisdictions. Spain challenged the applications on the basis of, *inter alia*, arguments relating to sovereign immunity and the concepts of recognition, enforcement and execution.

## 3. UK Commercial Court Judgment

By way of statutory context: the decision concerns an application made under the UK's *Arbitration (International Investment Disputes) Act 1966* (the "**1966 Act**"), which is the regime governing the recognition and enforcement of ICSID Convention awards in the UK.[3] Section 1(2) of the 1966 Act provides: "*A person seeking recognition or enforcement of* [an ICSID Convention] *award shall be entitled to have the award registered in the High Court…*".

The UK Supreme Court's 2020 decision in *Micula & Ors v Romania (European Commission intervening)*[4] is a direct and binding authority on the operation both of the ICSID Convention and the 1966 Act. In *Micula*, the Supreme Court distinguished the ICSID Convention from the New York Convention in the context of the review permitted by the UK courts when deciding an application for recognition of an award.

A notable feature of the ICSID Convention regime is that once the authenticity of an award is established, a domestic court before which recognition is sought may not re-examine the award on its merits, nor refuse to enforce on grounds of jurisdiction, national or international public policy, nor even the fairness and propriety of the proceedings before the ICSID tribunal. This significantly reduces the options for challenge available by comparison with non-ICSID awards. The Supreme Court in *Micula* left open the possibility that there may be additional defences against enforcement of ICSID awards "*in certain exceptional or extraordinary circumstances which are not defined…*".[5]

As to the present case: on 29 June 2021, upon an application by the award creditors (represented by Gibson Dunn), Cockerill J of the Commercial Court of the UK issued an order registering the Award (the "**Registration Order**"), pursuant to s. 1(2) of the 1966 Act.

Spain's application to set aside the Registration Order consisted of two prongs:

1. **Jurisdiction**: this complaint had several strands, including arguments based on grounds of State immunity, Spain's alleged non-agreement to arbitrate disputes under the ECT, and the validity of the Award itself.
2. **Alleged non-disclosure** of information by the claimants, arising under their duty of full and frank disclosure to the court in the context of making an *ex parte* application.

Spain relied primarily on State immunity arguments. Mr Justice Fraser (sitting in the Commercial Court) dismissed Spain's application to set aside the Registration Order.

Spain's jurisdictional and immunity objection relied on the notion that arbitration of disputes between an EU Member State and an investor of another EU Member State (where the dispute concerns an investment by the investor in the first Member State) is precluded under EU law. This has come to be known as the "**intra-EU objection**", and is the subject of a vast amount of judicial and academic commentary, both inside and outside the EU.[6] It is a proposition that has received the consistent support of the Court of

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Justice of the European Union (the "**CJEU**").

However, Fraser J observed that the CJEU's stance on this issue does not override the UK's pre-existing treaty obligations under treaties such as the ICSID Convention and the ECT. Critically, while the CJEU's decisions based on the internal EU treaties may reflect internal EU law, they do not trump pre-existing treaty obligations, nor do they override the relevant domestic law mechanism in the UK.[7]

Fraser J agreed with the Supreme Court's restrictive approach in *Micula* to opposing recognition of ICSID awards.[8] In the judge's view, the availability of defences to a foreign State faced with an application to register an ICSID Convention award is "*far narrower*" than those that would be available if an award were being enforced under the New York Convention. Indeed, Fraser J concluded that there was only one defence potentially available to Spain, which was one based on the UK's *State Immunity Act 1978* (the "**1978 Act**"). The 1978 Act is the primary UK legislation in respect of State immunity. It provides for general immunity for States from the adjudicative jurisdiction of the UK courts (s. 1(1)), subject to certain exceptions, including where the State has submitted to the courts of the UK in specific situations such as prior written agreements (s. 2(2)) and where the State has agreed to arbitrate disputes (s. 9(1)).

The claimants relied upon the exceptions under both s. 2(2) and s. 9(1) of the 1978 Act. Spain, by contrast, argued that Article 54 of the ICSID Convention did not constitute such prior written agreement, and nor did it constitute a waiver by a State of its adjudicative immunity in relation in the relevant jurisdiction.

Fraser J agreed with the claimants: Article 54 of the ICSID Convention constitutes a "prior written agreement" for the purposes of the 1978 Act, as does the relevant article of the ECT (Article 26) which incorporates the ICSID Convention.[9] He noted that Spain's argument ignores the clear terms of the ICSID Convention and the 1966 Act, and also the *ratio* of *Micula*. Further, Spain's proposed reading of the terms would mean that s. 1(1) of the 1978 Act would only apply to awards in which the UK was a party, which was "*plainly not correct*".[10]

Fraser J also dismissed Spain's arguments that Spain had not in fact submitted to the adjudicative jurisdiction of the UK court in proceedings relating to arbitration. Spain's argument was two-fold: (i) the exception in s. 9(1) related to commercial arbitrations and did not encompass "*arbitrations involving sovereign acts*" (such as the underlying ICSID award); and (ii) Spain's offer of arbitration in Article 26 of the ECT did not extend to the claimants, such that the underlying ICSID arbitral tribunal did not have jurisdiction to hear the dispute—i.e., there was no valid arbitration agreement and the Award was therefore invalid.

The first argument was withdrawn; Fraser J dismissed the argument in any event, finding that (i) there was in fact no distinction between commercial and non-commercial awards under the relevant statue and (ii) the argument necessarily invoked a consideration by the court of the substantive, underlying dispute, which was not within the court's purview in the context of recognition proceedings (as explained above).[11]

As to the second argument, Fraser J referred to his prior dismissal of this argument, explaining that "*there is no justification for interpreting* [the] *effect* [of the CJEU's ***Achmea*** and ***Komstroy*** judgments] *as, in some way, creating within the ECT itself, only a partial offer of arbitration to some investors, but not others, depending upon whether those investors were resident within Member States or elsewhere.*"[12] Both the ICSID Convention and the ECT satisfy the requirements of s. 9(1) of the 1978 Act.

Fraser J also dismissed Spain's argument that, in effect, the Commercial Court should give effect to EU law and find invalid the express ICSID arbitration provision included in the ECT: "*it would be wrong in law to allow this argument by Spain based on EU law, as explained in Achmea and Komstroy by the CJEU, to trump the existing treaty obligations*

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*of the ICSID Convention, as enacted into domestic law here by the 1966 Act.*"[13] In reaching this conclusion, Fraser J considered "*persuasive*" authorities from courts in the U.S. and Australia (including the decision discussed below) rendered in the context of similar proceedings involving the recognition and enforcement of ICSID awards.[14]

Lastly, Fraser J dismissed Spain's alternative basis for its set-aside challenge, founded on allegations of non-disclosure in the context of the claimants' duty of full and frank disclosure. Spain alleged that the claimants had failed to bring to the court's attention Spain's likely argument relating to sovereign immunity and EU law. The court disagreed, finding that these arguments had been properly brought before it.[15]

**4. Australian High Court Judgment**

The award creditors also brought proceedings in the Federal Court of Australia seeking to enforce the Award and seeking orders including that Spain pay EUR 101 million together with interest. Orders were granted and subsequently modified on appeal.

In its judgment dated 12 April 2023, the High Court of Australia (Australia's apex court) dismissed Spain's appeal against the earlier rulings. The High Court explained that a foreign State is generally immune from the jurisdiction of the Australian courts, pursuant to Australia's *Foreign States Immunities Act 1985* (Cth).[16] That Act, however, provides for certain exceptions to the general regime of State immunity, one of which entails the situation in which a State has submitted to the jurisdiction of the Australian courts; in such a case, the State will have waived its immunity from jurisdiction.[17] The issue, therefore, was whether Spain's agreement to Articles 53, 54 and 55 of the ICSID Convention constituted either an express or implied waiver of immunity from jurisdiction (similar to the issues that were before the UK Commercial Court, discussed above).

The High Court analysed and noted the distinction between the different uses of the terms "recognition", "enforcement" and "execution" within these Articles:

1. The obligation to "**recognize**" is expressed to apply to the entirety of "*an award rendered pursuant to this Convention*" and to be no more than an obligation to recognise the award "*as binding*".
2. **Enforcement** is the legal process by which an international award is transposed a judgment of the court that enjoys the same status as any judgment of that court.
3. Whether or not enforcement against a State party to an award can lead to **execution** is left entirely to be determined under the domestic law of the Contracting State concerning State immunity or foreign State immunity from execution. In practical terms, execution can be understood to be the means by which a judgment enforcing an international arbitral award is given effect, which commonly involves measures taken against the property of the judgment debtor.

With these principles in mind, the High Court found that the effect of Spain's agreement to Articles 53-55 amounted to a waiver of foreign State immunity from the adjudicative jurisdiction of the courts of Australia to recognise and enforce (but not to execute) the Award.[18]

Please do not hesitate to contact us with any questions.

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[1] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) (12 April 2023) (the "**Australian High Court Judgment**").

[2] *Infrastructure Services Luxembourg SARL & Anor v Kingdom of Spain* [2023] EWHC 1226 (Comm) (Fraser J) (24 May 2023) (the "**UK Commercial Court Judgment**").

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[3] Ordinarily, arbitration awards more routinely encountered are sought to be registered and enforced under the New York Convention, and therefore the Arbitration Act 1996 would usually apply.

[4] *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5. *See further* our client alert on this decision.

[5] UK Commercial Court Judgment, paras. 72-73, citing *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5, paras. 68-74, 77-78. Those observations were subsequently confirmed by Jacobs J in *Unión Fenosa Gas SA v Arab Republic of Egypt* [2020] EWHC 1723 (Comm). Jacobs J noted the highly theoretical nature of the availability of such a defence (para. 68): "*It clearly remains the case, however, that such a defence, even if it exists at all (a point which is arguable but has not yet been finally determined), is far narrower in scope than the possible defences under the New York Convention.*"

[6] Most notably in this context, *see* the decisions of the CJEU in: (i) *Slovak Republic v Achmea BV*, Case C-284/16, ECLI:EU:C:2018:158, 6 March 2018 (*see further* our client alert on this decision); and (ii) *Republic of Moldova v Komstroy LLC (successor in law to Energoalians)*, Case C-741/19, EU:C:2021:655, 2 September 2021 (*see further* our client alert on this decision).

[7] UK Commercial Court Judgment, para. 67.

[8] UK Commercial Court Judgment, para. 79.

[9] UK Commercial Court Judgment, para. 95.

[10] UK Commercial Court Judgment, para. 95.

[11] UK Commercial Court Judgment, paras. 96-100.

[12] UK Commercial Court Judgment, para. 101.

[13] UK Commercial Court Judgment, para. 125.

[14] UK Commercial Court Judgment, paras. 111-119. Fraser J also considered a decision of the Commercial Court in the BVI: *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan and others* BVIHC (Com) 2020/0196, which found that by virtue of Pakistan being a party to the ICSID Convention, it was not immune from the jurisdiction of the courts of the BVI under the BVI's equivalent State immunity legislation. Fraser J disagreed with this conclusion (paras. 120-121).

[15] UK Commercial Court Judgment, paras. 143-159.

[16] Australian High Court Judgment, paras. 11-13.

[17] Australian High Court Judgment, para. 14.

[18] Australian High Court Judgment, paras. 8, 69-70, 75.

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The following Gibson Dunn lawyers assisted in the preparation of this client update: Doug Watson, Piers Plumptre, and Theo Tyrrell.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's International Arbitration, Judgment and Arbitral Award Enforcement, or Transnational Litigation practice groups, or any of the following in London:

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Doug Watson (+44 (0) 20 7071 4217, dwatson@gibsondunn.com) Piers Plumptre (+44 (0) 20 7071 4271, pplumptre@gibsondunn.com) Robert Spano (+44 (0) 20 7071 4902, rspano@gibsondunn.com) Theo Tyrrell (+44 (0) 20 7071 4016, ttyrrell@gibsondunn.com)

Please also feel free to contact the following practice group leaders:

**International Arbitration Group:** Cyrus Benson (+44 (0) 20 7071 4239, cbenson@gibsondunn.com) Penny Madden KC (+44 (0) 20 7071 4226, pmadden@gibsondunn.com)

**Transnational Litigation Group:** Susy Bullock (+44 (0) 20 7071 4283, sbullock@gibsondunn.com)

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