

HIGH COURT OF AUSTRALIA GRANTS SPECIAL LEAVE TO APPEAL DECISION RECOGNIZING ICSID ARBITRAL AWARD AGAINST SPAIN

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International Arbitration Alert

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On Friday 18 March 2022, the High Court of Australia (High Court) granted special leave to appeal the decision of the full Federal Court of Australia (Full Federal Court) in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 3.

K&L Gates acted for the Applicant, the Kingdom of Spain.

The proceedings raise important questions - which go to the heart of the operation of the ICSID system and the extent to which Australia, by its domestic law, on the one hand respects that international arbitral process but on the other gives effect to its well-established domestic rules giving effect to sovereign immunity.

SPECIAL LEAVE QUESTIONS

The application for special leave asked the High Court to consider two questions:

- Can a foreign State be said to have clearly and unequivocally submitted to the jurisdiction of Australian national courts (and thereby waived its foreign state jurisdictional immunity) by reason of the terms of an international convention if the terms of that convention are ambiguous on the issue of submission?
- Is there a mutually exclusive dichotomy between 'recognition' proceedings and 'enforcement' proceedings and was the application before the High Court a proceeding for 'recognition' only?

BACKGROUND

Spain is a contracting party to the Energy Charter Treaty (ECT) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

In November 2013, two Investors, private companies incorporated in Luxembourg and the Netherlands commenced ICSID arbitration proceedings alleging that Spain had breached its obligation under the ECT. On 15 June 2018, the arbitral tribunal made an arbitration award in favor of the Investors which was later reduced to €101 million.

As a contracting party, Spain was obligated to make provision for the effective enforcement of any award of arbitration "in its Area". However, the Investors have not sought to enforce the ICSID award in Spain, Luxembourg or the Netherlands. There was no arbitration agreement between the Investors and Spain pertaining to the arbitration or enforcement of any resulting arbitration award in Australia.

THE DECISION BY FEDERAL COURT AT FIRST INSTANCE

At first instance, the Investors applied to have the arbitration award recognized as if it was a judgment of the Federal Court of Australia. Spain filed a conditional appearance and relied upon its general jurisdictional immunity as a Foreign State in accordance with section 9 of the *Foreign State Immunities Act 1985* (Cth).

Justice Stewart, the primary judge, rejected Spain's plea of immunity and held that Spain had '*inevitably consented*' to the jurisdiction of Australian national courts due to its accession to both the ECT and the ICSID Convention (specifically its arbitration mechanisms). Justice Stewart then granted the Investors leave under section 35(4) of the *International Arbitration Act 1974* (Cth) to 'enforce' the relevant award and ordered Spain to pay the Investors €101 million.

Spain appealed to the Full Federal Court in March 2020.

THE DECISION BY THE FULL FEDERAL COURT ON APPEAL

The Full Federal Court avoided dealing with Spain's principal submission that it had not clearly and unequivocally submitted to the jurisdiction of the Federal Court and therefore had not lost its general immunity because of the alleged ambiguity in the meaning of 'enforcement' and 'execution' in the wording of the ICSID Convention.

The Federal Court held that 'recognition' and 'enforcement' proceedings were 'dichotomous', in the sense that the proceedings could not be for both recognition and enforcement therefore finding that the primary judge had erred in requiring Spain to pay the Investors as it was not an order contemplated or possible in a 'recognition' proceeding.

The Full Federal Court adjourned the appeal for further argument on the form of the orders required for recognition of the award. After further argument, the Full Federal Court published its reasons on the form of the orders and despite its earlier findings, held that the award should be 'enforced' under section 35(4) of the *International Arbitration Act 1975* (Cth) by way of entry of judgment.

SPAIN'S ARGUMENTS BEFORE THE HIGH COURT

At the special leave application, Spain argued that the Full Federal Court erred in finding that:

- Spain had submitted to the jurisdiction of the Federal Court for the purpose of these proceedings;
- Spain had waived its right of Foreign State jurisdictional immunity afforded by section 9 of the *Foreign States Immunities 1985* (Cth) for the purpose of these proceedings; and
- There is a dichotomy between 'recognition' proceedings and 'enforcement' proceedings when construing Chapter IV section 6 of the ICSID Convention and then characterizing the Investors' application as one seeking only 'recognition'.

NEXT STEPS

The High Court granted Spain special leave to appeal on 18 March 2022. We expect the appeal to be heard in the second half of 2022.

Three similar Federal Court proceedings involving ICSID awards against the Kingdom of Spain are stayed awaiting the outcome of these proceedings.

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