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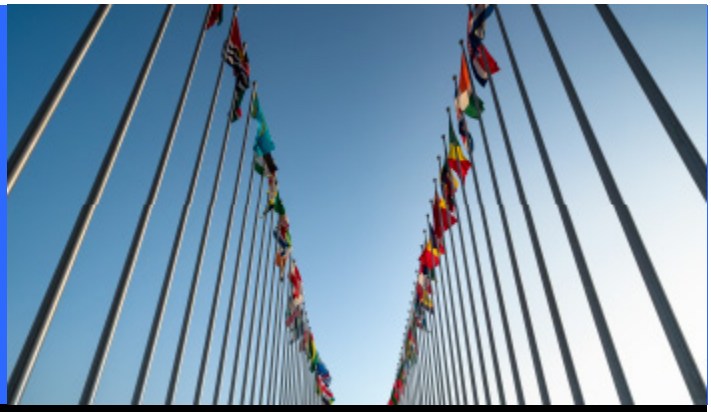

International Arbitration Update October 23, 2024

UK Court of Appeal Confirms Sovereign States Are Not Immune from Enforcement Proceedings for ICSID Awards

The UK Court of Appeal has confirmed that ICSID Contracting States' agreement to Art. 54 of the ICSID Convention is to be interpreted as a "written agreement" waiving State immunity and a submission to jurisdiction under the UK's State Immunity Act 1978. The decision is positive news for parties looking to enforce ICSID awards in the UK; it re-affirms the UK's pro-enforcement stance in relation to investor-State awards.

1. Executive Summary

On 22 October 2024, the UK Court of Appeal issued an important judgment in relation to arbitral award enforcement in the combined appeals of *Infrastructure Services Luxembourg S.À.R.L. v Kingdom of Spain* ("***Infrastructure Services v Spain***") and *Border Timbers Limited v Republic of Zimbabwe* ("***Border Timbers v Zimbabwe***").[1] The lead judgment was delivered by Lord Phillips, with whom Lord Newey and Sir Julian Flaux Chancellor of the High Court agreed.

The decision is critical to jurisdictional and State immunity issues arising in the context of enforcement of arbitral awards against sovereign States, pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the "**ICSID Convention**" and "**ICSID**").

In short, the Court of Appeal has confirmed that, whilst the UK's State Immunity Act 1978 (the "**1978 Act**") does apply to ICSID enforcement proceedings, there is an applicable exception to

State immunity. The relevant exception arises from s. 2 of the 1978 Act, which provides that a State may waive its immunity by a "*prior written agreement*" (read together with s. 17(2) of the 1978 Act, which provides that a "*prior written agreement*" includes references to a "*treaty, convention or other international agreement*"). The Court of Appeal affirmed that such prior written agreement is found in Art. 54 of the ICSID Convention.[2]

2. Background to the Court of Appeal's Judgment

a. Infrastructure Services v Spain

The award creditors (the "**ISL Claimants**") obtained an ICSID award worth approx. EUR 101 million for Spain's violations of the Energy Charter Treaty stemming from the regulatory changes Spain introduced to its renewable energy subsidy scheme.

The ISL Claimants commenced enforcement proceedings in the UK pursuant to s. 1(2) of the Arbitration (International Investment Disputes) Act 1966 (the "**1966 Act**") and obtained a registration order, which Spain sought to set aside on State immunity grounds. At first instance, Mr Justice Fraser dismissed Spain's set-aside application and upheld the registration order.[3] A central finding in that decision—the one on appeal—was that Art. 54 of the ICSID Convention constitutes a "*prior written agreement*" under s. 2(2) of the 1978 Act.[4]

b. Border Timbers v Zimbabwe

The award creditors (the "**Border Claimants**") obtained an ICSID award worth approx. USD 124 million arising out of Zimbabwe's expropriation of the Border Claimants' land in breach of the bilateral investment treaty between Switzerland and Zimbabwe (1996). Mirroring the *Infrastructure Services v Spain* case, the Border Claimants obtained a registration order under the 1966 Act, which Zimbabwe applied to set aside on State immunity grounds.

At first instance, Mrs Justice Dias dismissed Zimbabwe's set-aside application and upheld the registration order but on a different basis to (and expressly disagreeing with) Fraser J in *Infrastructure Services v Spain*.[5] In Dias J's view, the bespoke procedure for registration of ICSID awards set out in CPR 62.21 does not require service of any originating process on the respondent, and, as such, the doctrine of State immunity is not engaged at all in relation to such an application.[6] However, Dias J also separately held that Art. 54 of the ICSID Convention does not constitute a "*prior written agreement*" pursuant to s. 2(2) of the 1978 Act.[7]

Spain and Zimbabwe each obtained permission to appeal. The Court of Appeal decided to hear the appeals jointly in light of the overlapping issues, in particular as regards the "*prior written agreement*" exception under s. 2 of the 1978 Act. The appeals were heard between 17–20 June 2024 and the Court of Appeal handed down its judgment on 22 October 2024.

3. The Court of Appeal's Judgment

In the appeal, the parties largely maintained their positions taken at first instance. The Border Claimants also advanced a new argument: that Zimbabwe did not benefit from State immunity because s. 23(3) of the 1978 Act excluded from the scope of s. 1(1) of the 1978 Act "*matters that*

occurred before the date of the coming into force of [the 1978 Act]", and the ICSID Convention and the 1966 Act were such "*matters*".[8]

As such, the Court of Appeal had to resolve the following three questions:[9]

1. whether State immunity applies, in principle, to the registration of ICSID awards against a foreign State under the 1966 Act;

2. if State immunity does apply, whether Contracting States to the ICSID Convention have nonetheless waived that immunity from enforcement proceedings pursuant to s. 2 of the 1978 Act by ratifying the ICSID Convention (and, specifically, Art. 54 therein); and

3. if there is no such waiver by prior written agreement, whether a foreign State is estopped or otherwise prevented from asserting the invalidity of the underlying award, with the result that the arbitration exception in s. 9 of the 1978 Act is necessarily satisfied.

In relation to the **first question**, the Court of Appeal held that State immunity applies to applications for the registration of ICSID awards under the 1966 Act.[10] Disagreeing with Dias J's decision, the Court of Appeal concluded that the registration of an ICSID award as a judgment of the Court is not merely a ministerial or administrative act as it requires a judge to be satisfied to the requisite standard as to the proof of authenticity and the "*other evidential requirements*" of the 1966 Act.[11] The Court of Appeal also rejected the Border Claimants' new argument described above, holding that the phrase "*matters*" in s. 23(3) of the 1978 Act cannot be stretched to encompass treaties and legislation (such as the ICSID Convention and the 1966 Act).[12]

The Court of Appeal (disagreeing with Fraser J) also held that the UK Supreme Court's judgment in *Micula v Romania*[13] is not a binding authority for the proposition that State immunity does not apply to enforcement proceedings for ICSID awards (as opposed to execution proceedings).[14] That is because *Micula* did not expressly concern State immunity[15] and the 1978 Act is a complete code with regards to exceptions to State immunity, which does not exclude the "*regime*" for registration of ICSID awards under the 1966 Act from the scope of State immunity.[16]

As regards the **second question**, the Court of Appeal followed Fraser J's reasoning, concluding that Art. 54 of the ICSID Convention amounts to a sufficiently clear and express waiver of State immunity under s. 2 of the 1978 Act.[17] As such, it held that by ratifying the ICSID Convention, Contracting States have waived immunity, and submitted to the courts of the UK, for the purposes of enforcement of ICSID awards, although immunity in respect of execution is preserved by Art. 55 of the ICSID Convention.[18]

In reaching these conclusions, the Court of Appeal extensively referred to (and quoted from) the decision of the High Court of Australia ("**HCA**"), Australia's apex court, in the enforcement proceedings brought by the ISL Claimants against Spain there,[19] noting that, "[a]*s a general rule it is desirable that international treaties should be interpreted by the courts of all the states uniformly*."[20] Lord Phillips observed that the HCA's decision was a "*highly persuasive opinion*" and, also, on the interpretation of Art. 54 of the ICSID Convention, "*plainly right*".[21]

The Court of Appeal considered that the language of Art. 54 of the ICSID Convention is clear and unambiguous, flowing from the "*straightforward reading of the text*", which is also supported

"*rather than undermined, by the clear object and purpose of the Convention, as evidenced by the Preamble.*"[22]

In response to an argument raised by Zimbabwe, the Court of Appeal also considered briefly (and *obiter*) the potential impacts of its findings on Art. 54 of the ICSID Convention with respect to Art. III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "**New York Convention**"): *i.e.*, whether its conclusions meant that Art. III of the New York Convention also amounts to a waiver of immunity. Although providing limited observations, the Court of Appeal did not answer that question, noting that it had not heard full arguments and was not in a position to decide the issues.[23]

In light of its findings on the second question, the Court of Appeal considered that it was unnecessary to consider the **third question**.[24] Regardless, the Court did observe (*obiter*) that "*it is difficult to interpret section 9 of the SIA other than as imposing a duty on the court to satisfy itself that the state in question has in fact agreed in writing to submit the dispute in question to arbitration.*"[25]

4. Comment

The Court of Appeal's judgment is significant. It lends further weight to the growing body of international jurisprudence on the effect of Art. 54 of the ICSID Convention. The UK Court of Appeal, like the HCA, has confirmed that Contracting States' agreement to Art. 54 by ratifying the ICSID Convention is to be interpreted as a written agreement waiving State immunity and a submission to jurisdiction for the purposes of enforcement of an ICSID award. As recognised by the Court of Appeal, this also brings the UK position in line with the law in Australia, New Zealand, France, and Malaysia, as well as multiple decisions in the US.[26]

The decision is positive news for parties looking to enforce ICSID awards in the UK; it re-affirms the UK's pro-enforcement stance in relation to investor-State awards.

We note that the decision may well be subject to a further appeal to the UK Supreme Court.

[1] *Infrastructure Services Luxembourg SARL v Kingdom of Spain and Border Timbers Ltd v Republic of Zimbabwe* [2024] EWCA Civ 1257 (Sir Julian Flaux Chancellor of the High Court, Newey LJ, Phillips LJ) (the "**Judgment**").

[2] Judgment, para. 103.

[3] *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm) (Fraser J). See further our client alert on this decision.

[4] *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm) (Fraser J), para. 95.

[5] *Border Timbers Ltd v Republic of Zimbabwe* [2024] EWHC 58 (Comm) (Dias J).

[6] *Border Timbers Ltd v Republic of Zimbabwe* [2024] EWHC 58 (Comm) (Dias J), para. 106.

[7] *Border Timbers Ltd v Republic of Zimbabwe* [2024] EWHC 58 (Comm) (Dias J), paras. 72–73.

[8] Judgment, para. 11.

[9] Judgment, para. 12.

[10] Judgment, para. 58.

[11] Judgment, paras. 35–39.

[12] Judgment, paras. 40–42.

[13] *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5 (Lady Hale, Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Sales SCJJ). See further our client alert on this decision.

[14] Judgment, paras. 51–52.

[15] Romania did not challenge the registration of the ICSID award on state immunity or any other grounds in that case.

[16] Judgment, paras. 43–58.

[17] Judgment, para. 103.

[18] Judgment, paras. 77-79.

[19] *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ). See further our client alert on this decision.

[20] Judgment, para. 60, quoting *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 657A-B, per Lord Hope.

[21] Judgment, para. 77.

[22] Judgment, para. 80.

[23] Judgment, paras. 99–102.

[24] Judgment, para. 104.

[25] Judgment, para. 105.

[26] Judgment, para. 60.

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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 the authors in London:

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