



State immunity no bar to registration of ICSID arbitral award

Patrick Green KC & Kate Gardiner

***In Infrastructure Services Luxembourg & Anor v The Kingdom of Spain; Border Timbers Limited & Anor v Republic of Zimbabwe* [2024] EWCA 1257 ([available here](#)), the Court of Appeal unanimously ruled that foreign states cannot rely upon state immunity to set aside the registration in England of an ICSID international investment treaty arbitration award, under the Arbitration (Investment Disputes) Act 1966. This decision reinforces the pro-arbitration stance of the English courts and accords with the UK's international obligations. It has implications for other States in such disputes in England, including those disputing awards on the basis of the “intra-EU objection” in EU cases (following *Achmea* and *Komstroy*), although the Court of Appeal did not need to address that issue directly.**

Patrick Green KC, instructed by Kobre & Kim and leading Andrew Stafford KC and Richard Clarke of Kobre & Kim, appeared on behalf of the successful respondent, Infrastructure Services Luxembourg S.a.r.l..

Kate Gardiner was instructed to provide pre-hearing assistance.

INTRODUCTION

1. On 22 October 2024, the Court of Appeal handed down judgment in *Infrastructure Services Luxembourg & Anor v The Kingdom of Spain; Border Timbers Limited & Anor v Republic of Zimbabwe* [2024] EWCA 1257. It was unanimously held that foreign states cannot rely upon the principle of state immunity to set aside the registration in England of an international investment arbitration award under the Arbitration (Investment Disputes) Act 1966 (the “**1966 Act**”).
2. On 30 October 2024, the Court of Appeal refused permission to appeal.

FACTUAL BACKGROUND

3. In 2018, Infrastructure Services Luxembourg S.a.r.l and Energie Thermosolar B.V (together, the “**ISL claimants**”) obtained an arbitral award worth €101 million (the “**ISL Award**”) against Spain under the Energy Charter Treaty, in relation to changes to Spain’s tariff advantage scheme for solar energy. The ISL Award was issued by the International Centre for Settlement of Investment Disputes (“**ICSID**”) under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”).
4. In June 2021, the High Court granted the ISL claimants’ application for registration of the ISL Award under the 1966 Act.
5. Spain subsequently applied to set aside the registration order on the grounds of state immunity under section 1 of the State Immunity Act 1978 (the “**SIA**”). In May 2023, Fraser J dismissed Spain’s application, holding that Spain was not entitled to claim state immunity under the 1966 Act.

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6. Similarly, in *Border Timbers Limited & Anor v Republic of Zimbabwe*, Dias J dismissed Zimbabwe's application to set aside the registration of an ICSID award on the grounds of state immunity. Notably, Dias J's reasons for doing so were entirely different to those of Fraser J, namely that registration was not an exercise of adjudicative jurisdiction (a proposition which neither party before her supported).

LEGAL FRAMEWORK

7. The Convention is an international treaty governing the resolution of certain investment disputes which conventionally involve a foreign investor bringing an arbitral claim against its host state for alleged breaches of investor protections contained in bi-lateral or multi-lateral international investment treaties. The Convention was implemented in the United Kingdom through the 1966 Act, and whilst the 1966 Act does not give the Convention direct application in the United Kingdom, it should be read consistently with the Convention and so as to give effect to the Convention.
8. In *ISL v Spain*, the underlying treaty was the Energy Charter Treaty ("ECT") which is a multi-lateral treaty, containing investor protection provisions and, at Article 26, provision for arbitration, which (on the facts) meant that the parties agreed to submit to ICSID under the framework of the Convention (although Spain disputed the effect of this clause, by reason of the "intra-EU objection" of the CJEU to arbitration of investor state disputes).
9. Article 54 of the Convention provides that each contracting state shall recognise an ICSID award as binding and enforceable as if it were a final judgment of its domestic courts. Article 55 of the Convention expressly provides that Article 54 does not derogate from a contracting state's domestic law on state immunity.

10. The SIA provides:

- i. at Section 1(1), that states are immune from the jurisdiction of the English courts, save as otherwise provided within the SIA; and
- ii. at Section 2(2), that a state may submit to the jurisdiction of the English courts via a prior written agreement.

Section 1(1) applies in principle to the registration of ICSID arbitration awards

11. In *Border Timbers*, Dias J had concluded that section 1(1) of the SIA did not apply, reasoning that the registration of an award does not involve a judicial act.
12. The Court of Appeal has confirmed that this was misconceived [36], because registration requires judges to satisfy themselves that the requisite standard of proof of authenticity of the arbitral award is met [37]. Further, “*there could not be a clearer case*” of the English court exercising its adjudicative jurisdiction over a foreign state than entering judgment against that state on the basis of a decision that the requirements of a United Kingdom statute had been met [38].
13. In *ISL v Spain*, Fraser J had concluded that Section 1(1) of the SIA does not apply to registration of ICSID awards, relying upon the ratio in *Micula & Ors v Romania (European Commission intervening)* [2020] UKSC 5.
14. However, *Micula* had not involved an issue of state immunity. The Court of Appeal concluded, contrary to Fraser J, that there was no reason why the express immunity conferred by Section 1(1) would not arise in the instance of registering an ICSID award against a contracting state.

Where there is agreement to submit to the jurisdiction regarding the enforcement of an ICSID award, the exception to state immunity under Section 2(2) of the SIA applies

15. Having held that state immunity applied in principle, the Court went on to consider whether the statutory exception under Section 2(2) was applicable, concluding that this was plainly the case.
16. The appellants had contended that the wording of Article 54 was insufficient to satisfy the requirements of a “*prior written agreement*” for the purposes of Section 2(2), relying upon *R v Bow Street Metropolitan Stipendiary magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] UKHL 17, where it was held that any waiver by states of immunities, or any submission to jurisdiction, must be express.
17. The Court held that the lack of the exact words “*waiver*” and “*submit*” did not mean that there was no “*express*” intention to that effect: the proper construction of Article 54 plainly amounted to an unequivocal agreement to submit ([92] and [96]).
18. It is notable that the Court considered Spain’s waiver of state immunity by acceding to the Convention to be clear despite the fact that the CJEU had decided that the arbitration agreements in Article 26 were not applicable under EU law in a dispute between EU parties (the “*intra-EU objection*”), thereby imposing obligations on Spain under EU law that were inconsistent with those under the ECT and the ICSID Convention. The Court did not address the “*intra-EU objection*” directly.
19. The Court of Appeal also found support for its decision on s.2(2) from:
 - i. decisions of courts in other Convention states, including Australia, New Zealand, the United States, Malaysia and France, as public policy calls for

- international treaties to be construed consistently between jurisdictions;
and
- ii. prior Supreme Court decisions [79], the clear object and purpose of the Convention [80], and its *travaux préparatoires* [82].
20. The ISL Award is therefore to be recognised and enforced as if it were a final judgment of the High Court.
21. By contrast, Zimbabwe has contended that it has other “exceptional” defences against enforcement [107] and its set-aside application has been remitted to the Commercial Court so that these can be considered.

CONCLUSION

22. The Court’s unanimous dismissal of the appeals clarifies the law in this area, in circumstances in which there are a large number of similar awards pending against Spain, and reflects the well-established pro-arbitration stance of the English courts, in compliance with the UK’s international law obligations under the Convention.
23. The judgment makes clear that state immunity cannot stand in the way of registration of ICSID awards, regardless of the so-called “*intra-EU objection*” in the caselaw of the CJEU. EU member states will not be able to resist registration of ICSID awards as judgments of the High Court, by invoking state immunity or incompatibility with EU law.

Patrick Green KC

Kate Gardiner

5 November 2024