PRESS SUMMARY

22 October 2024

(1) Infrastructure Services Luxembourg S.a.r.l (2) Energia Termosolar B.V. v The Kingdom of Spain; (1) Border Timbers Limited (2) Hangani Development Co. (Private) Limited v Republic of Zimbabwe [2024] EWCA 1257

On appeal from [2023] EWHC 1226 (Comm) and [2024] EWHC 58 (Comm)

Court of Appeal (Civil Division): Sir Julian Flaux (Chancellor of the High Court), Lord Justice Newey, Lord Justice Phillips

BACKGROUND

These two appeals concern whether foreign states can rely on 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"). The appeals were heard, and judgment was given, together.

Infrastructure Services & Anor v Spain

In 2018, Infrastructure Services Luxembourg S.a.r.l and Energia Thermosolar B.V. (the "ISL claimants") obtained an arbitral award worth €101 million against Spain under the Energy Charter Treaty ("ECT") for changes to Spain's tariff advantage scheme for solar energy (the "ISL Award"). The arbitral 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").

In June 2021, Cockerill J granted the ISL claimants' application under the 1966 Act to recognise the ISL Award in England as if it had been a judgment of the High Court. Spain applied to set-aside the order on grounds of state immunity under section 1 of the State Immunity Act 1978 (the "SIA"). In May 2023, Fraser J held that Spain was not entitled to claim state immunity under the 1966 Act and dismissed its application. Spain appealed to the Court of Appeal.

Border Timbers & Anor v Zimbabwe

In 2015, Border Timbers Limited and Hangani Development Co. (Private) Limited (the "Border claimants") secured an ICSID arbitral award against Zimbabwe under a bilateral investment treaty between Zimbabwe and Switzerland (the "Zimbabwe-Switzerland BIT") for expropriation of their land (the "Border Award"). The Border Award required Zimbabwe to reinstate the properties to the Border claimants and pay $29 million or, alternatively, $123 million plus, in either event, $1 million in moral damages.

In 2021, the Border claimants obtained an order recognising the Border Award under the 1966 Act, which Zimbabwe applied to set-aside also on grounds of state immunity. In 2024, Dias J reached the same conclusion as Fraser J and dismissed the application. Zimbabwe appealed.

JUDGMENT

The Court of Appeal unanimously dismissed the appeals by holding neither defendant state was entitled to defend the recognition claims by reference to state immunity. The Court of Appeal did, however, remit Zimbabwe's application to set-aside to the Commercial Court for directions as regards its non-immunity defences.

REASONS FOR JUDGMENT

The relevant framework

The Convention is an international treaty which concerns the resolution of investment disputes. Investment disputes typically involve a foreign investor bringing an arbitral claim against its host state for alleged breaches of investor protections contained within international investment agreements ("IIAs").

The Convention is not itself an agreement to arbitrate but, instead, a framework for the resolution of such disputes as the parties may agree in writing to submit to ICSID **[17]**. Such agreements are usually found in IIAs. Both the ECT and Zimbabwe-Switzerland BIT are IIAs containing arbitration clauses.

The Convention was implemented in the United Kingdom through the 1966 Act, albeit the 1966 Act does not give the Convention direct application in the United Kingdom, but the 1966 Act should be read consistently with the Convention **[24]**.

Article 54 of the Convention provides that each contracting state shall recognize an ICSID award as binding and enforceable as if it were a final judgment of its domestic courts. Article 55 provides that article 54 does not derogate from a contracting state's domestic law concerning state immunity.

States are immune from the jurisdiction of the English courts pursuant to section 1(1) of the SIA save as otherwise provided within the SIA **[30]**. Section 2(2) of the SIA provides that a state may submit to the jurisdiction of the English courts via a prior written agreement. Section 9 provides that a state is not immune in respect of proceedings relating to an arbitration to which the state agreed in writing.

Issue 1: Does section 1(1) of the SIA apply, in principle, to the registration of ICSID arbitration awards against a foreign state under the 1966 Act?

Yes. Dias J's conclusion that section 1(1) does not apply because the recognition of an award does not involve a judicial act was misconceived **[36]**. Recognition under the 1966 Act involves a judge satisfying themselves that the requisite standard of proof of authenticity of the arbitral award, amongst other matters, is met **[37]**. Entering judgment against a foreign state is a clear example of the English court exercising its adjudicative jurisdiction and thus engages section 1 of the SIA **[38]**. The exclusion under section 23(3) of the SIA—which excludes "matters" occurring before the date of coming into force of the SIA—does not, however, exclude the Convention or 1966 Act **[41]**.

Similarly, the ISL claimants' submission that the SIA should be interpreted as subordinate to the 1966 Act was wrong **[57]**. The SIA is a complete code and therefore applies to the

recognition of an ICSID award. Nonetheless, the SIA can be read consistently with the requirement to recognise authenticated ICSID awards under the 1966 Act through the specific exceptions within the SIA **[58]**.

Issue 2: If so, is the exception to state immunity in section 2 of the SIA necessarily engaged because states, in signing the Convention, have agreed in writing to submit to the jurisdiction in relation to the enforcement of ICSID arbitration awards?

Yes. The express words used in article 54 amount, on their proper construction, to an unequivocal agreement by the state to submit to the jurisdiction, even if the words "submit" and "waiver" are not used **[59]**, **[92]**, **[96]**. This reading is consistent with the jurisprudence of other Convention states, including Australia, New Zealand, the United States, France and Malaysia, which is of considerable persuasive force given the public policy of construing international treaties consistently between jurisdictions (see *Islam v Secretary of State for the Home Department* [1992] 2 AC 629) **[60]**.

The text of article 54 refers to awards being recognised and enforced without qualification, and it is not possible to read the article as referring only to awards against investors as Spain and Zimbabwe submit **[78]**. Had that outcome been intended, it could have easily been included in the drafting. Furthermore, article 55's reference to preserving state immunity from execution only makes sense if article 54 requires recognition and enforcement against states.

This conclusion is further supported by prior Supreme Court decisions (see *Micula & Ors v Romania (European Commission intervening)* [2010] UKSC 5, [2020] 1 WLR 1033 **[79]** and *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 2 AC 495 **[94]**), the clear object and purpose of the Convention **[80]**, and its *travaux préparatoires* **[82]**.

Issue 3: If section 1(1) applies and a state has not submitted to the jurisdiction by the fact of being a party to the Convention, is a foreign state estopped or otherwise prevented from asserting the invalidity of the underlying award under section 9 of the SIA?

Issue 3 does not arise in light of the Court of Appeal's finding as regards issue 2 **[104]**. The Court of Appeal did, however, doubt that article 54 operated to prevent the English court from satisfying itself that there was a valid arbitration agreement within the meaning of section 9 of the SIA **[105]**. The Court of Appeal nonetheless declined to provide its *obiter* view on Spain's argument that the ECT had been invalidated between EU member states **[106]**.

Zimbabwe's non-immunity defences

Zimbabwe has indicated that it has other 'exceptional' defences against enforcement **[107]**. Such defences are unaffected by the decision on state immunity and should, therefore, be remitted **[109]**.

References in square brackets are to paragraphs in the judgment.