Australia's first contested ICSID enforcement

In February, the Federal Court of Australia delivered its judgment on the first contested enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards in Australia. In *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157, the Court enforced two ICSID awards—award of 4 May 2017 in Case No. ARB/13/36, and award of 15 June 2018 as rectified by the award dated 29 January 2019 in Case No. ARB/13/31—against the Kingdom of Spain. The two cases were brought by different applicants but were heard and decided together.

The judgment concerns the interaction of two instruments at the intersection of public and private international law. Firstly, it concerns the *Foreign States Immunities Act 1985* (Cth), which gives effect to a restrictive theory of state immunity. Secondly, the judgment concerns the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (Investment Convention), which is given the force of law in Australia by s 32 of the *International Arbitration Act 1974* (Cth).

Stewart J framed the issue for consideration as follows (at [2]):

> *[I]s a foreign state immune from the recognition and enforcement of an arbitral award made under the Investment Convention notwithstanding that the Investment Convention inherently envisages arbitration awards being made against foreign states and it provides that such awards "shall" be recognised and enforced by Australian courts?*

The judgment also contains useful consideration of the distinctions between recognition, enforcement and execution in the context of a common law system.

Background

The underlying dispute was triggered by a change in Spain's position on subsidies and regulation concerning renewable energy, and the applicant companies' investments in renewable energy projects in Spain before that change. The changes caused substantial harm to the value of the investments of the applicants, which are incorporated in England & Wales, Luxembourg and the Netherlands.

Before ICSID tribunals the applicants argued that Spain failed to accord fair and equitable treatment to their investments in breach of Art 10(1) of The Energy Charter Treaty (ECT), opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998). They were successful. Spain was ordered to pay hundreds of millions of Euros across two awards.

Spain then made applications for the annulment of the awards, which included stays of enforcement. For a time, each award was stayed. (In Australia, this resulted in a temporary stay of enforcement proceedings: see *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2019] FCA 1220). The stays were then discontinued, allowing enforcement action to proceed in Australia. At the time of writing, Spain had not complied with the awards in whole or in part.

Enforcement of the ICSID awards in Australia

The Commonwealth of Australia is a generally arbitration-friendly jurisdiction. Part IV of the *International Arbitration Act 1974* (Cth) deals with the Investment Convention. Section 33(1) provides the basic proposition 'that [a]n award is binding on a party to the investment dispute to which the award relates', while s 35 provides that awards may be enforced through the Federal Court of Australia.

How, then, could Spain challenge enforcement of the ICSID awards? It asserted immunity under s 9 of the *Foreign States Immunities Act 1985* (Cth), which provides foreign States with general immunity from the jurisdiction

of Australian courts. An exception to the general position is provided in s 10(1) for proceedings in respect of which a foreign State has submitted.

The applicant companies argued that the Investment Convention excludes any claim for foreign state immunity in proceedings for the recognition and enforcement of an award. The Court was thus asked to consider whether, 'by being a Contracting Party to the ECT and a Contracting State to the Investment Convention, Spain submitted to the arbitrations under the Investment Convention which produced the awards they seek to enforce': [179]. The Court held that Spain had submitted. There was no inconsistency between the *Foreign States Immunities Act 1985* (Cth) and the enforcement of the Investment Convention via the *International Arbitration Act 1974* (Cth).

The Court thus recognised each of the awards. Spain was ordered to pay the applicant companies hundreds of millions of Euros, plus interest, and costs—the scope of which are still to be determined.

Comments on recognition, enforcement and execution

According to Stewart J, '[t]he distinction between recognition and enforcement, on the one hand, and execution on the other, is central to [the] reasons': [6]. The judgment contains dicta that will be useful for teaching private international law in Australia. There is a helpful passage at [89] ff:

> *Recognition is a distinct and necessarily prior step to enforcement, but recognition and enforcement are closely linked: Briggs A, The Conflict of Laws (3rd ed, Oxford University Press, Clarendon Series, 2013) 140-141; Clarke v Fennoscandia Ltd [2007] UKHL 56; 2008 SC (HL) 122 at [18]-[23]. An award may be recognised without being "enforced" by a court:* ***TCL*** *Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533 at [23]. Examples would be where an award is recognised as giving rise to res judicata, issue estoppel, cause of action estoppel or set-off, or as a claim in an insolvent estate. See Associated Electric and Gas Insurance*

Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11; [2003] 1 WLR 1041 at [15] as an example of recognition by estoppel.

An arbitral award is enforced through the means of the entering of a judgment on the award, either in the form of a money judgment for the amount of an award or for damages for failing to honour an award. That form of enforcement by a court is an exercise of judicial power: TCL at [32]. There is some debate in the authorities as to whether an award can be enforced by means of a court making a declaration. See Tridon Australia Pty Ltd v ACD Tridon Inc [2004] NSWCA 146 and AED Oil Ltd v Puffin FPSO Ltd [2010] VSCA 37; 27 VR 22 at [18]-[20]. It is not necessary to enter upon that debate for present purposes because Art 54(3) of the Investment Convention requires the enforcement of only the pecuniary obligations of an award. That would seem to exclude declaratory awards, injunctions and orders for specific performance.

An award cannot, however, be executed, in the sense of executed against the property of an award debtor, without first being converted into a judgment of a court: Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd (No 2) [2011] FCA 206; 277 ALR 441 at [12]-[13]. Nevertheless, it is not a strain of language to refer to an award being enforced by way of execution.

Thus, depending on the context, reference to the enforcement of an arbitral award can be used to mean the entering of a judgment on the award to the exclusion of execution or it can mean execution, or it can encompass both.

Recognition and enforcement by judgment on the award is equivalent to what is referred to in civilian jurisdictions as exequatur (see Firebird at [47]-[48] and Briggs A, The Conflict of Laws (3rd ed, Oxford University Press, Clarendon Series, 2013), 139).

Comment

Eiser Infrastructure Ltd v Kingdom of Spain provides

plenty to think about for those interested in private international law, public international law, and international arbitration. It confirms the intuition that ICSID awards should be easily enforced in Australia.

However, it begs the question, why Australia? Stewart J speculated that the CJEU's decision in *Slovak Republic v Achmea BV* [2018] 4 WLR 87, [60] may have made Australia a more attractive forum for enforcement proceedings in these cases. However, should Spain have any assets in Australia, it may be difficult for the successful companies to get access to them. The High Court of Australia takes a foreign-State-friendly approach to immunity of execution over foreign States' property. It will be interesting to see what happens next in this dispute.