HIGH COURT OF AUSTRALIA TO HEAR APPEAL ON RECOGNITION OF ICSID ARBITRAL AWARD AGAINST SPAIN IN NOVEMBER 2022

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International Arbitration Alert

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The much anticipated High Court of Australia (High Court) appeal of the full Federal Court of Australia's decision in *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* (No 3) [2021] FCAFC 3 will now be heard in November 2022.

The appeal has garnered interest from around the globe including from the European Commission for the European Union, which has sought leave to intervene as amicus curiae. The European Commission's submissions are in full support of Spain's position in the proceedings.

The proceedings give rise to the key question of whether a national court can recognise and/or enforce an International Centre for Settlement of Investment Disputes (ICSID) arbitration award against a State in light of domestic law that entrenches Foreign State jurisdictional immunity.

K&L Gates represent the Applicant, the Kingdom of Spain.

BACKGROUND

The proceedings are one of many long-running disputes between Spain and foreign investors resulting from the legislative changes to Spain's renewable energy sector between 2012 and 2014, allegedly in breach of the Energy Charter Treaty (ECT).

In June 2018, an ICSID tribunal made an arbitration award against Spain in favour of two of foreign Investors, which was later reduced to €101 million (plus interest and costs). In April 2019, the Investors commenced proceedings in the Federal Court to have the arbitration award recognised as if it was a judgment of the Federal Court of Australia.

LITIGATION HISTORY IN AUSTRALIA

At first instance, 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 rejected Spain's plea of immunity and held that Spain had 'inevitably consented' to the jurisdiction of the Australian national courts due to its accession to both the ECT and the ICSID Convention (specifically the arbitration mechanisms).

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Spain appealed to the Full Federal Court in March 2020. The Full Federal Court held that the primary judge had erred in requiring Spain to pay the Investors as proceedings could not be for both "recognition" and "enforcement" of an ICSID award. The Full Federal Court held that these proceedings were "recognition" proceedings. Despite this finding, the Full Federal Court's ultimate orders held that the award should be "enforced" under section 35(4) of the *International Arbitration Act 1975* (Cth) by way of entry of judgment.

HIGH COURT APPEAL

The proceedings are set down for a day and a half hearing commencing on 9 November 2022. Details of Spain's successful application for special leave and a summary of its arguments is available here.

The High Court has yet to rule on whether it will grant leave to the European Commission to intervene as amicus curiae. The European Commission's submissions focus on the recent judicial consideration from the Court of Justice of the European Union (the ultimate authority on EU law) which has found that the ECT does not contain a valid offer to arbitrate between intra-EU parties (Member State and Investors of other Member States). The European Commission's position is that if there was no valid offer to arbitrate, any award stemming from the arbitration is not enforceable.

Three similar Federal Court of Australia proceedings are stayed awaiting the outcome of this appeal. The total of the ICSID awards sought to be enforced against Spain in Australia is €380 million plus costs and interest.

SIGNIFICANCE OF THE PROCEEDINGS

The Australian enforcement proceedings are playing out against a backdrop of European Courts and ICSID Tribunals hearing similar matters, including most recently in the Higher Regional Court of Cologne and Luxembourg Court of Cassation.

Over the last 10 years, Spain has faced more than 60 claims by investors under the ECT. Despite protracted litigation and arbitration in numerous jurisdictions, European Domestic Courts and ICSID Tribunals remain divided on whether the ECT bars intra-EU ICSID arbitrations.

The High Court will be one of the first higher appellate courts outside the European Union to consider the enforceability of ICSID awards against a State in a jurisdiction that has well-established domestic rules giving effect to sovereign immunity.

K&L Gates will continue to publish e-alerts on this appeal as the matter progresses.

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