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High Court rejects Spain's immunity challenge to recognition of ICSID award

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- Introduction
- Background
- Facts
- Decision
- Comment

Introduction

In *Infrastructure Services Luxembourg SARL (formerly Antin Infrastructure Services Luxembourg SARL) and Energia Termosolar BV (formerly Antin Energia Termosolar BV) v Kingdom of Spain*,[(1)] the English Commercial Court rejected an application by the Kingdom of Spain to set aside an order for registration of an International Centre for Settlement of Investment Disputes (ICSID) award pursuant to article 1 of the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act). Spain argued that the Court lacked jurisdiction and complained of alleged material non-disclosure in the without-notice registration application. The judgment highlights the approach taken by English courts in dealing with state objections to the registration of an ICSID award in light of the ongoing debate over intra-EU investment disputes.

Background

ICSID

The 1965 ICSID Convention (the Convention) provides a framework for the resolution of international investment disputes. ICSID administers arbitrations between contracting states and investors from other contracting states and proceedings before ad hoc annulment committees which hear challenges to ICSID awards on the limited grounds set out in the Convention.

Article 53 of the Convention provides that ICSID awards are binding on the parties and not subject to any appeal or other remedy except as provided for in the Convention.

Article 54 of the Convention provides that each contracting state shall recognise an award rendered pursuant to the Convention as binding and enforce the obligations imposed by that award within its territories as if it were a final judgment of a court in that state.

1966 Act

The United Kingdom acceded to the ICSID Convention in 1966. It enacted the 1966 Act to implement the Convention.

Section 1 of the 1966 Act entitles a person seeking recognition or enforcement of an ICSID award to have such award registered in the High Court subject to proof of the prescribed matters and to the other provisions of the Act.

Section 2 of the 1996 Act provides that an award registered under section 1 shall be of the same force and effect as a judgment of the High Court.

Energy Charter Treaty

The 1994 Energy Charter Treaty (the ECT) is a multilateral investment treaty which provides protections for investments made in the energy sector and establishes a dispute resolution process whereby investors can seek to enforce these protections.

Article 26(3) states that contracting parties to the treaty give their unconditional consent to disputes being referred to international arbitration. Article 26(4)(a) provides for arbitration under the Convention as one method of dispute resolution.

The United Kingdom, Spain, the Netherlands and Luxembourg have all acceded to the Convention and the ECT.

State Immunity Act

State immunity protects a state from the jurisdiction of the courts of other states. The State Immunity Act 1978 (the SIA) sets out the UK law on state immunity.

Section 1 of the SIA establishes that UK courts have no jurisdiction to adjudicate disputes against sovereign states unless one of the exceptions apply. One of those exceptions is where a state has agreed in writing to submit a dispute to arbitration. In such circumstances, the state does not enjoy immunity in respect of proceedings in the UK courts which relate to the arbitration.

Achmea and Komstroy cases

Before turning to the present case, it is worth recalling briefly the findings in the seminal cases of *Achmea* and *Komstroy* relating to intra-EU investment arbitration.

The matter *Slovak Republic v Achmea BV*,[(2)] was heard by the Grand Chamber of the Court of Justice of the European Union (the CJEU) and decided in March 2018. The underlying dispute between a Dutch company and the Slovak Republic arose under the 1991 bilateral investment treaty (BIT) between the Netherlands and the Czech and Slovak Federative Republic, which at article 8 foresaw the arbitration of disputes between one contracting party and an investor of the other contracting party. Following the commencement of an arbitration by Achmea, the Slovak Republic objected, arguing that the arbitral tribunal lacked jurisdiction and that, following its accession to the EU,

recourse to an arbitral tribunal appointed pursuant to article 8 of the BIT was incompatible with EU law. Achmea lost the arbitration. The German court reviewing Achmea's setting-aside application made a referral to the European Court of Justice (ECJ), enquiring whether articles 267 and 344 of the Treaty on the Functioning of the European Union (the TFEU) must be interpreted as precluding a provision in an international agreement concluded between EU member states allowing for the international arbitration of their investment treaty disputes. The CJEU concluded that treaty provisions permitting or establishing international arbitration for disputes involving EU member states and investors from EU member states (intra-EU arbitration) were contrary to the TFEU and were therefore effectively invalid.

In *Republic of Moldova v Komstroy LLC (successor in law to Energoalians)*,[(3)] decided in September 2021, the CJEU confirmed that article 26 of the ECT was not applicable to disputes between EU member states and EU investors. Applying the same reasoning as in *Achmea*, it further held that, because the EU was a contracting party to the ECT, that treaty was itself an act of EU law; an arbitral tribunal hearing an intra-EU arbitration under article 26 of the ECT might be required to interpret and apply that and other EU law in circumstances where the tribunal was not entitled to make a reference to the CJEU for a preliminary ruling. This situation was incompatible with the supremacy of the CJEU as the ultimate arbiter of matters of EU law under the EU treaties, and for this reason article 26 of the ECT was in conflict with EU member states' obligations arising under the EU treaties.

Facts

Underlying arbitration

In 2011, Infrastructure Services Luxembourg SARL (then known as Antin Infrastructure Services Luxembourg SARL) and Energia Termosolar BV (then known as Antin Energia Termosolar Netherlands BV) (the claimants) invested in certain solar power installations in Spain. Subsequent to the investment, Spain reduced and then removed the tariff advantages available for solar energy, to integrate tariffs and tax treatments within the European Union.

The claimants considered that Spain had breached its obligations under the ECT and in November 2013 commenced an ICSID arbitration. In its award dated 15 June 2018, the tribunal dismissed Spain's jurisdictional objection which, among other grounds, had alleged that the tribunal lacked jurisdiction on account of the dispute arising on an intra-EU basis. On the merits, the tribunal found that Spain had breached the fair and equitable treatment obligation under article 10(1) of the ECT and ordered the payment of damages of €112 million plus interest. A notable aspect of the arbitration was that the EU Commission applied to intervene as a non-disputing party, but ultimately did not do so, because it was unwilling to submit to the tribunal's demand that it give an undertaking that it would comply with any costs order made against it.

Spain applied to have the award annulled on the basis that the tribunal had exceeded its powers by exercising jurisdiction over the arbitration in breach of EU law. Spain again argued that any intra-EU arbitration under the ECT is precluded by EU law. On 30 July 2021, an ICSID annulment committee rejected Spain's application.

English proceedings

In June 2021, the claimants made an ex parte application to the English Court for an order of registration of the award under the 1966 Act. Ms Justice Cockerill granted the application and made the registration order (the order).

Spain issued proceedings to set aside the order, on the grounds that:

- a written agreement to arbitrate the underlying dispute did not exist and the award was, therefore, invalid (the intra-EU objection issue);
- Spain was entitled to immunity because the exceptions in the SIA did not apply and the court therefore did not have jurisdiction (the sovereign immunity issue); and
- the claimants allegedly failed to disclose material information when making their ex parte application (the non-disclosure issue).

Decision

Intra-EU objection issue

Placing reliance on the *Achmea* and *Komstroy* decisions of the CJEU, Spain argued that the order was made without jurisdiction, because any intra-EU arbitration under the ECT is precluded by EU law.

Mr Justice Fraser, in considering this argument, noted that Spain had presented the points of EU law as if they were decisions of an over-arching international court which must bind all nations. He agreed with the claimants that this approach ignored other aspects of international law requiring observance of existing express treaty obligations, such as the ICSID Convention and the ECT. He noted that the EU treaties do not trump other treaties, nor do they override the relevant domestic law mechanism in the United Kingdom.

In deciding on the intra-EU objection issue, Fraser J referred to the prior decision of the UK Supreme Court in *Micula & Ors v Romania (European Commission intervening)*.[(4)] That matter concerned an injunction issued by the EU Commission in 2014 ordering the suspension of any action to execute an ICSID award against Romania[(5)] until the Commission had taken a final decision on the compatibility of the award with EU State aid rules. When the Commission subsequently issued a decision finding that the award amounted to state aid, this was challenged by the claimant. Romania in turn obtained a stay of parallel English proceedings for registration of the *Micula* award under the 1966 Act. This order was appealed to the UK Supreme Court, on the grounds that:

- there was no power to order a stay under the ICSID Convention and the 1966 Act;
- such a stay was incompatible with the ICSID Convention;
- the European Communities Act 1972 did not require the United Kingdom to breach pre-accession obligations under the ICSID Convention; and
- article 351 of the TFEU applied, meaning that the obligations of the United Kingdom under the pre-accession ICSID Convention were not subject to the overriding effect of EU law.

The Supreme Court unanimously granted the appeal, noting that the provisions of the 1966 Act must be interpreted in the context of the ICSID Convention, under which, once the authenticity of an award was established, a domestic court had no authority either to examine

the award on its merits or to refuse to enforce the award on grounds of national or international public policy. This included a prohibition on re-examining the ICSID tribunal's jurisdiction.

As concerned Romania's argument that the ICSID Convention and the 1966 Act should be interpreted as far as possible in accordance with EU law, the Supreme Court commented that by operation of Article 351 of the TFEU, obligations arising from the ICSID Convention precluded the application of the EU treaties. In any event, the proper interpretation of the ICSID Convention was given by principles of international law applicable to all contracting states. Moreover, under the terms of the European Communities Act 1972 (the 1972 Act), EU law had effect within the United Kingdom only to the extent that it had been given such effect by section 2(1) of the 1972 Act. Successive EU treaties, which had been given effect in the domestic law of the United Kingdom by section 2(1) of the 1972 Act, included a provision equivalent to the current article 351 of the TFEU, as a result of which the 1972 Act made provision for the effect of accession on pre-accession treaties.

Additionally, Fraser J referred to the High Court decision in *Unión Fenosa Gas SA v Arab Republic of Egypt*.[(6)] That case concerned registration of an ICSID award in England and the question of whether the part 8 claim form should have been served on Egypt. In the context of considering articles 53 and 54 of the ICSID Convention, Mr Justice Males (as he then was) noted that the defences to enforcing an ICSID award under the 1966 Act were far narrower than those that would have been available if the award had been enforced under the 1958 New York Convention.

Reflecting on these cases, Fraser J opined that Spain (or any other member state) could not rely on *Achmea* and/or *Komstroy* to dilute the United Kingdom's own multilateral international treaty obligations nor rely on those cases to interpret the 1966 Act differently to what its clear terms required. He accordingly was not prepared to accept Spain's argument that the ECT and the ICSID Convention which, as he noted both had signatories which were not EU member states, should be interpreted by ignoring their clear terms regarding dispute resolution, in preference to granting the decisions of the CJEU complete primacy over those pre-existing treaty obligations of all states.

Sovereign immunity issue

Spain further argued that it was entitled to immunity from the registration of the ICSID award based on section 1(1) of the SIA. In turn, the claimants argued that under section 2(2) of the SIA, a state loses its adjudicative immunity if, by prior agreement, it has submitted to the jurisdiction of the English courts. This agreement was set out at article 54 of the ICSID Convention. Spain responded that only an express submission (or waiver) by the state itself would qualify as a submission pursuant to section 2(2) of the SIA and denied that article 54 of the ICSID Convention amounted to a submission or waiver.

Fraser J rejected this argument on the basis that article 54 of the Convention and article 26 of the ECT both constitute a "prior written agreement" for the purpose of the SIA 1978. He considered that the content and effect of the ICSID Convention and terms of the 1996 were clear. If Spain's reasoning were correct, section 1(1) of the 1966 Act would only apply to awards in which the United Kingdom was a party, which would be an absurd result.

Additionally, the claimants had invoked section 9(1) of the SIA, pursuant to which a state's adjudicative immunity is removed with respect to proceedings related to an arbitration in which it has agreed to arbitrate, including for recognition of any resulting award. Spain responded by arguing that under customary international law, a distinction was to be made between commercial arbitrations and those involving sovereign acts, which were not covered by the exception.

Fraser J disagreed – the wording of section 9(1) was not restricted only to commercial arbitration. Further, Spain's argument invited consideration of the substantive, underlying dispute in respect of which the award had been made as part of the court's consideration of whether the award should be recognised. This, he judged, was not appropriate.

Non-disclosure issue

Spain alleged that the claimants failed to comply with their duties of full and frank disclosure and fair presentation in obtaining the order. In particular, Spain complained that the claimants had failed to:

- update the court when the judgment of the CJEU in the *Komstroy* case was handed down on 2 September 2021;
- inform the court of various developments following the CJEU's judgment in *Achmea*, including the fact that EU member states, including (still) the United Kingdom, had signed a declaration whereby the committed to terminate their intra-EU BITs (intra-EU declaration);[(7)]
- update the court on developments within the EU relevant to Spain's argument that section 9(1) of the SIA cannot apply to displace its immunity; and
- draw the attention of the Court specifically to a passage in one of the authorities it had cited concerning inter partes hearings.

Fraser J summarised the principle that on applying for an ex parte order, an applicant must disclose to the Court any matters adverse to themselves which are material, because this was essential to ensuring due process where an order was to be made against a party without giving them the opportunity to be heard. He noted that materiality depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it. He accepted that the duty of full and frank disclosure also applied in respect of questions of state immunity.

As to the four complaints made by Spain, Fraser J considered the following:

- The failure to provide the court with a copy of the *Komstroy* judgment was not material, because whilst the decision did add to the weight of the material supporting Spain's arguments, it did not give rise to a new argument, and in any event the judgment was handed down about two and a half months after the order had been made and after the claimants had initiated the process for service of the order.
- The intra-EU declaration did not bind the English court or the judge who made the order, nor did it apply in priority over the 1966 Act or in preference to the ratio of the UK Supreme Court in *Micula* and, accordingly, was not relevant to the issues on the application;

- The Court was not likely to be assisted by a steady notification of material relevant to the development of EU law consistent with the *Achmea* judgment, as the issue was already put fairly by the claimants in the material already lodged with the court supporting the application; and
- The failure to cite a passage in one of its authorities concerning inter partes hearings was not a non-disclosure issue at all because inter partes hearings were not the procedure generally adopted for recognition of arbitral awards. Additionally, the judge considering the claimants' application (Cockerill J) was the judge in charge of the Commercial Court at the time and, therefore, will have been aware of the powers of the Court to order the holding of inter partes hearings.

Further, Fraser J disagreed with Spain's assertion that the judge making the order should have set the matter down for a fully contested hearing. He considered that Spain had been given the opportunity to address all the arguments that it wished to advance. Spain suffered no prejudice whatsoever. In particular, the claimants did draw the jurisdiction issues to the attention of the Court in their first witness statement and the extensive evidence lodged in support of their application. Further, listing the matter for an inter partes hearing would likely have required four court days, invariably some way in the future, which would not have been in accordance with the overriding objective,[(8)] let alone with the terms and ethos of the 1966 Act and the ICSID Convention itself.

Comment

This judgment confirms the United Kingdom's position that it will register ICSID awards made in intra-EU arbitrations, including under the ECT. This aligns the United Kingdom with the approach taken for example in several US federal courts and in Australia. In other jurisdictions, courts have been less willing to recognise and enforce intra-EU awards. No doubt, Britain's exit from the European Union makes it easier for the English courts to take this position, as EU law no longer is binding on the United Kingdom.

Fraser J dismissed Spain's arguments and observed that the ECJ is not the ultimate arbiter under the ICSID Convention nor under the ECT. Equally, he discouraged cases being brought to the Commercial Court for repetition or rehearing of jurisdictional objections already raised before and dismissed by an ICSID tribunal and/or annulment committee. This approach, which upholds the ICSID regime, will reassure investors.

The judgment makes clear that hearings and judgments of this length are uncommon and will only occur in exceptional cases, as this would ultimately contradict the Convention and the main purpose of international arbitration.

For further information on this topic please contact Christina Cathey Schuetz at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (christina.schuetz@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Abi Dhanji, trainee solicitor, assisted in the preparation of this article.

Endnotes

(1) [2023] EWHC 1226 (Comm).

(2) Case C-284/16.

(3) Case C-741/19.

(4) [2020] UKSC 5.

(5) *Ioan Micula, Viorel Micula, SC European Foods SA, SC Starmill SRL and SC Multipack SRL v Romania [I]* ICSID case No. arb/05/20, award dated 11 December 2013.

(6) [2020] EWHC 1723 (Comm).

(7) Declaration of the Representatives of the Governments of the member states of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union. The declaration stated in relevant part:

> *International agreements concluded by the [EU], including the [ECT], are an integral part of the EU legal order and must be compatible with the [EU] Treaties. Arbitral tribunals have interpreted the [ECT] as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, the clause would be incompatible with the Treaties and thus would have to be disapplied.*

(8) The overriding objective requires the court to consider the full list of matters at CPR part 1 in everything it does, including saving expense, acting proportionately, dealing with court business expeditiously and fairly, and allotting to any cases appropriate resources, including considering resources necessary for other court users.