

FEDERAL COURT OF AUSTRALIA AGAIN RECOGNISES AND ENFORCES ICSID AWARDS

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Legal Briefings - By **Leon Chung, Mitchell Dearness and William Hanna**

The Federal Court of Australia has recognised and enforced two awards issued in investor-state arbitrations conducted under the rules of the International Centre for Settlement of Investment Disputes (**ICSID**) (ICSID case numbers [ARB/13/31](#) and [ARB/13/36](#)). The Federal Court decision, [Eiser Infrastructure Limited v Kingdom of Spain \[2020\] FCA 157 \(*Eiser*\)](#), directly considers whether foreign states are immune from enforcement of an ICSID award in Australia.

This is the second decision involving the enforcement of an ICSID award against a foreign state in Australia (the first being [Lahoud v The Democratic Republic of Congo \[2017\] FCA 982 \(*Lahoud*\)](#)). The decision in *Eiser* is consistent with *Lahoud*.

The decision, that such an award could be enforced against Spain, shows that Australia is a reliable jurisdiction in which to seek the enforcement of awards against states. States cannot rely upon sovereign immunity protection to avoid the enforcement of ICSID awards. It also means that investors that have successfully obtained an arbitral award against a state should consider the possibility of enforcing that judgment against that state in Australia if its assets are located there.

BACKGROUND

Both arbitrations arose out of action taken by the Spanish Government in unwinding a series of financial incentives for solar power and other renewable resources which the investors had relied upon when making investments in solar power projects in Spain. The investors successfully obtained awards against Spain for its failure to accord fair and equitable treatment of the investors in breach of Art. 10(1) of the Energy Charter Treaty.

THE CASE IN THE FEDERAL COURT

In the Federal Court, Spain asserted foreign state immunity under section 9 of the *Foreign States Immunities Act 1985* (Cth) (**Immunities Act**). This operated in spite of section 32 of the *International Arbitration Act 1974* (Cth) (**Arbitration Act**) which gives effect to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**) under Australian law.

This was the only basis on which Spain asserted immunity, accepting that if the court found that it did not have immunity the enforcement of the awards necessarily followed.

Justice Stewart considered at length the object and purposes of the ICSID Convention, the English, French and Spanish texts of the relevant provisions, and commentary and foreign cases of the same. His Honour concluded that Article 54(1) of the ICSID Convention imposed on each Contracting State the obligation to enforce the pecuniary obligations of ICSID's awards in its territory as if it were a judgment of its designated courts, with the underlying implication being that Australia would also apply and enforce properly made ICSID awards.

Out of this discussion, his Honour noted that there was a tension between the *Immunities Act* and the ICSID Convention as it is given force of law in the *Arbitration Act*. His Honour found, however, that by also being a Contracting State (to the ICSID Convention), Spain had consented to the designated courts of other Contracting States (and therefore, Australia) recognising and enforcing arbitral awards against it. Accordingly, it had waived any right to claim immunity under the *Immunities Act* in such cases.

On 20 March 2020, the Kingdom of Spain filed a notice of appeal against Justice Stewart's decision.

COMMENT

While a decision on the appeal by Spain cannot be expected until at least the end of this year (and possibly later in light of COVID-19), taken together with *Lahoud, Eiser* at first instance reinforces that the Australia judiciary is equipped and willing to recognise and enforce arbitral awards issued in ICSID arbitrations.

An investor with a favourable award against a state should consider whether that state has assets in Australia. The cases continue to show that the Australian judiciary is pro-arbitration.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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