



## HIGH COURT OF AUSTRALIA

12 April 2023

KINGDOM OF SPAIN v INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L. & ANOR  
[2023] HCA 11

Today, the High Court unanimously dismissed an appeal from the Full Court of the Federal Court of Australia relating to the interpretation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("the ICSID Convention"). The issues before the Court concerned whether, and to what extent, entry by a foreign State into the ICSID Convention, and concomitant agreement to Arts 53, 54 and 55, constitutes a waiver of foreign State immunity under the *Foreign States Immunities Act 1985* (Cth) ("the Act") from Australian court processes concerning recognition and enforcement of arbitral awards.

The respondents, relying on the Energy Charter Treaty (1994), commenced arbitral proceedings against the Kingdom of Spain ("Spain") under the ICSID Convention. The respondents obtained an award of €101m and brought proceedings in the Federal Court of Australia to enforce the award under the *International Arbitration Act 1974* (Cth), which gives effect to the ICSID Convention in Australia. The issue was whether Spain had waived foreign State immunity under ss 9 and 10 of the Act, which relevantly provide that a foreign State is immune from the jurisdiction of Australian courts except where it has submitted to that jurisdiction by agreement (including by a treaty).

The primary judge held that Spain's agreement to Arts 53, 54 and 55 constituted a waiver of its immunity from recognition and enforcement, but not from execution of the award. Spain was ordered to pay the respondents €101m together with interest on that sum. On appeal, the Full Court held that immunity from recognition had been waived, but immunity from court processes of execution (and perhaps also from enforcement) had not. New orders were made, including for the award to be recognised as binding and for judgment to be entered against Spain for €101m.

The High Court, in dismissing the appeal, held that as Spain was the subject of a binding ICSID award, its agreement to Arts 53, 54 and 55 of the ICSID Convention amounted to a waiver of foreign State immunity from the jurisdiction of Australian courts to recognise and enforce, but not to execute, that award. The Court held that the international law principle that a waiver of immunity under s 10 of the Act must be "express" should not be understood as denying the ordinary and natural role of implications in elucidating the meaning of express words. The Court determined that the words "recognition", "enforcement", and "execution" in Arts 53, 54 and 55 of the ICSID Convention are used separately and with different meanings. Recognition is the obligation to recognise the award as binding, enforcement is the obligation to enforce any pecuniary obligations imposed by the award as if the award were a final judgment of a court in the Contracting State, and execution refers to the means by which a judgment enforcing the award is given effect. There is no real difference between the English text and the French and Spanish texts of Arts 53, 54 and 55 in respect of the distinction between recognition and enforcement, on the one hand, and execution, on the other. The Court concluded that the orders made by the courts below were properly characterised as orders for recognition and enforcement.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*