FEDERAL COURT OF AUSTRALIA

Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220

File number:	NSD 602 of 2019
Judge:	**STEWART J**
Date of judgment:	1 August 2019
Date of publication of reasons:	8 August 2019
Catchwords:	**ARBITRATION** – international arbitration – application for stay of proceeding for recognition and enforcement of award of a tribunal of the International Centre for Settlement of Investment Disputes (ICSID) under s 35(4) of the *International Arbitration Act 1974* (Cth) – where there is an application for annulment of the award by ICSID – where enforcement of award automatically stayed by ICSID until determination of annulment application – application to stay enforcement proceeding – application granted **PRIVATE INTERNATIONAL LAW** – foreign State immunity – where foreign State respondent asserts immunity and applicant applies to stay proceeding – s 9 of *Foreign States Immunities Act 1985* (Cth) does not deprive the Court of jurisdiction to determine the stay application
Legislation:	*Federal Court of Australia Act 1976* (Cth) ss 19, 23 *Foreign States Immunities Act 1985* (Cth) ss 9, 10, 38 *International Arbitration Act 1974* (Cth) ss 27, 32, 35, pt IV, sch 3 *Judiciary Act 1903* (Cth) s 39(IA)(c) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1985, 575 UNTS 159 (entered into force 14 October 1966) (1965 Convention on the Settlement of Investment Disputes), being Sch 3 to the International Arbitration Act 1974* (Cth) Arts 49, 52, 54
Cases cited:	*Bannon v Nauru Phosphate Royalties Trust (No 3)* [2017] VSC 284; (2016) 51 VR 370

	CGU Insurance Ltd v Blakeley [2016] HCA 2; 259 CLR 339 *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4, Interim Order 1, 12 August 1988) *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33; 247 CLR 240 *Wardley Australia Ltd v Western Australia* [1992] HCA 55; 175 CLR 514 *Zhang v Zemin* [2010] NSWCA 255; 79 NSWLR 513
Date of hearing:	1 August 2019
Registry:	New South Wales
Division	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	42
Counsel for the Applicants:	J Hogan-Doran and C Brown
Solicitor for the Applicants:	Norton Rose Fulbright
Counsel for the Respondent:	The Respondent did not appear
Solicitor for the Respondent:	Squire Patton Boggs

ORDERS

NSD 602 of 2019

BETWEEN:	**INFRASTRUCTURE SERVICES LUXEMBOURG S.A.R.L.** First Applicant
	ENERGIA SOLAR LUXEMBOURG S.A.R.L Second Applicant
AND:	**KINGDOM OF SPAIN** Respondent

JUDGE:	**STEWART J**
DATE OF ORDER:	**1 AUGUST 2019**

THE COURT ORDERS THAT:

1. The proceeding be stayed until further order.
2. The matter be listed for case management on 29 October 2019 at 10:15am.
3. Liberty to apply on three (3) business days' notice in writing.
4. Costs be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 By originating application filed on 17 April 2019, the applicants seek orders pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth) (**IAA**) for leave to have an award of the International Centre for Settlement of Investment Disputes (**ICSID**) enforced as if it was a judgment of this Court. The award was made under the ***Convention*** *on the Settlement of Investment Disputes between States and Nationals of Other States*.

2 The award was made against the respondent, the Kingdom of **Spain**. It is dated 15 June 2018 and was rectified by a further award dated 29 January 2019. The applicants also seek ancillary relief, including payment of the amount of the arbitration award as rectified, viz. €101 million plus interest and a contribution to the costs of the arbitration proceeding and the costs of this proceeding (the **enforcement proceeding**).

3 By interlocutory application filed on 15 July 2019, the applicants sought orders staying their own enforcement proceeding until further order. Unusually for a respondent, Spain initially expressed opposition to the stay. Later it did not appear at the hearing of the stay application to press that opposition.

4 On 1 August 2019, I made orders staying the proceeding until further order and dealing with ancillary matters. These are my reasons for making those orders.

The ICSID Convention in Australia

5 The Convention was signed by Australia on 24 March 1975 (IAA, s 31(1)) and is set out in Schedule 3 to the IAA. Section 32 of the IAA gives chapters II to VII of the Convention the force of law in Australia. Section 35(4) of the IAA provides that an award under the Convention may be enforced in the Federal Court of Australia with the leave of the Court as if the award were a judgment or order of the Court.

6 Chapter IV of the Convention deals with arbitration. Within that chapter, the following provisions are presently relevant:

SECTION 5

Interpretation, Revision and Annulment of the Award

…

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

(2) …

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. … The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) …

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) …

SECTION 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the

award as if it were a final judgment of the courts of a constituent state.

…

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

7 Also relevant to what follows are the following provisions of the *Foreign States* ***Immunities Act*** *1985* (Cth):

9 General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

10 Submission to jurisdiction

(1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

…

(6) Subject to subsections (7), (8) and (9), a foreign State may submit to the jurisdiction in a proceeding by:

(a) instituting the proceeding; or

(b) intervening in, or taking a step as a party to, the proceeding.

(7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:

(a) it has made an application for costs; or

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

…

38 Power to set aside process etc.

Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

Substantive background

8 On 15 June 2018, a three-member tribunal of ICSID in Washington DC issued the arbitration award in the applicants' favour against Spain for, amongst other things, payment of €112 million as compensation for Spain's breach of the Energy Charter Treaty (**ECT**) which entered into force with respect to Spain, Luxembourg and the Netherlands on 16 April 1998. In that

regard, the first and second applicants are corporations incorporated in Luxembourg and the Netherlands, respectively.

9 The dispute related to measures undertaken by Spain in the renewable energy sector which impacted on the applicants and their investments in that sector in Spain. Those investments consisted of the acquisition of shareholding participations in two operational concentrated solar power plants located in Granada, southern Spain, in 2011.

10 The tribunal found Spain responsible for breaching its obligations under Art 10(1) of the ECT to accord fair and equitable treatment to the applicants.

11 On 24 July 2018, pursuant to Art 49(2) of the Convention and r 49 of the *Rules of Procedure for Arbitration Proceedings* (**ICSID Arbitration Rules**), Spain submitted a request for rectification of the award to the Secretary-General of ICISD. Pursuant to the procedure that followed, on 29 January 2019 the tribunal issued a Decision on Rectification of the Award which, amongst other things, reduced the amount of the award to €101 million as compensation.

12 On or about 23 May 2019, Spain filed an application for annulment of the award with ICSID under Art 52(1). The application relies on the grounds in paragraphs (b), (d) and (e) of that provision. In its application for annulment, under Art 52(5) Spain requested the Secretary-General of ICSID to provisionally stay enforcement of the arbitral award until the ad hoc Committee, which is to be established to consider the application, rules on the request.

13 On 23 May 2019, the Secretary-General registered Spain's application for annulment and notified the parties to the arbitration that enforcement of the award is provisionally stayed under Art 52(5). Such notification is required by r 54(2) of the ICSID Arbitration Rules.

Procedural background

14 Also on 23 May 2019, the matter came before me for its first case management hearing. Spain appeared conditionally by senior counsel who explained that Spain was considering its position. I made orders directing Spain to file and serve a notice of appearance, if any, by 6 June 2019 and, if it filed an appearance, to briefly indicate in correspondence to the applicants (copied to my Chambers) the basis on which it opposes the relief sought by the applicants.

15 On 6 June 2019, Spain's solicitors indicated in correspondence that it objects to the originating application on the basis that Spain is immune from the jurisdiction of this Court in the enforcement proceeding pursuant to s 9 of the Immunities Act.

16 Also on 6 June 2019, Spain filed a conditional appearance stating that it "entered a conditional appearance in these proceedings only for the limited purpose of asserting immunity from the jurisdiction of the courts of Australia in accordance with section 10(7) of the Immunities Act".

17 At a case management hearing on 13 June 2019, I made programming orders for the service and filing of evidence and submissions and listed the proceeding for final hearing on 29 October 2019.

18 The fulfilment of the programming orders was interrupted by the filing of an interlocutory application by the applicants on 15 July 2019 in which they sought, in substance, the stay and other orders that I made on 1 August 2019 as referred to in [4] above. The stay was sought because of the automatic provisional stay of enforcement of the award under Art 52(5) of the Convention discussed above. The applicants envisage that if, and when, the stay is lifted by ICSID then they will apply again for the lifting of the stay of this proceeding in order to be able to progress the enforcement proceeding to final hearing.

19 In response to the stay application, Spain took the position in correspondence that the automatic provisional stay of enforcement does not impact upon or affect the determination of the foreign State immunity issue which was listed to be dealt with by way of final hearing on 29 October 2019. The applicants, in contrast, took the position in correspondence that for them to continue to progress the matter towards final hearing on 29 October 2019 would be in conflict with the automatic provisional stay on enforcement, yet for them not to progress the matter in that way would put them in breach of the orders of this Court.

20 In view of the position taken by Spain, the applicants in correspondence asked Spain to commit to not relying on the automatic provisional stay on enforcement in this proceeding or any appeal from it. Spain declined to do so, continuing to take the view that the automatic provisional stay does not affect the hearing on 29 October 2019.

21 I listed the interlocutory application for case management on 18 July 2019. The applicants filed written submissions in support of the stay application. Spain then filed written submissions in response. Spain submitted that the legal authorities (to which I will refer below) make it plain that when the question of foreign State immunity is raised, that issue must be

determined prior to and before any purported exercise of jurisdiction against the foreign State. Spain also submitted that the stay application is an impermissible attempt to implead a foreign State in circumstances where a conditional appearance has been filed by the foreign State and the immunity issue has been directly raised and is listed for hearing.

22 At the case management hearing on 18 July 2019, I relisted the matter for further case management on 1 August 2019. That was on the basis that the parties would confer in the interim to see whether they could reach an agreement on how both their respective positions could be protected. For the applicants, the concern was to avoid doing anything in the enforcement proceeding that is in conflict with the automatic provisional stay of enforcement recognised by ICSID. For Spain, the concern, as I understood it, was to have the immunity issue determined on 29 October 2019 at the same time that the same issue is determined in separate but similar proceedings that involve Spain as the respondent where exactly the same State immunity point has been taken. The two matters had been listed to be heard simultaneously.

23 In the interim period, the parties were not able to arrive at a common position. In correspondence dated 31 July 2019, the solicitors for Spain reiterated that the question of foreign State immunity must be determined "at the threshold of the litigation" and before the Court deals with the applicants' stay application. Spain put the matter firmly in the applicants' court stating that if the applicants are concerned about being in breach of the automatic provisional stay of enforcement then they can discontinue the enforcement proceeding or ask that the interlocutory application be adjourned until 29 October 2019 and be determined after the foreign State immunity point is resolved.

24 In separate correspondence on the same day, the solicitors for Spain stated that they would not attend the case management hearing the following day. The implication was that Spain would not appear. The solicitors for the applicants replied to that correspondence advising that the applicants would seek to have the interlocutory stay application heard and determined immediately, i.e. on the occasion of its listing for case management.

25 When the matter was called on 1 August 2019, there was no appearance by Spain, as anticipated. I infer that the reason for Spain not appearing and not opposing the stay, despite having initially filed submissions in opposition, was to avoid thereby submitting to the jurisdiction of the Court and losing any immunity that it may have on account of s 10(1) of the

Immunities Act, i.e. by being seen to intervene in or take a step in the proceeding as envisaged by s 10(6)(b) of the Immunities Act.

Consideration

26 Subject to Part IV of the IAA, by force of s 32 of the IAA, Art 52(5) of the Convention has the force of law in Australia. There is nothing else in Part IV of the IAA that appears to be relevant to the issues that arise for consideration.

27 It is thus the position that under Art 52(5) of the Convention "enforcement" of the award is provisionally stayed. In the enforcement proceeding, the applicants seek enforcement of the award. On the face of it, progressing the enforcement proceeding towards the final hearing on 29 October 2019 would therefore be in conflict with the automatic provisional stay of enforcement under Art 52(5).

28 However, under Art 54(1), Australia as a contracting State "shall recognize [the] award … as binding and enforce the pecuniary obligations imposed by [the] award within its territories as if it were a final judgment of a court in that State". That might be seen to oblige the Court to progress the proceeding and not stay it. However, in my view the obligations under that provision are subject to the provisions of Art 52(5) with the result that the automatic provisional stay of enforcement also stays, or suspends, Australia's obligations under Art 54(1).

29 In *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4, Interim Order 1, 12 August 1988) the *ad hoc* Committee that was established following Guinea's request for a stay of enforcement of an award considered the relationship between the stay provisions in Art 52 and the enforcement provisions in Art 54. The Committee (at [10]) reasoned that "although the Convention does not explicitly so provide, it seems clear that suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation (and for that matter its authority) to enforce the Award, even though during the pendency of the Committee's examination of the application for annulment the validity of the Award remains unaffected".

30 To my mind, that reasoning is correct and I adopt it. Arts 52 and 54 have to be read and understood together, and that is the only logical way of reading them in harmony.

31 It remains to consider whether the contentions put forward by Spain in the written submissions that it filed but which it subsequently did not assert by way of appearance at the hearing, have the consequence that the current proceeding should not be stayed.

32 In that regard, the starting point is that the applicants rely on the power conferred by s 23 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) "in relation to matters *in which it has jurisdiction*, to make orders of such kinds, including interlocutory orders … as the Court thinks appropriate" for the stay orders (my emphasis). That raises the question whether in the face of Spain's conditional appearance to assert foreign State immunity this Court has "jurisdiction" as referred to in s 23 such as to have the power conferred by that section.

33 In ***PT Garuda*** *Indonesia Ltd v Australian Competition and Consumer Commission* [2012] HCA 33; 247 CLR 240 consideration was given to the nature of the immunity from "jurisdiction" that the Immunities Act confers, and to the manner or procedure by which a court will decide the question of immunity.

34 The plurality of French CJ and Gummow, Hayne and Crennan JJ stated as follows with regard to "jurisdiction":

> [17] …in s 9 and elsewhere in the Act the term "jurisdiction" is used not to identify the subject matter of a proceeding, but the amenability of a defendant to the process of Australian courts. The notion expressed by the term "immunity" is that the Australian courts are not to implead the foreign State, that is to say, will not by their process make the foreign State against its will a party to a legal proceeding. Thus, the immunity may be understood as a freedom from liability to the imposition of duties by the process of Australian courts.
>
> [Footnotes omitted.]

35 Their Honours went on to consider how the question of foreign State immunity is to be raised and decided. After citing (at [21]) the provisions of s 27(2) of the IAA by which a judgment in default of appearance shall not be entered against a foreign State or against a "separate entity" of a foreign State unless the court is satisfied that, in the proceeding, the foreign State or separate entity is not immune, the following was said:

> [22] If the foreign State or separate entity has appeared and waived any immunity, or has asserted its immunity, the issue of immunity will have either disappeared or fallen for adjudication. If there is no appearance, then it will be for the court to be satisfied under s 27 as to the absence of immunity before entry of any default judgment which is sought. It is not a correct construction of the Act that even without an application under s 38 to set aside service, or an application under s 27 for a default judgment, the court must of its own motion satisfy itself that the defendant could not establish immunity.
>
> [Footnote omitted.]

36 That paragraph has one footnote at the end as follows: "cf ***Zhang*** *v Zemin* [2010] NSWCA 255; (2010) 79 NSWLR 513 at 523, 541-542." Obviously the use of "cf" in this footnote indicates that not everything that is referred to in *Zhang* is necessarily approved or adopted.

The latter of the pinpoint references (i.e. 541-542) is from the separate concurring judgment of Allsop P which does not seem to be immediately relevant. The former (i.e. 523) is to the judgment of Spigelman CJ, with whom McClellan CJ at CL agreed. Relevantly, it is as follows:

> [33] In my opinion, s 9 is intended to have effect prior to the purported exercise of a jurisdiction to which it is addressed. In the usual case, the issue of jurisdiction should be determined as a preliminary matter. (See […])
>
> [34] Where s 9 applies a court is deprived of jurisdiction to hear and determine the matter. Section 9 has effect prior to any "judgment, order or process of the court". Section 9 is, as the Attorney submitted, self-executing.
>
> [35] Nothing in s 38 impliedly, let alone expressly, suggests that it is the sole mechanism for dealing with the issue of jurisdiction. In its terms, s 38 indicates that it is not. It applies only when there has been a "judgment, order or process" which is "inconsistent with an immunity" under the Act. The peremptory terms of s 9, and the whole of Pt II of the Act, suggest that the protection of s 9 is intended to apply *in limine* and not only after a "judgment, order or process" has issued from the court.
>
> [36] This conclusion is, in my opinion, reinforced by a purpose of the legislative scheme, one of which is to prevent foreign states from being subject to the necessity to participate in proceedings at any stage. That is one reason why s 9 is directed to the jurisdiction of the courts, rather than to the powers of the courts. Imposing a necessity on a foreign state to contest the issue of immunity in all circumstances is inconsistent with the attainment of that object.
>
> [37] A further, alternative, reason for rejecting the appellant's contentions is that there is a long line of authority that a court must satisfy itself that it has jurisdiction, whether or not a jurisdictional issue is raised by a party.

37 It is clear from *PT Garuda* that the mere fact of Spain having entered a conditional appearance in which it has indicated that it asserts foreign State immunity under the Immunities Act does not mean that that issue has to be determined prior to any consideration of a stay of the proceeding. That is because staying the proceeding does not implead Spain in any way; it does not "make the foreign State against its will a party to a legal proceeding" (see *PT Garuda* at [17]).

38 I do not read *Zhang* to be in conflict with that. Staying the proceeding is avoiding or deferring any "judgment, order or process of the court" (see *Zhang* at [34]) rather than making Spain subject to any judgment, order or process. A "judgment, order or process" referred to in that paragraph is, as is made clear in *Zhang* at [35], something that might be the subject of an application under s 38 of the Immunities Act on the basis that it is inconsistent with an immunity conferred by the Immunities Act. That is an immunity from jurisdiction in the sense explained in *PT Garuda* (at [17]) which, as I have said, is not impugned by the stay.

39 This Court has "jurisdiction" in this matter in the sense used in s 23 of the Federal Court Act by virtue of s 19 of that Act, s 39B(1A)(c) of the ***Judiciary Act*** *1903* (Cth) and s 35(3) of the IAA which provides that this Court is designated for the purposes of Art 54 of the Convention. That is subject matter jurisdiction (see *Wardley Australia Ltd v Western Australia* [1992] HCA 55; 175 CLR 514 at 561 per Toohey J and *CGU Insurance Ltd v Blakeley* [2016] HCA 2; 259 CLR 339 at [24] per French CJ and Kiefel, Bell and Keane JJ) which is distinct from the question of jurisdiction over Spain (i.e. "the amenability of [Spain] to the process of Australian courts", *PT Garuda* at [17]) as dealt with by the Immunities Act.

40 In light of *PT Garuda*, the first sentence of paragraph [34] of *Zhang*, which states that where foreign State immunity applies the court is deprived of jurisdiction to hear and determine the matter, must be understood as saying that the court is deprived of jurisdiction *over the foreign State respondent*. Even where foreign State immunity applies, if the court has subject matter jurisdiction under s 39B(1A)(c) of the Judiciary Act then it still has jurisdiction to consider and determine procedural issues such as the stay that is sought in this case and whether or not the State respondent enjoys foreign State immunity. Section 9 of the Immunities Act does not deprive it of that form of jurisdiction.

41 In the circumstances, as an exercise of the power conferred on the Court by s 23 of the Federal Court Act, I stayed the enforcement proceeding.

42 Although the applicants' interlocutory application indicated that they would seek the costs of the application from Spain, before me they asked that the costs be reserved. That approach relieved me from having to deal with the question of whether such an order would have impleaded Spain in such a way as to require me to first decide the foreign State immunity point (see *Bannon v Nauru Phosphate Royalties Trust (No 3)* [2017] VSC 284; (2016) 51 VR 370 which dealt with the obverse situation of a non-party foreign State seeking the costs of its successful assertion of immunity).

I certify that the preceding forty two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart.

Associate:

Dated: 8 August 2019