IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-734
[2021] NZHC 371

UNDER	the Arbitration (International Investment Disputes) Act 1979 and the High Court Rules 2016
IN THE MATTER	of an originating application for the recognition, by entry as a judgment, of an arbitral award made by the International Centre for the Settlement of Investment Disputes
BETWEEN	SODEXO PASS INTERNATIONAL SAS Applicant
AND	HUNGARY Respondent

Hearing: 15 and 16 November 2021

Appearances: D R Kalderimis, N K Swan and J P Papps for the Applicant
Hon C Finlayson QC, I Thain and I S Scorgie for the Respondent

Judgment: 10 December 2021

JUDGMENT OF COOKE J
(Protest to jurisdiction)

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[1] By application dated 9 December 2020 the applicant, Sodexo Pass International SAS (Sodexo) has sought an order that an arbitral award in its favour dated 28 January 2019 against the respondent, Hungary, be recognised in New Zealand. Following the Court giving certain procedural directions, including in relation to service, Hungary lodged a protest to jurisdiction dated 31 May 2021. By application dated 5 July 2021 Sodexo seeks to set aside Hungary's protest to jurisdiction. This judgment deals with that application.

Background

[2] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966 (the ICSID Convention),[1] corporations that have invested within the jurisdiction of state parties, and those states, are able to obtain binding arbitral awards when there are disputes about the investment. New Zealand acceded to the ICSID Convention in May 1980, and Hungary acceded in March 1987. The arbitral award that is sought to be recognised in these proceedings was so conducted under the ICSID Convention. On 6 November 1986 Hungary and France entered into the Agreement on the Reciprocal Promotion and Protection of Investments between the two countries. This contemplated the type of investment regulated by the ICSID Convention, and the availability of the arbitration procedures.

[3] Sodexo made investments into Hungary by becoming a meal voucher issuer in that country. At that stage such vouchers were exempt from income tax. In 2010 Hungary introduced tax reform which included new tax rates on meal vouchers. Sodexo then filed an arbitral claim against Hungary on 30 July 2014 alleging that the tax reforms meant that its investment had been appropriated. Arbitral proceedings proceeded before three arbitrators leading to an award dated 28 January 2019 where, by a majority decision, Sodexo was awarded €72,881,361 together with interest.

[4] In May 2019 Hungary filed an application for annulment of the award under art 52(1) of the ICSID Convention. On 7 May 2021 an ICSID ad hoc committee declined to annul the award in accordance with the Convention.

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1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (14 October 1966) [ICSID Convention].

[5] Sodexo now seeks to enforce the award in New Zealand. It does so by first seeking to have the award recognised by the New Zealand High Court. Hungary has protested the Court's jurisdiction and Sodexo seeks to set this aside. Sodexo relies on the following relevant provisions of the ICSID Convention to found jurisdiction:

> **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.
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> (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 recognise 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.
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> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
>
> *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.

[6] The provisions of the ICSID Convention have been incorporated into New Zealand domestic law. Under the Arbitration (International Investment Disputes)

Act 1979 (the ICSID Act) Articles 18, 20–24, and Chapters 2–7 of the Convention have the force of law in New Zealand in accordance with the provisions of the Act.[2] Section 4 of the ICSID Act provides:

> **4 Recognition and enforcement of awards**
>
> (1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.
>
> (2) The High Court is designated for the purposes of Article 54 of the Convention.

[7] As initially enacted, the ICSID Act was in different terms closely following the formulation in the Arbitration (International Investment Disputes) Act 1966 (UK). In 2000 the Act was amended to more accurately reflect New Zealand's international obligations.[3]

Hungary's protest

[8] It is first appropriate to set out the basis for Hungary's protest to the jurisdiction of the New Zealand Court.

[9] Hungary argues it is immune from the Court's adjudicative jurisdiction and that Sodexo had not established the existence of a relevant exception to that immunity. It emphasises the importance in international law and international relations of state immunity which was not merely a matter of comity.[4] If there is immunity, the Court has no jurisdiction.[5] Hungary accepts that the immunity is not absolute, and the restrictive theory of state immunity applies.[6] But Sodexo has the burden to demonstrate an exception to the immunity, reflecting a commercial transaction or state consent, and it has failed to do so.

[10] Hungary further argues that adjudicative immunity can only be lost by consent by submission to the jurisdiction of the court after the proceedings are commenced.

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2 Arbitration (International Investment Disputes) Act 1979, s 3A.
3 Arbitration (International Investment Disputes) Amendment Act 2000 (2000 No 52).
4 *Jurisdictional Immunities of the State* (*Germany v Italy; Greece intervening*) [2012] ICJ Rep 99 at [53].
5 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827.
6 *I Congreso del Partido* [1983] 1 AC 244; *Young v Attorney-General*, above n 5; compare *Democratic Republic of the Congo v FG Hemisphere Ass* [2011] HKCFA 41.

The various authorities relied on by Sodexo which adopt a different view based on the terms of the ICSID Convention involved countries that had codified, and adjusted the law of state immunity by domestic legislation.[7] That was not the case in New Zealand where the common law, and customary international law apply.

[11] In terms of customary international law the United Nations Convention on Jurisdictional Immunity of States and their Property (the United Nations Convention) did not assist Sodexo. It was not in force notwithstanding being open for signature for 15 years with only 22 states ratifying it.[8] Sodexo needed to establish that what was set out in the articles were relevant principles of customary international law, and that they applied in the present circumstances. This would involve showing "widespread, representative and consistent state practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation…".[9] This was a high threshold that Sodexo had not reached.

[12] Hungary further argues that, even if the United Nations Convention were treated as reflecting customary international law, art 17 (which prevents a state invoking immunity before the jurisdiction of the court where it has submitted a matter relating to a commercial transaction to arbitration) did not apply as there was no commercial transaction. The International Law Commission had also noted that it may not apply to ICSID Convention proceedings.[10] Article 7 (which prevents a state from invoking state immunity if it has expressly consented to the exercise of jurisdiction by the relevant court) also did not apply as, even if customary law had moved on from the requirement that submission needed to be in the face of the court, the agreement had to be unequivocal and not implied. A waiver of a principle of this kind had to be in clear and unambiguous language as a matter of general principle.[11] The authorities that Sodexo relied upon, such as *Kingdom of Spain v Infrastructure*

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7 See the authorities at footnotes 20–23 below.

8 *United Nations Convention on Jurisdictional Immunities of States and their Property* GA Res A59/38 (2004).

9 *Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] AC 82 at [31].

10 *Draft articles on the Jurisdictional Immunities of States and their Property* [2001] vol 2, pt 2 YILC 13 at 54.

11 An example provided was art 14(5) of the 1992 International Convention on the Establishment of an International Fund for Compensation of Oil, Pollution Damage which requires a bound state to waive any immunity it would otherwise be entitled to invoke; see also *Case concerning Eletrronica Sicula S.p.A* (*United States v Italy*) *(ELSI)* [1989] ICJ Rep 15 at [50].

Services Luxembourg SARL referred to consent arising as a matter of implication, and this was not sufficient.[12]

[13] Article 54 of the ICSID Convention contained no submission to the New Zealand Court's jurisdiction. It was in similar terms as art III of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which had never been interpreted as involving a waiver of state immunity.[13] Professor Schreuer's views to the contrary were outlined without full discussion, and without squarely addressing the wording of the Convention.[14] As the British Virgin Islands High Court had held in *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan and Anor* the provisions of the ICSID Convention placed no obligations on Hungary.[15] Moreover the suggestion that art 54 created an international obligation could make states in breach in a range of circumstances where their domestic laws did not allow an award to be recognised for technical reasons. This could not be the case.

[14] Hungary argued that Sodexo's remedy arose under art 64 of the ICSID Convention. Article 64 deals with disputes between contracting states and requires those states to refer their disputes, if not settled by negotiation, to the International Court of Justice. So Sodexo could ask France to pursue this route on its behalf. The *traveaux préparatoires* demonstrated that it was assumed that states would comply with awards and that the art 64 procedure was the contemplated remedy when they did not.[16]

[15] Hungary says that by seeking entry of the award as a judgment Sodexo was actually seeking enforcement of the award which was precisely what Hungary had immunity from under art 55 of the ICSID Convention. Enforcement and execution

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12 *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2021] FCAFC 3. That was also so of many of the other precedents Sodexo relied upon.

13 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (10 June 1958).

14 See footnote 31 below.

15 *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan and Anor* BVIHC (Com) 2020/0196 (25 May 2021).

16 *History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention of the Settlement of Investment Disputes between States and Nationals of Other States* vol 11–1 (ICSID 1968) at 344.

effectively mean the same thing as is demonstrated by the French and Spanish versions of the Convention which have equal validity.

[16] In the alternative Hungary argued the Court should not assume jurisdiction under the High Court Rules 2016. Rule 6.27(2)(m) did not apply as Sodexo advanced its application on the basis that it did not seek to execute the award in New Zealand against Hungary's assets. It could not avoid this conundrum by an exercise in verbal gymnastics. Moreover New Zealand was not the appropriate forum because there was no real and substantial connection with New Zealand and there was no evidence that Hungary even had any assets in New Zealand. Sodexo needed to put forward some evidence that there was some reason for the proceedings in New Zealand, and no such admissible evidence has been filed.

[17] Hungary emphasised that the Court should not lightly assume jurisdiction over a foreign state, and it would be perverse to do so based on what had been put forward here.

The issues

[18] I will address the reasons why Sodexo argues that the matters advanced by Hungary should not lead to the protest being upheld when explaining the conclusions that I have reached.

[19] Notwithstanding the detailed nature of the argument before me, which included two days of tightly reasoned oral argument following written submissions from counsel specialising in this area, I will seek to express my conclusions in concise terms, and believe it is appropriate to do so.

[20] There are two key issues. The first is whether Hungary is able to claim state immunity from having the award recognised in New Zealand in light of what it has agreed to in the ICSID Convention. The second is whether there is a proper basis for the New Zealand Court to assume jurisdiction under the High Court Rules 2016. Hungary's protest to jurisdiction can only be set aside if Sodexo satisfies me on both matters.

State immunity

[21] In assessing the arguments in relation to state immunity I will first address the meaning of the ICSID Convention, and in the alternative, the arguments concerning customary international law.

Meaning of ICSID Convention

[22] The ICSID Convention should be interpreted in accordance with art 31 on the Vienna Convention on the Law of Treaties.[17] The ICSID Act should be interpreted in accordance with the standard principles of statutory interpretation.[18] The starting point for both is the text of the ICSID Convention interpreted in its context and in light of its object and purpose.[19]

[23] Following that approach I generally agree with the decisions of the courts of Australia,[20] the United States of America,[21] and France,[22] that states in the position of Hungary have agreed that an ICSID arbitral award will be recognised as enforceable before domestic courts subject to their ability to claim state immunity in relation to subsequent execution steps.[23]

[24] My conclusion is based on the terms of the ICSID Convention. The proper meaning of arts 53–55 should be considered together as they are interrelated provisions that involve an overall scheme relating to the enforcement of ICSID arbitral awards. The important features of the scheme are, for present purposes, that:

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17 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

18 Legislation Act 2019, s 10.

19 Vienna Convention on the Law of Treaties, above n 17, art 31(1); Legislation Act 2019, s 10(1).

20 *Kingdom of Spain v Infrastructure Services Luxembourg SARL*, above n 12; *Kingdom of Spain v Infrastructure Services Luxembourg SARL (No 3)* [2021] FCAFC 112 at [72]; *Lahood v The Democratic Republic of Congo* [2017] FCA 982.

21 *Liberian Eastern Timber Corporation (LETCO) v Liberia USDC New York* (12 Dec 1986) 2 ICSID Reports.

22 *Société Africiane des Bétons Industriels (SOABI) v Senegal Cour de cassation* (11 June 1991) 2 ICSID Reports 341.

23 That approach appears also to have been applied in English and Wales – see *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm) [2006] 1 WLR 1420 at [5] and [7]; and *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), [2016] 1 WLR 2829.

(a) Under art 53(1) Hungary has agreed to abide by and comply with the terms of the award subject to enforcement being stayed under the ICSID Convention. No such stay has been entered here.[24] The enforcement Hungary has agreed can be taken against it when no such stay has been entered is that referred to in the subsequent articles, and particularly art 54(1).

(b) Under art 54(1) each contracting state is obliged to recognise an award as binding, and agrees to enforce it as if it were a final judgment of its own courts. New Zealand has accordingly agreed with the other contracting states that it will recognise this award as if it were a judgment of a New Zealand Court. Hungary has agreed with contracting states, including New Zealand, that this is New Zealand's obligation.[25]

(c) Article 54(2) then deals with the machinery that will apply for such recognition and enforcement steps, including the party seeking recognition and enforcement furnishing a copy of the award certified by the Secretary General to the domestic court. By s 4(2) of the ICSID Act the High Court is designated for this purpose, and it is contemplated that it will honour New Zealand's international obligations in this respect.

(d) Article 54(3) then addresses the execution of the judgment so recognised. It provides that that execution is to be governed by the domestic law of the contracting state. So Hungary has agreed that New Zealand's domestic law will be applied to the execution steps.

(e) Under art 55 all contracting states have agreed that nothing in the preceding articles is to be construed as derogating from the principles of state immunity recognised in domestic law in relation to execution.

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24 See ICSID Convention, above n 1, arts 50(2), 51(4) and 52(5).

25 The balance of art 54(1) deals with the situation of states with a federal constitution which is not relevant in New Zealand.

> New Zealand has thereby agreed that Hungary may claim state immunity from execution to the extent recognised by New Zealand law.

[25] The meaning of these articles appears clear. Their terms overtly apply to enforcement against state parties as well as investor parties to the awards. Sodexo is entitled to have the award recognised in New Zealand as if it were a judgment of the New Zealand Court in order that it may be enforced under New Zealand's laws. The High Court of New Zealand is obliged to so recognise the award as if it were a judgment. But Hungary is able to claim state immunity under New Zealand law in relation to any execution processes. That immunity does not prevent the award from first being recognised, however. Hungary has agreed that the award may be so recognised, and has waived any adjudicative immunity it had in relation to recognition. It is only after recognition of the award in the New Zealand judicial system that New Zealand law can be applied to assess the claims to immunity in relation to execution steps. It is agreed that the New Zealand Court has jurisdiction to make such decisions.

[26] I do not accept Hungary's argument that enforcement and execution are synonymous and that the preservation of state immunity in art 55 concerning execution contemplates immunity from all the steps contemplated in art 54, including recognition. Enforcement is a more general term. The concepts of recognition in art 54(1), and execution in arts 54(3) and 55, are the more technical and precise concepts. To enforce an award one needs to take these more technical steps. First the award is recognised and then execution steps may be taken. The immunity applicable to execution is not an immunity from the prior step involved in having the award recognised in domestic law. Indeed it is only possible to apply the domestic laws on immunity from execution if the domestic courts first have jurisdiction. So for this reason art 55 does not make Hungary immune from the jurisdiction. Recognition of the award is necessary in order to allow such domestic law to be applied. The protest to jurisdiction needs to be set aside on that basis.

[27] The fact that both the French and Spanish text of the Convention, which are also official versions, use the same word for enforcement and execution (*d'exécution* and *ejecución*) is not an answer to this analysis. As I say, the English word

"enforcement" is a more general word that may not have equivalence in French or Spanish. More significantly both the French and Spanish versions have separate words for recognition (*reconnaît* and *reconocerá*). So all the versions contemplate recognition is different from execution. Only execution is subject to the preservation of state immunity in art 55. The heading to section 6 in all three versions likewise recognises the separate steps of recognition and execution. So I see the French and Spanish texts as supporting Sodexo's argument.

[28] I do not agree with the analysis of the British Virgin Islands High Court in *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan and Anor*.[26] The Court there concluded that art 54(1) of the ICSID Convention placed no international obligation on Pakistan, and accordingly could not involve a waiver of its immunity.[27] But it is not a matter of identifying whether the state who is a party to the award itself has an obligation under art 54(1) of the ICSID Convention or not. It is a matter of identifying what that state has agreed are the obligations of other states, implemented in their judicial systems. Such agreement is clear from the articles as a whole for the reasons outlined above. Moreover, in art 53(1) Hungary does have a relevant obligation — the obligation to abide by and comply with the terms of the award, subject to any stay of enforcement granted under the ICSID Convention. The contemplated enforcement that can be stayed is that set out in art 54, subject only to the principles of state immunity against execution recognised by the domestic court referred to in arts 54(3) and 55. It is necessary to read all the articles together to ascertain their proper meaning, and accordingly the scope of what a contracting state party has agreed to.

[29] I see this interpretation as consistent with the scheme and purpose of the ICSID Convention in light of recognised concepts of state immunity.[28] The Convention was seen to be of advantage to all contracting states as it facilitates investment across borders. To do so it included a regime for arbitrating any disputes about the investments. Contracting states then agreed how arbitral awards could be enforced in section 6. State immunity from domestic procedures was preserved in art 55, but this

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26 *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan and Anor*, above n 15.

27 At [50]–[51].

28 See Andrea Bjorklund, Lukas Vanhonnaeker and Jean-Michel Marcoux *State Immunity as a Defense to Resist the Enforcement of ICSID Awards* (2020) 35(3) ICSID Review 506 at 518.

is to be understood in light of the restrictive theory of state immunity — it is not absolute. The machinery set out in arts 53 and 54 apply to all parties to the award, and this machinery would be undermined if art 55 gave a contracting state party the option to be immune from that machinery altogether. Limiting the remedy to a complaint under art 64 would deprive the enforcement machinery of effect for one party. Interpreting the Convention to avoid that outcome involves the appropriate preservation of the immunity of contracting states in their sovereign capacity, whilst recognising that such immunity is not absolute. It also facilitates investment in states contemplated by the Convention as both the investors and the recipient states know there is an effective system of enforcement through arbitral awards.

[30] I also see this approach as consistent with the *travaux préparatoires*. There is perhaps nothing decisive in this material, but the ability of a state to claim immunity was identified as an issue in the discussions, and the better view of the *travaux* is that it was agreed that the machinery of the Convention allowed the awards to be recognised and therefore enforceable, with the normal immunities then applying to execution.[29] Article 55 was added after debates on that question had occurred, and it is significant that this article preserved immunity in relation to execution processes only. Something more decisive would have been added as a consequence of these discussions if it had been intended that states could be immune from these processes altogether.

[31] This approach is also consistent with the Report to the World Bank Executive Directors when the Convention was adopted by them,[30] and the views of the leading scholars in this area, including Professor Schreuer.[31] I agree with the overall summary

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29 *History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, above n 16, especially at 344–346; see also Aron Broches "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution" (1987) 2(2) ICSID Review 287 at 299–307, 316–318.

30 *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals and Other States* (ICSID Document No 2, 18 March 1965) 1083 at [42]–[43].

31 Christoph Schreuer and others *The ICSID Convention: A Commentary* (2nd ed. Cambridge University Press, United States of America, 2009) at 1128–1130. See also George Bermann *Understanding ICSID Article 54* (2020) 35 ICSID Review 311 at 320.

provided by Allsop CJ in *Kingdom of Spain v Infrastructure Services Luxembourg SARL* when reaching a similar conclusion in Australia:[32]

> Recognition and enforcement of an arbitral award are distinct, but related concepts. The linguistic debate as to whether execution is synonymous with enforcement or is a concept within it need not, it seems to me, be debated or resolved as a question of fixed content, for all purposes. We are dealing here with Arts 54 and 55 of the ICSID Convention. As Professor Schreuer's authoritative work (*The ICSID Convention: A Commentary* (Cambridge University Press, Second Edition)) makes clear, the related aims of Arts 54 and 55 were clear.
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> …
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> The obligation to recognise an award under article 54 was unequivocal and unaffected by questions of immunity from execution. As the reasons of Perram J and as the discussion of Professor Schreuer (*op cit* pp 1128–1134) both show, sovereign immunity from execution (Arts 54(3) and 55) does not arise at the point of recognition.

[32] For these reasons I find that Hungary is not able to claim state immunity from having the arbitral award recognised in New Zealand, and that its protest to jurisdiction should be set aside as a consequence unless there is reason not to do so under the High Court Rules 2016.

Customary international law

[33] The submissions for the parties devoted substantial attention to the requirements of customary international law for a waiver of state immunity, and to the question of whether Hungary had waived its immunity in accordance with those requirements.

[34] I do not agree that customary international law is directly applicable, however. Hungary sought to distinguish the decisions in other jurisdictions on the basis that in each of those jurisdictions there was domestic legislation codifying state immunity, whereas New Zealand had not done so. It argued that this meant that the common law, and accordingly customary international law applied. But whilst there is no legislation codifying state immunity in New Zealand, if the provisions of the ICSID Convention codify the rules of state immunity in this field then the provisions of the ICSID Convention apply as a consequence of the ICSID Act. For the reasons set out above I

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[32] *Kingdom of Spain v Infrastructure Services Luxenbourg SARL*, above n 12, at [3] and [6].

have concluded that the ICSID Convention does address the scope of state immunity that may be claimed, and how it may be claimed in relation to the enforcement of awards under that Convention. There is no room for the common law, and accordingly customary international law, to operate. The ICSID Act covers the field.

[35] In any event had it been appropriate to apply the common law, and accordingly customary international law, in my view Hungary has waived its adjudicative immunity in accordance with customary international law.

[36] I take the starting point for identifying the principles of customary international law to be the United Nations Convention on Jurisdictional Immunities of States and their Property (the United Nations Convention),[33] which follow on from the International Law Commission draft articles on jurisdictional immunities.[34] The United Nations Convention is not in force, neither New Zealand nor Hungary have ratified it, and it is wrong to assume that its articles correctly declare customary international law.[35] Indeed sometimes its articles have been seen as not reflecting customary international law.[36] I accordingly accept Hungary's submission that it is necessary to consider each of the articles of the United Nations Convention to assess whether it does reflect customary international law. But that does not necessitate the Court receiving comprehensive evidence of the practices of states in order to assess whether a sufficient number of them conform with the suggested rule.[37] Rather it is a matter of considering the articles of the United Nations Convention alongside other materials legitimately considered when identifying the rules of customary international law.

[37] I see the key article to be the following:

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33 United Nations Convention on Jurisdictional Immunities of States and their Property, above n 8.

34 *Draft articles on the Jurisdictional Immunities of States and their Property*, above n 10.

35 *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22, [2021] 3 WLR 231 at [72].

36 *Benkharbouche v Embassy of the Republic of Sudan*, above n 9, at [72].

37 Hungary relied on the conclusion of the International Court of Justice in *North Sea Continental Shelf (Federal Republic of Germany) v Denmark*; *Federal Republic of Germany v The Netherlands* [1969] ICJ Rep 3 at [74] where that the practice of 15 states was not sufficient to establish a customary rule.

Article 7
Express consent to exercise of jurisdiction

> 1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
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> (a) by international agreement;
>
> (b) in a written contract; or
>
> (c) by a declaration before the court or by a written communication in a specific proceeding.
>
> 2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

[38] Hungary did not accept that this article accurately captured customary international law. It relied on the proposition that immunity could only be lost by a submission to the jurisdiction of a court when proceedings were commenced, and not earlier.[38] That is reflected in art 7(1)(c). I do not agree. As Lord Collins said in the majority judgment of the UK Supreme Court in *NML Capital Ltd v Argentina*:[39]

> As Dr FA Mann said, "the proposition that a waiver or submission had to be declared in the face of the court was a peculiar (and unjustifiable) rule of English law": (1991) 107 LQR 362, 364. In a classic article (Cohn, *Waiver of Immunity* (1958) 34 BYIL 260) Dr E J Cohn showed that from the 19th century civil law countries had accepted that sovereign immunity could be waived by a contractual provision, and that the speeches in *Duff Development* on the point were obiter (and did not constitute a majority) and that both *Duff Development* and *Kahan v Pakistan Federation* had overlooked the fact that submission in the face of the court was not the only form of valid submission since the introduction in 1920 in RSC Ord 11, r 2A (reversing the effect of *British Wagon Co Ltd v Gray* [1896] 1 QB 35) of a rule that the English court would have jurisdiction to entertain an action where there was a contractual submission. In particular, in *Duff Development* Lord Sumner had overlooked the fact that *British Wagon Co v Gray* was no longer good law.

[39] The New Zealand cases similarly contemplate that waiver can arise from the terms of an international agreement.[40] I conclude that a state can waive its immunity

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38 Relying on *NML Capital v Argentina* [2011] UKSC 31, [2011] 2 AC 495 at [11] per Lord Phillips (dissenting).

39 At [125].

40 *Young v Attorney-General* [2018] NZCA 307, [2018] 3 NZLR 827 at [71]–[80]; see also *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426 (CA) at 430 per Cooke P and 438 per Richardson J.

by the express terms of an international convention it has entered. That is consistent with art 7(1)(a).

[40] Hungary argued that any such agreement must be express, and cannot be implied. It must be clear and unambiguous.[41] The International Law Commission has said in its commentary that there is "no room for implying the consent of an unwilling state".[42] That is consistent with art 7(1)(a), and I accept Hungary's submission. I was then referred to additional materials going to whether terms of an agreement were sufficiently express, including dictionary definitions of "express", Black's Law Dictionary and Stroud's Judicial Dictionary of Words and Phrases, including on the meaning of the phrase "necessary implication".

[41] I accept there is little, or no room for implied agreement. It is necessary to stay within the four corners of the written instrument relied upon, here the ICSID Convention. But the task of interpretation of such instruments is not an exercise of literal wording using dictionary meanings. Like all written documents intended to have legal effect the text is understood in light of its purpose and context. That is the well-recognised modern approach to interpretation, and it is reflected in the Vienna Convention on the Law of Treaties.

[42] Hungary's agreement must accordingly be within the written terms of the international agreement and it must be clear. Ambiguity would be resolved in its favour as it is appropriate to be cautious when a domestic court is asserting jurisdiction over a foreign state. But I do not accept that the agreement must adopt a particular verbal formulation, such as that in Article 14(5) of the International Convention on the Establishment of an International Fund for Compensation of Oil, Pollution Damage 1992. If by the terms of a convention, properly interpreted, a state has agreed to waive its immunity, then full effect should be given to that agreement. It is a matter of applying the orthodox approach to interpretation — considering the text in light of context and purpose.[43] The accepted meaning of other international conventions may

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41 See *ELSI*, above n 11, at [50].

42 *Draft articles on the Jurisdictional Immunities of States and their Property,* , above n 10 at [8].

43 Vienna Convention on the Law of Treaties, above n 17; Article 31 also refers to the concept of "good faith".

not be of assistance because the circumstances may be different — words carry different meanings when used in different contexts.[44]

[43] As I have found, properly interpreted the terms of the ICSID Convention involve an agreement by state parties that awards will be recognised by other state parties, with the right to claim state immunity from execution preserved. The suggested certainties, or ambiguities are artificial. The meaning of the ICSID Convention is clear. The Convention regulates when state immunity may be claimed in arts 54 and 55. Under art 55 it may only be claimed for the execution steps. I do not see the requirement of customary international law that the agreement being express materially affects that finding, as it is based on the terms of the ICSID Convention. The ICSID Convention cannot have a meaning that alters with the circumstances. It means what it means. It would be an odd result if the Courts of the United States of America, France and Australia had held that parties such as Hungary had agreed to waive adjudicative state immunity under the ICSID Convention so that awards were to be recognised, but that this agreement was not sufficiently express for New Zealand to adopt the same meaning.[45]

[44] For those reasons had it been necessary to apply the common law, and accordingly customary international law, I would have found that Hungary had waived immunity from having the award recognised by the New Zealand Court.

New Zealand Court should not assume jurisdiction under its Rules

[45] The second main question is whether under the High Court Rules 2016 it is appropriate for the Court to assume jurisdiction. Hungary argues that on the correct application of those Rules its protest to jurisdiction should be upheld.

[46] Under the Rules a party seeking to bring proceedings against an overseas person can either do so with leave under r 6.28, or without leave under r 6.27. Here

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44 So little assistance arises from the similar terms of art III of the New York Convention as that was not dealing with obligations when states are the party to the arbitration, and it also does not address state immunity.

45 Ascertaining the true meaning of an express term by reference to the necessary implications of other terms is conceptually different from implying a term; see also Xiaodong Yang *State Immunity in International Law* (Cambridge University Press, 2012) at 333.

Sodexo proceeded without leave and achieved service overseas in accordance with earlier directions as to service.[46] Rule 6.29 then sets out the approach in such circumstances:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
>
> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or
>
> (b) that, had the party applied for leave under rule 6.28,—
>
> (i) leave would have been granted; and
>
> (ii) it is in the interests of justice that the failure to apply for leave should be excused.
>
> …

[47] Sodexo relies on r 6.29(1)(a). In terms of the requirement of r 6.29(1)(a)(i), Sodexo relies on r 6.27(2)(m) which provides that service of proceedings may take place outside New Zealand "when it is sought to enforce any judgment or arbitral award". Hungary argues that this rule does not apply, returning to the argument that enforcement is synonymous with execution to which state immunity attaches, and that the verbal gymnastics involved in Sodexo's argument that it was enforcing, but not executing the award should not be accepted. Hungary also emphasises that r 6.27(2)(m) was added to the High Court Rules to enable service abroad of enforcement proceedings against non-resident judgment debtors who actually had assets within the jurisdiction. Yet there was no evidence that there were such assets in New Zealand, and even if there were they would be immune from enforcement proceedings.

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[46] *Sodexo Pass International SAS v Hungary* HC Wellington CIV-2020-485-724, 10 December 2020.

[48] I do not accept Hungary's arguments. As I have found above the word "enforcement" has a more general meaning which encompasses steps to have the judgment recognised, and then subject to execution. That is the meaning also contemplated by s 4 of the ICSID Act. The award here is plainly an arbitral award falling within the terms of r 6.27(2)(m).

[49] The second requirement under r 6.29(1)(a)(ii) involves the application of the factors in r 6.28(5):

> (5) The court may grant an application for leave if the applicant establishes that—
>
> (a) the claim has a real and substantial connection with New Zealand; and
>
> (b) there is a serious issue to be tried on the merits; and
>
> (c) New Zealand is the appropriate forum for the trial; and
>
> (d) any other relevant circumstances support an assumption of jurisdiction

[50] Sodexo must show that the Court should assume jurisdiction for the reasons set out in r 6.28(5)(b)–(d). Hungary argues that New Zealand is not the appropriate forum for this matter pointing out that it has no connection with New Zealand, and that there is no evidence that Hungary even has assets in New Zealand.

[51] I accept that Hungary raises a legitimate question —why should a Court of a country at the bottom of the South Pacific assume jurisdiction in relation to a dispute arising in Europe, between a French investment company and the state of Hungary? The underlying dispute, and the arbitration, had no connection with New Zealand whatsoever. I also agree with Hungary's objections to the third affidavit of Stuart Dutson to the extent that it is relied upon to establish that there are Hungarian assets within New Zealand that can be enforced against.[47]

[52] In *Tassaruf Mevduati Sigorta Fonu v Demirel*, the English and Welsh Court of Appeal addressed whether an arbitration award should be recognised when there was

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[47] I nevertheless admit the affidavit, for what it is worth, as evidence concerning the applicant's intentions.

no evidence the respondent had assets within the jurisdiction in the context of similarly expressed rules of court.[48] The Court held that ordinarily it would not be just to recognise the award against a non-resident party unless there was a real prospect of obtaining a legitimate benefit from the English proceeding and that the applicant would need to "ordinarily show ... that he can reasonably expect the benefit from such a judgment".[49] In that case, however, the respondent had been found to have committed fraud, with the associated difficulty of locating assets, and there was some possibility that he would at some point have assets in London given his global operations such that recognition was justified.[50] By contrast in *Albaniabeg Ambient Sh.p.k v Enel S.p.A and Enelpower S.p.A* the Irish Court of Appeal followed *Tassaruf* in concluding that the litigant must demonstrate some practical benefit from the proceeding, but found in that case that the applicant had not done so without there being evidence of assets within the jurisdiction.[51]

[53] Here the applicant has put forward no evidence of New Zealand assets, and unlike *Tassaruf* there is no reason to expect Hungary may have assets that could form the basis of execution within New Zealand because of its conduct. So it can be said that this case is more similar to *Albaniabeg*.

[54] I nevertheless conclude that there are good reasons why the Court should assume jurisdiction in accordance with the factors in r 6.28(5)(b)–(d).

[55] The first, and critical, reason is that it is New Zealand's international obligation to recognise the award. That was not a factor in either *Tassaruf* or *Albaniabeg*. Under art 54(1), which has legal force in New Zealand in accordance with s 4(2) of the ICSID Act, the High Court "shall recognise an award rendered pursuant to [the ICSID] Convention". New Zealand has promised that it will do so, and pursuant to s 4 of the ICSID Act Parliament has identified the High Court as the designated body for the purposes of fulfilling New Zealand's obligations under art 54. The requirements of r 6.28(5)(b)–(d) must be seen through that lens.

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48 *Tassaruf Mevduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799, [2007] 1 WLR 508.
49 At [29].
50 At [39]–[40].
51 *Albaniabeg Ambient Shpk v Enel SpA and Enelpower SpA* [2018] IECA 46.

[56] The second significant point is that the requirement in r 6.28(5)(a) that the claim have a real and substantial connection with New Zealand does not apply as a consequence of r 6.29(1)(a)(ii). As the Court of Appeal explained in *Wing Hung Printing Co Limited v Saito Offshore Pty Limited* that is because it is assumed that a party able to show a good arguable case that the claim falls within r 6.27 has a necessary connection.[52] For that reason the potential enforcement of the award satisfies this requirement.

[57] The New Zealand Court will still generally be slow to assert jurisdiction for conduct occurring wholly outside New Zealand.[53] But it is different when New Zealand has an international obligation to do so. The Rules need to be interpreted and applied with that important gloss. There is clearly a serious issue to be tried on the merits under r 6.28(5)(b) and New Zealand is the appropriate forum for that matter under r 6.28(5)(c) because what is involved is attempted enforcement of the arbitration in New Zealand, and New Zealand is the only place where such enforcement could take place.[54] More generally the r 6.28(5)(b)–(d) considerations are influenced by New Zealand's obligations and the overall scheme of the ICSID Convention. Under the terms of art 54(3) of the ICSID Convention New Zealand's domestic laws must be applied to such matters of execution, including in relation to state immunity under art 55. So jurisdiction must be assumed for that purpose.

[58] Hungary has emphasised, however, there is no information before the Court to show that there is a genuine enforcement exercise contemplated within New Zealand. That gives pause for thought on the appropriateness of recognising the award so that such execution steps may take place. But there are two interrelated reasons why the identification of assets that may be the subject of execution steps would not be appropriate at this stage:

(a) Requiring a party in the position of Sodexo to identify the assets it wishes to proceed against could potentially prejudice its ability to do so. Steps could be taken in an attempt to avoid such execution. So a

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52 *Wing Hung Printing Co Limited v Saito Offshore Pty Limited* [2010] NZCA 502, [2011] 1 NZLR 754 at [28].

53 At [36].

54 See *Tassaruf Mevduati Sigorta Fonu v Demirel*, above n 48, at [45].

requirement to set out how execution is intended to proceed would likely prejudice the efficacy of the enforcement regime contemplated by the Convention. I bear in mind that Hungary has promised in the ICSID Convention that it will comply with the award, and that it appears to be in default.

(b) Recognising the award should be a straightforward step. A more extensive exercise which involves an identification of the assets that may be in the jurisdiction, and arguments over whether those assets could be the subject of state immunity, should not arise at the recognition stage. Any such arguments can properly take place later under domestic law with respect to particular execution steps and particular assets. To require more would again undermine the efficacy of the enforcement steps contemplated by the Convention.

[59] In those circumstances New Zealand's international obligations, as passed to the High Court under the ICSID Act, provide the necessary justification for the Court assuming jurisdiction to recognise the award. It also reflects practical realities — Sodexo has no reason to seek recognition here if there is was no point in doing so, and Hungary would have no reason to oppose recognition unless there were perceived to be practical consequences. I also note that Hungary could itself have provided evidence that it had no assets in New Zealand against which enforcement could take place if it had wanted to. So the Court's ignorance is the product of a stance adopted by both sides.

[60] I emphasise that at this stage of the proceeding the Court is only concerned with recognition. Indeed the present application only concerns the setting aside of the protest to jurisdiction. Whether, and the extent to which enforcement steps may be taken by execution against particular assets is an argument for another day. State immunity may well still protect Hungary in the end. Professor Schreuer has described this as the potential "achilles heel", or at least a weakness in the ICSID Convention enforcement procedure.[55] This decision may simply foreshadow the potential for more

[55] Christoph Schreuer and others, above n 31, at 1154.

substantive argument over what can be done in New Zealand. But before that argument can even be contemplated the award must first be recognised. Given the scheme of the ICSID Convention, and the obligations it contemplates, it is necessary to recognise the award to allow the decisions under domestic law under arts 54 and 55 to be made. The protest to jurisdiction cannot be sustained either as a matter of principle, or in light of the High Court Rules in those circumstances.

Conclusion and result

[61] For the above reasons Sodexo's application of 5 July 2021 seeking to set aside Hungary's protest to jurisdiction is granted.

[62] The applicant is entitled to costs which will be determined by the Court if they cannot be agreed. Memoranda may be filed.

[63] Sodexo's earlier application dated 9 December 2020 that the arbitral award be recognised is not formally before me. For the reasons I have given I cannot presently see a basis upon which Hungary could oppose that application, however. But Hungary's position can be considered at a further case management conference.

[64] In order to review further steps the proceeding should be called for a telephone conference in the week of Tuesday 25 January 2022 unless the parties agree to defer it to a later date.

Cooke J

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