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Sovereign Immunity in Australian Courts: Hard and Fast Limits on Enforcement of Arbitral Awards

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KEY POINTS

- Enforcement of arbitral awards against foreign state assets requires consideration of issues relating to sovereign immunity. When faced with an adverse arbitral award, states and state-owned entities might invoke sovereign immunity to resist jurisdiction and enforcement.
- In Australia, sovereign immunity is governed by the *Foreign State Immunities Act* 1985 (Cth). This provides that a foreign state is immune from the jurisdiction of Australian courts, but that immunity may be waived by agreement or submitting to proceedings.
- Arbitral awards are often enforced against states pursuant to the ICSID Convention or the New York Convention (depending on the type of arbitration). In recent decisions, the High Court of Australia has confirmed that a foreign state's ratification of the ICSID Convention constitutes a waiver of sovereign immunity from enforcement proceedings before Australian courts, but ratification of the New York Convention does not.
- This distinction is vital when devising enforcement strategies against sovereign counterparties. It also highlights the importance of pre-empting sovereign immunity issues both when contracting with states and state-owned entities and deciding whether to pursue claims against them.

INTRODUCTION

In some disputes, obtaining an arbitral award is only half the battle. If a counterparty does not comply with the award, enforcement proceedings in domestic courts may be required to locate and enforce the award against assets.

Where states, state-owned entities, and state-owned assets are involved, there may be an additional layer of complexity. A sovereign counterparty might raise sovereign immunity as a defence in enforcement proceedings. When this occurs, an award creditor may need to persuade a domestic court that a foreign state is neither immune from jurisdiction or enforcement and nor are its assets immune from execution.

In recent years, Australia has become a popular destination for enforcement of arbitral awards against foreign states. Inevitably, related questions of law have made their way to Australia's apex court for judicial consideration.

In these cases, the path for enforcement of arbitral awards against foreign states has been clarified as a matter of Australian law. This has ramifications for all parties – be they offshore or Australian-based – considering an attempt to enforce an arbitral award in Australian courts against a sovereign counterparty.

ENFORCING AGAINST FOREIGN STATE ASSETS

These questions of law arose in separate cases pursued by award creditors from Luxembourg and the United States against Spain (*Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11) and India (*CCDM Holdings LLC v Republic of India* [2026] HCA 9).

The High Court of Australia held in the earlier case that Spain was not immune from Australian court jurisdiction, and in the more recent case that India was immune. The award creditors in these cases faced very different scenarios at the outset of their Australian enforcement attempts: one was barred at the gates of the court, and the other was let through.

These cases resulted from typical arbitration enforcement scenarios.

- In one case, the investor had obtained an award for USD 740 million against India in an arbitration under the India-Mauritius bilateral investment treaty.

- In the other, the investors had obtained awards for EUR 229 million against Spain in arbitrations under the Energy Charter Treaty.

Despite their equal success in arbitration proceedings, the parties did not enjoy equal success in monetising their awards through Australian enforcement proceedings. Without further detail, these unequal outcomes may sound surprising.

However, the High Court identified substantive reasons for these different outcomes. The common element to both cases was the impact of sovereign immunity in enforcement proceedings. The distinctive element, which led to the different outcomes, was the international conventions pursuant to which the award creditors pursued enforcement.

SOVEREIGN IMMUNITY IN AUSTRALIAN LAW

Sovereign immunity is a public international law doctrine, which explains the unique treatment

of foreign states in domestic courts.

Historically, foreign states enjoyed immunity in all circumstances. In most jurisdictions, the prevailing approach is now that immunity only applies to sovereign or governmental acts, and not to commercial or private acts.

In domestic courts, sovereign immunity has two main dimensions.

- Immunity from jurisdiction (adjudicative immunity): unless it has provided consent, a foreign state cannot be sued in the domestic courts of another state.

- Immunity from execution (enforcement immunity): a foreign state's assets may be immune from enforcement measures in domestic courts even when a party has obtained a judgment or arbitral award against the foreign state.

In Australia, sovereign immunity is governed principally by the *Foreign States Immunities Act* 1985 (Cth) (**FSIA**). The FSIA contains two key features relevant to arbitration:

- Arbitration exception: a foreign state has no immunity where it has agreed in writing to submit a dispute to arbitration.

- Arbitral award enforcement: when enforcing an arbitral award against a foreign state, separate immunity considerations apply.

It is these separate considerations which received recent attention in the High Court.

DIFFERENT INTERNATIONAL CONVENTIONS, DIFFERENT OUTCOMES

There are two main international conventions pursuant to which arbitral awards are typically enforced against foreign states. Both are multilateral treaties, but they have distinct objectives.

The ICSID Convention established ICSID (the International Centre for Settlement of Investment Disputes). ICSID:

- provides dispute resolution facilities for the conciliation and arbitration of investment disputes between states and foreign nationals;

- is often selected as the arbitration institution for resolving disputes arising from bilateral investment treaties; and

- contains a self-executing enforcement mechanism, pursuant to which states expressly waive sovereign immunity for the purposes of enforcement proceedings.

In contrast, the New York Convention is an instrument aimed at facilitating international arbitration. Its application is not limited to disputes to which a state is a party. Instead, the

New York Convention requires courts of contracting states:

- to give effect to arbitration agreements; and
- to recognise and enforce arbitral awards issued in other contracting states (with limited exceptions).

The case against Spain was an ICSID arbitration and enforcement was sought pursuant to the ICSID Convention. The case against India was an ad hoc arbitration under the UNCITRAL Rules and enforcement was sought pursuant to the New York Convention.

In reaching its conclusions in these separate cases, the High Court held that:

- Spain's ratification of the ICSID Convention amounted to waiver of immunity from recognition and enforcement of foreign arbitral awards.
- However, India's ratification of the New York Convention did not amount to a waiver of sovereign immunity from jurisdiction. There is a presumption that foreign state immunity has not been waived. Any waiver must be clear and unmistakeable. The New York Convention does not reference sovereign immunity and ratification of it does not amount to waiver.

Following the High Court's decisions, there is a precise distinction under Australian law between the enforcement of arbitral awards against foreign states pursuant to the ICSID Convention and the New York Convention.

In making its decision in the Indian case, the High Court expressly declined to determine the scope of the New York Convention and whether it extends to disputes concerning the exercise of a state's sovereign power. Under the New York Convention, states are permitted to make commercial reservations, which limit the application of the Convention to commercial relationships. The High Court did not explore whether a state's commercial reservation under the New York Convention might amount to waiver in certain circumstances.

Furthermore, various commercial arbitration rules contain provisions requiring parties to comply with the terms of an award or to carry out an award without delay. The High Court did not have reason to explore whether a foreign state's agreement to arbitration rules containing such provisions would be sufficiently clear and unmistakable to amount to a waiver of foreign state immunity.

CONCLUSION

The key point highlighted by these decisions is the need to pre-empt enforcement strategies. This should be done not only when a claim arises, but already at the contracting stage of a transaction. This is especially so where ICSID arbitration is not available to an investor. Where it is available, this is likely to lead to stronger enforcement prospects. This follows from the express waiver of enforcement immunity to which states agree when ratifying the ICSID

Convention.

Either way, negotiating express contractual waivers of sovereign immunity extending to jurisdiction, recognition and enforcement proceedings, and execution against assets, may be desirable. Procuring a waiver of sovereign immunity is likely to broaden enforcement options. However, bargaining power with states and state-owned entities may often be limited, and attempting to procure such waivers may not always be realistic. Dispute resolution clauses in the suite of contractual documents should always be carefully assessed to identify potential sovereign immunity issues (see further our Guide to Arbitration Agreements).

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ABOUT PETER & KIM

Peter & Kim is a specialist arbitration firm with offices in Geneva, Zurich, Sydney, Seoul, Perth and Singapore. We support clients globally through a cohesive cross-border team structure offering a depth of common and civil law expertise that is grounded in decades of combined experience at partner level in international arbitration proceedings (including ISDS cases) and in advising and representing commercial and government clients in arbitration-related proceedings before State Courts.

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