



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY
 BETWEEN:

KINGDOM OF SPAIN

Appellant

and

INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L.

First Respondent

ENERGIA TERMOSOLAR B.V.

Second Respondent

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**RESPONDENTS'
 OUTLINE OF ORAL SUBMISSIONS**

Part I:

This outline is in a form suitable for publication on the internet.

Part II:

Interpretation of s 10 Immunities Act

1. Section 10 must be interpreted in accordance with orthodox principles of statutory interpretation, starting with the plain words of the section (RS [23]). They provide that submission may be in writing including by treaty or other international agreement (s 10(2)-(3)), or by conduct (s 10(6)-(9)).
- 20 2. The courts below applied to the treaty in question the customary rules embodied in Arts 31-32 VCLT, which were not disputed. See PJ [83]-87], [117]-[144]; CAB 31-3, 40-7; FFC [81] CAB 96. A submission found through application of these rules is by definition not found by inadvertence, ambiguity or uncertain inference: *Li v Zhou* at [33]-[37].
- 30 3. The appellant's argument proposes a rule of customary international law that requires a written waiver of immunity must be 'express, clear and unambiguous' (AS [23]-[25]), apparently leaving no room for the necessary implications from words used (Reply [8]). No such rule was advanced below. It is drawn from the separate albeit related field of diplomatic immunity. It is not found in s 10, or the extrinsic material, whether ALRC 24 Ch 6 or the 1982 ILC Report which the ALRC followed and which identified Art 54 as a form of 'express' submission by treaty (RS [24]-[28]).

4. The rule lacks necessary state practice and *opinio iuris* to be applied to the jurisdictional immunities of States. The 2004 UN Convention does not support it. See RS [18]-[22]; [34]-[44]; *Sodexo* at [36]-[44].
5. There is no good reason for the Court to depart from its decision in *Firebird* and read down s 10 in light of s 17 of the Immunities Act (contra AS [45]-[47]).

Interpretation of Art 54 ICSID Convention

6. The ordinary meaning of the actual words of Art 54(1)-(2) is that, in the event that a State fails to comply with its obligation under Art 53: (a) Contracting States have unequivocally agreed that other States must recognize any award against them as if it were a judgment of the recognizing State (Art 54(1)); and (b) this can be done by the designated courts of the recognizing State in proceedings for relief with that effect upon presentation of a certified award (Art 54(2)). See FFC [4]-[6], [20]-[25], [30]-[38], [53]-[55], [72] CAB 75, 83-86, 89, 94; RS [45]-[47]; *Sodexo* at [22]-[29].
7. The Full Court did not have to travel beyond the actual words of Art 54. The appellant's agreement to the real exercise of such power by the designated courts of a recognizing State *was* a submission to the jurisdiction of those courts in proceedings seeking recognition of the Award in accordance with Art 54.
8. The necessary implication arises only from the actual words of Art 54 (FFC [22]-[23] CAB 81). *Li v Zhou; Bosnian Genocide Case* at [2007] ICJ Rep 43 at [161]-[166] and [439]-[443].
9. The plain words of Art 55 and its *travaux préparatoires* confirm that Contracting States understood Art 54 as a waiver of immunity to the extent that an award is recognized *as if it were* a judgment of the court, but sought to guard against any waiver of immunity from execution that might be found therein. See PJ [134]-[135] CAB 45; RS [58] (and *contra* Reply [14]).

Characterization of the Proceedings and the interpretation of Section 35(4) Arbitration Act

10. The characterization of the proceedings as recognition and not execution (AS [52]) arose from the appellant's interpretation of Arts 54 and 55, not s 35(4) Arbitration Act. See FFC [20]-[25], [30]-[35] [96]-[100] CAB 80-2, 83-5, 100-1. Terms used in that Act have the same meaning as in the Convention: s 32.
11. The 'note' to s 35 (AS [53]) was added only after final orders were made in the Full Court. Section 10 Immunities Act is satisfied anyway. See RS [66]-[68].

Relationship between ‘execution’ in Arts 54(3) and 55 and recognition in Article 54

12. The obligation of Contracting States to recognize an award and execute it within their territories is additional to the appellant’s obligation to comply with the award in Art 53. RS [52]; PJ [181] CAB 55; FFC [37] CAB 85; *Sodexo* at [28].
13. Arts 54(3) & 55 in terms apply only to local laws for ‘execution’, not recognition under Art 54(2). See RS [55]-[58]; PJ [97] CAB 35; FFC [30]-[35] CAB 83-5.

Notice of Contention Grounds

14. The appeal should not turn on a question of evidentiary onus, but the reversal of the onus of proof of the meaning of the Spanish and French texts was in error. RS [77]
- 10 15. If s 10 requires a higher standard of clarity than the ordinary meaning of Art 54, it is inconsistent with Art 54 as given force of law by s 32. Either s 34 Arbitration Act or an implied repeal resolves the matter. See RS [78]-[79].

The agreement to arbitrate and the EC intervention

16. The appellant never disputed the validity of its consent to arbitration. See FFC [115] CAB 104-5. The European Commission should pay the respondent’s costs of its intervention, which sought to agitate matters outside the real issues between the parties. See FFC (No 3) at [28] CAB 121.

Dated: 8 November 2022

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Bret Walker



Justin Hogan-Doran