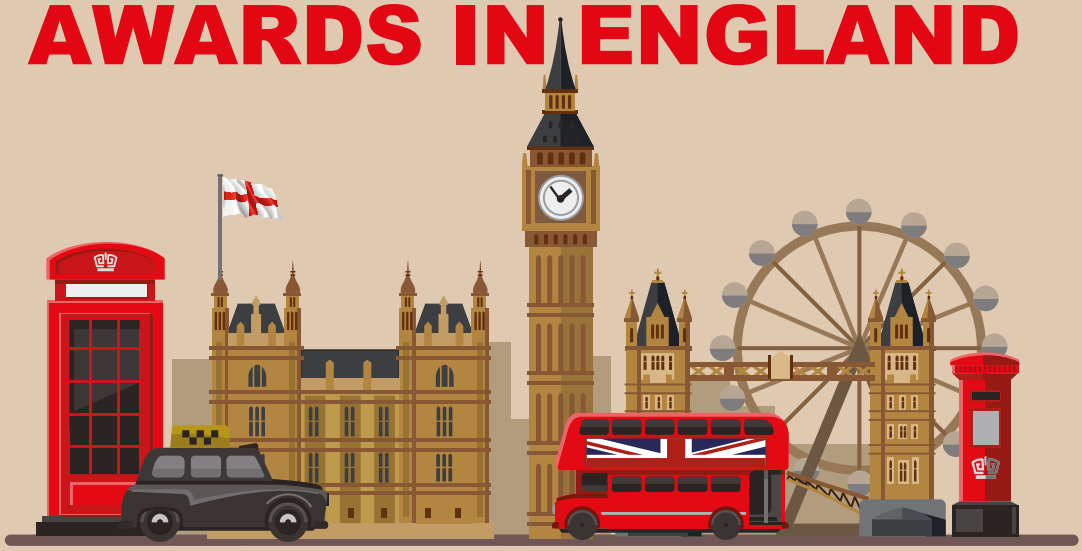
SOVEREIGN IMMUNITY AND THE ENFORCEMENT OF ICSID AWARDS IN ENGLAND



Authored by: Lucian Ilie (Barrister) – Outer Temple Chambers

"Sovereign Immunity" is a principle of international law, which is applied in accordance with the law of the forum. The concept of "Sovereign Immunity" in the United Kingdom is rooted in common law principles.

Historically, it was encapsulated in the maxim "the King can do no wrong", meaning that the Crown and its agents could not be sued in civil or criminal court.

Over time, this principle has evolved, meaning that the concept of sovereign immunity is not absolute anymore but only restrictive to acts of a governmental nature (acta jure imperii). As a result, acts of a commercial nature (acta jure gestionis) do not enjoy immunity.

Under English law, the statute giving effect to the doctrine of restrictive immunity is the State Immunity Act 1978 ("the SIA"), which determines whether (i) a dispute involving a State entity can be adjudicated and (ii) the judgment arising from that adjudication can be enforced. The defence of Sovereign Immunity applies not only to the State itself and its various organs, agencies and instrumentalities but also to separate entities acting in the exercise of sovereign authority.

Immunity From Adjudication

As per section 1 of the SIA, the UK courts have no jurisdiction to adjudicate disputes against States unless one of the statutory exceptions in sections 2 to 11 applies, such as when dealing with (i) submissions to the jurisdiction of the English courts, (ii) commercial transactions, (iii) contracts to be performed in the UK; (iv) employment contracts; (v) personal injuries and damage to property; (vi) ownership, possession and use of property; (vii) admiralty proceedings concerning ships in commercial use, and (viii) arbitration agreements. These are exceptions to jurisdictional immunity and do not in themselves overcome enforcement immunity.

Immunity From Enforcement

As per sections 13(3) and 13(4) of the SIA, a party can be prevented from enforcing any judgment or arbitration award against the property of a State unless one of the two exceptions to immunity from enforcement/execution applies: (i) when the State in question provides its written consent to execution (submission to jurisdiction is not sufficient so an explicit waiver of immunity as to enforcement is needed), and (ii) where the property of the State in question is used for commercial purposes.

Put simply, a successful Sovereign Immunity plea will mean that the UK courts either will refuse to hear the dispute or will be unable to enforce any foreign judgment or award made against a sovereign State.

The Enforcement of ICSID Awards

Since its entry into force in 1966, the ICSID Convention has provided a framework for contracting States and investors of those States (i) to arbitrate investment disputes, and (ii) to recognise and enforce ICSID awards against any contracting State as if it were a domestic court judgment.

In England, the ICSID Convention (including the process for registration and enforcement of ICSID awards) has been implemented into domestic law through the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act") and CPR 62.21 (specific to ICSID awards). While the default position is that ICSID awards will be recognised as enforceable by the domestic courts without further review (cf. to Articles 53 and 54 of the ICSID Convention), States have been known to challenge ICSID awards at the recognition stage based on "Sovereign Immunity" defence by alleging that recognition of the ICSID award contravenes the State's right to immunity from jurisdiction under section 1 of the SIA.

Until recently, the English Commercial Court (which oversees the recognition and enforcement of ICSID awards) had an established approach towards the recognition and enforcement of ICSID awards.

However, in a recent judgment dated 19 January 2024 [Border Timbers Limited and another v Republic of Zimbabwe, 2024 EWHC 58 (Comm)], the Commercial Court took a "novel approach" by declining to set aside an order for the registration of an ICSID award against Zimbabwe, finding that sovereign immunity is irrelevant at the stage of registration of ICSID awards.

State immunity irrelevant in arbitration award registrations

In 2021, the Claimants obtained in the Commercial Court a without-notice order registering a USD 125 million ICSID award made in their favour. Zimbabwe applied to set aside the order on grounds that it was immune from the jurisdiction of the UK courts since the State waived its immunity pursuant to:

1. Section 2(2) of the SIA on the basis that Article 54(1) of the ICSID Convention constituted a prior written agreement to submit to the jurisdiction of courts of the UK; and/or
2. Section 9(1) of the SIA because of Zimbabwe's alleged agreement to submit the dispute to arbitration.

Mrs Justice Dias found that neither one of the exceptions applied: parting with a previous ruling of Mr Justice Fraser in Infrastructure Services Luxembourg v. Spain [formerly Antin, 2023 EWHC 1226 (Comm)], the judge found that Article 54 of the ICSID Convention was insufficient to satisfy the requirements for the submission exception contained in section 2(2) of the SIA, which requires an express submission to the jurisdiction of the courts.

In addition, Mrs Justice Dias determined that courts should be able to review the State's jurisdictional objections, even if they had been rejected in the arbitration, before applying the arbitration exception under section 9 of the SIA. Given that the existence of the arbitration agreement under the applicable BIT was disputed, Mrs Justice Dias considered that it did not constitute an agreement in writing for the purpose of section 9 of the SIA. Nevertheless, the judge declined to set aside the order on the basis that the defence of sovereign immunity did not arise at the stage of the registration but could only come into play later, at the stage of execution of the ICSID award.

In doing so, Mrs Justice Dias recognised that this was "a novel approach for which there is no direct authority" and granted Zimbabwe permission to appeal to the Court of Appeal.

Time will tell whether this "novel approach" will be followed when dealing with the enforcement of ICSID awards in England.