

Decoding Arbitral Disputes: Spain Faces Award Enforcement

By **Josep Galvez** (October 15, 2024)

This article is part of a regular column that delves into the most critical cross-border investment and commercial European disputes over arbitral award enforcement. In this installment, I examine the implications of the Federal Court of Australia's recent ruling against the Kingdom of Spain.



Josep Galvez

In a significant ruling that underlines the resilience of international arbitration enforcement mechanisms, on Aug. 29 the Federal Court of Australia handed down its decision in *Kingdom of Spain v. Infrastructure Services Luxembourg SARL*.^[1]

The case concerned Spain's persistent attempts to resist enforcement of an arbitral award amounting to over €125 million (\$137 million). Despite several procedural maneuvers, Spain's application for leave to appeal an order requiring security for costs was dismissed.

This outcome serves as a cautionary reminder to sovereign states that their status will not wholly shield them from the enforcement of investment arbitration awards. The judgment also sheds light on how courts deal with issues of consular immunity and procedural objections in the context of enforcement actions.

Background

The background of this case traces back to Spain's controversial reform of its renewable energy incentives, which directly affected foreign investors like Infrastructure Services and Energia Termosolar BV, which had invested heavily in Spain's solar energy projects.

The investors successfully sought compensation through arbitration at the International Centre for Settlement of Investment Disputes^[2] under the Energy Charter Treaty, culminating in an award^[3] of approximately €120 million in the claimants' favor. Spain, however, has persistently refused to comply with the decision, arguing that its obligations under EU law prohibited it from making payments related to the arbitral award, also impeding the enforcement in the European Union.

Faced with this defiance, the investors sought enforcement of the award in other jurisdictions, such as the U.K.^[4] and Australia, targeting assets that could satisfy the award.

In this case, the Federal Court of Australia issued examination orders specifically directed at Spanish consular officials in Sydney, requiring them to provide information about Spain's assets within the Australian jurisdiction. The purpose of these orders was to assist in enforcing the arbitral award. Spain, predictably, moved to set aside these orders, citing procedural grounds and asserting that its consular officials were immune from such orders under the Vienna Convention on Consular Relations.^[5]

Spain's refusal to comply with the judgment, despite repeated rulings against it, forced the investors to take more incisive enforcement actions, such as requesting a security for costs order. In response, Spain sought to challenge the examination orders, but its application was dismissed, further underscoring the country's continued refusal to engage with the legal

process in good faith.

The Judgment

The court's decision by Justice Nye Perram dealt a significant blow to Spain's arguments.

Spain had argued that the application to set aside the examination orders should have been reviewed under Section 35A(5) of the Federal Court of Australia Act 1976. However, the court found that Spain failed to follow the necessary procedural steps to raise this argument at the appropriate stage. On the contrary, the court emphasized that Spain had not applied under Section 35A(5) within the required time frame and had instead pursued an alternative legal pathway under Rule 39.05 of the Federal Court Rules 2011. Spain's failure to meet the deadlines for a proper application under Section 35A(5) meant that the court was bound to dismiss its arguments.

On the substantive issue of consular immunity, Spain had invoked Articles 40 and 44 of the Vienna Convention, which protect consular officials from being compelled to appear in court or provide testimony under coercion. Spain argued that these protections extended to the examination orders in question.

However, the court also rejected that line of reasoning, pointing out that the examination orders were not directed personally at the consular officials but at uncovering Spain's assets for enforcement purposes. Moreover, Spain had not demonstrated that complying with the examination orders would violate any specific consular privileges or immunities. The court concluded that there was no reason to believe that consular officials' immunities should prevent the enforcement of a lawful arbitral award.

Another critical aspect of the court's reasoning involved the issue of security for costs. Spain's history of noncompliance and refusal to engage with the judgment prompted the court to order security for costs in favor of the investors.

The court observed that Spain, as a judgment debtor that had repeatedly refused to meet its obligations, was unlikely to pay costs if its challenge failed. This justified the imposition of a security for costs order to ensure that the investors would not face further financial risks in their pursuit of justice. The court's decision thus highlighted the role of this kind of order as a safeguard against parties who attempt to use procedural delays to avoid complying with enforcement obligations.

The implications of this judgment extend far beyond the immediate case. Spain's attempts to avoid paying the arbitral award have placed it in the international spotlight, with courts in various jurisdictions scrutinizing its conduct. The decision of the Federal Court of Australia adds to the growing body of jurisprudence holding the Kingdom of Spain accountable for its international arbitration obligations.

Similarly, recent rulings by the English High Court have enforced arbitral awards against Spain, including actions involving Spanish state assets. Notably, cases have emerged where claimants sought enforcement against Spanish properties in Luton and assets associated with the Instituto Cervantes.[6]

The ruling sends a clear message that sovereign immunity will not protect states from complying with international arbitral awards, particularly when they are found to be acting in bad faith or delaying proceedings unnecessarily.

Takeaways

This judgment is likely to influence future enforcement cases in the broader context of arbitration involving sovereign states.

Spain's continued reliance on procedural defenses and assertions of consular immunity has been largely unsuccessful, both in Australia, England and Wales, and other jurisdictions. Courts are increasingly unwilling to entertain such defenses, mainly when the underlying goal is to avoid satisfying a lawful arbitral award despite the controversial decisions issued by the European Court of Justice. In contrast, this case demonstrates that Australian courts are prepared to take decisive action to ensure that international arbitration awards are enforced, even against sovereign states.

Looking beyond Australia, this judgment also has potential implications for arbitration enforcement actions within the European Union, where European Court of Justice decisions like *Slovak Republic v. Achmea BV*,^[7] which held in 2018 that intra-EU bilateral investment treaty arbitration clauses are incompatible with EU law, and *Republic of Moldova v. Komstroy LLC*,^[8] which in 2021 extended this reasoning to the Energy Charter Treaty, have strained the relationship between EU law and the enforcement of arbitral awards.

The Federal Court of Australia's approach stands in contrast to recent EU jurisprudence, which has sought to limit the enforceability of arbitral awards within the EU, particularly in intra-EU disputes. Furthermore, this divergence makes jurisdictions like Australia, the U.K. and the U.S. increasingly attractive forums for investors seeking to enforce awards against EU member states. The willingness of these courts to enforce arbitral awards, even in the face of ironclad procedural and diplomatic defenses, underscores their importance in the international legal order.

Undoubtedly, the Federal Court of Australia's decision in *Spain v. Infrastructure Services* aligns Australia with the other common-law jurisdictions while reinforcing the principle that sovereign states must comply with their obligations under international arbitration awards.

By dismissing Spain's procedural objections and upholding the security-for-cost order against the debtor country, the court has set a powerful precedent that will likely shape future enforcement actions. The judgment also serves as a reminder to sovereign states that attempts to avoid enforcement through procedural maneuvers or claims of immunity will not succeed in the face of robust legal reasoning and the determined pursuit of justice by aggrieved investors.

Josep Galvez is a barrister at 4-5 Gray's Inn Square Chambers, and a former Spanish judge.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2024] FCAFC 113.

[2] *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom*

of Spain, ICSID Case No. ARB/13/31.

[3] ICSID award dated 15 June 2018 handed down by the arbitral tribunal composed by Mr J. Christopher Thomas QC, Prof. Francisco Orrego Vicuña and Dr. Eduardo Zuleta, President.

[4] Infrastructure Services Luxembourg v. Kingdom of Spain [2023] EWHC 1226 (Comm).

[5] Vienna Convention on Consular Relations, done at Vienna on 24 April 1963.

[6] Blasket Renewable Investments LLC v. The Kingdom of Spain and Ors, EWHC, order dated 27 March 2023.

[7] Slovak Republic v. Achmea B.V. Court: Court of Justice of the European Union (CJEU) Judgment date: 6 March 2018 Case number: C-284/16 Citation: Achmea v. Slovak Republic, C-284/16, EU:C:2018:158.

[8] Republic of Moldova v. Komstroy LLC Court: Court of Justice of the European Union (CJEU) Judgment date: 2 September 2021 Case number: C-741/19 Citation: Komstroy v. Moldova, C-741/19, EU:C:2021:655.