



Neutral Citation Number: [2025] EWHC 2874 (Comm)

Case No: CL-2021-000481

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/11/2025

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

(1) OPERAFUND ECO-INVEST SICAV PLC
(2) SCHWAB HOLDING AG
- and -
THE KINGDOM OF SPAIN

Claimants

Defendant

Christopher Harris KC and Mark Wassouf (instructed by **Duane Morris**) for the Claimants
and Applicant
Cameron Miles (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing dates: 28-29 October 2025

Approved Judgment

This judgment was handed down remotely at 9.30am on 10 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE PELLING KC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC :

Introduction

1. These proceedings are concerned with the registration by the claimants of an arbitration award dated 6 September 2019 (“Award”) made in their favour in arbitration proceedings between them and the defendant, the Kingdom of Spain (“Spain”), under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (“ICSID Convention”). This is the hearing of an application by the current claimants (“claimants”) and Basket Renewable Investments LLC (“Basket”) for an order that Basket be substituted for the claimants as Claimant in these proceedings. The application is made pursuant to CPR r.19.2(4)(a) on the basis that the claimants purported to assign their interests in the Award to Basket by an assignment agreement between the Claimants and Basket dated 31 January 2024 (the “Assignment Agreement”). The application is opposed by Spain, which alleges the Award is not assignable as a matter of international law (“assignability issue”) so that the jurisdictional requirements of CPR 19.2(4)(a) have not been satisfied.
2. A similar issue arose in proceedings between Basket and Spain in the Federal Court of Australia – see Basket Renewable Investments LLC V The Kingdom of Spain [2025] FCA 1028 (“FCA proceedings”). In those proceedings Basket had been substituted on the basis that the making of that order would not prevent Spain from disputing the validity or efficacy of the purported assignment at trial - see Paragraph 36 of Stewart J’s judgment. That is not a course that either party in these proceedings contend should be adopted here, because they each maintain that because this is an application under CPR r.19.2(4)(a) the issues that arise must be resolved finally and on the balance of probabilities applying the judgment of Mr Peter MacDonald Eggers KC sitting as a Judge of this court in Tactus Holdings Ltd (in administration) v Jordan and others [2025] EWHC 133(Comm); [2025] 1 WLR 1602 (“Tactus”).
3. I do not accept that Tactus requires such an all or nothing approach in all cases. On the contrary it recognises that there may be cases in which an evidential dispute prevents a court reaching a final conclusion on the issue and that in such cases the substitution issue should be resolved by making an order under CPR r.19.2(2) and/or 19.2(4)(b) (if the claimants did not want to remain parties to these proceedings) because that permits substitution where a court concludes “... *it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.*” I consider that generally such an approach is also likely to be appropriate where there is an issue of law that is not capable of final resolution because all the relevant evidence is not available or because the issue of law is otherwise one best left to a trial by reason of the novelty, general importance or legal complexity of the issue that arises – see by analogy Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15] approved by the Court of Appeal in AC Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098; [2010] Lloyd’s Rep. I.R. 301 at [24]. However, different considerations may apply in a registration claim such as this because by definition there will be no trial. It is not necessary that I consider this issue further however, because, I have been able to resolve the issue finally as both parties have asked me to do.

4. The assignability issue was resolved against Spain in the FCA proceedings. Blasket maintains that the judgment in those proceedings creates an issue estoppel that precludes Spain from arguing the same point on this application. Spain challenges this submission. It is common ground that Spain can appeal as of right from the order to be made following the judgment in the FCA proceedings. It is also common ground that (a) the time for appealing is 28 days running from the date of the order made following the judgment in the FCA proceedings; and (b) that time has not yet started to run because the order has not yet been issued and sealed and will not be issued or sealed until after a hearing to settle the terms of the order due to take place towards the end of November 2025. Spain by its solicitor's evidence in these proceedings has confirmed an intention to appeal. If there is an appeal it is unclear when that appeal will be heard and determined.
5. Given that both parties consider I should resolve as a matter of law on the balance of probabilities whether an ICSID Convention arbitration award is assignable, the application hearing lasted for 2 days and has generated an application bundle and supplemental bundle running to over 3500 pages, an authorities bundle of over 2000 pages containing 65 different authorities, statutes, treaties, regulations and extracts from text books and a supplemental authorities bundle running to over 400 pages and containing a further 11 items.
6. Spain applied at the start of this hearing for an order adjourning or staying this application until after an appeal in the FCA proceedings. For reasons I gave at the time, I decided to postpone determining that application until after I had heard the arguments on the assignability issue in full. I did so because the arguments are lengthy, detailed and involve potentially important points of public international law that I could not assess properly in the context of an adjournment application at the start of the hearing. This led me to warn the parties that one order available to me remained to adjourn the application and direct that it and all other steps in these proceedings be stayed until after final determination of the appeal from Stewart J's judgment in the FCA proceedings or the expiry of Spain's time for commencing such an appeal. In the result I have been able to resolve the issues that arise without the need to adjourn these proceedings.

The Factual Background

7. The factual background is not seriously in dispute. Between July 2008 and July 2009, the Claimants invested in a number of solar energy plants in Spain allegedly in reliance upon representations made on behalf of Spain as to minimum tariffs and incentives which would be extended to renewable energy projects in Spain. It is alleged that between November 2010 and June 2014, Spain passed legislation revoking those tariffs and incentives, which the claimants alleged breached the terms of the Energy Charter Treaty 1994 ("ECT") and caused the claimants substantial losses.
8. On 31 July 2015, the Claimants commenced arbitration against Spain seeking damages pursuant to Article 26 of the ECT. The arbitration was conducted under the rules applicable to ICSID Convention arbitrations. It is not in dispute for present purposes at least that the arbitration, the making of the award and its enforcement are all governed by the provisions of the ICSID Convention. On 6 September 2019, the

Tribunal published the Award in which it found proved the breaches alleged by the claimants and ultimately awarded the claimants €29.3m.

9. On 9 August 2021, the Claimants applied without notice under s.1(2) of the Arbitration (International Investment Disputes) Act 1966 (the “1966 Act”) for an order registering the Award in England & Wales. On 14 September 2021, Cockerill J (as she then was) made the order sought. By operation of s.2(1) of the 1966 Act, the effect of registration was that the Award had the same force and effect for the purposes of execution as if it was a judgment of the High Court.
10. Following service, which delayed matters somewhat, on 6 January 2023, Spain applied to set aside Cockerill J’s Order on grounds that included that Spain was immune from the English Court’s jurisdiction under s.1(1) of the State Immunity Act 1978. As noted already, on 31 January 2024, the Claimants purported to assign to Blasket “*all of the rights, interests and benefits ... under or in respect of the Award...*”.
11. By an order made on 13 February 2024 Fraser LJ (sitting as a Judge of the Commercial Court) dismissed the set aside application save for the ground based on the State Immunity Act 1978. That issue has been resolved against the position adopted by Spain by the Court of Appeal in Infrastructure Services Luxembourg Sarl v. the Kingdom of Spain [2024] EWCA Civ 1257; [2025] 2 WLR 621 (“ISL”). That being so, Fraser LJ adjourned final determination of the set aside application until after the Court of Appeal had handed down its judgment in ISL. Spain applied for and obtained permission to appeal to the Supreme Court and that appeal is due to be heard at the end of this year. By consent it has been directed that the set aside application be further adjourned until after hand down of the Supreme Court’s judgment. In making that order Henshaw J directed that this application should be heard separately because “... *it ought to be resolved promptly in order to provide clarity as to who the parties are.*” It is common ground that the parties are bound by the decision of the Court of Appeal in ISL unless and until that decision is reversed by the Supreme Court.

The Substitution Application

12. Mr Harris KC accepts that if the application is to succeed, the claimants and Blasket must satisfy the Court on the balance of probabilities that there has been a valid assignment so as to engage the Court’s jurisdiction under CPR 19.2(4)(a).

The Issue Estoppel Argument

13. Blasket’s primary submission is that the assignability argument is one that is not open to Spain because Spain is estopped from pursuing it following the hand down of Stewart J’s judgment in the FCA proceedings (“FCA judgment”). The awards in dispute in the FCA proceedings were awards published by arbitral tribunals appointed under the ICSID Convention which had been registered in Australia under its International Arbitration Act 1974 – broadly the Australian equivalent of the 1966 Act. Spain challenged registration in the FCA proceedings on the grounds that (i) it was immune from the court’s jurisdiction under Australia’s equivalent of section 1(1) of the State Immunity Act 1978; and (ii) the awards were not assignable.

14. Although Spain maintains in these proceedings that it is immune from the English Court's jurisdiction under s.1(1) of the State Immunity Act 1978, it is not in dispute that this point is not available to Spain unless and until the Supreme Court overturns the decision of the Court of Appeal in *ISL*. This is so because the Court of Appeal decided that although the general immunity conferred by section 1(1) of the State Immunity Act 1978 in principle applied to the registration of ICSID Convention arbitration awards, each Convention state (including Spain) had agreed by Article 54 of the ICSID Convention that awards against them in arbitrations conducted in accordance with the ICSID Convention could be enforced in all other Convention states and thus enforcement of such awards came within the exception to the general immunity under s.1(1), which is set out in section 2 of the 1978 Act.
15. It is the determination in the FCA proceedings of the assignability issue that is said to give rise to the issue estoppel. Spain challenges this approach essentially on the basis that some or all of the technical requirements that apply before an issue estoppel can arise from a foreign judgment are not satisfied.
16. It is common ground that the principles that apply to an issue estoppel based on a foreign judgment are those set out by Males LJ in Hulley Enterprises Ltd v Russian Federation [2025] EWCA Civ 108; [2025] 3 WLR 252 ("Hulley"). In his summary of the applicable principles, Males LJ (a) followed the summary of the applicable principles set out by Clarke LJ in Good Challenger Navegante SA v Metalexportimport SA [2004] 1 Lloyd's Rep 67 ("Good Challenger") at [50]; and (b) approved the later summary of the applicable principles set out in the Judgment of the Privy Council in Linhas v MatlinPatterson [2022] UKPC 21; [2023] Bus LR 1305 at [36]. The applicable principles are those summarised by Males LJ at [74]-[75] in Hulley in these terms:

"74 The ordinary rule that for issue estoppel to arise as a result of a foreign judgment, the foreign judgment must be entitled to recognition here, was explained by the Privy Council in *Gol Linhas v MatlinPatterson* [2023] Bus LR 1305:

36. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 the House of Lords held that issue estoppel can be based on a foreign judgment. To give rise to such an issue estoppel, three requirements must be satisfied: see *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar (The Sennar) (No 2)* [1985] 1WLR 490, 499 (Lord Brandon of Oakbrook); *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67, at para 50. First, the judgment must be entitled to recognition in accordance with the domestic rules on the recognition of foreign judgments. At common law, these rules require the judgment to be (a) given by a court of a foreign country with jurisdiction to give it and (b) final and conclusive on the merits. Second, the parties in the two actions must be the same. Third, the issue decided by the foreign court must be the same as the issue in the domestic proceedings."

75 Section 31¹ sets out the additional requirements for recognition and enforcement of a foreign court judgment against a state, which must therefore be satisfied if it is sought to invoke such a judgment as giving rise to an issue estoppel against that state.”

Males LJ also approved the additional principles identified by Clarke LJ in Good Challenger at [54] of which two are relevant to this case being (i) it is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law and (ii) the application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.

17. It is not in dispute that the parties in these proceedings and the FCA proceedings are the same. All other issues are in dispute.
18. Spain challenges the availability of issue estoppel firstly on the basis that before a foreign judgment can give rise to an estoppel, the judgment must be capable of being registered in England and Wales and that is not currently the position in relation to the FCA proceedings because a final order is yet to be made and thus the judgment in the FCA proceedings is not final or binding.
19. I accept (indeed it is not seriously in dispute) that as a matter of Australian law, the judgment in the FCA proceedings will only become final and binding when a final order is issued and sealed because it is at that point that the FCA becomes *functus* and the decision binding subject only to an appeal – see Burrell v R [2008] HCA 34, (2008) 237 CLR 219 at [20]. Although there is no evidence of Australian law available, I do not consider any is required given the nature of the issue and the authority relied on – see Brownlie v. FS Cairo (Nile Plaza) LLC [2021] UKSC 45 per Lord Leggatt JSC at [148].
20. Mr Harris KC’s submission that this is mere legal technicality in one sense is correct but in another is immaterial because of the very clear and well-established principles that apply in this area. Unless and until a final order is made by the FCA, the judgment in the FCA proceedings is not “... *final and conclusive on the merits*...”. Mr Harris KC submitted that if I reached this conclusion, one of two solutions might be adopted – one was to delay handing down the judgment in these proceedings until after final judgment had been entered in the FCA proceedings or to qualify any order I make as taking effect only when the order is made and sealed in the FCA proceedings. In principle the point at which the rules applicable to an issue estoppel based on a foreign judgment are to be tested is no later than the date when judgment is given in the application or trial in which the issue arises. In my judgment therefore there are two possible approaches available – either simply to reject the claimants and Blasket’s submission that Spain is estopped from asserting that the Award is non-assignable or to adjourn this application until after the FCA has made a final order by reference to its judgment in the FCA proceedings. I return to this issue having considered Spain’s other submissions concerning estoppel because how to proceed only matters if the absence of an order is the only obstacle to an issue estoppel arising.

¹ Of the Civil Jurisdiction and Judgments Act 1982.

21. As Males LJ held in Hulley at [75], s.31 of the Civil Jurisdiction and Judgments Act 1982 sets out additional requirements for recognition and enforcement of a foreign court judgment against a state, which must be satisfied if it is sought to invoke such a judgment as giving rise to an issue estoppel against that state. Spain submits that those requirements are not satisfied in the circumstances of this case.

22. S.31(1) provides:

“31 Overseas judgments given against states, etc.

(1) A judgement given by a court of an overseas country against a state other than the United Kingdom or the state to which that court belongs shall be recognised and enforced in the United Kingdom if, and only if –

(a) it would be so recognised and enforced if it had not been given against a state; and

(b) that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978.”

The requirements of s.31(1)(b) are plainly satisfied on the law as it is following the decision of the Court of Appeal in ISL. Spain’s submission was that it would be potentially unfair to resolve this issue in these proceedings given the impending appeal to the Supreme Court in ISL because such a resolution may give rise to an issue estoppel as between the parties. In the circumstances as they now are that is fanciful. Firstly, the parties have always proceeded on the basis that this issue will be finally determined in this case on the application to set aside, which is to be listed following hand down by the Supreme Court of its judgments on the appeal. Thus neither party intended any conclusion on this application to be determinative of that point. In any event that has been put beyond doubt by the undertakings that Mr Harris KC offered and which I accepted in the course of the adjournment application – see paragraph 4(c) of the Judgment on the adjournment application. As the law now is, unless I adjourn this application, I am bound to conclude that s.31(1)(b) of the Civil Jurisdiction and Judgments Act 1982 is satisfied. An adjournment is not appropriate given the undertaking I have accepted. In those circumstances, I conclude that s.31(1)(b) is satisfied.

23. The position in relation to s.31(1)(a) is more problematic. It was submitted on behalf of Spain and I accept that a judgment of a foreign court entered in personam against a defendant other than a state is not capable of being enforced in England and Wales unless “... *the judgment debtors were present ... in the foreign country when the proceedings were commenced, or if they submitted to its jurisdiction.*” – see Rubin and another v Eurofinance SA and others [2012] UKSC 46; [2013] 1 AC 236 *per* Lord Collins of Mapesbury at [7] and [10].

24. By s.33 of the Civil Jurisdiction and Judgments Act 1982, “(f)or the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales ... the person against whom the

judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings ... to contest the jurisdiction of the court...” Spain contends that it appeared in the FCA proceedings solely to contest the jurisdiction of the court. The claimants and Blasket dispute this.

25. The parties invite me to reach conclusions on this issue from what appears in the judgment of Stewart J in the FCA proceedings. This is unsatisfactory. Absent agreement, the issue ought to be the subject of evidence. I am not critical of Spain for the absence of evidence from it on this point because as was submitted on behalf of Spain:

“70 This [issue estoppel] argument was not flagged in Blasket’s witness evidence. It was not raised with Spain when Blasket Renewable [2025] FCA 1028 was handed down on 29 August 2025, two months before the Hearing. It was not raised in subsequent correspondence concerning the arrangement of this Hearing. Rather, it was raised for the first time in Blasket’s Skeleton, filed at 4pm on 22 October 2025 (i.e. the day before the present Skeleton Argument was filed).”

This is not a satisfactory way to conduct litigation of this sort. It necessarily means that I will have to resolve any doubts I might have on this issue against the claimants and Blasket because the onus rests on them to establish the issue estoppel on which they rely on the balance of probabilities.

26. Turning to Stewart J’s judgment, at paragraph 1 he records that the “... *respondent to each application is the Kingdom of Spain, a sovereign State, which conditionally appears to assert foreign State immunity.*” At paragraph 35 Stewart J records that (as here) there had been an application to substitute Blasket as claimant following a purported assignment of rights under various ICSID Convention awards against Spain and at paragraph 36 the Judge states that Blasket had been joined “*on the basis that the making of those orders would not prevent Spain from disputing the validity or efficacy of the purported assignment at trial, which it now does.*” In relation to an issue as to whether the immunity arguments should be argued separately from and ahead of the other issues that arose, Blasket had submitted that the issues should be argued separately because “... *a party claiming immunity ... loses its immunity...*” by arguing issues other than those concerning immunity. In the result all issues were argued together because as Stewart J records “...*because Spain’s contentions as to power, including its constitutional argument, are all directed to the maintenance of its immunity, it would not be irregular for the immunity and substantive points to be run together and that in adopting that approach Spain would not be regarded as having waived immunity...*”
27. On the basis of this material. I conclude that Spain appeared and was understood by all parties to be appearing in the FCA proceedings for the sole purpose of contesting the jurisdiction of the Australian courts. That being so, I conclude that by appearing in the FCA proceedings for that purpose Spain was not submitting to the jurisdiction of the Australian courts. In those circumstances, Spain did not submit to the jurisdiction of the FCA and that prevents the judgment in those proceedings being recognised or

enforced in England applying s.33 of the Civil Jurisdiction and Judgments Act 1982 and in consequence s.31(1)(a) of the Civil Jurisdiction and Judgments Act 1982 is not satisfied and the claimants and Blasket are not entitled to assert an issue estoppel by reference to the judgment in the FCA proceedings irrespective of the point concerning the making of a final order considered earlier.

28. Finally, Spain argues that issue estoppel is not available in relation to a pure point of law. Although not material given the conclusions I have so far reached, I set out my conclusions on this issue in the interest of completeness. I am not able to accept Spain's submission on this point for the following reasons.
29. In Skatteforvaltningen v MCML Ltd [2025] EWCA Civ 371; [2025] 4 WLR 52 ("Skatt"), the majority (Newey and Popplewell LJ) held that determinations of either law or fact in earlier proceedings could give rise to an issue estoppel by reference to well established earlier authority. Popplewell LJ concurred with Newey LJ at [124]. As Newey LJ stated at [127] "*In Hoystead², Lord Shaw, giving the judgment of the Privy Council, said at p 170 that the principle extended to any point which was "in substance the ratio of and fundamental to the decision"*". Newey LJ relied on the decision of Dixon J in the High Court of Australia in Blair v Curran (1939) 62 CLR 464, where the emphasis was not on whether the point was one of law or fact (or one of pure law, which is what Spain asserts in this case is incapable of giving rise to an estoppel) but on whether the point was fundamental to resolution of the case by the judgment said to give rise to the estoppel. As Dixon J put it (see Newey LJ's judgment at [129]) "... *ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation...*"
30. In my judgment the applicable principles are those set out in Skatt by Newey LJ at [134]:

"It is, I think, clear from the authorities that issue estoppels can arise from determinations on points of law as well as points of fact. Thus, *Spencer Bower* states in paragraph 8.04, "The determinations which will found an issue estoppel may be of law, fact, or mixed fact and law". In *Jones v Lewis* [1919] 1 KB 328, Bankes LJ said at pp 344–345, "No question of fact which was directly in issue between the parties to the action before Bray J, and which was decided by him, could be further litigated by either party, and the same would apply to the exact point decided by Bray J, whether it were *a point of law or of mixed law and fact*". In *Hoystead*, Lord Shaw commented at p 165 that "[p]arties are not permitted to begin fresh litigations because of new views they may entertain of *the law of the case*" and, at p 168, that "whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon *construction of a statute*, that is ... nothing to the point in considering the question of estoppel". In

² Hoystead v Commissioner of Taxation [1926] AC 155

Blair v Curran³, Dixon J observed at p 531 that “[a] judicial determination directly involving an issue of fact *or of law* disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies”... In *Watt v Ahsan*⁴, Lord Hoffmann said in para 31 that issue estoppel arises “when a court of competent jurisdiction has determined some question of fact or *law*, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties”. (Emphasis added in each instance.) In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 916F–917B (“*Carl Zeiss*”), Lord Reid indicated that there was no justification for a distinction between issues of fact and issues of law.”

31. It was submitted by Spain that the majority in *Skatt* left open the possibility that the principles so far considered may not arise in relation to pure points of law. I reject this as at best fanciful. First it is inconsistent with all the analysis by Newey LJ down to and including [134]. Secondly the precise parameters of the pure law exception contended for are unclear beyond it involving a foreign rule of law other than one that “... *relates ... to a factual situation...*”. It is difficult to see how a point of law that is determinative of a claim or application would not satisfy this test. An inability to define clearly where the boundary between pure points of law and other points of law falls makes it improbable that such an analysis could or should be adopted, particularly when the approach identified above of testing whether the point of law said to give rise to an estoppel by asking whether it was “*in substance the ratio of and fundamental to the decision*” is a test that is relatively straight forward to apply in most cases. Thirdly, contrary to Spain’s submission, I do not read what Newey LJ said at [135] as him acknowledging the possibility of such a conclusion. Rather he adopts the point (made originally by Nugee LJ in his dissent on this point) that the case relied on in the text book Nugee LJ had relied on appeared to turn on a different point (so that the statement in the text book was unsupported by authority) before concluding that if there was any such principle it was of no application in the case he was deciding. In context that was not a recognition that the point is at all plausible. I was told that permission has been given to appeal *Skatt* to the Supreme Court. However, I was not told whether the “*pure point of law*” point was relevant to that appeal.
32. As things stand I conclude that the better view is that an estoppel on a point of law is capable of arising from a judgment of a foreign court of competent jurisdiction providing that that the point of law is part of the “... *ratio of and fundamental to the decision...*” of the foreign court. It follows that I reject Spain’s challenge to the claimants and Blasket’s reliance on issue estoppel on the basis that issue estoppel is not available by reference to points of law and I reject the notion that estoppel is not available in relation to pure points of law if otherwise the point concerned is part of the “... *ratio of and fundamental to the decision...*” of the foreign court.

³ (1939) 62 CLR 464

⁴ [2007] UKHL 51; [2008] 1 AC 696

33. In the result, I conclude that the claimants and Blasket have failed to establish that Spain is estopped from advancing its substantive arguments on the assignability issue because (a) there is as yet no final order in the FCA proceedings capable of triggering the right to assert an issue estoppel and, more fundamentally, (b) by appearing in the FCA proceedings for the purpose of asserting what it claimed to be its entitlement to state immunity, Spain was not submitting to the jurisdiction of the Australian courts with the result that the judgment in the FCA proceedings is not capable (or capable as yet) of being enforced in England and Wales.
34. Had I concluded that the only reason why issue estoppel was not available was that referred to in (a) above, I would have directed that this application be adjourned and re-listed for short supplemental submissions following the sealing of the order in the FCA proceedings with judgment on this application to follow as soon as possible thereafter. However, in the circumstances, that does not arise.

The Assignability Issue

35. The claimants and Blasket submit that even if issue estoppel is not available the assignability objection ought to be rejected on its merits. In the alternative, the claimants and Blasket submit that following registration of the Award, a new and free standing group of rights arose and they maintain that those are capable of assignment as a matter of English law even if the Award itself is incapable of being assigned. I consider each of these arguments in turn below.

Assignability of the Award

36. It is common ground that the ICSID Convention contains no express provision either permitting an investor to assign an award or precluding the assignment of an award. Whether an assignment of an award is permitted depends therefore the true meaning and effect of the ICSID Convention and the ECT and on any applicable principles of customary international law.
37. The claimants and Blasket submit that since neither the ICSID Convention or the ECT contains an express prohibition on assignment, and there is no other applicable principle of international law that prohibits assignment, it follows that non-parties may seek recognition or enforcement of such awards, at any rate in relation to ECT disputes.
38. Spain disputes each of these propositions, maintaining that conventions are to be construed strictly and so construed the ICSID Convention precludes ICSID Convention awards being assignable (at any rate in relation to ECT disputes) save to the extent there is express permission to that effect is given after the event by the state concerned. Spain submits that the principles of construction that should be adopted are those to be found in the Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”). For the reasons that I explain in detail below, I consider the issue is one that is to be resolved as a matter of construction primarily of the ICSID Convention and to a lesser extent the ECT and that no useful assistance can be obtained from customary public international law because there is no or no sufficiently widespread, representative or consistent practice that establishes a rule of customary international law that rights under treaties or conventions such as the ICSID Convention either are or are not assignable.

Construction of the ICSID and ECT Relevant to Assignability of the Award

39. The starting point is the Vienna Convention, because the rules of interpretation set out in Articles 31 and 32 are themselves rules of customary international law binding on all parties to treaties and (by necessary extension any other persons claiming rights under such treaties) – see *Ben Nevis (Holdings) Limited v. HMRC* [2013] EWCA Civ 578. In so far as is material for present purposes those articles respectively provide:

“Section 3. Interpretation of Treaties

Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

40. The claimants and Blasket argue that where the authors of the ICSID Convention intended to refer only to the parties to a dispute referred to arbitration in accordance with the ICSID Convention arbitration scheme they did so expressly. They submit that this is apparent for example from Article 25(1) of the ICSID Convention, which provides that the arbitration scheme is available in relation to “... *any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit... When the parties have given their consent, no party may withdraw its consent unilaterally.*” Some care needs to be taken with this submission because what the phrases “*a party*” or “*the parties*” tend to be used interchangeably with the phrase “*party to a dispute*” or “*parties to the dispute*”. This is apparent in Article 25 itself where the phrases “... *the parties...*” and “...*no party...*” plainly refer back to the phrase “... *the parties to the dispute...*” referred to in the part of the first sentence quoted above.
41. The claimant and Blasket rely on clauses 32, 35, 64 and 67 for similar purposes. Article 32 is concerned with the ability of an arbitral tribunal to rule on its own competence. A party other than a “*party to the dispute...*” would not or is highly unlikely to be involved in such a dispute. It does not lend support to the notion that use of the phrase “*party*” or “*parties*” necessarily means something other a “*party to the dispute...*”. Article 35 is concerned with the privileged nature of communications made in the course of a Convention mandated conciliation process. That is clear because the article appears in Chapter III, entitled “*Conciliation*”, Section 3, entitled “*Conciliation Proceedings*” which are the proceedings referred to in Article 28(1). Similar considerations apply to Article 35 as apply to Article 32. The assignee of an award nor anyone else other than a party to the relevant dispute would have no need to refer to such communications or is highly unlikely to wish to do so. Article 64 is a self-contained provision concerned with disputes between Contracting States and in that context refers expressly to “...*any party to such dispute...*”. It does not support the conclusion that use of the phrase “*party*” or “*parties*” necessarily means something other a party to a ICSID Convention arbitration. Article 67 is concerned with which states were entitled to sign the ICSID Convention and in that context defined the states that could sign as including a qualifying “... *State which is a party to the Statute of the International Court of Justice...*”. Again that form of description is to be expected in a provision which is concerned with defining which states were entitled to become Contracting States and does not support the conclusion that use of the phrase “*party*” or “*parties*” necessarily means something other a party to an ICSID Convention arbitration.
42. The claimants and Blasket place substantial reliance on Article 54(2) of the ICSID Convention. It provides:

“(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.”

The claimants and Blasket submit that the phrase “*a party*” is used in Article 54(2) without limitation and so permits a person other than a party to an award to seek recognition or enforcement. It follows, so it is submitted, that this is implicit acknowledgement that awards are capable of being validly assigned. I consider that submission is mistaken applying the construction principles to which I refer earlier. I reach that conclusion for the following reasons.

43. Article 54 appears in Section 6 of the ICSID Convention entitled “*RECOGNITION AND ENFORCEMENT OF THE AWARD*”. That Section appears as part of Chapter IV of the ICSID Convention which is entitled “*ARBITRATION*”. Article 53 is the first article that appears in the Section and Article 53(1) provides that 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.*”. The phrase “*the parties*” first appears in Chapter IV in Article 37(2)(b) which is within Section 2 of Chapter IV. When viewed in that context the phrases “*the parties*” and “*a party*” plainly refer to the parties or a party to the arbitration in which the award referred to in Article 53(1) has been rendered. It is one example of the language on which the claimants and Blasket rely being used to refer exclusively to the parties to an ICSID Convention arbitration. Similar usage appears in Articles 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52, but occasionally (Article 41 is an example) the phrase “... *a party to the dispute...*” is used. In my judgment the authors used the phrases “*the parties*” or “*a party*” interchangeably with the longer form “*party [or parties] to the dispute...*” where the context in which the phrases “*the parties*” or “*a party*” are used show that they relate back or otherwise clearly refer to or mean the parties or a party to the arbitration in issue. In my judgment this provides significant textual context for the construction of Article 54(2) and undermines the submission that the phrase “*a party*” in that article was intended to mean anyone other than a party to the arbitration in which the award to be registered had been rendered.
44. There are a number of contextual points that tend to support this analysis. Firstly, there is no obvious reason why the meaning of “*a party*” in Article 54(2) should mean anything other than one of “*the parties*” referred to in Article 53(1) or why if that was what the authors of the ICSID Convention intended, they could not have made that clear. I was not shown any of the *travaux préparatoires* relevant to the ICSID Convention but it was not suggested that there was anything in those materials that would support such a construction nor any reason why if that was intended Article 54(2) could and would not have said so explicitly. The absence of a clearly expressed provision permitting assignment and/or recognition and enforcement by parties other than the parties to the dispute is much more consistent with the restrictive approach identified above being the correct approach applying the Vienna Convention principles.

45. Secondly, the requirement in Article 54(2) “... *to 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...*” suggests that it was not contemplated that any party other than a party to the dispute would seek to enforce the award since on the face of the award it could be binding only on the parties mentioned in it. This point is given added force by Article 53(1), which on its face provides that the award will be binding on and only on the parties by requiring only that each party will comply with the terms of the award. In its context that can mean only the parties to the dispute – see the point made above concerning Articles 37, 38, 39, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52.
46. Aside from the points so far considered, this analysis is supported by the commentaries on the ICSID Convention. In “*Schreuer’s Commentary On The ICSID Convention*”, Article 54(2) is considered in Vol. II at paragraph 133 and following. It describes the provision as establishing a “... *procedure [which] is merely administrative and does not grant the courts or other authorities any possibility to review the copy of the award certified by the Secretary-General...*” and as a provision that “... *merely organizes the logistics of seeking the recognition and enforcement, through the identification of a given judicial or other authority whose function is merely administrative, in the sense of undertaking the operation of receiving the copy of the award...*” At Para 139, the authors express the view that:

“Only a party to the original ICSID arbitration proceeding may initiate the procedure under Art. 54(2). This would exclude action by an interested third party.”

The authors identify as a consequence of this construction that the “... *requirement that only one of the original parties may initiate a proceeding for the recognition and enforcement of an award may also lead to problems of State succession or corporate succession.*” That issue does not arise in this case and may engage different principles and is best left to a case where the issue arises. Later in the same work there is some commentary that addressed the possibility of claims (as opposed to awards) being assigned. However even in that section (and consistently with what had been said in relation to Article 54(2)) the authors record at paragraph 723 that “... *tribunals have looked with disfavor upon situations in which parties sought to transfer existing treaty claims, that is, actual claims for the alleged breach of an investment treaty based on past conduct of the host State, from an entity that did not fulfil the Convention’s nationality requirements to another that did.*”

47. This has received academic support – see by way of example “*The Transfer of Investments and Rights of Investors under International Investment Agreements – Some Unresolved Issues*” written by Hanno Wehland and published in Vol 30, number 3 of *Arbitration International*, the Journal of the London Court of International Arbitration. He referred to the same published tribunal decision referred to in “*Schreuer’s Commentary On The ICSID Convention*” at paragraph 723, and concluded that the tribunal was correct in the decision it had reached and then added “...*(w)hile IIAs do not explicitly address the transferability of rights arising under them, an interpretation in accordance with the principles embodied in Articles 31 and 32 of the [Vienna Treaty] will typically reveal that neither damages claims nor jurisdictional offers under these treaties are freely transferable...*” and then:

“... it would be surprising if States had intended to allow investors to freely transfer rights in an area that is still being perceived as particularly sensitive and closely linked to issues of sovereignty. In particular, the possibility of an assignment of treaty rights to a national of a non-signatory would seem to be an implausible assumption. But even if transfers were limited to an investor’s co-nationals, States would still lose control over who could assert treaty breaches and bring arbitral proceedings against them. In the absence of clear treaty language to such an effect it must be concluded that this could not have been the intention of the signatories.”

48. Another leading commentary is “*The ICSID Convention, Regulations And Rules - A Practical Commentary*”. It addresses the issue I am now considering at Para 4.1363 in these terms:

“Recognition and enforcement proceedings can only be initiated by a ‘party’ to the Award, as the terms of Article 54(2) state. This excludes the ability for third parties to commence such proceedings, which would include the investor’s home State acting on a diplomatic protection basis and the State of origin of any constituent subdivision or agency that was the respondent to an Award.”

As Mr Miles submits, the consequence that follows is that where a party (here Spain) is required to pay another party or parties to a dispute (here the claimants) then a party in Spain’s position cannot be required to pay an assignee (here Blasket) because that is not what the award requires. I accept that is the literal effect of the language used in Article 54(2) when read in its relevant context as set out earlier.

49. In my judgment adopting the approach I have adopted does not work commercial absurdity or injustice contrary to Mr Harris KC’s submission on behalf of the claimants and Blasket. Subject to the outcome of the currently stayed set aside application, the claimants remain entitled as between them and Spain to enforce the Award by registration under the 1966 Act and Blasket can control the process and recover any sums recovered by the claimants by enforcement as is already expressly provided for by clause 7 of the Assignment Agreement between the claimants and Blasket.
50. The claimants and Blasket submit that applying Article 31(1) of the Vienna Convention precludes interpreting a treaty in a way that would render some of its words surplus and that therefore there must be a distinction between the meaning of the phrase “*a party to the dispute*” and the phrase “*a party*”, with the latter designating a broader category and to interpret the two in the same way “... *would impermissibly render the words “to the dispute” surplus to requirements.*” I consider this to be mistaken. There is nothing in Article 31(1) of the Vienna Convention which requires a court construing a treaty to adopt such an approach – see by way of example the approach adopted by the High Court of Australia in Kingdom of Spain v Infrastructure Services Luxembourg SARL (2023) 275 CLR 292 at [70] cited with approval by Phillips LJ in ISL at [76]. Rather the focus is on arriving at the ordinary

meaning of the words used - see Article 31(1) of the Vienna Convention. The requirement to carry out the exercise in good faith points to the need to examine the use of the word or phase in its treaty or convention specific context and to construe the provision in dispute as a whole and so as to give effect to its purpose.

51. Drawing these various points together, I do not consider that the phrase “*a party*” in Article 54(2) of the ICSID Convention refers to anyone other than a party to the arbitration in issue and in consequence only a party to the underlying arbitration can seek recognition or enforcement of a ICSID Convention award. As I have explained already, the use of the phrases “*the parties*” or “*a party*” is used predominantly throughout Chapter IV and Section 6 within that chapter of the ICSID Convention to mean the parties to the arbitration in issue. Whilst it is true to say that the phrase a party or the parties “... *to a dispute*...” is used elsewhere in the Convention that does no more than demonstrate that those who drafted the ICSID Convention used the long and short form phrases interchangeably and emphasises the need to construe the words “*party*” or “*parties*” in the context in which the phrases are used. Approaching the issue in that way, there is no reason to suppose that the phrase used in Article 54(2) of the ICSID Convention was intended to refer to anyone other than the parties to the arbitration.
52. Since it is not alleged that the ECT contains a provision that positively permits assignment of rights, it is probably unnecessary to refer to that instrument in any detail. However, it is worth noting that Article 15 of the ECT provides:

“Article 15: Subrogation

(1) If a Contracting Party or its designated agency (hereinafter referred to as the “Indemnifying Party”) makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the “Party Indemnified”) in the Area of another Contracting Party (hereinafter referred to as the “Host Party”), the Host Party shall recognise:

(a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and

(b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.

(2) The Indemnifying Party shall be entitled in all circumstances to:

(a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and

(b) the same payments due pursuant to those rights and claims, as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.

(3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received or will be received pursuant to an insurance or guarantee contract.”

53. Spain submits that this provision is inconsistent with the notion that the ECT permitted the assignment of the benefit of claims or awards or judgments resolving such claims because the requirement that the Host Party recognise the assignment to the Indemnifying Party would be entirely unnecessary if the authors of the ECT had intended rights acquired under or by reference to the ECT to be assignable generally or had intended any of the provisions of the ECT to have such an effect or such if such rights were understood by the authors to be assignable as a matter of customary international law. In my judgment this submission has significant force. As Hanno Wehland states in his article referred to earlier:

“While IIAs do not explicitly address the transferability of rights arising under them, an interpretation in accordance with the principles embodied in Articles 31 and 32 of the [Vienna Convention] will typically reveal that neither damages claims nor jurisdictional offers under these treaties are freely transferable. ...

IIAs frequently contain subrogation provisions, which stipulate a *cessio legis* of both treaty claims and jurisdictional offers where the investor’s home State or its designated agency indemnify the investor for losses suffered with regard to the investment under an indemnity or guarantee agreement. Since the indemnity or guarantee agreement will typically already provide for the transfer of the investor’s rights in the event of payment, the function of these clauses can arguably not be seen as limited to the subrogation itself. Rather, it would appear that these provisions are really meant to provide for an exception to what is the rule in the mind of the signatories – namely that an investor’s claims and other rights under the treaty cannot be assigned without the host State’s consent.”

I consider that that is the correct analysis applying Articles 31 and 32 of the Vienna Convention. In the result claims and awards concerning claims under the ECT are not assignable as a matter of construction of the ECT even if (contrary to my conclusions set out above) other claims in arbitrations under the ICSID Convention may be.

Customary International Law Relevant to Assignability of the Award

54. As will be apparent from what I have said so far, I do not consider any relevant ambiguity arises, nor do I consider the outcome to be commercially or in any other way absurd. It was submitted by Mr Miles that if and to the extent there was any ambiguity then it was to be resolved by reference to principles of customary international law, to be derived from other judicial decisions concerning the same provisions by other courts in other jurisdictions and from the writing of scholars of

public international law. This involves an examination of judicial decisions at domestic and international level and the writing of reputed scholars in the field of public international law. The key to an understanding of customary public international law is it depends upon the existence of a broad consensus as to the principle being considered – see Benkharbouche v Embassy of the Republic of Sudan [2019] AC 777 per Lord Sumption at [31], where he held that:

“To identify a rule of customary international law, it is necessary to establish that there is a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation (*opinio juris*): see conclusions 8 and 9 of the International Law Commission’s Draft Conclusions on Identification of Customary International Law (2016). There has never been any clearly defined rule about what degree of consensus is required. The editors of Brownlie’s *Principles of Public International Law*, 8th ed (2012), p 24, suggest that “Complete uniformity of practice is not required, but substantial uniformity is”. This accords with all the authorities. ”

What is required therefore is for such material to establish a “*widespread, representative and consistent practice*” – see General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, [2022] AC 318 per Lord Lloyd-Jones at [51]. For the reasons that follow, I have concluded that the material relied on does not establish a principle to the effect that rights under an award made in an ICSID Convention arbitration are either assignable or not assignable. The issue is therefore one that depends exclusively on the construction of the ICSID Convention.

55. One scholar on which Spain placed significant reliance was Lord McNair and his work *The Law of Treaties* published by the Clarendon Press in 1961. This work was cited by Mummery J. in IRC v Commerzbank AG [1990] STC 285 in terms that were approved by the Court of Appeal in Ben Nevis (Holdings) Limited v. HMRC [2013] EWCA Civ 578. Lord McNair was a former president of both the International Court of Justice and the European Court of Human Rights, as well a Professor of International law. In my judgment his work is to be regarded as forming part of the corpus of scholarly work on which reliance can and should be placed.
56. Lord McNair considers the assignment of treaty obligations in Chapter 28 of his book. What is set out in that chapter does not assist on the issue I am concerned with. The opening words of the chapter show that Lord McNair was considering the assignment of rights under treaties by and between states. It was in that context that Lord McNair concluded that there was “... *no existing rule of international law permitting a State to assign ... rights which it holds under a treaty...*” and that he could “... *find no basis in principle for the validity of such an assignment.*”
57. Spain also relied on the conclusion of RSJ Martha in “*The Financial Obligation in International Law*”, Chapter 12 (entitled “Assignment”), that:

“Given that other than by virtue of customary international law a State or other international person cannot incur obligations towards a party without its consent, it would be difficult to

accept the proposition that a creditor under a money judgment or award may assign its judgment/award benefits to a third party who would be able to exercise the same enforcement rights as the assignor. These benefits hail from international law and can thus not be treated as if they have emancipated from the very legal order that gives rights to them and that regulates their validity as well as their extinction. Hence, no conclusion can be drawn one way or the other from the fact that under domestic law award/judgment creditors may assign their benefits. Under international law, it remains a truth that no debtor–creditor relations can be imposed on either a State or an international organization unless a governing international legal instrument so permits.”

58. Mr Miles submits that the material referred to above and a limited number of other commentaries to similar effect “... *supports a consistent conclusion: if an ICSID award creditor that is a natural or juridical person is to be given a right to assign rights arising pursuant to an ICSID award, this can only be done by way of a specific grant of right or capacity...*” and that “... *the position could not be clearer*”.
59. Whilst I accept that this material is consistent with the effect of the commentaries on the ICSID Convention and with the effect of the ICSID Convention as I construe it, I am not able to accept the very broad submission that Mr Miles makes. Firstly, none of the material relied on by Spain before me was cited on behalf of Spain to Stewart J in the FCA proceedings. That suggests that Spain’s advisors in that case did not consider that the point now being relied on was realistically arguable. Secondly, much the same point can be made in respect of Blue Ridge Investments LLC v Republic of Argentina (Memorandum Opinion & Order), 10 Civ. 153 (PGG) (“Blue Ridge”) a decision of the United States District Court for the Southern District of New York to which I refer in more detail below. It is close to inconceivable that Argentina would not have relied in that case on a proposition of customary international law to the effect that rights under an ICSID Convention award were not assignable had it been considered such a point is arguable. Thirdly, none of the commentaries on the ICSID Convention address head on the availability of assignment by reference to any propositions of customary international law. They each proceed by reference to their understanding of the true meaning and effect of Article 54(2). The same is true of the commentaries referred to above. Fourthly, Lord McNair’s analysis as I have explained is concerned with whether a state can assign to a third party state a right it has or has acquired against another state under a treaty. In my judgment that is different from the situation that arises in the context of a commercial relationship.
60. I accept Mr Miles’ submission that the conclusions in favour of the availability of assignment in other courts in other jurisdictions appears to be founded on earlier authorities that at least realistically arguably do not support the proposition for which they are cited. In CC/Devas (Mauritius) Ltd. v Republic of India (No 2) [2023] FCA 527 (as case relied on by Stewart J in the FCA proceedings) Jackman J held that:

“There is no international law rule prohibiting the assignment of an award between a private party and a state: Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd, 725

F. Supp. 2d 198 (D.D.C. 2010); Belize Social Development Ltd v Government of Belize, 5 F. Supp. 3d 25 (D.D.C. 2013). Third, there are no rules of international law on the assignability or assignment of awards or other choses in action; it is the role of municipal law to fill this gap as a general principal of law widely accepted across different municipal systems: see Statute of the International Court of Justice, Art 38(1)(c). Absent any rule, the Court must apply the law of the forum.”

Mr Miles submitted that none of these authorities assisted. I agree. Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd (ibid) was not an ICSID Convention case but a case concerning enforcement under the New York Convention. I cannot detect anything in the judgment cited to me that assists on the issues that now arise. Belize Social Development Ltd v Government of Belize (ibid) is of limited assistance too because it was not an ICSID case but was concerned with the assignment of a foreign arbitral award against the Government of Belize. The challenge was not concerned with any principles of public international law – see [11] – [12] of the Judgment.

61. I agree with the third point made by Jackman J in CC/Devas quoted above. The material deployed before me does not satisfy me that there is a rule or principle of public international law that either supports or prohibits the assignment of awards made in ICSID awards. The only principle that I can be reasonably sure of is the principle identified by Lord McNair but that is confined to the assignment of treaty rights by sovereign states to third part sovereign states. It is not concerned with rights under arbitration awards against sovereign states in favour of juridical persons other than states.
62. It was submitted on behalf of the claimants and Blasket that I should conclude positively that assignment of ICSID Convention awards is permissible as a matter of customary international law. I am not satisfied that this is so or that the issue is one that can be determined other than by construing the ICSID Convention as a whole.
63. In support of their submission, the claimants and Blasket place significant reliance on the judgment in Blue Ridge and the decision of Stewart J in the FCA proceedings. Both are first instance judgments. It is highly questionable whether the judgments in those cases can be said to represent a “... *widespread, representative and consistent practice of states on the point in question...*”.
64. In Blue Ridge, the United States District Court for the Southern District of New York was concerned with an application by Blue Ridge (as assignee of the Award) to confirm an ICSID award against the Republic of Argentina. Argentina applied to dismiss the application for want of jurisdiction. There is a difficulty in relation to this authority in so far as it is concerned with the interpretation of the ICSID Convention, because it focuses exclusively on United States law relating to the interpretation of statutes. There is nowhere any mention of the Vienna Convention even though that Treaty is binding on all states in relation to the true meaning and effect of treaties.
65. At Section 2 in the judgment the Judge refers to Article 54(2) of the ICSID Convention. The Judge’s analysis that follows focuses on the meaning of the word

“party” in that Article. He draws attention to various other Articles in the ICSID Convention where language has been used that restricts or confines the scope of the word “party” or the phrase “parties”. The Judge concludes as I have so far that:

“In those Articles in which “party” or “parties” is not qualified or restricted, it is generally abundantly clear from context how these terms should be construed. For example, in Chapter IV Section 3, of the Convention – entitled “Powers and Functions of the Tribunal” – there are references to “party to the dispute,” but also references simply to “a party.” Compare ICSID Convention, Arts. 41, 42 with ICSID Convention, Art. 45. In those instances in which “party” or “parties” is not qualified or restricted, it is clear from context that these terms refer to a party or parties to the arbitration. For example, Article 43 provides: “[e]xcept as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.” ICSID Convention, Art. 43 (emphasis added). Read in context, it is clear that “the parties” refers to “a party to the arbitration,” because this section addresses rules applicable to the arbitration proceeding.”

However in relation to Article 54 the Judge concludes that this is not so and is to be distinguished from what has gone before because Article 54 is “... *is part of a section dealing with “Recognition and Enforcement of the Award,” and perforce addresses events after the arbitration proceeding is entirely complete and there has been a final award.*” The judge refers to a “... *basic canon of [United States] statutory interpretation, which is equally applicable to interpreting treaties, is to avoid readings that ‘render statutory language surplusage’ or ‘redundant.’*”. Respectfully, this ignores the points made earlier concerning the true meaning and effect of Article 54(2) when read in its correct context. It also placed undue weight on the need to avoid surplusage – an argument that was rejected by the High Court of Australia in terms approved by the Court of Appeal as stated above.

66. The judge concludes that “(c)onsidering the Convention as a whole, and how the terms “party” and “parties” are used, the decision not to modify or restrict the term “party” in Article 54(2) undermines Argentina’s argument that “a party” must mean “a party to the arbitration.” The Court concludes that “a party” as used in Article 54(2) is ambiguous...”. I respectfully disagree with this analysis for the reasons set out above. In my judgment this conclusion is too heavily influenced by United States principles of construction and not at all by the Vienna Convention principles and on that account cannot safely be regarded as being a representative statement of customary international law.
67. The Judge further concludes that the ICSID Convention permits or requires contracting states to apply their own laws in enforcing ICSID awards, that there was nothing in US domestic law that suggested that only a party to a ICSID arbitration could enforce an ICSID award and that “... *nothing in the ICSID Convention, in*

Congress's legislation implementing ICSID, or in New York law prevents an assignee from seeking recognition and enforcement of an ICSID Convention award." It was this analysis that led Jackman J to conclude in *CC/Devas* (ibid) that it was the role of municipal law to provide an answer. As I have explained, respectfully I consider that to be incorrect because the answer is provided by the construction exercise set out earlier.

68. Aside from this point, in my judgment it is implausible that the authors of the ICSID Convention could have intended that the assignability of an award made pursuant to it would be left to the random effects of local law with the result that whether an award was assignable would depend on which state the award was being enforced in with the very real possibility that assignment may be permitted in some jurisdictions where enforcement was sought but not others. It is in order to avoid such outcomes that issues concerning assignability depend on the governing law of the contract or in this case Convention – that is in this case the ICSID Convention and the ECT. Further, the principles that I consider below in relation to the claimants' and Blasket's alternative case suggest that resort to local law at the place where enforcement is sought is wrong in principle.
69. In his judgment in the FCA proceedings, Stewart J considered the effect of *Blue Ridge* at [307] and following of his judgment. He concluded at [309] that:
- “... His Honour's decision may have ultimately turned on municipal law, but only after concluding that “[n]othing in Article 54(2) suggests that it was intended to communicate that only a ‘party to the arbitration’ can seek enforcement of an ICSID Convention award, nor does any other provision in the Convention suggest such a restriction”. In other words, it was certainly not the case that no attention was given to the relevance of public international law as contained in the treaty terms on the question of assignability. As discussed immediately below and following, there is no basis in public international law to read into the ICSID Convention a prohibition on assignment. ... On that basis, the assignee, relevantly Blasket, has the right of recognition and enforcement under the ICSID Convention itself, which is an answer to Spain's argument regarding standing.”
70. I conclude that I should not follow what Stewart J has stated for the reasons identified earlier. His judgment is not representative of the current state of international law. To the extent that the Judge relied on *CC/Devas (Mauritius) Ltd. v Republic of India* (ibid), *Global Distressed Alpha Fund I LP v Red Sea Flour Mills Co Ltd* (ibid) and *Belize Social Development Ltd v Government of Belize* (ibid) I do not consider they contain any leaning that assists in resolving the assignability issue.
71. In the result, I conclude that as a matter of construction of the ICSID Convention, awards made in arbitrations convened in accordance with it are not capable of assignment and that there is no rule of customary international law that provides either that such awards are either assignable or not assignable. The issue depends on

the construction of the ICSID Convention applying the Vienna Convention principles of construction.

Assignment of the English Litigation Rights

72. The final issue I have to determine is whether, notwithstanding the conclusions I have reached so far, the rights that accrued to the claimant from the commencement of these proceedings are assignable as a matter of English law.
73. The assignment agreement between the claimants and Blasket purported to assign to Blasket “... *all of the rights, interests and benefits of the Assignors under or in respect of the Award (including the Decision on Rectification and the Annulment Decision) (including in each case, if any, the respective decision on arbitration costs and legal fees therein)*...” The Claimants and Blasket submit that the rights that accrued to the claimant as a result of the commencement of these proceedings are “... *rights... in respect of the Award...*” and that whilst the assignability of the Award is governed by International law, the rights that accrued to the claimants following registration under s.2 of the 1966 Act are rights created by English law and their assignability if governed by English law. Spain argues that these submissions should be rejected because registration under the 1966 Act does not accord to the claimant rights that it did not otherwise have under the Award and that in consequence the rights arising as a result of registration are unassignable.
74. By Article 69 of the ICSID Convention, each Contracting State was required to take “... *such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.*”. In the United Kingdom, that obligation was satisfied by the enactment of the 1966 Act, the long title of which describes the purpose of that Act as being “... *to implement an international Convention on the settlement of investment disputes between States and nationals of other States.*” S.1(1) of the 1966 Act permits registration of Awards rendered pursuant to the ICSID Convention and by s.2(1) of the 1966 Act:

“Subject to the provisions of this Act, an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, and, so far as relates to such pecuniary obligations—

- (a) proceedings may be taken on the award,
- (b) the sum for which the award is registered shall carry interest,
- (c) the High Court shall have the same control over the execution of the award, as if the award had been such a judgment of the High Court.”

By s.3 of the 1966 Act, the Arbitration Act 1996 (“AA 96”) “... *shall not apply to proceedings pursuant to the Convention...*” other than sections 36 and 38 to 44 of AA

96 to the extent directed by order of the Lord Chancellor. It follows from this that in my judgment the reliance by the claimants and Blasket on s.58(1) of AA 96 is mistaken.

75. As is apparent from the provisions set out above, the 1966 Act was concerned exclusively with the provision of a procedural means by which effect was to be given to ICSID Convention awards in the United Kingdom. What that required was that the United Kingdom takes the necessary legislative steps to give effect to Chapter IV (Arbitration) Section 6 (Recognition And Enforcement Of The Award) of the ICSID Convention. The key provision that matters for present purposes is Article 54. Article 54(1) requires that each Contracting State “... *shall recognize 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.*” That provision contains nothing to suggest that recognition was required or permitted to have any impact on substantive rights and that the purpose of this provision was anything other than exclusively to facilitate enforcement of an ICSID Convention award in each Contracting State. That was put beyond doubt by Article 54(3), which provides that “*(e)xecution 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.*”
76. That is precisely what s.2(1) of the 1966 Act achieves because it limits the effect of registration under the Act to defining the force and effect of a registered award for the purpose of execution by analogy with a High Court monetary judgment – see Micula & Ors v Romania [2018] EWCA Civ 1801, [2019] Bus LR 1394 *per* Leggatt LJ (as he then was) at [259]. The obligation to “*enforce*” is expressed to apply only to the pecuniary obligations imposed by the award and to go no further than to oblige the contracting state to enforce those pecuniary obligations within its territories “... *as if [the award] were a final judgment of a court in that state ...*” – see *ISL per* Philips LJ at [74]. As Leggatt LJ held in Micula & Ors v Romania (ibid) the effect of section 2(1) of the 1966 Act is not to make an ICSID award registered under section 1 of the 1966 Act equivalent for all purposes to a judgment of the High Court given in ordinary domestic proceedings. As Leggatt LJ held at [257], “... *the purpose of the 1966 Act, ... is to implement the ICSID Convention. To give effect to that purpose, section 2(1) of the 1966 Act must so far as possible be interpreted in a manner which is consistent with the ICSID Convention...*” In those circumstances, registration does not render assignable what is not assignable under the ICSID Convention, merely because the benefit of a High Court judgment is capable of being assigned. Arden LJ (as she then was) agreed with Leggatt LJ - see [105] and at [116], where she held that “... *Section 2(1)(c) [of the 1966 Act] is making it clear that the High Court controls its process applying its rules in the form in which they stood at the date of registration. It does not go further and make any change of substantive law...*”.
77. The analysis by Leggatt and Arden LJ remained intact following the appeal in that case to the Supreme Court because the Supreme Court did not overturn the analysis summarised above. It is right to note that the issue that arose in Micula & Ors v Romania (ibid) was different from that which arises in this case but the guiding principle remains the same.

78. In my judgment therefore registration does not create nor was it intended to create new substantive rights. If the Award is non-assignable, that cannot be changed by registration. As observed already, such an outcome would create an entirely random outcome in which assignability of an award (which I have concluded is not assignable as a matter of its governing law) might become assignable depending on which jurisdiction in the world it might be registered. Further it would give rise to the entirely undesirable possibility that the effect of registration might permit assignment in some jurisdictions but not others. That is not the effect of either the ICSID Convention or s.2(1) of the 1966 Act nor would such an outcome give effect to the purpose of either. In light of this conclusion it is not necessary for me to decide whether Spain's alternative argument that as a matter of English law an ICSID Convention award is personal and so incapable of assignment under English law is correct or not.

Conclusions

79. For the reasons set out above, I conclude that (a) Spain is not estopped from asserting that the Award in issue in these proceedings is non-assignable; (b) as a matter of construction of the ICSID Convention and/or ECT, Awards made in ICSID Convention arbitrations, alternatively in such arbitrations concerning ECT disputes, are not assignable and (c) that position did not alter following registration of the Award in accordance with the Arbitration (International Investments Disputes) Act 1966.