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Zimbabwe Ruling Bolsters UK's Draw As Arbitration Enforcer

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On Jan. 19, in Border Timbers Ltd. and Hangani Development Co. (Private) Ltd. v. Republic of Zimbabwe, the High Court of Justice of England and Wales examined the relationship between the International Centre for Settlement of Investment Disputes Convention and the State Immunity Act 1978, or SIA, finding that the question of state immunity from jurisdiction does not arise in relation to the registration of ICSID awards.[1]

The decision reinforces the attractiveness of the English jurisdiction for the enforcement of ICSID awards, and awards and judgments more generally.

This article explores the bases upon which it was argued that state immunity did not apply, namely the exceptions contained in Section 2 on submission to the jurisdiction and Section 9 of the SIA on the agreement to submit a dispute to arbitration, before turning to the novel approach adopted by the judge that state immunity did not apply at all.

The article also addresses the important duty of full and frank disclosure that arises upon making a registration application, which acts as a reminder that a failure to comply can have serious consequences. Zimbabwe has been given permission to appeal, and there is a pending appeal in a recent case considering similar issues, so it remains to be seen whether this is the final word on the subject.

Background

The decision relates to an underlying ICSID arbitration under the Zimbabwe-Switzerland bilateral investment treaty in which the claimants, Border Timbers and Hangani, sought compensation and restitution of legal title of land that was said to have been expropriated under Zimbabwe's land reform program.

In an award issued in mid-2015, Zimbabwe was found liable and was ordered to pay $124 million in damages, plus interest and a further $1 million in moral damages and costs. Zimbabwe's attempt to have the award annulled was dismissed by an ICSID annulment committee in late 2018.

When the award was not satisfied, Border Timbers and Hangani successfully obtained an order from the English court for the registration and entry of the judgment of the award in England, pursuant to Section 2 of the Arbitration (International Investment Disputes) Act 1966, which gives effect to the ICSID convention in English law and Civil Procedure Rule 62.21.

The application for this order was made without notice to Zimbabwe. As a result, when making the application, Border Timbers and Hangani had to comply with the duty of full and frank disclosure. This involved identifying the crucial points both for and against a without-notice application, and disclosing all facts that could or would be taken into account by a

judge in deciding whether to grant the application.

Shortly after the ex parte order was served to Zimbabwe, the state applied to have that order set aside on the grounds that (1) it was immune from the jurisdiction of the English courts by virtue of section 1(1) of the SIA, and (2) Border Timbers and Hangani had breached their duty of full and frank disclosure when obtaining the order, by failing to draw the court's attention to potential arguments as to Zimbabwe's state immunity.

Issues and the Court's Findings

Border Timbers and Hangani argued that Zimbabwe was not entitled to immunity due to two statutory exceptions. The first was an allegation that Zimbabwe had submitted to the English court's jurisdiction under Section 2 of the SIA, by virtue of Article 54 of the ICSID convention.[2]

Second, Border Timbers and Hangani relied upon the arbitration exception to immunity under Section 9 of the SIA, which they stated applied to ICSID awards and excluded any review by the enforcement court of arbitral jurisdiction.

Contrary to the High Court's judgment in Infrastructure Services Luxembourg SARL v. Spain on May 24, 2023,[3] Judge Julia Dias found that "Article 54 is not a sufficiently clear and unequivocal submission to the jurisdiction of the English courts for the purposes of recognising and enforcing the award against Zimbabwe."[4]

In this respect, she drew a distinction between the general waiver of immunity contained in Article 54 and the need under Section 2 to submit to the jurisdiction in relation to specifically identifiable proceedings before a specific court. This was a salutary lesson for those contracting with states — and not relying upon any investment treaty — to seek to ensure that any contract containing a submission to jurisdiction is clear and unequivocal, both in relation to adjudication and enforcement.

In regard to Section 9 of the SIA, the court held, with reference to the plain and ordinary meaning of the section, that it was in fact required to independently reexamine the jurisdiction of the tribunal and was not bound by the findings of the tribunal or annulment committee. Judge Dias also determined that ICSID awards should not be treated differently from other awards in this respect as Section 9 is of general application.

Nevertheless, upon considering her judgment, it occurred to the judge that there was another point — one which had not been raised in oral or written submissions. Taking a "a novel approach for which there is no direct authority,"[5] and again disagreeing with Judge Peter Donald Fraser's approach in Infrastructure Services Luxembourg v. Spain,[6] Judge Dias held that the court's jurisdiction to make the registration order derives directly from the 1966 act and involves no exercise of discretion or adjudication at all but simply gives effect to the applicant's statutory entitlement.

Judge Dias considered that the ICSID is a self-contained regime and the only way to challenge an award is through annulment in accordance with the terms of the convention. Further, it is only after a registration order is granted and served that a state is impleaded.

Accordingly, the court found that the issue of state immunity was irrelevant to the registration of an ICSID award and so it was not open to Zimbabwe to apply to set it aside on that basis.[7] The judge considered that this gave full force and effect to the U.K.'s obligations under the ICSID convention to recognize and enforce ICSID awards and did "no violence to the principles of state immunity because an order for recognition and enforcement goes no further than recognising the award as binding."[8]

Therefore, despite Border Timbers and Hangani being unsuccessful in proving the applicability of the statutory exceptions to state immunity on the question of registration, the court found in their favor. The decision, however, is confined to registration and therefore — subject to any appeal — it remains open for Zimbabwe to seek to rely on immunity from any steps taken toward execution.

On the issue of the Border Timbers' and Hangani's alleged breach of full and frank disclosure, the court found that they had culpably (but not deliberately) breached their duty by not addressing this duty at all, including any mention of immunity, when making their ex parte application.

However, Judge Dias determined that this breach was not sufficient to set aside the order, considering that this would have been an excessively harsh outcome. However, the court did penalize Border Timbers and Hangani in costs.

Key Takeaways

Questions of state and immunity were front and center in this decision. Therefore, in addition to addressing some interesting and topical questions, the judgment is a helpful reminder that parties making an application to register an ICSID award — and indeed making any application made without notice — should ensure that they comply with their duty of full and frank disclosure to avoid cost sanctions and, potentially, the discharge of any order granted.

Insofar as state immunity is concerned, Judge Dias stated that it is incumbent on anyone making an application naming a state as respondent to address that question, so the court can satisfy itself that immunity is not engaged.

It is understood that Zimbabwe has been granted permission to appeal by Judge Dias, which — assuming it is in relation to the decision against the state on immunity — is unsurprising given the novel nature of her approach to the question when concerned with the registration of ICSID awards.

Upon being invited to make brief submissions on the point, Zimbabwe's position, which may feature in any grounds of appeal, was that state immunity is a substantive statutory rule, which is engaged whenever the jurisdiction of the courts of the U.K. is invoked against a sovereign state and that the operation of the SIA does not depend on whether service is required or has occurred. Further, Zimbabwe submitted that the very making of and service of a court order entails an exercise of the court's jurisdiction.[9]

As for Border Timbers and Hangani, it remains to be seen whether they will seek to appeal the decisions in relation to Section 2 of the SIA, which the judge accepted ran contrary to the object and purpose of the ICSID convention, and Section 9 of the SIA, following the contrary approach in the Infrastructure Services case.

In that regard, it appears from the High Court's January decision in OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain — another ICSID enforcement case, which has followed hot on the heels of Border Timbers — that the Infrastructure Services decision is being appealed and that the appeal will consider, among other things, (1) whether Section 1(1) of the SIA applies to proceedings for the registration of an ICSID award, and (2) whether the ICSID convention constitutes a submission to the jurisdiction of the English courts under Section 2 of the SIA.[10]

In the meantime — following on from the Infrastructure Services case and the U.K. Supreme Court's February 2020 decision in Micula v. Romania,[11] among a growing body of English case law concerning ICSID enforcement — the court's finding that state immunity is irrelevant to applications for registration is encouraging for parties looking to enforce ICSID awards in England and is indicative of the English jurisdiction's reputation as a creditor-friendly destination for the enforcement of awards and judgments more generally.

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[1] Border Timbers Ltd and Hangani Development Co. (Private) Limited v Republic of Zimbabwe [2024] EWHC 58 (Comm).

[2] Article 54 of the ICSID Convention provides that each contracting state is to recognise an ICSID award as binding and enforce the pecuniary obligations imposed by that award within its own territories as if it were a final judgments of a court in that state.

[3] [2023] EWHC 1226 (Comm). In that case it was held that Article 54 of the ICSID Convention could be considered a prior written agreement for the purposes of the SIA and that Spain had therefore submitted to the jurisdiction of the English court due to its accession to the ICSID Convention (paragraphs 95 and 114). The authors of this article have previously written an article relating to this case which can be found here.

[4] Paragraph 72. This applied the earlier House of Lords decision in R v Bow Street Magistrates, ex parte Pinochet (no. 3) of 24 March 1999[iv].

[5] Paragraph 111. The judge noted only a passing comment by Stanley Burnton J of the Queen's Bench Division of the English High Court in AIC Limited v Nigeria [2003] EWHC 1357 (QB) (dated 13 June 2003) in the context of the Administration of Justice Act 1920: see paragraph 104 of Border Timbers.

[6] Fraser J found that the recognition and enforcement of an ICSID award involves the exercise of the court's adjudicative jurisdiction (paragraphs 20 and 56).

[7] The court did note that Zimbabwe could of course claim immunity in relation to any further steps toward execution (paragraph 109).

[8] Paragraph 111.

[9] See paragraph 103. Border Timbers' and Hangani's position is at paragraph 102.

[10] See paragraph 32 of the English High Court decision in OperaFund Eco-Invest SICAV Plc and Schwab Holding AG v Kingdom of Spain [2024] EWHC 82 (Comm) (25 January 2024).

[11] [2020] UKSC 5 (19 February 2020).