

First Malaysian Judgment Recognising ICSID Arbitral Award

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Introduction

The High Court at Kuala Lumpur, in the first-ever decision of its kind, recognised a foreign award made by an arbitral tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"). This recognition resulted in the foreign award being treated as if it is a judgment of the High Court.

To give context, the ICSID Convention was formulated by the World Bank and aims to facilitate the conciliation and arbitration of investment disputes between countries that have ratified the ICSID Convention ("**Contracting States**") and nationals of other Contracting States. The ICSID Convention also provides for the recognition and enforcement of an arbitral award made thereunder.

The ICSID Convention, which came into force on 14 October 1966, has been ratified by 158 countries as of February 2024. Malaysia signed the ICSID Convention on 22 October 1965 and domestically enacted the Convention on the Settlement of Investment Disputes Act 1966 ("**Malaysian ICSID Act**") to give domestic effect to the ICSID Convention.

Contribution Note: *This article was written with contributions from Kumara Guru Naiker (Senior Associate, Christopher & Lee Ong).*

In *Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe* [2023] MLJU 2657 ("**Von Pezolds Case**"), the High Court had to decide whether an ICSID award is enforceable in Malaysia as if it is a judgment obtained from the High Court by virtue of section 3 of the Malaysian ICSID Act. Various issues were considered by the High Court including its jurisdiction to hear such an application and the entitlement of a foreign state to claim state sovereign immunity.

The following provisions of the ICSID Convention took centre stage in the *Von Pezolds Case*:

1. Article 53 which in essence provides that an ICSID award is binding on the parties and each party is required to abide by and comply with the terms of the award;
2. Article 54 which in essence stipulates that each Contracting State is required to recognise an ICSID award as binding and enforce the pecuniary obligations imposed therein within its territories as if it were a final judgment of a court in that Contracting State; and
3. Article 55 which preserves the law in force in any Contracting State relating to sovereign immunity of that Contracting State or of any foreign state from execution.

The full grounds of the judgment which was released by the High Court recently can be accessed [here](#).

Background Facts

In the *Von Pezolds Case*, the plaintiffs were eight members of the same family ("**Plaintiffs**") with the defendant being the Republic of Zimbabwe ("**Zimbabwe**").

Through several Zimbabwean companies, the Plaintiffs held interests in three large agricultural estates in Zimbabwe ("**Zimbabwean Estates**"). Between 1980 and 2000, Zimbabwe carried out its land reform programme to modify the ethnic distribution of land ownership. Consequently, various properties associated with the Zimbabwean Estates were expropriated by Zimbabwe between 2000 and 2007, without any compensation being paid to the Plaintiffs for these properties.

The Plaintiffs therefore filed a request for arbitration against Zimbabwe with the International Centre for Settlement of Investment Disputes and an arbitral tribunal was established pursuant to the ICSID Convention ("**ICSID Tribunal**"). During the arbitration proceedings, the Plaintiffs claimed, among others, that their shares in the Zimbabwean companies, the Zimbabwean Estates and its associated properties were all investments that were protected under the Germany-Zimbabwe Bilateral Investment Treaty signed on 29 September 1995 ("**German BIT**") and the Switzerland-Zimbabwe Bilateral Investment Treaty signed on 15 August 1996 ("**Swiss BIT**"), and that Zimbabwe should therefore be held liable for breaching its treaty obligations through the various expropriation and mistreatment measures that resulted in damage to the Plaintiffs' investments.

On 28 July 2015, the ICSID Tribunal ruled in favour of the Plaintiffs and awarded both pecuniary and non-pecuniary reliefs involving a sum of over US\$200 million in compensation and damages ("**ICSID Award**").

On 21 October 2015, pursuant to Article 52 of the ICSID Convention, Zimbabwe filed an annulment application before the ICSID annulment committee to annul the ICSID Award. Article 52 of the ICSID Convention enables a party to apply for an annulment of an award made by an ICSID Tribunal on various grounds, including that the ICSID Tribunal had manifestly exceeded its powers. The said annulment application was dismissed by the ICSID annulment committee on the merits, and costs were awarded to the Plaintiffs ("**Decision on Annulment**").

Notwithstanding that Zimbabwe had previously issued a letter pledging to honour the ICSID Award if not annulled, the ICSID Award remained unsatisfied. On 27 July 2021, the Plaintiffs therefore commenced an action before the High Court at Kuala Lumpur seeking to enforce both the ICSID Award and the Decision on Annulment (collectively referred

to as "**ICSID Awards**") in Malaysia pursuant to the Malaysian ICSID Act ("**Plaintiffs' Applications**"). The Plaintiffs were granted orders for service out of jurisdiction by the Senior Assistant Registrar in respect of the Plaintiffs' Applications ("**Orders for Service Out of Jurisdiction**"), enabling service out of jurisdiction of the cause papers relating to the Plaintiffs' Applications on Zimbabwe. Zimbabwe opposed the Plaintiffs' Applications on various grounds including on jurisdiction and sovereign immunity points and also sought to set aside the Orders for Service Out of Jurisdiction.

High Court's Decision

Justice Atan Mustaffa Yussof Ahmad allowed the Plaintiffs' Applications by recognising the ICSID Awards as if the same were judgments of the High Court. The material considerations and conclusions arrived at by the High Court are summarised below.

Jurisdiction

On the issue of whether the High Court has jurisdiction to hear the Plaintiffs' Applications for recognition of the ICSID Awards, it was held that Parliament had expressly vested the High Court with jurisdiction to recognise the ICSID Awards (including the Decision on Annulment, which is considered as an ICSID award under the ICSID Convention) through section 3 of the Malaysian ICSID Act, which provides that "*... an award made by an arbitrator under the [ICSID] Convention shall be binding and may be enforced in the same manner as if it is a decree judgment or order of the Court*".

The High Court also referred to section 23(2) of the Courts of Judicature Act 1964 ("**CJA**") which provides that the High Court has "*... such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction*". Accordingly, the High Court held that the Malaysian ICSID Act constitutes the very written law vesting jurisdiction on the High Court to recognise the ICSID Awards in accordance with Malaysia's treaty commitments.

The High Court further emphasised the binding nature of an ICSID award against Contracting States – including Malaysia – by virtue of Articles 53, 54 and 55 of the ICSID Convention. The High Court held that since the Plaintiffs had exhibited certified copies of the ICSID Awards in compliance with Article 54(2), the High Court, as the designated "*competent court*", was mandated to recognise the ICSID Awards by virtue of the Malaysian ICSID Act implementing the ICSID Convention in Malaysia.

Sovereign immunity

Zimbabwe contended that as a sovereign state, it should be immune from proceedings to recognise the ICSID Awards and any subsequent execution measures. Zimbabwe also argued that it had never submitted to the jurisdiction of the Malaysian Courts or waived its sovereign immunity. The Plaintiffs, on the other hand, argued that Zimbabwe could not invoke sovereign immunity to avoid the jurisdiction of the High Court in recognising the ICSID Awards, since state immunity may only be sought to be invoked at the execution stage (and not at the recognition stage) under Article 55 of the ICSID Convention.

The High Court concurred with the Plaintiffs' submission and emphasised that the Plaintiffs were only seeking recognition and not seeking execution of the ICSID Awards at this stage. In this regard, the High Court referred to the New Zealand High Court decision in *Sodexo Pass International SAS v. Hungary* [2021] NZHC 371 ("**Sodexo**") and agreed that by acceding to the ICSID Convention, Contracting States such as Zimbabwe were deemed to have agreed that ICSID awards could be recognised domestically as binding in all Contracting States including Malaysia, but that Contracting States could invoke immunity from subsequent execution proceedings as commenced under the relevant domestic law.

The Court also held that recognition of an ICSID award is a pre-requisite and necessary for the domestic court to later apply immunity laws on any execution of the award. Zimbabwe, therefore, could not claim immunity to resist or prevent

recognition of the ICSID Awards, as considerations of immunity at this juncture would be premature and could only be pursued if and when execution was attempted.

Further, the High Court observed that the ICSID Convention has different terms for the recognition and execution of ICSID awards. Article 54 of the ICSID Convention requires each Contracting State to recognise ICSID awards, whereas Article 55 provides that the recognition of ICSID awards does not affect the law in force relating to the immunity of the state from execution. The High Court accordingly held, based on the language of the ICSID Convention, that sovereign immunity considerations would be limited to the execution stage, only after the recognition of ICSID awards as final judgments of a Contracting State.

The High Court also found that Zimbabwe had submitted to the jurisdiction of the Malaysian courts and simultaneously waived any claim to immunity for recognition purposes. Zimbabwe, during the annulment proceedings, had sought a stay of enforcement of the ICSID Award. In its reply filed in respect of the stay proceedings, Zimbabwe had stated that the Plaintiffs had the right to enforce the ICSID Award in any ICSID Contracting States and that it undertook to comply with the ICSID Award, if the same remained intact after the annulment proceedings. The High Court therefore held that by ratifying the ICSID Convention and making such representations, Zimbabwe had acquiesced to Contracting States, including Malaysia, recognising the ICSID Awards as a binding domestic judgment pursuant to Article 54 of the ICSID Convention, without claiming immunity.

On Zimbabwe's contention that the land reforms were acts of a sovereign and governmental nature and therefore, Zimbabwe should be protected by sovereign immunity, the High Court observed that the ICSID Tribunal had found that it had jurisdiction over such acts of Zimbabwe leading to the dispute. Accordingly, the High Court held that Zimbabwe would be precluded from reopening the question of the jurisdiction of the ICSID Tribunal, and that the ICSID Awards had become final and binding by virtue of Articles 53(1) and 54(1) of the ICSID Convention.

Lack of procedural framework

Another argument posed in resisting the Plaintiffs' Applications was that there was no specific procedural framework in Malaysia for the enforcement of the ICSID awards, and therefore the Court should not exercise its jurisdiction over Zimbabwe.

This was rejected by the High Court. The Court held that the lack of such a procedural framework would not preclude its substantive jurisdiction to allow the Plaintiffs' Applications. Citing various authorities from Commonwealth jurisdictions, the High Court held that the absence of prescribed procedures did not fetter the Court where jurisdiction has been substantively conferred to it – the High Court remains imbued with powers intrinsic and inherent, as a superior court of law, to adapt existing procedures to the extent required in service of the ends of justice.

The High Court referred to section 3 of the Malaysian ICSID Act ("**section 3**") and held that this provision granted the High Court substantive power, as the designated competent court, to recognise ICSID awards as "*binding and enforceable in the same manner as if it is a decree, judgment or order of the Court.*"

By empowering recognition of ICSID awards under section 3, Parliament is legally presumed to be cognisant that substantive jurisdiction carries the inherent capacity for Courts to adapt and adopt requisite procedures to fulfil its judicial role. Accordingly, it was held that section 3 remained fully operative notwithstanding the lack of attendant or ancillary procedural rules. The High Court, by implication, could formulate the appropriate procedures for exercising the jurisdiction substantively granted by Parliament under section 3.

Enforcement limited under Swiss BIT and German BIT

Zimbabwe separately contended that the Swiss BIT and the German BIT (collectively referred to as "**BITs**"), under which the ICSID Awards were made, expressly limited enforcement to only being within the jurisdiction of the contracting states to the said BITs, i.e. Germany, Switzerland, and/or Zimbabwe. Zimbabwe referred to Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT, which in essence stipulate that an arbitral award between the contracting parties is enforceable in accordance with the laws of the contracting party in which the investment in question is situated. Therefore, Zimbabwe argued that Malaysia would not be the proper forum for the reliefs sought by the Plaintiffs, and sought to stay the proceedings before the High Court.

The High Court rejected this argument. It held that although the language in Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT required the application of local laws if enforcement were to take place where the investment lies, the said Articles did not expressly prohibit or exclude enforcement in other Contracting States. The High Court also noted that there was nothing in the BITs to restrict the enforcement of the ICSID awards outside Zimbabwe.

The High Court also observed that the purpose of investment treaties is to promote foreign investment, and the recognition and enforcement mechanism under the ICSID Convention is a core feature. The High Court observed that if ICSID awards could only be enforced in a respondent state, this would nullify the very purpose of investment treaties.

The High Court also found it significant that no reservation had been made by Zimbabwe to restrict the terms of the ICSID Convention, and therefore construed this to mean that the ICSID Convention could be enforced in any ICSID Contracting State, including Malaysia.

Further, the High Court held that in any event, the suggested interpretation – that the BITs expressly limit enforcement of the awards to only Germany, Switzerland, and/or Zimbabwe – was not consistent with the Most Favoured Nation ("**MFN**") clauses present in the BITs. The effect of the suggested interpretation would be that the investments and activities of nationals of Germany and Switzerland would be treated less favourably than investments and activities of other states. The relevant MFN clauses in the BITs provided in essence that each contracting party would treat investments and activities of the nationals or companies of the other party no less favourably than investments and activities of its own nationals or companies, or those of any third state. In other words, through the MFN clauses in the BITs, Zimbabwe had made a commitment to extend to German and Swiss investors any better right that had been given to investors from other countries.

In this regard, the High Court noted that the bilateral investment treaty between Zimbabwe and the Netherlands ("**Dutch BIT**") did not restrict enforcement of an award to only the Netherlands and/or Zimbabwe. The High Court therefore held that by virtue of the MFN clauses present in the BITs, the Plaintiffs as German and Swiss investors similarly should not be restricted to enforcement of the ICSID Awards in Germany, Switzerland, and/or Zimbabwe only even if Article 11(3) of the German BIT and Article 10(6) of the Swiss BIT were to be interpreted as limiting enforcement of the awards to only Germany, Switzerland, and/or Zimbabwe.

Absence of assets in Malaysia

A further contention put forward by Zimbabwe in opposing the Plaintiffs' Applications was that since the Plaintiffs had not identified or shown the presence of any assets or properties of Zimbabwe in Malaysia against which the ICSID Awards could be enforced, the ICSID Awards should not be enforced or recognised by the courts in Malaysia.

The High Court disagreed with this contention and held that the absence of Zimbabwean assets in Malaysia was not relevant to the Plaintiffs' entitlement to seek the recognition of the ICSID Awards. The High Court again referred to the *Sodexo* decision and held that, notwithstanding the inability to show the existence of assets of a foreign state, a domestic court is bound to recognise an ICSID award under Article 54(1) of the ICSID Convention which has been given the force

of law within the jurisdiction. Accordingly, the High Court held that the absence of identified seizable Zimbabwean assets in Malaysia would not prevent the recognition or enforcement of the ICSID Awards in Malaysia.

The High Court also referred to *The ICSID Convention: A Commentary* by Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair where it was observed that:

"recognition as a preliminary step to execution may be meaningful even if there are no immediate prospects of execution ... Once recognition has been obtained, execution will be quicker and easier should assets become available at a later stage. In addition, recognition will put the award debtor on notice that execution will be sought as soon as assets become available".

Orders for service out of jurisdiction

In respect of Zimbabwe's applications seeking to set aside the Orders for Service Out of Jurisdiction, Zimbabwe argued that Malaysia lacked specific legislation governing the service of process on a foreign sovereign state, unlike the United Kingdom ("**UK**") and Singapore. It was further contended that Order 11 Rule 1 of the Rules of Court 2012 ("**ROC 2012**") in Malaysia, on which the Plaintiffs relied for serving the Originating Summons out of jurisdiction, would only be applicable on a service to a defendant located in a foreign state, and not on the foreign state itself.

The High Court dismissed the applications seeking to set aside the Orders for Service Out of Jurisdiction. It referred to Order 11 Rule 1(1)(M) of the ROC 2012, which permits service of an originating process out of jurisdiction with leave of the High Court if the claim is brought to enforce any judgment or arbitral award. As the Plaintiffs' Applications were filed for the purpose of enforcing the ICSID Awards, the High Court held that the Orders for Service Out of Jurisdiction fell within the ambit of Order 11 Rule 1(1)(M) of the ROC 2012. The High Court further held that the absence of specific legislation in Malaysia governing the service of process on a foreign sovereign state, akin to the legislation in the UK or Singapore, would not restrict the court's discretionary power to grant an order for service out of jurisdiction in cases involving the enforcement of an international arbitral award.

Concluding Words

Zimbabwe has filed an appeal against the High Court's decision in the *Von Pezolds Case*, and the hearing of the appeal is pending before the Malaysian Court of Appeal.

Christopher & Lee Ong is acting for the Plaintiffs in the *Von Pezolds Case*.

Should you require further information or any advice on the above or on any other matters pertaining to dispute resolution, please feel free to contact our team below.

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