Malaysian Court of Appeal Affirms Recognition and Enforcement of ICSID Arbitral Award

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Introduction

On 28 March 2025, the Malaysian Court of Appeal in the case of *Republic of Zimbabwe v. Elisabeth Regina Maria Gabriele Von Pezold & Ors* [unreported] unanimously upheld the decision of the Kuala Lumpur High Court to recognise and enforce a foreign arbitral award ("**ICSID Arbitral Award**") rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") as if the ICSID Arbitral Award is a judgment made by the Malaysian High Court. This landmark ruling marks the Malaysian Court of Appeal's first recognition of an ICSID Arbitral Award.

To give context, the ICSID Convention was formulated by the World Bank and aims to facilitate 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 recognising and enforcing an arbitral award made thereunder. Malaysia ratified the ICSID Convention on 14 October 1966 and enacted the Convention on the Settlement of Investment Disputes Act 1966 ("**Malaysian ICSID Act**") in the same year to give domestic effect to the ICSID Convention.

The Republic of Zimbabwe ("**Zimbabwe**") appealed against the decision of the High Court which, also for the first time in Malaysia, held that an ICSID Arbitral Award is recognised and enforceable in Malaysia as if it is a judgment obtained from the High Court by virtue of section 3 of the Malaysian ICSID Act.

The Court of Appeal had to decide whether the High Court was correct in recognising and enforcing an ICSID Arbitral Award in Malaysia. Various issues were raised before the Court of Appeal including the jurisdiction of the Malaysian High Court to recognise and enforce an ICSID Arbitral Award and the entitlement of a foreign state to claim sovereign immunity from the legal proceedings as initiated.

Background Facts

In this matter, the plaintiffs are eight members of the same family ("**Plaintiffs**") with the defendant being Zimbabwe. The Plaintiffs were citizens of Germany and/or Switzerland.

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 ("**ICSID**"), and an arbitral tribunal was established pursuant to the ICSID Convention. During the arbitration proceedings, the Plaintiffs claimed, among others, that their share 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 was liable for breaching its treaty obligations for expropriating the Zimbabwean Estates which resulted in damage to the Plaintiffs' investments.

On 28 July 2015, the ICSID arbitral tribunal ruled in favour of the Plaintiffs and awarded, among others, a sum exceeding 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 arbitral tribunal on various grounds, including that the 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, "**ICSID Awards**") in Malaysia under 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 them to serve the cause papers relating to the Plaintiffs' Applications on Zimbabwe out of jurisdiction. Zimbabwe opposed the Plaintiffs' Applications on various grounds, including issues of jurisdiction and sovereign immunity, and also sought to set aside the Orders for Service Out of Jurisdiction.

High Court Decision

The learned High Court Judge, in recognising and enforcing the ICSID Awards as if they were judgments of the High Court, made the following findings, among others:

1. On the issue of whether the High Court has jurisdiction to hear the Plaintiffs' Applications to seek recognition of the ICSID Awards, the High Court 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 Arbitral Award under the ICSID Convention) under section 3 of the Malaysian ICSID Act. The High Court further held that since

the Plaintiffs had exhibited certified copies of the ICSID Awards in compliance with Article 54(2) of the ICSID Convention, the High Court, as the designated "*competent court*", was mandated to recognise the ICSID Awards in Malaysia.

2. Regarding the defence of sovereign immunity claimed by Zimbabwe, the High Court held that by acceding to the ICSID Convention, contracting states such as Zimbabwe were deemed to have agreed that an ICSID Arbtral Award can be recognised domestically as binding in all Contracting States including Malaysia, but immunity from subsequent execution proceedings may be invoked to the extent such immunity is conferred under the relevant domestic law where execution is sought. Further, the High Court emphasised that the Plaintiffs, at this stage, were only seeking recognition and enforcement of the ICSID Awards, and not the execution of the ICSID Awards. Therefore, it was held that Zimbabwe could not claim immunity to resist or prevent the recognition and enforcement of the ICSID Awards, and that immunity could only be pursued if and when execution was attempted.

3. Regarding Zimbabwe's contention that the High Court should not exercise its jurisdiction over Zimbabwe due to the lack of a specific procedural framework in Malaysia for the recognition and enforcement of an ICSID Arbitral Award, the High Court held that the lack of a procedural framework would not preclude its substantive jurisdiction to allow the Plaintiffs' Applications seeking recognition and enforcement of the ICSID Awards. Further, the High Court held that by empowering recognition and enforcement of an ICSID Arbitral Award under section 3 of the Malaysian ICSID Act, 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.

4. Other than that, the High Court rejected Zimbabwe's contention that the Swiss BIT and the German BIT (collectively, "**BITs**"), under which the ICSID Awards were made, limited enforcement of the ICSID Awards within the jurisdiction of the contracting states to the said BITs (i.e. Germany, Switzerland, and/or Zimbabwe) only. In this regard, the High Court noted that there was nothing in the BITs to restrict the enforcement of the ICSID awards outside Zimbabwe. Further and alternatively, the High Court held, in any event, that Zimbabwe's 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 in the BITs as 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.

5. Regarding Zimbabwe's contention that the ICSID Awards should not be enforced or recognised by the courts in Malaysia since the Plaintiffs did not identify or show the presence of any assets or properties of Zimbabwe in Malaysia, the High Court held that the absence of Zimbabwean assets in Malaysia is irrelevant at the recognition and enforcement stage and that it would not prevent the recognition or enforcement of the ICSID Awards in Malaysia.

6. The High Court also dismissed Zimbabwe's applications seeking to set aside the Orders for Service Out of Jurisdiction. In this regard, 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 Rules of Court 2012 as the Plaintiffs' Applications were filed for the purpose of enforcing the ICSID Awards. 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 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.

Court of Appeal Decision

Dissatisfied, Zimbabwe appealed to the Malaysian Court of Appeal against the decision of the High Court. The Court of Appeal dismissed the appeal and upheld the High Court's decision on the broad grounds summarised below:

1. The Court of Appeal held that section 3 of the Malaysian ICSID Act confers substantive jurisdiction on the High Court to recognise and enforce an ICSID Arbitral Award as if it were a judgment of the High Court. The absence of terms such as "*recognition*", "*by entry as a judgment*" or "*registration*" in section 3 does not mean that the recognition process is not envisaged in the statutory framework of the Malaysian ICSID Act. This omission cannot deprive the High Court from exercising its substantive jurisdiction. Further, the Court of Appeal held that the legislative scheme for the recognition and enforcement of ICSID awards under section 3 of the Malaysian ICSID Act is not comparable to the regimes governing the registration or recognition of commercial arbitral awards or certain foreign judgments, which do not necessarily require the High Court to recognise as binding such commercial arbitral awards or foreign judgments. The Malaysian ICSID Act, in contrast, mandates the High Court to recognise an ICSID Arbitral Award as binding and to enforce it in the same manner as a judgment of the High Court.

2. Bearing in mind the substantive jurisdiction conferred, the Court of Appeal held that the lack of a specified procedural framework under the Malaysian ICSID Act or otherwise does not preclude the recognition and enforcement of an ICSID Arbitral Award in Malaysia. This approach is consistent with the treaty obligations of Malaysia as a contracting state under the ICSID Convention.

3. Regarding the claim of sovereign immunity, the Court of Appeal noted that the Plaintiffs were seeking only recognition and enforcement of the ICSID Awards and not execution of the ICSID Awards. In this regard, the Court of Appeal held that a holder of an ICSID Arbitral Award goes through a two-stage process:

    - **Stage One – Recognition and Enforcement**: Under Article 54(1) of the ICSID Convention, each Contracting State is obliged to recognise an ICSID Arbitral Award as binding and enforce the same accordingly. Refusal to recognise such an award is not an option even on the grounds of sovereign immunity.

    - **Stage Two – Execution**: Article 54(3) of the ICSID Convention provides that the execution of the ICSID Arbitral Award is governed by the laws concerning the execution of judgments in force in the state in whose territory such execution is sought.

    The Court of Appeal accordingly held that Contracting States are deemed to have waived their immunity from jurisdiction in relation to recognition and enforcement of an ICSID Arbitral Award, but not any immunity that they may have in respect of the execution process. As the Plaintiffs only sought and obtained recognition and enforcement – and not execution – of the ICSID Awards in Malaysia, the High Court was correct in holding that Zimbabwe could not claim sovereign immunity at this stage.

4. The Court of Appeal also held that the BITs do not limit the enforcement of the ICSID Awards to Zimbabwe only. The MFN clauses in the BITs are meant to protect the Plaintiffs' rights and interests as the beneficiaries of the MFN clauses. Given that Dutch investors under the bilateral investment treaty between the Netherlands and Zimbabwe can seek recognition and enforcement of an ICSID Arbitral Award in any contracting state of the ICSID Convention, the Swiss and German investors, such as the Plaintiffs, should likewise be entitled to the same right.

Concluding Words

Zimbabwe has filed applications for leave to appeal against the decision of the Court of Appeal ("**Leave Applications**") to the Federal Court (i.e. the apex court in Malaysia). The hearing of the Leave Applications is pending.

Christopher & Lee Ong acted for the respondents in this matter. For more information on the earlier decision of the Kuala Lumpur High Court to recognise the ICSID Award, please see our February 2024 article titled "First Malaysian Judgment Recognising ICSID Arbitral Award".

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