Enforcement of ICSID Awards in England: is the door half-open or half-shut? A discussion of the High Court decision in Border Timbers Ltd v Republic of Zimbabwe and its impact on enforcement of ICSID awards in England

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This article discusses the recent decision of Mrs Justice Dias in Border Timbers Ltd v Republic of Zimbabwe regarding the application of sovereign immunity and the UK's State Immunity Act to the enforcement of ICSID Awards before the English courts.

The Commercial Court judgment in *Border Timbers Ltd v. Republic of Zimbabwe [2024] EWHC 58 (Comm)* sees the English Court appearing to depart from prior practice and take an alternative approach to sovereign immunity vis-à-vis ICSID awards (see *Legal update, State immunity not applicable to registration of ICSID awards (English Commercial Court)*. If this judgment is not overturned on appeal, it could affect foreign investors seeking to enforce ICSID awards in the English Courts. The case reinforces how important it is to include appropriate dispute resolution and submission to jurisdiction clauses in agreements with states or state entities and, where a claim is being brought under an investment treaty, to pay due consideration to enforcement strategies at an early stage.

Mrs Justice Dias handed down judgment in the case on 19 January 2024. The decision considers the application of state immunity under the *State Immunity Act 1978* (SIA) to the registration and enforcement of ICSID arbitration awards. It also emphasises the importance of full and frank disclosure when making without notice applications for enforcement of arbitral awards and foreign judgments.

Background facts

The Commercial Court enforcement proceedings stemmed from an ICSID arbitration claim brought against the Republic of Zimbabwe by Border Timbers and Hangani Development Co (Private) Limited (Claimants) under the Switzerland-Zimbabwe bilateral investment treaty (BIT) in relation to the alleged expropriation of land in Zimbabwe. The Claimants were successful in the arbitration, and on 28 July 2015, an ICSID tribunal awarded the claimants restitution, or alternatively, USD124 million plus interest and a further USD1 million in moral damages and costs. Zimbabwe subsequently sought to annul the award before an ICSID annulment committee. The annulment application was dismissed on 21 November 2018, and the award became binding thereafter.

On 15 September 2021, the claimants applied to the English Commercial Court for registration and entry of judgment on the award pursuant to *section 2* of the Arbitration (International Investment Disputes) Act 1966 (the legislation which implemented the ICSID Convention into English law) (1966 Act) and *Part 62* of the Civil Procedure Rules. The application, as is common practice, was made on a without notice basis. The application was granted, but Zimbabwe subsequently applied to set aside the order on grounds of state immunity under *section 1* of the SIA. That section provides that "a State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act".

Section 2 of the SIA provides an exception to this immunity in circumstances where the state has submitted to the jurisdiction of the courts of the United Kingdom.

Section 9 of the SIA provides: "where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration".

The claimants contested Zimbabwe's application to set aside the registration order on grounds that:

- Zimbabwe had submitted to the jurisdiction of the English Courts by virtue of article 54 of the ICSID Convention, which provides that if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID member state, as though it were a final judgment of that state's courts.
- The "arbitration exception" to sovereign immunity (under section 9 of the SIA) also applies to ICSID awards and thus precludes the English court from any review of the question of arbitral jurisdiction. It was argued by the claimants that Zimbabwe's consent to ICSID arbitration in the BIT fell within the arbitration exception, and that this had been affirmed (despite Zimbabwe's objections) by both the arbitral tribunal and the annulment committee.

The judge's findings

Interestingly, Mrs Justice Dias ruled against the Claimants on both counts, taking a view that appears to be contradictory to another recent decision by Mr Justice Fraser (as he then was) in *Infrastructure Services Luxembourg Snarl v. Spain [2023] EWHC 1226 (Comm)* (discussed in *Legal update, Spain fails in attempt to set aside registration of intra-EU ICSID award (English Commercial Court)*). The judge's approach was also contradictory to the position adopted by the Australian, New Zealand and US courts, who had taken a broader view that article 54 of the ICSID Convention constitutes a submission to the jurisdiction for the purposes of state immunity defences.

Mrs Justice Dias rejected the claimants' arguments on the grounds that:

- The language of article 54 of the ICSID Convention is not sufficiently clear and cannot constitute an unequivocal submission to the English jurisdiction for the purposes of section 2 of the SIA.
- The court was not bound by the findings of the tribunal or the annulment committee as regards to the existence of a valid arbitration agreement. The English Court can therefore review afresh whether a valid and binding arbitration agreement underpinned the award for the purposes of section 9 of the SIA.

However, Mrs Justice Dias went on to conclude (noting that this was a novel approach) that the order permitting enforcement of the award ought not to be set aside because there was no basis upon which Zimbabwe could assert sovereign immunity against an application to **register** an ICSID award, which was governed by the procedure set out in the Civil Procedure Rules and the 1966 Act and which did not permit a state to resist enforcement on such grounds.

On a related issue, Mrs Justice Dias also found that the dlaimants had breached their duty of full and frank disclosure by failing to disclose, in the without notice registration application, possible sovereign immunity arguments that might be raised by Zimbabwe. The judge did not set aside the order (as no prejudice to Zimbabwe could be demonstrated), but the claimants were penalised on costs for this omission. This further underlines the need to address the obligations of full and frank disclosure in all without notice applications to the courts, irrespective of whether they constitute a procedural formality (as was arguably the case here) or are more substantive in nature.

Where are we now?

The decision has already been the subject of much commentary in various forums. Permission to appeal has been granted, and the judge expressly recognised that the law would need to be settled by a higher court (given the conflicting decisions). What is particularly interesting, however, is the discussion around the English courts' ability to revisit the question of jurisdiction afresh in order to independently satisfy itself with respect to the validity of the arbitration agreement, notwithstanding that the arbitral tribunal may have already ruled on this issue. This position shows some parallels with the recent decision in *P&ID v. Nigeria* (discussed in *Articles, Federal Republic of Nigeria v P&ID: questions for the arbitration community* and *Corruption, Nigeria v P&ID and the laws of evidence: how should international arbitration respond?*).

The distinction made by the judge between registration of an ICSID award, in relation to which issues of state immunity did not arise, and practical enforcement and execution of an award, for which the state may raise immunity arguments, is a significant one. It spotlights the importance of properly documenting waivers of sovereign immunity when contracting with states or state-owned entities. In particular, parties should be aware that standard boiler plate dispute resolution clauses may not be sufficient, and an express submission to jurisdiction in respect of both suit and enforcement needs to be incorporated (see *Practice note, Sovereign immunity: state immunity from adjudication and enforcement*). The importance of taking legal advice in this respect cannot be overstated.

In addition, parties contracting with states on significant projects or high-value transactions should consider their broader enforcement strategy at the outset, and not only after a dispute has arisen.

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