# The growing consensus on recognition and enforcement of foreign investment awards

Written by **ALEXANDER LYALL**

A recent decision from the High Court of Malaysia (the **Court**), *Elisabeth Regina Maria Gabrielle von Pezold and Others v Republic of Zimbabwe*,[1] features a case of investors from Switzerland and Germany going to Malaysia as a result of their investments in Zimbabwe. Although a seemingly odd prospect, *Elisbeth Regina* makes it clear that this is a process contemplated fully by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (the **ICSID Convention**).

For scorned investors, the challenge has not just been success at the arbitral tribunal stage but also the opportunity to have their award recognised and enforced. However, a number of recent decisions have made developments in clarifying the status of the award. *Elisabeth Regina* is further confirmation that a global legal framework is in place that gives life to the arbitral process.

## Getting an arbitral award in your favour is just the start

Investing in a foreign State naturally carries risks. The growth of bilateral investment treaties (**BITs**) between States since the 1950s occurred in part to mitigate risks such as expropriation without compensation. The BITs enable various rights for investors and protections for their investments. If the risk materialises, the investor can look to the BIT signed between their home country and the host country for remedy. BITs will often include instructions on how the disputes are to resolved.

However, an award being made against the state does not necessarily mean that the investor will receive compensation. This is where some of the finer details of ICSID become relevant.

## Background

Throughout the 1980s and 1990s, the Zimbabwean government conducted land reforms with the intent of distributing foreign-held land to the indigenous population. Among the foreign investors, many from Germany and Switzerland believed these reforms to be in

1 *Elisabeth Regina Maria Gabrielle von Pezold and Others v Republic of Zimbabwe* [2023] MLJU 2657.

## Foreign investment awards

→ The High Court of Malaysia assessed its obligations under the ICSID Convention.


violation of the BITs signed by their home countries and Zimbabwe. The various disputes went to multiple arbitral tribunals, each making the awards in favour of the investors.

### Come for the Petronas Towers, stay for the award recognition

The investors went to the High Court of Malaysia for recognition and enforcement of the award. The High Court was asked to consider whether Zimbabwe had made itself subject to the jurisdiction of the Malaysian courts.

### Did the Malaysian courts have jurisdiction to recognise the award?

Zimbabwe's core argument was that the Court did not have jurisdiction to recognise and enforce the award.

This idea rested on several subpoints, mainly that:

- Zimbabwe had State immunity;
- the BITs had instructed that recognition and enforcement could only occur in Zimbabwe, or the relevant European States; and
- the lack of Zimbabwean property in Malaysia meant that recognition and enforcement were not possible.

#### Did Zimbabwe have State immunity?

Just what business exactly did the Court have in hearing a dispute between European investors and the State of Zimbabwe? What about Zimbabwe's right to sovereign immunity?

The Court answered these questions through an assessment of the function of the ICSID Convention. A primary role of the Convention is the ability for parties successful in arbitration to have their award recognised in any part of the world, provided that country is also a signatory. Having signed the Convention, Zimbabwe had agreed that it would be subject to the courts of a fellow signatory. The Court consequently held that Zimbabwe's status as a signatory and member State to the ICSID Convention meant it had waived its State immunity.

#### Land reforms: a matter of public policy or commerce? Did that even matter?

Zimbabwe argued that the actions

it had taken which interfered with the investments were clear acts of the government undertaking its sovereign functions. The actions were not commercial in nature. This was therefore not a matter on which any court could make a decision.[2]

The Court found that this argument had neglected to consider the ICSID Convention's modification of common law immunity. Furthermore, in signing the ICSID Convention Zimbabwe had conceded that once an award had been made, it could not then reopen the arguments in court.

### Did the BITs preclude enforcement in other States?

Zimbabwe then moved onto the contents of the BITs as a way of escaping the Malaysian courts. These contained articles which suggested that the treatment of the awards would have to occur within the jurisdictions of Zimbabwe. Article 11(3) of the German BIT stated that *the award shall be enforced in accordance with the domestic law of the Contracting Party in the territory of which the investment in question is situated*. Article 10(6) of the Swiss BIT contained a similar instruction: *the arbitral award shall be enforceable in accordance with the laws of the Contracting Party in which the investment in question is located*. However, the Courts viewed this as an incomplete assessment of the provisions of the BITs. Looking at the documents in full, it was clear that they were intended to be subject to the ICSID Convention.[3]

### Did the investors need Zimbabwean property to be present in Malaysia?

Zimbabwe argued that since the only assets the State had in Malaysia were of a diplomatic nature (such as the contents of its embassy), there would be nothing for which the Malaysian courts could make an order. The Court rejected this argument. Distribution of property would only occur if the Court was required to execute the award. In the present case, however, it was the Court's job to consider whether the award could be recognised.[4]

## The High Court of Malaysia endorses the views of the New Zealand High Court

The judgment incorporates and considers a range of judgments on enforcement and recognition of foreign awards. Among these is the Australian High Court decision of *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor*.[5] There, the Court held that the ICSID Convention intended for a distinction to be made between enforcing an award and executing one. This view persuaded the High Court of Malaysia that it could recognise and enforce the award, even though it could not execute it.[6]

No decision, however, is more prevalent in the judgment than a 2021 decision from the New Zealand High Court.[7] In *Sodexo Pass*

2 Citing *Rahimtoola v H.E.H. The Nizam of Hyderabad* [1958] AC 379 (House of Lords) and Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors [2018] 7 MLJ.
3 *Elisabeth Regina*, above n 1, at [73].
4 *Elisabeth Regina*, above n 1, at [51].
5 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. & Anor* [2023] HCA 11.
6 *Elisabeth Regina*, above n 1, at [44].
7 For an in-depth look, please see NZDRC's article on the judgment.

*International SAS v Hungary*,[8] the High Court decided whether an award made against Hungary could be recognised and enforced in New Zealand. Hungary argued that it had sovereign immunity and therefore the High Court could not look to recognise and enforce the award. The High Court disagreed. It found it relevant that both Hungary and New Zealand were signatories to the ICSID Convention. For Hungary, signing the Convention meant it had agreed to be subject to the courts of other member States. For New Zealand, it had international obligations to meet and so recognition and enforcement was the only option.

Recognising the clear similarities between the cases, the High Court looked to *Sodexo* for guidance. Like New Zealand, Malaysia's signing of the Convention meant it had carved out exceptions to previously enacted legislation guaranteeing that it would not subject foreign States to the jurisdiction of its courts. The New Zealand High Court recognised the Arbitration (International Investment Disputes) Act 1979 (the **New Zealand ICSID Act**) as creating obligations upon it to recognise and enforce the award. In Justice Cooke's words,

> [E]ach Contracting State shall recognise an award… as binding and enforce the pecuniary obligations imposed by that award… as if it were a final judgment of a court in that State.

The High Court of Malaysia identified the New Zealand ICSID Act as being similarly light in detail in terms of how a foreign investment award is to be processed. However, in assessing *Sodexo*, it saw that courts may select their own procedures on personal service to fit the situation.[9] In *Sodexo*, the High Court was sympathetic to Hungary's argument that under High Court rule 6.29[10] it would have to dismiss the appeal. However, by way of the New Zealand ICSID Act, rule 6.27(2)(m)[11] would prevail.[12]

Here, Section 3 of the Convention on the Settlement of Investment Disputes Act 1966 (the **Malaysian ICSID Act**) provided that an award is binding and enforceable as if it was a judgment of the Court. As was the case in *Sodexo*, the court rules were modified for the purpose of recognising the award.

## Conclusion

The *Elisabeth Regina* decision captures the growing consensus around the recognition and enforcement of arbitral awards. Although State immunity is a valid legal doctrine in international law, it is becoming increasingly clear that this is waived when a State becomes a signatory to arbitration-recognising conventions such as ICSID and the New York Convention.

From New Zealand, to Australia, and now Malaysia – the chorus is growing louder. If the host State is a signatory to ICSID, then an award made against it can be recognised and enforced.

8 *Sodexo Pass International SAS v Hungary* [2021] NZHC 371.

9 *Elisabeth Regina*, above n 1, at [65].

10 If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes otherwise (under 6.29(a) or (b)).

11 Service of proceedings may take place outside of New Zealand when it is sought to enforce any judgment or arbitral award.

12 *Sodexo*, above n 8, at [47].


### About the author

Alexander Lyall is a Research Clerk in The ADR Centre's Knowledge Management team, working with NZDRC and NZIAC. He gained his LLB from the University of Canterbury, and he also holds a BA in political science, media studies, and Te Reo Māori. His writing has previously been published by Radio New Zealand, The Spinoff, the Kluwer Arbitration Blog and The Press.