

## Zim loses US\$124m Border Timbers appeal case

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THE Court of Appeal in the United Kingdom (UK) has dismissed an appeal by Zimbabwe and Spain to set aside the International Centre for Settlement of Investment Disputes (ICSID) awards in each case worth over US\$100 million to investors arguing that they were immune from the Court's adjudicative jurisdiction.

[The UK courts in January this year](#) dismissed Zimbabwe's application to set aside the order of October 2021.

By that award, rendered on July 28, 2015, Zimbabwe was required to reinstate properties to the Border Timbers, pay US\$29 263 498, or, in default of reinstatement, pay US\$124 041 223.

In either event, Zimbabwe was to pay a further US\$1 million in moral damages.

The Chancellor of the High Court, Lord Justice Newey and Lord Justice Phillips handed down judgment on October 22, 2024 in the jointly-heard appeals in Infrastructure Services Luxembourg S.À.R.L. v Kingdom of Spain and Border Timbers Limited v Republic of Zimbabwe [2024] EWCA Civ 1257.

The judgment attempted to reconcile, at Court of Appeal level, a high-profile conflict of authority in the Commercial Court between Justice Dias DBE in the Zimbabwe case, and Justice Fraser (as he then was) in the Spain case.

According to reports, the central issue before the Court of Appeal was whether the ICSID Convention or the Arbitration (International Investment Disputes) Act 1966 (implementing the Convention in UK law), deprives foreign States of their general immunity from the adjudicative jurisdiction of the courts of the United Kingdom conferred by section 1(1) of the State Immunity Act 1978 (the "SIA").

The respondents in the appeals were investors or alleged investors in Spain and Zimbabwe respectively.

They obtained ex parte orders registering those awards under the 1966 Act. Spain and Zimbabwe applied to set aside those orders on the basis that they were immune from the Court's adjudicative jurisdiction.

Each of Zimbabwe and Spain's award creditors in turn argued that immunity was displaced by two statutory exceptions: submission under section 2 of the SIA, by way of Article 54 of the ICSID Convention; and the so-called arbitration exception under section 9, which the respondents in the appeals said applied to ICSID awards so as to exclude any review by the enforcement court of arbitral jurisdiction.

Both Justices Dias DBE and Fraser found that sovereign immunity was displaced, but (as the Court of Appeal put it) "for entirely different reasons".

The Court of Appeal also rejected the principal analysis of both first instance judges, and decided that the parties to the ICSID Convention have submitted (for the purposes of section 2 of the SIA) to the enforcement jurisdictions of all contracting States by virtue of Article 54 of the Convention, and, therefore, may not oppose the registration of ICSID awards against them on the grounds of State immunity.

However, the Court of Appeal also rejected a number of other arguments by the investor parties: that section 1(1) of the SIA simply did not apply to the registration of ICSID awards; that the Supreme Court's previous decision in *Micula v Romania* [2020] 1 WLR 1033 was binding authority disapplying the SIA in ICSID cases; that proceedings under the 1966 Act were outside the temporal scope of the SIA and that States are precluded (in particular by estoppel) for the purposes of section 9 of the SIA from arguing that ICSID arbitral tribunals lacked jurisdiction (as both Spain and Zimbabwe maintain in respect of each of the awards against them).

The Court of Appeal did not address Spain's case that there was no valid arbitration agreement between intra-European Union parties by way of Article 26 of the Energy Charter Treaty; and non-immunity defences to enforcement reserved by Zimbabwe have been remitted to the Commercial Court.

According to the judgment, Zimbabwe made it plain from the outset that if it lost its challenge on State immunity grounds, it would oppose the enforcement of the ICSID award "on further grounds".

"It is suggested that these would come within the class of exceptional matters which were recognised in *Micula* as remaining open by reason of the award being treated like any other final judgment.

"It, therefore, seems that such grounds have not been adjudicated upon, remain at large, and therefore Zimbabwe is right to say that its application to set aside the registration order should not have been dismissed but should have been the subject of further directions. I say nothing about the merit of the non-immunity defences," part of the judgment reads.

Tariq Baloch appeared for the Kingdom of Spain (leading Cameron Miles), instructed by Stuart Dutson, Jonathan Schuman, Craig Gilchrist and Eliza Jones of Simmons & Simmons LLP.

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