FEDERAL COURT OF AUSTRALIA

Lahoud v The Democratic Republic of Congo [2017] FCA 982

File number:	NSD 846 of 2017
Judge:	**GLEESON J**
Date of judgment:	8 August 2017
Date of publication of reasons:	23 August 2017
Catchwords:	**ARBITRATION** – application for recognition of decisions of the International Centre for Settlement of Investment Disputes under s 35(4) of the *International Arbitration Act 1974* (Cth) – application granted
Legislation:	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1985, 575 UNTS 159 (entered into force 14 October 1966) (1965 Convention on the Settlement of Investment Disputes), being Sch 3 to the *International Arbitration Act 1974* (Cth) Arts 1, 25, 36, 37, 41, 42, 48, 49, 52, 53, 54, 55 *International Arbitration Act 1974* (Cth) ss 2D, 31, 32, 34, 35 *Federal Court Rules 2011* rr 28.49, 28.50
Cases cited:	*Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31 Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Australia, 2014)
Date of hearing:	25 July 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	International Commercial Arbitration
Category:	Catchwords
Number of paragraphs:	30

Counsel for the Applicants:	Mr JC Conde
Solicitor for the Applicants:	ACA Lawyers

ORDERS

NSD 846 of 2017

BETWEEN:	**ANTOINE ABOU LAHOUD** First Applicant
	LEILA BOUNAFEH-ABOU LAHOUD Second Applicant
AND:	**THE DEMOCRATIC REPUBLIC OF CONGO** Respondent

JUDGE:	**GLEESON J**
DATE OF ORDER:	**25 JULY 2017, AS VARIED ON 8 AUGUST 2017**

THE COURT ORDERS THAT:

1. Pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth), the applicants have leave to have the following awards recognised by the Court and enforced as if they were judgments of the Court:

   (a) award of the International Centre for Settlement of Investment Disputes in Case ARB/10/4 dated 7 February 2014 ("Award"); and

   (b) decision on the Request for Annulment of the International Centre for Settlement of Investment Disputes in Case ARB/10/4 dated 29 March 2016 ("Annulment Decision").

2. Pursuant to s 43(1) of the *Federal Court of Australia Act 1976* (Cth), the respondent is to pay the applicants' costs of this proceeding as agreed or assessed.

THE COURT NOTES THAT:

3. The amounts awarded to the applicants under the Award and the Annulment Decision are as follows:

   Award:

   (a) USD 1,728,194 (award) – being AUD 1,935,577.20 as at the date of the Award;

(b) USD 368,743.46 (arbitration costs) – being AUD 412,992.67 as at the date of the Award;

(c) 50% of the legal costs and expenses – being AUD 376,062.88 as at the date of the Award;

(d) post-judgment interest at the rate of LIBOR plus 2% updated every six months on the amount in (a) above from 19 May 2005 to the date of this Order;

Annulment Decision

(e) EUR 9,203.72 (legal costs and expenses) – being AUD 13,621.51 as at the date of the Annulment Decision;

(f) USD 217,606.84 (legal costs and expenses) – being AUD 289,417.09 as at the date of the Annulment Decision; and

(g) post-judgment interest at the rate of LIBOR plus 2% on the amounts in (e) and (f) above from the date of the Annulment Decision to the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GLEESON J:

1 On 25 July 2017, I made orders granting leave to the applicants to have two decisions of the International Centre for Settlement of Investment Disputes ("ICSID") recognised by this Court and enforced as if the awards were judgments of the Court, pursuant to s 35(4) of the *International Arbitration Act 1974* (Cth) ("Act").

2 The relevant decisions are decisions made in ICSID Case No ARB/10/4 on 7 February 2014 and 29 March 2016. The decisions followed a request for arbitration submitted by the applicants and dated 5 February 2012. The request arose from a dispute between the applicants and the respondent concerning a company known as "IMPOREX", which apparently conducted business activities in the Democratic Republic of Congo.

3 After a contested arbitration process conducted by a tribunal of three arbitrators, which included a decision on jurisdiction dated 16 February 2012, the tribunal published a document entitled "Award" comprising 182 pages dated 7 February 2014 ("Award"). In the Award, the tribunal ultimately ruled:

> 664. For these reasons, the [T]ribunal rules as follows:
>
> (i) The exceptions of incompetence filed by the Respondent are rejected except for those retained in the terms indicated in paragraphs 248, 256, 269-270, 277 and 307-309; within the limits so specified, the Tribunal is certainly competent to hear the litigation brought before the ICSID by the Claimants.
>
> (ii) the [R]espondent violated its obligations under the terms of articles 25 and 26 of the New Investment Code.
>
> (iii) The Respondent is ordered to pay to the Claimants the amount of 1,728,194 U.S. dollars as indemnification for the tangible damages suffered by the Claimants.
>
> (iv) Such amount shall accrue simple interest at the rate of LIBOR+2 updated every six months, as of May 19, 2005, and until its complete payment by the Respondent.
>
> (v) The arbitration costs, which includes the costs and fees of the members of the Tribunal, as well as the fees of the ICSID, which shall be finally determined and notified by the Parties by the Centre, shall be paid in the following proportions: 75% by the Respondent and 25% by the claimants. The Respondent shall reimburse to the Claimants 75% of the amounts paid by the latter.
>
> (vi) The Respondent shall pay for its own cost and the fees of its attorneys and representation engaged in this proceeding, as well as 50% of the costs and fees of the attorneys and representation of the Claimants, as determined in this award.
>
> (vii) All other allegations and claims of the Parties are rejected.

4 On 29 March 2016, a differently constituted tribunal published a decision entitled "Decision on the request for annulment made by the Democratic Republic of Congo" ("Annulment Decision"). That decision followed a request for annulment submitted by the respondent to ICSID and dated 9 June 2014. The decision, which comprised 59 pages, concludes:

> VI. DECISION
>
> 241. The Committee rejects the entirety of the [respondent]'s Application for annulment.
>
> 242. The Committee orders that the costs and fees of its members as well as the costs of ICSID, as they will be subsequently determined and issued to the Parties by the Centre, be entirely covered by the [respondent].
>
> 243. The Committee finds that the [respondent] will bear half of the costs and fees of counsel and of representation incurred by the Claimants in the proceeding, namely 50% of EUR 18,407.45, totalling EUR 9,203.72, and 50% of USD 435,213.68, totalling USD 217,606.84, with interest at the LIBOR+2 rate from the date of this decision until the effective payment of said sums.
>
> 244. All other claims and allegations of the Parties are dismissed.

JURISDICTION

5 Section 2D of the Act identifies the objects of the legislation which are, relevantly:

> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and
>
> (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and
>
> (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and
>
> …
>
> (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.

6 The English text of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1985, 575 UNTS 159 (entered into force 14 October 1966) (1965 Convention on the Settlement of Investment Disputes) ("Investment Convention") is set out in Sch 3 to the Act.

7 Part IV of the Act, comprising ss 31-38, is entitled "Application of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States". By s 31(2), except so far as the contrary intention appears, a word or expression used in Pt IV and in the Investment Convention (whether or not a particular meaning is given to it in the Investment

Convention) has, in Pt IV, the same meaning as it has in the Investment Convention. By s 31(3), a reference in Pt IV to a numbered Article is a reference to the Article so numbered in the Investment Convention.

8 Section 32 of the Act provides that Chs II-VII (inclusive) of the Investment Convention have the force of law in Australia. Section 33 of the Act provides that an award under the Investment Convention is binding and is not subject to any appeal or to any other remedy, otherwise than in accordance with the Investment Convention.

9 Section 35(3)-(4) of the Act provides:

> **35 Recognition of awards**
>
> …
>
> (3) The Federal Court of Australia is designated for the purposes of Article 54.
>
> (4) An award may be enforced in the Federal Court of Australia with the leave of that court as if the award were a judgment or order of that court.

10 Section 31(1) provides that "award" includes:

> (a) an interpretation of an award under Article 50; and
>
> (b) a revision of an award under Article 51; and
>
> (c) an annulment of an award under Article 52.

11 ICSID is established by Art 1(1) of the Investment Convention. Section 34 of the Act makes clear the special nature of awards of ICSID. Section 34 provides:

> **34 Investment Convention awards to prevail over other laws**
>
> Other laws relating to the recognition and enforcement of arbitral awards, including the provisions of Parts II and III, do not apply to:
>
> (a) a dispute within the jurisdiction of the Centre; or
>
> (b) an award under this Part.

12 Article 25(1) in Ch II of the Investment Convention provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

13 Article 36 in Ch IV of the Investment Convention provides for the initiation of an arbitral proceeding. Article 36(1) provides that:

> Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

14 Article 37(1) in Ch IV provides that "[t]he Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36".

15 Article 41 in Ch IV provides for the Tribunal's competence of jurisdiction as follows:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

16 The law to be applied by the Tribunal is the law agreed by the parties or, failing such agreement, "the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (Art 42(1)). The Tribunal may not make a finding of "*non liquet*" (no applicable law) on the ground of silence or obscurity of the law (Art 42(2)). If the parties agree for the Tribunal to do so, the Tribunal may dispense with the law and consider what is fair and equitable in the circumstances (Art 42(3)).

17 Articles 48 and 49 in Ch IV of the Investment Convention provide for awards as follows:

> SECTION 4
>
> **The Award**
>
> *Article 48*
>
> (1) The Tribunal shall decide questions by a majority of the votes of all its members.
>
> (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
>
> (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
>
> (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
>
> (5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

18 Articles 50-52 in Ch IV provide for requests to the Secretary-General for the interpretation, revision or annulment of awards. In particular, Art 52(1) identifies the following five bases for the annulment of an award:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

19 Articles 53-55 in Ch IV of the Investment Convention provide for the recognition, enforcement and execution of awards. Those Articles are set out in full below:

SECTION 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall

> treat the award as if it were a final judgment of the courts of a constituent state.
>
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
>
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.
>
> *Article 55*
>
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

20 As can be seen from Arts 54 and 55 above, the Investment Convention expressly distinguishes between an initial stage of recognition of an award and a final stage of execution. In that last stage, as Arts 54(3) and 55 foreshadow, there may be issues under domestic law relating to sovereign immunity.

21 Rule 28.49 of the *Federal Court Rules 2011* ("Rules") identifies further procedural requirements for having an ICSID award recognised. That rule provides (notes omitted):

> **28.49 Recognition of award**
>
> (1) A party to an arbitral proceeding who wants to enforce an award under section 35(4) of [the Act] must file an originating application, in accordance with Form 58.
>
> (2) The application must be accompanied by an affidavit stating:
>
> (a) the extent to which the award has not been complied with, at the date the application is made; and
>
> (b) the usual or last-known place of residence or business of the person against whom it is sought to enforce the award or, if the person is a company, the last-known registered office of the company.
>
> (3) The application may be made without notice.

22 Finally, r 28.50 of the Rules provides that English translations of documents not in the English language must be provided to the Court.

HOW JURISDICTION ARISES IN THE PRESENT MATTER

23 The applicants submitted that the Court's jurisdiction was invoked by the tender and filing of the following documents and evidence:

(1) the original copies of the Award and the Annulment Decision, satisfying Art 54(2) of the Investment Convention;

(2) an originating application in Form 58 dated 29 May 2017 filed on 31 May 2017, in accordance with r 28.49(1);

(3) the applicants' evidence that the Award and the Annulment Decision have not been complied with at all, in satisfaction of r 28.49(2)(a);

(4) the applicants' evidence about the respondent's diplomatic representation in Australia and overseas, in satisfaction of r 28.49(2)(b), and

(5) English translations of the Award and the Annulment Decision, in satisfaction of r 28.50.

24 The applicants also adduced the following evidence:

(1) a certificate dated 26 May 2017 from the Commonwealth Department of Foreign Affairs and Trade stating that the respondent ratified the Investment Convention on 29 May 1970 and is a "Convention country" within the meaning of s 3(1) of the Act; and

(2) a copy of an English translation of the ICSID "Decision on jurisdiction" dated 16 February 2012, referred to at [3] above.

CONSIDERATION

25 Section 39(2) of the Act requires that the Court, when considering whether to perform any function or exercise any power under the Act, have regard to two things:

(1) first, the objects of the Act (reproduced at [5] above); and

(2) second, the facts that "arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" and "awards are intended to provide certainty and finality".

26 Having regard to the matters set out above, the applicants submitted that the Court should be satisfied that:

(1) the Court has jurisdiction to hear the applicants' application;

(2) the Court has jurisdiction to grant the relief sought; and

(3) it is appropriate in the circumstances for the Court to grant the relief.

27 The definition of "award" in s 31(1) is inclusive. Where an "award" includes an annulment of an award under Art 52, the ordinary, natural meaning of "award" extends to a decision to refuse to annul an award under Art 52: cf. Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, LexisNexis Australia, 2014) at [6.62]-[6.63].

28 This being an *ex parte* application, the applicants drew attention to a potential argument that might be made against the relief sought arising from s 9 of the *Foreign States Immunities Act 1985* (Cth), which was considered by the High Court in *Firebird Global Master Fund II Ltdv Republic of Nauru* [2015] HCA 43; (2015) 258 CLR 31. I considered the matters raised by the applicants and was satisfied that the Foreign States Immunities Act had no relevant application, particularly where the decisions of the two ICSID tribunals demonstrated that the respondent had submitted to their jurisdiction.

CONCLUSION

29 I was satisfied that the Court has jurisdiction to make the orders sought, having regard to the applicants' compliance with rr 28.49 and 28.50. I was satisfied that the Award and the Annulment Decision are awards within the meaning of s 35(4) as they are, respectively, an award under Art 48 and a decision to refuse to annul that award under Art 52.

30 Having regard to the matters specified in s 39(2), I was satisfied that it was appropriate to recognise the two awards by making the orders sought by the applicants.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

Dated: 23 August 2017