

The First Enforcement of an Investment Arbitration Award in Australia

What you need to know

- The Federal Court of Australia has recently recognised and enforced two investment arbitration awards for the first time.
- The decision provides confidence that investment arbitration awards will be recognised and enforced in Australia.
- The Court confirmed that awards may be enforced against a foreign state, despite foreign state immunity.

Investment arbitration

Investment arbitration is being increasingly used by investors to protect their international investments.

To encourage investment between the contracting states, an investment treaty will commonly confer certain minimum levels of protection on investors from one state with respect to their investments in the other. These protections are typically enforceable by the investor directly against the state party through investment arbitration.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**Washington Convention**) provides a comprehensive and stand-alone regime for parties to resolve investment disputes. It established the International Centre for Settlement of Investment Disputes (**ICSID**) that administers investment arbitrations. Once implemented into a contracting state's domestic law, it also provides for the recognition and enforcement of ICSID awards.

The Washington Convention has force of law in Australia in accordance with the *International Arbitration Act 1974* (Cth) (**Act**): section 32.

The dispute

In *Lahoud v The Democratic Republic of Congo* [2017] FCA 982, Mr and Mrs Lahoud (**Applicants**) sought leave of the Federal Court of Australia for the recognition and enforcement of two ICSID awards.

The parties were involved in an ICSID arbitration concerning a company known as IMPOREX. IMPOREX was owned and operated by the Applicants and conducted business in the Democratic Republic of Congo. The Applicants alleged that the Democratic Republic of Congo had breached a number of obligations under its New Investment Code in its dealings with IMPOREX.

On 7 February 2014, an ICSID arbitral tribunal handed down an award in favour of the Applicants. The tribunal found that the Democratic Republic of Congo had breached its fair and equitable treatment and expropriation obligations under the New Investment Code (for further information on the common investment treaty protections see [here](#)).

On 29 March 2016, a separate ICSID arbitral tribunal handed down a decision refusing the Democratic Republic of Congo's application to annul the initial award.

The decision

The Applicants sought leave to have the award and the decision recognised and enforced in accordance with the Act.

Section 35 of the Act provides that the Federal Court of Australia has jurisdiction to recognise and enforce an ICSID award "as if the award were a judgment or order of that court".

Justice Gleeson was satisfied that the Court had jurisdiction to recognise and enforce both the award and the decision. In coming to that conclusion, her Honour reasoned that the decision refusing to annul the initial award was itself an "award" that was capable of being recognised and enforced:

1. the definition of "award" in section 31(1) of the Act is inclusive; and
2. "award" is to be understood in accordance with its ordinary and natural meaning.

Her Honour was also satisfied that it was appropriate for the Court to recognise and enforce the awards. In considering whether to perform any function or exercise any power under the Act, section 39(2) of the Act requires the Court to consider:

1. the objects of the Act; and
2. the facts that "an arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes" and that "awards are intended to provide certainty and finality".

In the circumstances of an investment arbitration, Gleeson J observed that the objects of the Act relevantly include to:

1. facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and

2. facilitate the use of arbitration agreements made in relation to international trade and commerce; and
3. facilitate the recognition and enforcement of arbitral awards in relation to international trade and commerce; and
4. to give effect to the Washington Convention: section 2D.

Her Honour also confirmed that the Democratic Republic of Congo could not rely upon foreign state immunity to argue that the award and decision should not be recognised and enforced. Foreign states have a general immunity from the jurisdiction of the courts of Australia: section 9, *Foreign States Immunities Act 1985* (Cth). Her Honour found that foreign state immunity was irrelevant in the circumstances, particularly because the Democratic Republic of Congo had submitted to the jurisdiction of the ICSID tribunals.

Comment

This decision marks the first time that an Australian court has recognised and enforced an investment arbitration award.

It provides clear guidance on the application of the Washington Convention in Australia and demonstrates that Australia is a pro-arbitration jurisdiction in line with the objects of the Act.

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