



Review of
Investor-State Arbitral
Awards by States Courts:
Recent French Decisions

Organisers



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Review of Investor-State Arbitral Awards – The Singapore Approach

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1. *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57
2. *Swissbourgh Diamond Mines (Pty) Limited & Ors v Kingdom of Lesotho* [2018] SGCA 81
3. *Deutsche Telekom AG v Republic of India* [2023] SGHC (I) 7



Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] SGCA 57

- PRC-Laos BIT
- Tribunal held it had jurisdiction to hear Sanum's claims against Laos for, among other things, that Lao Government had deprived it of benefits to be derived from its capital investment through the imposition of unfair and discriminatory taxes.
- Sanum made application pursuant to Section 10(3) of the International Arbitration Act



Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] SGCA 57

- Jurisdictional Issues:
 - Whether the PRC-Laos BIT applies to Macau
 - Whether the Tribunal had subject-matter jurisdiction over Sanum's expropriation claims
- Singapore Court of Appeal reversed Singapore High Court's findings, and upheld the Tribunal's jurisdiction



Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] SGCA 57

Article 8(3) of the PRC-Laos BIT:

“If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of [Article 8]”, the dispute may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2 of this Article [i.e. Laotian courts].”



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Annex 1 to the Protocol on Finance and Investment of the Southern African Development Community (18 August 2006 (entered into force 16 April 2010) (“**Investment Protocol**”))



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Investors brought claim against Kingdom under SADC Treaty for alleged wrongful expropriation of mining leases. Claim was before the SADC Tribunal
- Investors claimed that Kingdom facilitated the shuttering of the SADC Tribunal



Swissbourn Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Relevant dispute before the Tribunal was the Kingdom's alleged wrongful act of interfering with and displacing the means provided and existing at the time for shuttering the SADC Tribunal
- Relief sought (and granted by Tribunal) was the constitution of a new tribunal to hear the investors' SADC Claim



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- PCA Tribunal held that:
 - It had jurisdiction to hear the investors' claims against the Kingdom, and
 - The Kingdom had breached various obligations under the Treaty of the Southern African Development Community ("**SADC Treaty**"), the Protocol on Tribunal in the Southern African Development Community (7 August 2000) (entered into force 14 August 2001) ("**Tribunal Protocol**"), and the Investment Protocol.



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Kingdom made application to the Singapore courts to set aside
 - the entirety of the award pursuant to Section 10(3) of the International Arbitration Act, or Section 3(1) of the International Arbitration Act read with Article 34(2)(a)(iii) of the UNCITRAL Model Law, or
 - the part of the award finding the Kingdom liable to pay Appellants' costs of the PCA arbitration pursuant to Section 24(b) of the IAA and/or Section 3(1) of the International Arbitration Act read with Article 34(2)(a)(iii) of the Model Law



Swissbourn Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Issues before the Singapore Court of Appeal were:
 - a) Whether the Court has jurisdiction to set aside the Award;
 - b) Is the Kingdom bound to accept the PCA Tribunal's jurisdiction due to unilateral declarations and estoppel;
 - c) Whether the PCA Tribunal had jurisdiction to hear and determine the investors' claim, having regard to Art 28(1) of Annex 1; and
 - d) Whether the investors exhausted all local remedies before commencing PCA Arbitration.



Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

- Singapore Court of Appeal affirmed the Singapore High Court's finding:
 - a) It did have jurisdiction to hear the Setting Aside Application and to set aside the Award under Art 34(2)(a)(iii) of the Model Law
 - b) The Kingdom was not bound by the doctrines of estoppel or formal unilateral declaration to accept the PCA Tribunal's jurisdiction; and
 - c) The Award should be set aside because the PCA Tribunal had no jurisdiction to hear and determine the claim referred by the investors; and
 - d) The investors may not have exhausted their local remedies.



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

Article 28 of Annex 1 to the Investment Protocol

SETTLEMENT OF INVESTMENT DISPUTES

1. *Disputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former, which have not been amicably settled, and after exhausting local remedies shall, after a period of six (6) months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.*



Swissbourngh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

Article 28 of Annex 1 to the Investment Protocol

2. *Where the dispute is referred to international arbitration, the investor and the State Party concerned in the dispute may agree to refer the dispute either to:*

(a) The SADC Tribunal;

(b) The International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the ICSID Convention and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or



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Article 28 of Annex 1 to the Investment Protocol

(c) An international arbitrator or ad hoc arbitral tribunal to be appointed by a special agreement United Nations Commission on International Trade Law.



Swissbourn Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho [2018] SGCA 81

Article 28 of Annex 1 to the Investment Protocol

3. *If after a period of three (3) months from written notification of the claim there is no agreement to one of the above alternative procedures, the parties to the dispute shall be bound to submit the dispute to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. Law as then in force. The parties to the dispute may agree in writing to modify these Rules.*

4. *The provisions of this Article shall not apply to a dispute, which arose before entry into force of this Annex.*



Deutsche Telekom AG v The Republic of India [2023] SGHC(I) 7

- India-Germany BIT
- Arbitration was governed by UNCITRAL Arbitration Rules 1976, and it was seated in Geneva.
- Tribunal issued: (1) Interim Award on jurisdiction and liability, and found India liable for breach of India's fair and equitable treatment obligation under the BIT, and (2) Final Award on damages.



Deutsche Telekom AG v

The Republic of India [2023] SGHC(I) 7

- India applied to Swiss Federal Supreme Court to set aside the Interim Award and chiefly raised jurisdictional grounds to challenge the award. The Swiss court rejected India's application to set aside the Interim Award.
- The Final Award was certified by Civil Court of Geneva to be enforceable and declared as legally binding in August 2020.
- DT commenced enforcement proceedings in the US and Singapore.



Deutsche Telekom AG v

The Republic of India [2023] SGHC(I) 7

- In Singapore, India resisted enforcement of the Award.
- Issue which arose was whether India is immune from the jurisdiction of the Singapore courts
- Section 3(1) of State Immunity Act provides: *“A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part”*.



Deutsche Telekom AG v

The Republic of India [2023] SGHC(I) 7

- Relying on the offer to arbitrate in Art 9 of the BIT, DT contended that the case falls within an exception in Section 11(1) of the State Immunity Act:

“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 in Singapore which relate to the arbitration”.

- India argued that DT’s investment falls outside the scope of Art 9



Deutsche Telekom AG v

The Republic of India [2023] SGHC(I) 7

- Singapore International Commercial Court dismissed India's application to set aside the order granting leave to enforce the Final Award, finding that none of the following arguments / grounds raised by India are tenable, namely:
 - Illegality
 - Pre-investment expenditure
 - Indirect investment
 - Essential security interests
- Therefore, the exception to state immunity in section 11(1) of the State Immunity Act applies and the Final Award is enforceable



Deutsche Telekom AG v The Republic of India [2023] SGHC(I) 7

Art 9 of BIT

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.



Deutsche Telekom AG v

The Republic of India [2023] SGHC(I) 7

Art 9 of BIT

(2) *If the dispute cannot be thus resolved as provided in paragraph 1 of this Article within six months from the date of notice given thereunder, then the dispute may be referred to conciliation in accordance with the United Nations Commission on International Trade Law Rules on Conciliation, 1980, if both parties agree. If either party does not agree to conciliation or if conciliation fails, either party may refer such dispute to arbitration in accordance with the United Nations Commission on International Trade Law Rules on Arbitration, 1976 ...*



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