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Lesotho sets aside award before the Singapore High Court

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In a 172-page judgment, the Singapore High Court in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited* [2017] SGHC 195 (*Lesotho*), set aside an investor-state arbitration award rendered against Lesotho after an extensive review of international investment jurisprudence.

This is the second investor-state matter that has confronted the Singapore courts following *Sanum Investments Ltd v Government of the Lao People's Democractic Republic* [2016] 5 SLR 536.

Similar to *Sanum*, the dispute in *Lesotho* had no connection to Singapore other than the fact that, with the benefit of parties' submissions, the Tribunal in *Lesotho* had decided on Singapore as the seat of arbitration.

Background

In *Lesotho* the investors contended that their mining leases in Lesotho, a member of the Southern African Development Community (*SADC*), had been unlawfully expropriated between 1991 to 1995.

The SADC was established by the SADC Treaty. Under the SADC Treaty, a regional tribunal was established to hear disputes regarding adherence to and interpretation of the SADC Treaty. In 2006, SADC signed a Protocol on Finance and Investment which granted protections to investors. Under Annex 1 to the Protocol, investors could commence international arbitration against signatory States if the dispute arose after 16 April 2010. The precise scope of the arbitration agreement in Annex 1 to the Protocol extended to "*disputes between an investor and a State Party concerning an obligation of the [State] in relation to an admitted investment…after exhausting local remedies*".

In June 2009, the investors commenced a claim before a SADC tribunal constituted under the SADC Treaty and a Protocol on Tribunal in the SADC. However, that SADC tribunal was dissolved by resolution at a summit of the SADC before the claim could be heard.

In response, the investors commenced arbitration against Lesotho in 2012, this time before the Permanent Court of Arbitration (*PCA*) under Annex 1 to the Protocol. The investors alleged that Lesotho had breached its obligations under the SADC Treaty after 16 April 2010 by contributing to or facilitating the shuttering of the SADC tribunal, without providing alternative means of recourse.

By a majority, the PCA Tribunal rendered an award in favour of the investors, and directed the parties to constitute a new tribunal to hear the expropriation claims. Lesotho applied to the Singapore courts to set aside the award on the basis that the PCA Tribunal lacked jurisdiction and/or the award exceeded the scope of the submission to arbitration.

Singapore High Court's decision

The Singapore High Court, applying a *de novo* standard of review, set aside the award in its entirety under Art 34(2)(a)(iii) of the Model Law. Among other things:

- The Court disagreed with the Tribunal that the investors' right to submit disputes to the SADC tribunal qualified as an "*investment*" under Annex 1.
- The Court disagreed with the Tribunal that the dispute before the PCA Tribunal involved an "*obligation of the [State] in relation to*" the investors' right to submit disputes to the SADC tribunal.
- The Court disagreed that the investors had exhausted local remedies.

Comments

There are at least three take-away points for readers.

1. The first point concerns whether Lesotho had invoked the correct grounds to set aside the award. The Court, following a previous decision, held that Art 16(3) of the Model Law does not apply to an award that deals with the merits of the dispute, however marginally. Additionally, the Court rejected the investors' reliance on various textbooks for the proposition that Art 34(2)(a)(iii) of the Model Law is only applicable in cases concerning *excess* of jurisdiction (rather than the absence of any jurisdiction at all).

   The Court clarified that any argument concerning the existence and validity of the arbitration agreement belonged to the specific province of Art 34(2)(a)(i). On the other hand, any argument concerning the *scope* of the Tribunal's jurisdiction, as in the present case, belonged to the province of Art 34(2)(a)(iii).

2. The second point concerns the definition of "investment". Readers will immediately appreciate that the question of what qualifies as an "investment" has attracted much ink in foreign investment law jurisprudence. Typically, "investment" is defined to mean "*every kind of asset, including …*". In this case, the Court placed significant weight on how the definition of "investment" was narrower; an "investment" means "*the purchase, acquisition or establishment of productive and portfolio investment assets, and … includes …*".

   Readers will also recall the case of *White Industries Australia Limited v India*, where the Tribunal, citing *Mondev v USA*, *Chevron Corporation v Ecuador* and *Frontier Petroleum*

Services v Czech Republic, held that awards made by tribunals arising out of disputes concerning investments made by investors represent a "*continuation or transformation of the original investment*". Such awards "*constitute part of the investor's original investment*", being a crystallisation of its rights.

By dint of reasoning, the investors' argument in this case was that the mining leases created a bundle of rights which were protected, and that bundle included "*secondary rights to seek remedies*". The majority of the Tribunal in *Lesotho* accepted the investors' argument. However, the Court was not persuaded, reasoning that the purported "secondary right" was not reciprocal with the investors' contractual obligations under the mining leases; the investors' right of recourse to the SADC Tribunal arose much later in 2001 when the Protocol on Tribunal in the SADC entered into force.

Yet, at the same time, the Court observed that it does not matter whether an "investment" arose before or after the entry into force of Annex 1 to the Protocol. If that were the case, it is suggested here that, even if the investors' right of recourse to the SADC Tribunal arose only in 2001, that would not *ipso facto* preclude that "secondary right" from forming part of the bundle of rights, that would, in turn, qualify as an "investment" for the purpose of the Annex 1 to the Protocol.

3. The third point concerns the exhaustion of local remedies. Applying Articles 14 and 15 of the ILC Draft Articles on Diplomatic Protection on the basis that they are reflective of customary international law, the Court held that the local remedies to be exhausted must be reasonably available to provide effective redress. In the Court's view, whether local remedies have been exhausted ought to be referenced with reference to the shuttering dispute, and not the underlying expropriation claim.

The Court accepted that Lesotho's domestic courts recognise a tortious claim for pure economic loss, known as an "Aquilian" action. However, although Lesotho identified an Aquilian action as a potential remedy, in the words of the Court "*what is less clear or even unclear is whether such an [Aquilian] action is available in a case such as this"*.

Consequently, what is noteworthy for readers is that, this issue was ultimately decided based on the burden of proof. The investors bore the burden of establishing that they had exhausted local remedies. To discharge this burden, the investors had to, in the words of the Court, adduce "*evidence positively demonstrating*" that an Aquilian action is unavailable or ineffective with reference to the shuttering dispute. With the Court recording that the investors had acknowledged that no steps had been taken in Lesotho's legal system regarding the shuttering dispute, this would have been a tall order.

This entry was posted on Monday, September 18th, 2017 at 2:00 pm and is filed under Arbitration, International arbitration, Investment Arbitration, Singapore
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