

South Sudan bound by arbitration clause in agreement entered into by Sudan (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

Legal update: case report | Published on 08-Sep-2023 | Switzerland

In its *Decision 4A_575/2022*, the Swiss Supreme Court found that South Sudan is bound by an arbitration clause in a licence agreement which was entered into by Sudan prior to South Sudan's independence.

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The Swiss Supreme Court has found that South Sudan is bound by an arbitration clause in an agreement entered into by Sudan prior to South Sudan's independence.

In 2003, Sudan entered into a licence agreement for the operation of a telecommunications network in the south of the country. The licence agreement provided for disputes to be resolved by ICC arbitration in Switzerland and that the parties waived any right of appeal against an award.

South Sudan gained independence from Sudan in 2011. In 2018, following a disagreement about the project, the licensee and its parent company initiated arbitration proceedings against South Sudan, claiming nearly USD2.7 billion in damages. South Sudan challenged the jurisdiction of the sole arbitrator and disputed the validity of the licence agreement, its liability and the quantum of damages.

In a partial award, the arbitrator confirmed his jurisdiction over the dispute and found South Sudan partially liable for damages incurred by the claimants, finding that the licence agreement had been validly concluded and transferred to South Sudan.

South Sudan challenged the partial award before the Swiss Supreme Court. Its main argument was that the arbitration agreement had not been transferred to it and the arbitrator therefore lacked jurisdiction.

The Supreme Court found that it could hear the challenge even though the arbitration clause included a comprehensive waiver of the right to appeal, as the key question was whether South Sudan was bound by the arbitration clause. On that question, the Supreme Court held that it need not examine the principles of state succession under international law, given that in the present case, the sole arbitrator had relied on:

- An economic agreement between Sudan and South Sudan allocating assets and liabilities along territorial lines, resulting in the licence agreement being allocated to South Sudan.
- A ministerial decree of 2012 confirming that the licensee was accepted as a "duly licensed Telecommunications Operator within the Republic of South Sudan under the terms and conditions of [its] original license issued by the Republic of Sudan".
- The fact that South Sudan maintained a commercial relationship with the licensee, expressly stating it "honours the license agreement".

The Supreme Court upheld the arbitrator's finding that, in these circumstances, South Sudan was bound by the arbitration clause.

This decision highlights the Supreme Court's pragmatic approach when it comes to certain issues like the extension or transfer of an arbitration agreement to non-signatories.

Case: [Decision 4A_575/2022 \(Swiss Supreme Court\) \(7 August 2023\)](#).

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