

ENGLISH COURT DISMISSES JURISDICTION CHALLENGE TO ICC ARBITRATION AWARD FOR ALLEGED FAILURE TO COMPLY WITH AN "ESCALATION" CLAUSE, RULING IT AN ADMISSIBILITY ISSUE

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By: Peter R. Morton, Edward A. Brown-Humes

INTRODUCTION

In *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) the English Commercial Court dismissed a challenge to an ICC arbitration award made under section 67 of the Arbitration Act 1996 (the "Act"). The Court found that the basis of challenge, in particular alleged non-compliance with a pre-arbitration procedural requirement (under a multi-tiered dispute resolution / escalation clause), was one of admissibility to be determined by the arbitrators rather than an issue of jurisdiction falling within section 67 of the Act.

The Court also found that the claimant had in any event waived its rights under the escalation clause, and that non-compliance with the clause did not act as an absolute bar to commencing arbitration proceedings.

BACKGROUND

The parties had entered into a mining licence agreement (the "Agreement") in 2017, which was suspended and subsequently cancelled by Sierra Leone.

SL Mining commenced ICC arbitration proceedings (as claimant) against Sierra Leone (as respondent) in respect of that cancellation. It served its Notice of Dispute (the "Notice") on 14 July 2019, and the Request for Arbitration (RFA) followed on 30 August 2019.

However, the escalation clause in the Agreement required a three month period between service of the Notice and the commencement of arbitration proceedings for the parties to attempt to resolve the dispute by "amicable settlement" (the "Notice Period").

Sierra Leone contended that SL Mining could not serve its RFA until 14 October 2019 (following the expiration of the three month Notice Period), and accordingly, that the ICC tribunal lacked the jurisdiction to hear that dispute.

The Tribunal dismissed those arguments in its partial final award on jurisdiction of 6 March 2020 (the "Award"), and Sierra Leone challenged the Award in these High Court proceedings under section 67 of the Act.

JURISDICTION VS ADMISSIBILITY

Section 67 of the Act enables a party to arbitration proceedings to apply to the Court to determine issues of “substantive jurisdiction” only (i.e., not issues of admissibility).

The difference between these two concepts is a subtle one. Jurisdictional issues relate to whether the forum in question is the correct one. Examples of jurisdictional issues can be found in other sections of the Act¹, where the term “substantive jurisdiction” is defined to include:

whether there is a valid arbitration agreement;

whether the tribunal is properly constituted; and

what matters have been submitted to arbitration in accordance with the arbitration agreement.

Sierra Leone relied on (c) in the above list to argue that because SL Mining had not complied with the Notice Period, the matter had not been submitted to arbitration in accordance with the Agreement.

Conversely, admissibility issues relate to whether the claim should be heard at all, or whether the claim has been brought prematurely or too late. For instance, a question as to whether the claim is time-barred goes to its admissibility.

Having considered the authorities (including those from the United States and Singapore), the Court held that they “plainly overwhelmingly” all point “one way”—namely that, when it came to considering issues regarding compliance with pre-arbitration procedural requirements, the arbitral tribunal was better placed than the Court to do so. This was because these issues are capable of being resolved by the tribunal, and by opting for arbitration as the forum in the Agreement, it was assumed that the parties wanted a “one stop shop” for the resolution of any dispute.

Accordingly, the Court held that the claimant’s challenge under section 67 of the Act failed. The basis of challenge was a question of admissibility to be determined by the arbitrators rather than an issue of jurisdiction falling within section 67 of the Act.

CONSENT / WAIVER

Having filed its Notice on 14 July 2019, SL Mining then applied for the appointment of an emergency arbitrator under the ICC Rules. Those rules required that the RFA be filed within 10 days of that application. SL Mining proposed deferring service of its RFA until the Notice Period had expired. However, Sierra Leone insisted on holding SL Mining to the 10 day deadline.

Consequently, the Court found that the claimant had in any event waived its right to rely on the Notice Period.

OTHER FINDINGS

The judge further held that even if section 67 of the Act was engaged, and even if the claimant had not waived its right to the Notice Period, the challenge would still have failed.

This was because the purpose of the escalation clause in the Agreement was to give the parties a three month window, during which the parties could explore “amicable settlement”, but always subject to earlier proceedings if the objective of a settlement could not be achieved.

The question posed by the relevant clause was whether the parties “shall be unable to reach an amicable settlement” by 14 October. Thus, the question was not whether the parties were unable or had been unable, but whether objectively they would be able to reach an amicable settlement, given another six weeks.

The judge noted that the conduct of the parties toward one another had been “all very far from “amicable”” and there was a “massive gulf” between them. On any analysis, the parties would never have resolved the dispute within the Notice Period, and that non-compliance with the escalation clause was not an absolute bar to SL Mining commencing arbitration proceedings.

COMMENT

The judgment demonstrates the English Court's reluctance to find that an obligation to negotiate in an escalation clause constitutes an absolute bar to the commencement of arbitration proceedings.

The decision is noteworthy for its discussion of the distinction between issues of admissibility and jurisdiction. The judgment indicates that similar challenges under section 67 of the Act, based on an alleged lack of jurisdiction by reason of an alleged failure to comply with pre-arbitral steps specified in escalation clauses, are unlikely to be successful.

Parties intending to rely on the provisions of multi-tiered dispute resolution / escalation clauses must take care not to waive their rights granted by them.

FOOTNOTES

¹ Sections 82(1) and Section 30(1)

KEY CONTACTS



PETER R. MORTON
PARTNER

LONDON
+44.20.7360.8199
PETER.MORTON@KLGATES.COM

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