ARBITRATION & ADR - UNITED KINGDOM

Compliance with preconditions to arbitration a matter of admissibility, not jurisdiction

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Introduction

In its decision in *Sierra Leone v SL Mining Ltd*,(1) the High Court confirmed that alleged non-compliance with the provisions of a multi-tiered dispute resolution clause (in particular, the submission of claims to arbitration prior to the end of a prescribed period of negotiation) is exclusively a matter of admissibility for the arbitral tribunal and cannot lead to a successful jurisdictional challenge under Section 67 of the Arbitration Act 1996. This decision confirms the scope of a London-seated tribunal's substantive jurisdiction under Section 30(1) of the Arbitration Act. It also confirms that initiation of arbitration proceedings, in apparent breach of a mandatory multi-tiered dispute resolution clause, may be valid where settlement of the dispute is deemed impossible within the remaining prescribed period.

Legal background

Parties to an arbitration seated in England and Wales may apply to the courts under Section 67 of the Arbitration Act to challenge an award of an arbitral tribunal on the grounds that the tribunal lacked substantive jurisdiction. Such a challenge can result in the setting aside of the award if the tribunal is held to have lacked jurisdiction. As such, the threshold for successful challenges is necessarily burdensome and applications are rarely brought (and even fewer are successful). In 2018 and 2019 the courts heard only four Section 67 challenges, all of which were rejected.

Section 30(1) of the Arbitration Act provides the basis for a tribunal's jurisdiction in a London-seated arbitration, granting it the power to issue an award as to:

- 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.

Prior to the *SL Mining* decision, the English authorities were somewhat unclear as to the effect of an obligation to enter into negotiations prior to arbitration on the jurisdiction of a tribunal over the matters submitted to arbitration. This potentially stemmed from a lack of clarity on the interpretation of Section 30(1)(c) of the Arbitration Act.

In 2020 the High Court in *Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development*(2) ruled that Section 30(1)(c) of the Arbitration Act provided jurisdiction to a tribunal to decide on the scope of the arbitration agreement and thus what disputes could be referred to arbitration.(3) It did not limit a tribunal's ability to decide its own substantive jurisdiction on any claims submitted to it by the parties. On that basis, the question of whether a claim was validly submitted, including by reference to a multi-tiered dispute resolution clause or obligatory period of negotiation, appears to be one of admissibility rather than substantive jurisdiction(4) and therefore falls outside the permissible scope of a Section 67 challenge.

However, there remained a degree of tension between the general principles espoused in the *Obrascon* decision and several prior Section 67 challenges for failure to comply with the time requirements of a multi-tiered dispute resolution clause. Both *Emirates Trading Agency LLC v Prime Mineral Exports*(5) and *Tang v Grant*

Thornton International(6) had considered the enforceability of such provisions as part of Section 67 challenges. In each case, the court had reached a decision on the Section 67 challenge without submissions or analysis on the application and interpretation of Section 30(1)(c) of the Arbitration Act. This left the issue ripe for re-examination after *Obrascon*.

Facts

The dispute arose from Sierra Leone's cancellation of a mining licence agreement. Clauses 6.9(b) and 6.9(c) of the governing contractual agreement established a multi-tiered dispute resolution clause obliging the parties to first "endeavour to reach an amicable settlement" and then referring the dispute to arbitration "in the event the parties shall be unable to reach an amicable settlement within a period of 3 (three) months".

The notice of dispute was served on 14 July 2019. On 30 August 2019, still six weeks from the expiry of the three-month period for negotiations, SL Mining served the request for arbitration in accordance with the ruling of an emergency arbitrator (and after it had proposed deferring service of the request until the expiry of the period). Sierra Leone challenged the jurisdiction of the tribunal on the grounds that arbitration proceedings had been commenced prematurely. The tribunal rejected this challenge and issued an award in SL Mining's favour. Sierra Leone subsequently brought a jurisdictional challenge before the High Court under Section 67 of the Arbitration Act.

Decision

Was the prematurity of the request a question of jurisdiction and within the scope of Section 67 of the Arbitration Act?

The judge agreed with the tribunal's analysis that prematurity of a claim is an issue of admissibility rather than of jurisdiction. It was common ground between the parties that a challenge under Section 67 of the Arbitration Act may be brought only under the latter ground of jurisdiction, specifically where there is no clear substantive jurisdiction under Section 30(1) of the Arbitration Act.(7)

The judge approved of Mr Justice Butcher's decisions in *Obrascon* and *Tatneft*, particularly as they related to the interpretation of Section 30(1)(c) of the Arbitration Act. He concluded that the subsection applies to "identify what matters have been submitted to arbitration"(8) and was not intended to determine whether a "claim is arbitrable... which is best decided by the Arbitrators".(9)

The court departed from the decision in *Emirates Trading* on the basis that in that case, Section 67 jurisdiction had been assumed and there had been no examination of the later distinction (confirmed in *Obrascon*) between the concepts of admissibility and jurisdiction (or, indeed, the definition of a tribunal's jurisdiction under Section 30(1)(c) of the Arbitration Act). In any event, the decision in *Emirates Trading* to uphold a Section 67 challenge by reference to a time condition precedent had been the subject of robust criticism and the court deemed it non-binding.(10)

In considering the question of whether pre-arbitral procedural requirements may be viewed as a jurisdictional obstacle, and not merely a question of admissibility, the court emphasised the unified approach to this issue taken by leading academic and practising commentators in the field of international arbitration.(11)

The judge explicitly referred to remarks in one of the leading commentaries that a contractual clause concerning:

> *[procedural] requirements would presumptively be both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court)... Similarly, the arbitral tribunal's resolution of such issues would generally be subject to only minimal judicial review.*(12)

More specifically (and in a welcome display of consistency in the approaches of national courts to international arbitration issues), the judge also quoted two decisions of the US Supreme Court(13) and the Singapore Court of Appeal,(14) both of which ruled that the alleged prematurity of submitted claims was a matter for the tribunal, and that "whether it is appropriate for the tribunal to hear [the claim]" does not pose a question of substantive jurisdiction.(15)

Unsurprisingly, the court couched its analysis in the wider context of the 'hands off' approach to arbitration evidenced in the UK Supreme Court's decision in *Fiona Trust v Privalov*.(16) This confirms the reluctance of the English and Welsh courts to find that a tribunal lacks jurisdiction under Section 67 of the Arbitration Act, especially in the absence of an express contractual basis for doing so.

Relevance of consent or waiver in establishing tribunal's jurisdiction

Although not strictly necessary following the court's broad affirmation of the tribunal's jurisdiction, the judge also found, *obiter*, that Sierra Leone had waived its right to assert non-compliance with the dispute resolution

clause as a result of its preliminary submission to the jurisdiction of an emergency arbitrator.(17) In its pleadings to the emergency arbitrator, and later in the request for arbitration itself, SL Mining offered to stay proceedings until the expiry of the three-month negotiation period. However, Sierra Leone demanded that the request be served immediately and later refused to address SL Mining's offer of a stay.

The judgment is clear that regardless of Sierra Leone's arguments at the substantive stage of proceedings, such conduct constituted effective consent to service of the request and, consequently, waiver of any potential rights to enforce the three-month negotiation provision.(18)

Construction of Clause 6.9(c) of agreement

The court reviewed the dispute resolution clause itself and considered whether it effectively invalidated SL Mining's initiation of the arbitration prior to the end of the three-month negotiation period. This analysis appears to have been conducted solely for the purpose of fulfilling the court's obligations under Section 67 of the Arbitration Act in the event that Sierra Leone had validly brought a challenge under that section.

Sierra Leone was once more unsuccessful. Sierra Leone submitted that the status of the parties' efforts to reach an amicable settlement of the dispute was irrelevant and that proceedings could not be initiated until the end of the three-month period in any event. The court disagreed, siding with the tribunal's opinion that on a proper construction of the clause, the three-month period was not an independent obligation but rather conditional on continuing efforts to reach an amicable settlement.(19)

As such, the obligation was inextricably linked to the express objective of the clause (amicable settlement) and would not be enforced where negotiations were at an impasse and settlement was no longer possible in the remaining time available.(20)

Comment

The court's clarification that issues of admissibility (including the treatment of pre-arbitral contractual requirements) lie exclusively within the remit of an arbitral tribunal will be welcomed by parties agreeing to arbitrate their disputes in England and Wales.

Perhaps more importantly, English law is now clearly aligned with the prevailing position internationally (including in those jurisdictions adopting the United Nations Commission on International Trade Law Model Law in national arbitration legislation) that a tribunal should decide on the admissibility of all claims before it, with narrow grounds for interference by national courts.

Parties should note that a tribunal may:

- deem a claim inadmissible for failure to comply with relevant preconditions in a multi-tiered dispute resolution clause;
- stay the proceedings for the prescribed negotiation period; or
- apply cost sanctions.

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Endnotes

(1) *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm).

(2) [2020] EWHC 1643 (Comm).

(3) *Id* at [18] and [19].

(4) See *PAO Tatneft v Ukraine* [2018] 1 WLR 5847 at [97]:

> *Issues of jurisdiction go to the existence or otherwise of a tribunal's power to judge the merits of a dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it.*

Quoted with approval by Sir Michael Burton in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) at [11].

(5) *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145.

(6) *Wah (aka Tang) v Grant Thornton International (GTILL) Ltd* [2012] EWHC 3198.

(7) *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) at [8].

(8) *Id* at [11].

(9) *Id* at [18].

(10) *Id* at [12] and [13]; see Flannery, Merkin, *Arbitration International* (Vol 1, No 1) (2015), pp 102-106; Flannery, Merkin, *Arbitration Act 1996* (6th Ed, 2019) at 30.3, 30.13(vii) and 30.13.2; and Sir George Leggatt, lecture at Aston University, 19 October 2018.

(11) *Id* at [14].

(12) *Id* at [14]; see Born, *International Commercial Arbitration* (3rd Ed, 2021), Chapter 5 at [110 ff].

(13) *BG Group v Republic of Argentina* (2013) 134 S.Ct.1198.

(14) *BBA v BAZ* [2020] 2 SLR 453 and *BTN v BTP* [2020] SGCA 105.

(15) *Id* at [15].

(16) *Id* at [20]; *Fiona Trust v Privalov* [2007] 1 AER 951 at [10].

(17) *Id* at [23] and [25] to [27].

(18) *Id* at [28].

(19) *Id* at [30] and [32].

(20) *Id* at [35] to [36] and at [37]: "As I put it in argument, it seemed to me clear that as at 30 August there was not a cat's chance in hell of an amicable settlement by 14 October."

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