International Arbitration Alert

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The Importance of Pre-Arbitral Steps: The Latest English High Court Approach

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The Fundamental Problem

International arbitration is facing continued (if not increased) problems stemming from multitier arbitration clauses. What should happen when one party has not complied with a pre-arbitral step but nonetheless commenced arbitral proceedings? Typically, the parties have a satellite dispute: on one side, whether the commencement of the arbitration is void thus depriving the arbitral tribunal of all jurisdiction due to the non-compliance and on the other side, whether such non-compliance is an issue of admissibility that falls within the arbitral tribunal's remit to address by way of procedural modification (for example, by ordering a stay of proceedings pending completion of a negotiation period).

Legal jurisprudence is split on whether a failure to comply with a multitier resolution provision is an issue of jurisdiction (depriving the tribunal of the ability to hear the claim entirely) or admissibility (relating to a lack of ripeness of the dispute due to a failure to follow a pre-agreed procedure). The weight of authority in the arbitral community leans in favor of a failure to follow a multitier clause as being characterized as an issue of admissibility that should be dealt with by the arbitral tribunal. Recently, the authors have advocated that, due to the divergent views taken under national laws, the arbitral tribunal's jurisdiction to decide on issues of compliance with multitier dispute resolution clauses should be expressly stated in the arbitral rules (click here to access the Article). This would elevate the issue to one of party-agreement and alleviate need for national court intervention. There are three key points:

- Multitier dispute resolution clauses are complex both in their operation and in legal effectiveness. This is especially so in International Construction Arbitration where typically there are many discrete disputes travelling through different pre-arbitral steps (including DABs).
- The prevailing judicial view is that a failure to follow a pre-arbitral step is not fatal to the claim in Arbitration. Courts and commentators prefer the notion that the arbitral tribunal has threshold jurisdiction and can thus work out what needs to be done. This normative proposition is not always feasible in practice where discrete claims are comingled and at differing steps in the pre-arbitral process.

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- Clarity creates certainty. A failure to follow a multitier clause is an issue of admissibility that should be dealt with by an arbitral tribunal. Institutional arbitral rules should be amended to make this express. Parties should also consider making this clear in arbitration agreements.

Republic of Sierra Leone v. SL Mining Limited

The recent English High Court case of *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm) discussed as a matter of first impression whether noncompliance with a multitier dispute resolution provision gives rise to a right to challenge an arbitral award under Section 67 of the English Arbitration Act. The English High Court found that failure to adhere to multitier dispute resolution provisions is an issue of admissibility, not jurisdiction (and therefore not open to challenge under Section 67). Further, the Court found that on the facts of the case, the claimant had waived any challenge it may have possessed to the jurisdiction of the arbitral tribunal.

The arbitration clause at issue provided:

> "b) The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them in respect to the execution performance and interpretation or termination of this Agreement, and in respect of the rights and obligations of the parties deriving therefrom.
>
> c) In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with the International Rules of Conciliation and Arbitration of the… ICC."

SL Mining filed a notice of dispute triggering the period for settlement negotiations on July 14, 2019. Shortly thereafter, SL Mining sought Emergency Relief under the International Chamber of Commerce (ICC) Rules on August 20, 2019, by filing an Application for Emergency Measures. SL Mining filed its Request for Arbitration on August 30, 2019, in accordance with the ICC Rules[1] only six weeks after starting the period for negotiations. However, during the course of the Emergency Arbitration procedure, counsel for SL Mining had sought relief from the provision of the ICC Emergency Arbitration Rules requiring a Request for Arbitration be filed within 10 days of the Application for Emergency Arbitration. Instead, counsel for SL Mining suggested that the parties agree to filing the Request for Arbitration on October 14, 2019, at the end of the negotiation period. Counsel for Sierra Leone rejected the offer to file the Request in October, insisting that it be filed in compliance with the ICC Rules not more than 10 days from the application for Emergency Arbitration.

Sierra Leone subsequently challenged the jurisdiction of the tribunal for failure to follow the multitier dispute resolution clause. The arbitral tribunal rendered a Partial Final Award rejecting the jurisdictional challenge by Sierra Leone. The arbitral tribunal considered that the failure to comply with the multitier dispute resolution step was ultimately a question of admissibility and not of threshold jurisdiction.[2] It was

theretofore open to the tribunal to address the consequences of any noncompliance. This finding was in keeping with the majority of academic texts on the issue.

Sierra Leone appealed the Partial Final Award on the basis of Section 67 of the English Arbitration Act, which allows challenges to "substantive jurisdiction." The High Court's analysis was framed by the understanding that Section 67 allows challenges to an arbitral tribunal's "substantive jurisdiction," which is defined in Section 82 (which itself refers back to Section 30 of the Act).[3] Section 30 provides in relevant part:

> Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –
>
> (a) whether there is a valid arbitration agreement,
>
> (b) whether the tribunal is properly constituted, and
>
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

Sierra Leone framed its challenge under Section 67 by arguing that the terms of Section 30(c) were open to an interpretation that any case not submitted in compliance with the multitier dispute resolution clause was not "submitted to arbitration in accordance with the arbitration agreement" and therefore disturbed the arbitral tribunal's jurisdiction.[4]

The High Court rejected Sierra Leone's argument. It began by reviewing past cases that had sparsely discussed differences between jurisdiction and admissibility.[5] The Court then took a survey of academic commentary which confirmed that noncompliance with multitier dispute resolution provisions does not amount to questions of the tribunal's threshold or substantive jurisdiction, but only to the admissibility of the claims.[6] The Court also took note of other cases in the United States[7] and Singapore,[8] which confirmed the position. The Court ultimately found:

> The issue for [Section 30](c) is, in my judgment, whether an issue is arbitrable. The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators.[9]

Finally, the court found that based on the precise facts, in any event, Sierra Leone consented to the Request for Arbitration being served earlier than required under the dispute resolution clause by its insistence on its filing on August 30, 2019, in accordance with the ICC Rules on Emergency Arbitration.[10] It also found, even in the absence of waiver, that the three-month period was objectively unable to be met such that there was no failure to comply with clause 6.9(c) of the contract.[11]

Renewed Call for Reform

While the position under English Law, Singaporean Law and in the United States is relatively clear that issues of noncompliance with multitier dispute resolution clauses should be decided by the arbitral tribunal, other jurisdictions take different views. As the authors have previously advocated, the most legally pure way to move the issue

from the competence of the courts to arbitral tribunals is to have the parties so agree by incorporating arbitral rules that make the point explicit.[12] Until such reform is enacted, parties to international arbitrations face uncertain resolution to the issue of noncompliance with multitier arbitration clauses. Much may depend on the jurisdiction applicable to the supervising court.

[1] 2017 ICC Rules, Appendix V – Emergency Arbitrator Rules, Art. 1(6).

[2] Partial Final Award, at para. 110 ("[I]f reaching the end of the settlement period is to be viewed as a condition precedent at all, therefore, it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction.").

[3] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 9.

[4] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 10.

[5] In particular: *Obrascon Huarte Lain S.A. v. Qatar Foundation for Education* (2020) EWHC 1643 (Comm), *PAO Tatneft v. Ukraine* (2018) 1 WLR 5947; *Republic of Korea v. Dayanni* (2020) 2 AER (Comm) 672, *Fiona Trust v. Privalov* (2007) 1 AER 951 at (10), *Cable & Wireless PLC v. IBM* (UK) (2002) 2 AER (Comm) 1041, *Dallah Real Estate and Tourism Holding Co v. Pakistan* (2011) 1 AC 763), *Emirates Trading Agency LLC v. Prime Mineral Exports Pte Ltd* (2015) 1 WLR 1145 and *Tang v. Grant Thornton International Limited* (2013) 1 AER (Comm) 1226.

[6] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 14.

[7] *BG Group v. Republic of Argentina*, 134 S.Ct. 1198 (2002).

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

[9] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 18. The Court confirmed its reasoning in paragraph 20 ("The Arbitrators are in any event, in my judgment, in the best position to decide questions relating to whether the conditions precedent has been satisfied, consistent with the views of Lord Hoffmann in Fiona Trust referred to in paragraph 8 above.").

[10] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 28.

[11] *Republic of Sierra Leone v. SL Mining Limited* (2021) EWHC 286 (Comm), at para. 37.

[12] Hamish Lal, Brendan Casey, Josephine Kaiding and Léa Defranchi, "Multi-Tiered Dispute Resolution Clauses in International Arbitration – The Need for Coherence" 38(4) *ASA Bulletin* 796 (Kluwer 2020).

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