King & Spalding
Client Alert

FEBRUARY 19, 2021

For more information, contact:

Thomas K Sprange QC
+44 20 7551 7529
t.sprange@kslaw.com

John Savage QC
+44 20 7551 2157
j.savage@kslaw.com

Kabir Bhalla
+44 20 7551 2178
k.bhalla@kslaw.com

King & Spalding

London
LLP
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500

English High Court Rules That Compliance With Pre-Arbitration Negotiation Periods Incapable of Challenge on Jurisdictional Grounds

Republic of Sierra Leone v SL Mining

The English High Court (Sir Michael Burton GBE) has handed down a significant judgment dismissing a challenge to a Tribunal's jurisdiction under section 67 of the Arbitration Act 1996 - *Republic of Sierra Leone v SL Mining* [2021] EWHC 286 (Comm). King & Spalding represented SL Mining before the High Court and continues to represent it in the ongoing underlying ICC Arbitration, and in an ICSID Arbitration. Thomas K. Sprange QC and Kabir Bhalla appeared with Ali Malek QC in the High Court, instructed by John Savage QC.

The decision is the first detailed consideration in English law of the distinction between jurisdiction and admissibility in a jurisdiction challenge under section 67 of the Arbitration Act 1996. It is the first decision to find that compliance with a condition precedent to arbitration (in the form of a pre-arbitration negotiation requirement under an arbitration clause) is a question of admissibility that must be challenged before the Tribunal, and not before the English Court by way of a section 67 application. Sir Michael Burton GBE declined to follow long-criticised first instance decisions, such as Teare J's decision in *Emirates Trading Agency LLC v Prime Minister Exports Ltd* [2015] 1 WLR 1145, in which the threshold admissibility point was not argued, and it was assumed (wrongly) that the point was a question of jurisdiction under section 67. The decision is not being appealed, so now stands as the key authority on the admissibility-jurisdiction distinction under the Arbitration Act 1996.

The dispute relates to the suspension, and then purported cancellation, of SL Mining's Mining Licence to mine iron ore at the Marampa Project by the Government of Sierra Leone. The arbitration clause imposed a

requirement that the parties "*in good faith endeavour to reach an amicable settlement*" of the dispute, and that "*in the event that the parties shall be unable to reach an amicable settlement within a period of 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 three arbitrators*" [under the ICC Rules 2007]. SL Mining filed a Notice but commenced an Emergency Arbitration halfway into the negotiation period, and obtained emergency relief. It then filed a Request for Arbitration, again short of the negotiation deadline, in part because it took the view that the further negotiations would be futile, but also because the Emergency Arbitrator provisions of the ICC Rules required a Request to be filed within 10 days.

The English Court substantially upheld the Tribunal's own reasoning as to jurisdiction, and held as follows:

On the critical admissibility/jurisdiction threshold question, Sir Michael Burton confirmed that compliance with a pre-arbitration negotiation period is a question of admissibility for the Tribunal, not a question of jurisdiction for the Court under section 67. As a matter of construction, section 30(1)(c) of the Arbitration Act, which sets out the matters that are questions of "substantive jurisdiction" susceptible to review under section 67, relates to whether or not a claim could be brought to arbitration, and not "*whether a claim should not be heard by arbitrators at all, or at least not yet*" - those are questions of admissibility. In a wide-ranging judgment, Sir Michael Burton relied on two recent decisions of Butcher J that referenced the admissibility-jurisdiction distinction in the last year: *Obrascon Huarte Lain SA v Qatar Foundation for Education* [2020] EWHC 1643 (Comm) and *Republic of Korea v Dayanni* [2020] 2 All ER (Comm) 672, as well as *PAO Tatneft v Ukraine* [2018] 1 WLR 5947. The Judge also drew inspiration from Commonwealth decisions, including two recent (again, in the last year) decisions of the Singapore Court of Appeal (*BBA v BAZ* [2020] 2 SLR 453 and *BTN v BTP* [2020] SGCA 105), decisions of the US Supreme Court (Breyer J in *BG Group v Republic of Argentina* 134 S. Ct. 1198 (2002)), and authoritative commentary from leading international arbitration authorities, such as Jan Paulsson and Gary Born.

The Judge further found that the section 67 application would have been dismissed in any event, because:

(i) Sierra Leone consented to (alternatively waived its right to object to) the filing of the Request for Arbitration, because it insisted that SL Mining comply with its obligation to file it within 10 days of commencing the Emergency Arbitrator procedure under the ICC Rules.

(ii) On the wording of the arbitration clause, the negotiation period was not an "*absolute bar*" to bringing proceedings before the expiry of three months, and did not prevent the parties filing a Request for Arbitration before then "*if the objective of amicable settlement could not be achieved". This was the case here: "there was not a cat's chance in hell of an amicable settlement*" between the parties.

The decision has far-reaching consequences. Parties seeking to challenge an award on jurisdictional grounds under section 67 of the Arbitration Act must carefully evaluate whether the question is one of admissibility (and so only for the Tribunal), or jurisdiction (and so susceptible to review by the English Court). This will depend on the proper interpretation of section 30(1) of the Arbitration Act 1996, on which this judgment gives useful guidance. The issue of compliance with pre-arbitration negotiation periods, at least, is one for the Tribunal to decide.

A link to the decision can be found here: https://www.bailii.org/ew/cases/EWHC/Comm/2021/286.html.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

ABU DHABI	CHARLOTTE	GENEVA	MOSCOW	RIYADH	TOKYO
ATLANTA	CHICAGO	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
AUSTIN	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
BRUSSELS	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE	