English Court rules that p arbitration are not matte

By Simon Chapman, Briana Young and Charlotte Benton

Introduction

The English High Court has declined to set aside an arbitral award, despite the fact that the Defendant had allegedly failed to comply with certain pre-conditions to arbitration agreed in a multi-tiered dispute resolution clause.

The Court said that the alleged non-compliance was a question of admissibility of the claim before the tribunal and not of the tribunal's jurisdiction. The matter was best determined by the arbitrators and the award was not amenable to challenge under Section 67 of the English Arbitration Act 1996 (**Act**).

The decision provides welcome certainty that arbitration agreements will be upheld, even where there are questions regarding compliance with pre-conditions to arbitration, such as mandated cooling off or negotiation periods.

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

Background

The underlying dispute concerned the cancellation of a large-scale mining licence. The licence contained a multi-tiered dispute resolution clause, in which the parties agreed to attempt to amicably settle disputes before commencing arbitration:

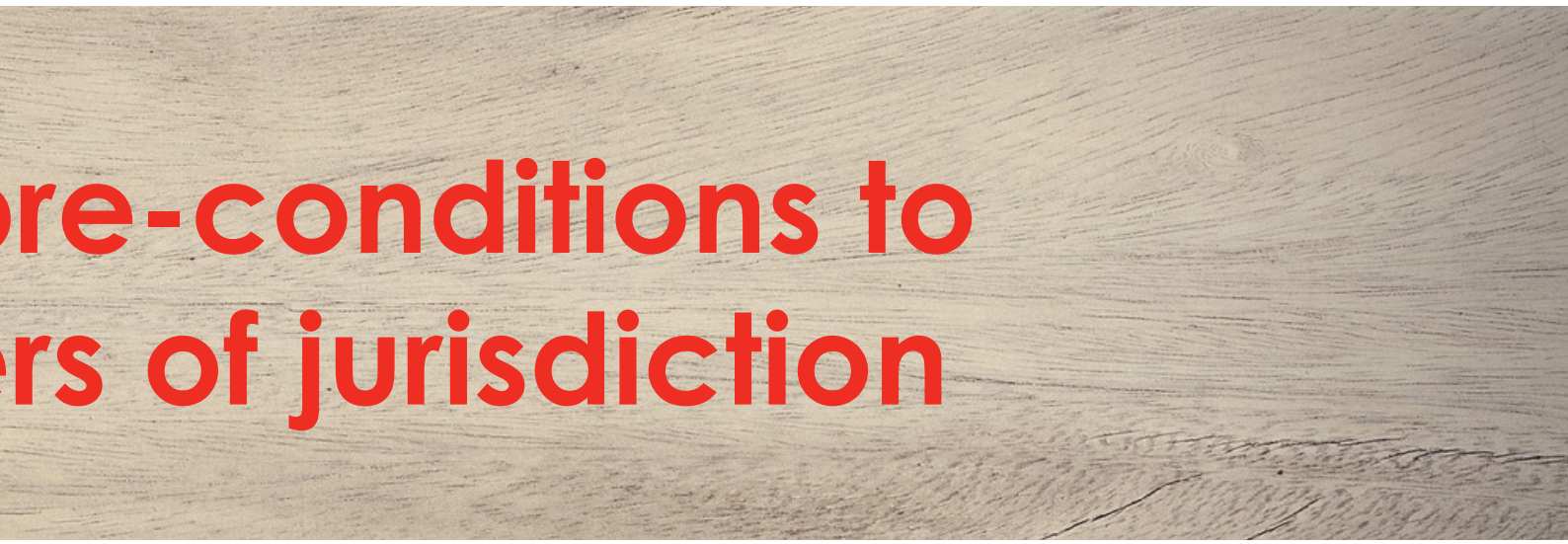
> "The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them in respect to the execution performance and interpretation or termination of this Agreement, and in respect of the rights and obligations of the parties deriving therefrom.
>
> 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…"

The Defendant served a Notice of Dispute on 14 July 2019 and its Request for Arbitration followed some six weeks later, on 30 August 2019.

The Claimant applied to set aside the award under Section 67 of the Act, which provides that an application may be made to Court to challenge any award as to its "*substantive jurisdiction*". This is defined under Section 82(1) as referring to the matters specified in Section 30(1) of the Act.

Section 30(1) states that unless otherwise agreed by the parties, a 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*."

The Claimant relied on Section 30(1)(c), submitting that because proceedings could not be commenced until the three month window for negotiations had lapsed, the dispute had not been submitted to arbitration in accordance with the parties' arbitration agreement.



re-conditions to rs of jurisdiction

It was common ground between the parties that there is a distinction between a challenge that a claim is not admissible before the tribunal and a challenge that the tribunal had no jurisdiction to hear the claim. Only the latter challenge is available to a party under Section 67 of the Act. The distinction had been recognised by the Court in an earlier case in which it was said that: "*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*."

Decision

The Court found that leading commentary and international authorities all lean "*one way*" in saying that pre-conditions to arbitration are questions of admissibility, not jurisdiction.

The Court cited Gary Born's *International Commercial Arbitration* (3rd edn. 2021), in which Born said that the best approach is to presume, "*absent contrary evidence*", that pre-arbitration procedural requirements are not jurisdictional, but matters better determined by the arbitrators. The rationale for this approach engages important public policy issues:

> "…parties can be assumed to desire a single, centralised forum (a 'one-stop shop') for resolution of their disputes, particularly those disputes regarding the procedural aspects of their dispute resolution mechanism.… The more objective, efficient and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties' dispute resolution mechanism."

The Court was also persuaded by decisions in other leading international arbitration venues. The United States Supreme Court in *BG Group v Republic of Argentina* 134 S.Ct.1198 rejected a challenge to an arbitral award on the basis that a mandatory pre-condition to arbitration, namely a need to exhaust remedies before a local court, had not been complied with. The Supreme Court held that the question of compliance with pre-arbitration procedures was a matter for the arbitral tribunal to decide and not a question of jurisdiction to be reviewed by the courts.

The Singapore Court of Appeal in BBA v BAZ [2020] 2 SLR 453 and BTN v BTP [2020] SGCA 105 has also recognised the distinction between jurisdiction and admissibility. In the latter case, whether a claim was time barred was held to be a question of admissibility, not a question of jurisdiction.

As a matter of English law, the key question was whether the alleged prematurity of the proceedings properly fell within Section 30(1)(c) of the Act. The Court rejected the Claimant's submission that this depends on the construction of the dispute resolution clause at hand, on the basis that there is no difference between a clause which provides: "*No arbitration shall be brought unless X*" and another which says: "*In the event of X the parties may arbitrate*".

The Court found that Section 30(1)(c) of the Act has been applied so as to identify what matters have been submitted to arbitration, rather than whether or not matters have been submitted to arbitration. It concluded that if an issue relates to whether a claim could be brought to arbitration (i.e. whether arbitration is the appropriate forum), the issue is ordinarily one of jurisdiction and subject to further recourse under Section 67 of the Act. Whereas if it relates to whether a claim has been

brought too early, the issue is one of admissibility and that is best decided by the arbitrators.

In reaching its conclusion, the Court distinguished its previous decisions in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) (see our blog post here) and *Wah (aka Tang) v Grant Thornton International (GTIIL) Ltd* [2012] EWHC 3198 (blog post here). In both cases, a challenge under Section 67 of the Act was entertained in circumstances where there was allegedly a failure to comply with a multi-tiered dispute resolution clause. However, the distinction between admissibility and jurisdiction had not been argued before the Court in either case.

Comment

The English High Court's decision is of great practical and commercial significance, engaging fundamental policy considerations, including upholding arbitration agreements and promoting cost-effective and efficient resolution of disputes.

These policy issues are likely to be persuasive in other arbitration-friendly jurisdictions where this question may arise. Like the Act, many of its international counterparts limit the circumstances in which national courts can intervene in arbitration. In addition, although the Act is bespoke legislation and England and Wales is not an UNCITRAL Model Law jurisdiction, the distinction between matters of admissibility and jurisdiction has been recognised in Singapore, a Model Law jurisdiction.

Parties to disputes, however, remain best advised to comply with multi-tiered dispute resolution clauses where possible. Such clauses will usually be enforceable if they are drafted with a sufficient degree of certainty. Arbitral tribunals retain broad discretion to stay proceedings for a mandated cooling-off or negotiation period, or to apply cost sanctions on a non-compliant party.

It would also be open to a tribunal to rule that a premature claim is not admissible before it. In these circumstances, the parties may have to appoint a new tribunal after they have complied with the relevant pre-conditions, resulting in delay and unnecessary extra cost.

About the authors

HERBERT SMITH FREEHILLS

Briana Young

Briana is a Professional Support Consultant and practice manager in the Greater China arbitration practice.

Simon Chapman

Simon is the Regional Head of Dispute Resolution in Asia and an international arbitration specialist focusing on cross-border disputes.

Charlotte Benton

Charlotte advises banks and corporates on complex disputes and contentious regulatory matters.