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Multi-Tiered Dispute Resolution Clauses: Pre-conditions To Commencing Arbitration, A Question of Jurisdiction Or Admissibility

Contact Persons:

Datuk D P Naban
Senior Partner

+603 6209 5405
naban@rdslawpartners.com

Nagarajah Muttiah
Partner

+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner

+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner

+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner

+603 6209 5400
rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate

+603 6209 5400
kenny@rdslawpartners.com

Shaun Tan Cheng Hong
Senior Associate

+603 6209 5400
shaun@rdslawpartners.com

Dispute resolution clauses typically contain condition precedents prior to the initiation of adversarial dispute resolution proceedings such as arbitration or court litigation. The clauses provide for different stages of alternative dispute resolution such as negotiation or mediation before a party can commence arbitration or court proceedings.

Such clauses aim to narrow or resolve the dispute between parties in a time and cost-effective manner, in a non-adversarial setting which would enable parties to preserve their commercial relationship.

Historically, the courts have taken the position that multi-tiered dispute resolution clauses must be strictly adhered to, failing which, an arbitrator could not assume jurisdiction to arbitrate a dispute. The English High Court in *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 recently discussed the compliance with condition precedents to arbitration.

Facts

This case concerned an arbitration award wherein the arbitrators concluded that they had jurisdiction in respect of claims in an arbitration regarding the suspension and subsequent cancellation of a large-scale mining license granted on 29.3.2017 and a license agreement dated 6.12.2017, for a period of 25 years.

The mining license agreement contained a multi-tiered dispute resolution clause, which states as follows:

“6.9 Interpretation and Arbitration

- a) *Except as may be otherwise herein expressly provided, this Agreement shall be construed, and the rights of [the*

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Claimant and the Defendant] hereunder shall be determined, according to the Law Sierra Leone.

- 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 of 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....*
- d) *In the event of any notified dispute hereunder, both parties agree to continue to perform their respective obligations hereunder until the dispute has been resolves in the manner described above.”*

SL Mining Ltd, served a Notice of Dispute on the Republic of Sierra Leone on 14.7.2019. Thereafter, SL Mining Ltd served its Request for Arbitration (RFA) on 30.8.2019.

The Republic of Sierra Leone applied to set aside the arbitration award under Section 67 of the English Arbitration Act 1996, which provides for an application to challenge the “*substantive jurisdiction*” of an arbitration award.

Issues Before The High Court

The main issues in this case were:

1. Is the challenge to the alleged prematurity of the RFA one to jurisdiction of the Arbitrators and thus within Section 67 of the English Arbitration Act 1996?

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2. If necessary, was there consent by the Republic of Sierra Leone to the issue of the RFA or waiver of the condition precedent?
3. If necessary, what is the proper construction of Clause 6.9(c)?; and
4. Upon the proper construction of Clause 6.9(c), was there breach/non-compliance with it by virtue of SL Mining Ltd's issuance of the RFA on 30.8.2020?

Determination

The English High Court held that:

Issue 1

1. Non-compliance with a multi-tiered dispute resolution clause is an issue of admissibility (i.e., whether the claim is premature/whether the claim has been presented too early) rather than an issue of jurisdiction (i.e., whether the claim is arbitrable/whether a claim can be brought to arbitration).
2. Whether a party has complied with a multi-tiered dispute resolution provision is a procedural matter which falls within the purview of an arbitral tribunal rather than a court.
3. Non-compliance with a multi-tiered dispute resolution provision does not give rise to a basis to challenge the jurisdiction of an arbitral tribunal before the English court under Section 67 of the English Arbitration Act 1996.

Issue 2

4. By insisting on service of the RFA on 30.8.2020, The Republic of Sierra Leone had consented to such service and the commencement of the arbitration. Consequently, the Republic of Sierra Leone had waived the condition precedent to commencing arbitration.

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R Rishi

Partner

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Kenny Lam Kian Yip

Senior Associate

+603 6209 5400

kenny@rdslawpartners.com

Shaun Tan Cheng Hong

Senior Associate

+603 6209 5400

shaun@rdslawpartners.com



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Issues 3 and 4

5. On the proper construction of Clause 6.9(c), the question is not whether the parties 'are' unable or certainly 'have been' unable, but whether objectively they will be able to reach an amicable settlement, given another 6 weeks. The parties would be unable to reach an amicable settlement and there was therefore no failure to comply with Clause 6.9(c).

Conclusion

This judgment, which cites with approval, many academic authorities, clarifies that questions of compliance with multi-tiered dispute resolution provisions will be determined by an arbitral tribunal and the English court will not interfere with that determination. This judgment brings English law in line with the position in the United States (*BG Group v Argentina* 572 U.S. 25 and Singapore (*BBA v BAZ* [2020] 2 SLR 453).

It remains to be seen whether courts in Malaysia would follow suit, as the positions in Singapore and the United Kingdom would be persuasive in Malaysia. Currently, the position in Malaysia is that an arbitrator cannot assume jurisdiction of a dispute until the condition precedents specified in a multi-tiered dispute resolution clause have been fulfilled.

Authored by Shaun Tan, a Senior Associate with the firm's Construction and Arbitration practice.

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