Neutral Citation Number: [2021] EWHC 286 (Comm)

Case No: CL-2020-000185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/02/2021

Before :

SIR MICHAEL BURTON GBE
SITTING AS JUDGE OF THE HIGH COURT

- -

Between :

THE REPUBLIC OF SIERRA LEONE	**Claimant**
- and -	
SL MINING LIMITED	**Defendant**

IN THE MATTER OF AN ARBITRATION
WITH ICC CASE NO. 24708/TO

Between :

SL MINING LIMITED	**Claimant in the Arbitration**
- and -	
THE REPUBLIC OF SIERRA LEONE	**Respondent in the Arbitration**

- -

Charlie Lightfoot (instructed by **Jenner & Block (London) LLP**) for the **Claimant**
`Ali Malek QC, Tom Sprange QC and Kabir Bhalla (instructed by **King and Spalding International LLP**) for the **Defendant**

Hearing dates: 2 February 2021

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Approved Judgment

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 15 February 2021 at 10:30 am

SIR MICHAEL BURTON GBE :

1. This has been the hearing of a challenge under s 67 of the Arbitration Act 1996 (the 1996 Act) by the Claimant, the Republic of Sierra Leone, to the Partial Final Award on Jurisdiction dated 6 March 2020 by Arbitrators, Professor Fabian Gelinas, Justice Sanji Monageng and Dr Michael Pryles AQ PBM, in an underlying ICC Arbitration between it as respondent and the Defendant, SL Mining Ltd as claimant.

2. By the Award the Arbitrators concluded that they had jurisdiction in respect of the Defendant's claims in the Arbitration concerning the suspension and subsequent cancellation by the Claimant of a large-scale mining licence granted to the Defendant on 29 March 2017, and a licence agreement dated 6 December 2017, for a period of 25 years. The Claimant has been represented before me by Charlie Lightfoot of Jenner & Block (London) LLP and the Defendant by Ali Malek QC, and Tom Sprange QC and Kabir Bhalla of King and Spalding International LLP.

3. The clause of the MLA in question in the Award was clause 6.9 (c). Clause 6.9 reads 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 Claimant and the Defendant] hereunder shall be determined, according to the Laws of 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 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. ……*
>
> *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 resolved in the manner described above."*

4. The relevant Notice of Dispute was served by the Defendant on 14 July 2019. The Request for Arbitration (RFA) was served on 30 August 2019. The Claimant's challenge, rejected by the Arbitrators, after written submissions and a hearing on 10 January 2020, was that no arbitration proceedings could be commenced before 14

October 2019 (three months from the Notice of Dispute) and so the Arbitrators were without jurisdiction. There was a subsidiary argument that the Emergency Arbitrator procedure, invoked by the Defendant pursuant to Appendix 5 of the Emergency Arbitrator Rules (incorporated by clause 6.9 l(c)), on 20 August 2019, in the light of the steps being taken by the Claimant, was also invalid.

5. I can deal shortly with this subsidiary argument, which was hardly run before me. I am entirely satisfied that by the provisions under clause 6.9 (c), incorporating the ICC Rules, the Claimant consented to the adoption of the Emergency Arbitrator procedure, and that the availability of such a procedure was thus provided for, just as would have been an application for interim relief in court prior to issue of a writ, in order to preserve the parties' respective positions pending the resolution of the dispute. This is made clear in paragraph 117 of the Award, which cross-referred to paragraph 36 of the Interim Order of the Emergency Arbitrator, dated 30 August 2019:

> *"Article 6.9 (c)) of the Agreement is directed to the amicable settlement of the substance of any dispute, whereas an Emergency Application is directed to the preservation of the rights of a party pending an amicable settlement of the dispute or its adjudication by an arbitral tribunal."*

It was all the more relevant because of the provisions of clause 6.9 (d) of the MLA quoted in paragraph 3 above. As the Award (and the Interim Order) made clear, there was no conflict between clause 6.9 (c) and the appointment of an Emergency Arbitrator, if otherwise appropriate, and applying for and obtaining interim relief from the Emergency Arbitrator did not constitute a breach of any condition precedent in clause 6.9, which was relevant only to the commencement of the substantive arbitration by the RFA.

6. As to the substantive arbitration, commenced on 30 August 2019, some 6 weeks before the expiry of 3 months from the Notice of Dispute, there were the following issues between the parties in respect of the challenge to the Arbitrators' decision that there was no non-compliance with clause 6.9 (c):

   i) Is the challenge to the alleged prematurity of the RFA one to jurisdiction of the Arbitrators and thus within s 67 of the Act? (the jurisdiction/admissibility issue)

   ii) If necessary, was there consent by the Claimant to the issue of the RFA and or waiver of the condition precedent? (the consent/waiver issue)

   iii) If necessary, what is the proper construction of clause 6.9 (c)? and

   iv) Upon the proper construction of clause 6.9 (c), was there breach/non-compliance with it by virtue of the Defendant's issue of the RFA on 30 August?

7. The Award contains some discussion as to the law to apply, but it was common ground before me that I should apply Sierra Leone law, which for all purposes was

agreed to be the same as the law which would be applied at English law in this Court, which the parties and I have consequently applied.

Jurisdiction/admissibility

8. It was common ground before me that there is a distinction (seemingly first drawn out judicially in an English court by Butcher J in **Obrascon Huarte Lain S.A. v Qatar Foundation for Education** [2020] EWHC 1643 (Comm), **PAO Tatneft v Ukraine** [2018] 1 WLR 5947 and **Republic of Korea v Dayanni** [2020] 2 AER (Comm) 672 between a challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction). Only the latter challenge is available to a party under s 67, and interference by a court is thus limited and discouraged by s 1(c) of the 1996 Act, just as arbitration, if the choice of the parties, is encouraged (as for example by Lord Hoffmann in **Fiona Trust v Privalov** [2007] 1 AER 951 at [10]). The issue here was alleged prematurity. The claim, otherwise arbitrable, allegedly should not have been brought for another six weeks. To stay or adjourn the proceedings for six weeks (to allow for further time for negotiations to elapse), a course taken in similar circumstances in the courts (in non-arbitration cases, such as **Cable & Wireless PLC v IBM (UK)** [2002] 2 AER (Comm) 1041), would not be an answer for the Claimant, because if there were no jurisdiction, there would be no jurisdiction to stay or adjourn: a claim should simply be rejected as outside the jurisdiction of the arbitrators (pro tem). The Arbitrators concluded in the Award that it was a matter of admissibility and ruled that it was admissible. The distinction between admissibility and jurisdiction is, as will be seen, a considerable topic for academic discussion.

9. It is common ground that the starting point at English law is s 30 of the 1996 Act. S 67 permits an application to the Court to challenge any Award as to its "*substantive jurisdiction",* and this is defined by s 82 (1) of the Act :

> *""Substantive jurisdiction", in relation to an arbitral tribunal, refers to the matters specified in section 30 (1) (a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly."*

10. S 30 (1) provides as follows:

> *"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."*

Mr Lightfoot did submit that his challenge falls within s 30 (1) (a), on the basis of a contention that *valid* includes *enforceable*, but this was not developed, and it seemed

obviously unarguable. However his real case was that his challenge fell under (c). He accepts that, as he put it, (a) and (b) pose binary questions, and (c) does not, so that the question is not whether (or not) a matter has been submitted to arbitration, but on its face addresses identification of the matters submitted. However, he submits that the wording allows for an argument that no matters have been "*submitted to arbitration in accordance with the arbitration agreement*".

11. The applicability of s 30 (1) (c) was considered in relation to some (but not identical) questions by Butcher J in **Obrascon** at [18]-[19], referring to three earlier decisions, including two of mine, where he concludes that the subsection has been applied so as to "*identify what matters have been submitted to arbitration".* In **Tatneft** at [97] he differentiates between jurisdiction and admissibility:

> *"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."*

None of these judgments applied to a clause such as this, where the challenge is that the claim was allegedly premature, i.e. there was a time challenge to it.

12. Mr Lightfoot submitted that much would depend upon the precise wording of the clause in question. He does not contend that other time issues, such as limitation, would ordinarily be regarded as going to jurisdiction rather than admissibility, though he asserted that it might depend upon the construction of a clause. He also considered problematic my example of a bill of lading with a time limit on arbitration, which, after consideration, he thought would in the event of a dispute also probably be a matter of admissibility rather than jurisdiction. However he referred to two judgments in which a challenge by reference to a time condition precedent was accepted as appropriate pursuant to s 67 (although in both cases failing), namely **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.

13. However in both these cases the point was not argued, and s 67 jurisdiction was assumed, perhaps because the difference between jurisdiction and admissibility had not yet been adverted to in an English case by Butcher J, in the three judgments to which I have referred. Given that the point was not argued, and that the judgments in each of the two cases did not address the question, I am unable to be persuaded by any argument, and plainly the judgments would not in any event be binding on me (particularly given that in the result both claims were dismissed). The decision in **Emirates** is criticised for dealing with the issue as a matter of jurisdiction under s 67 by Messrs Flannery and Merkin in their article in Arbitration International (Vol 31 Issue 1 March 2015) at 102-106 and in Merkin and Flannery on the Arbitration Act 1996 (6th Ed December 2019) at 30.3, 30.13(vii) nd 30.13.2, and similarly doubted extrajudicially by Sir George Leggatt in a lecture at Aston University on 19 October 2018.

14. The views of the leading academic writers, after careful analysis by them, are all one way:

i) Born, in International Commercial Arbitration (3rd Ed 2021) chapter 5 at 110 ff, while recognising the existence of possible national variations and the possibility of an extreme case, clearly concludes as to the preponderance of views, and his own opinion, that:

> *"In interpreting the parties' arbitration agreement, the better approach is to presume, absent contrary evidence, that pre-arbitration procedural requirements are not "jurisdictional". As a consequence, in most legal systems, these 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) for their initial decision. Similarly, the arbitral tribunal's resolution of such issues would generally be subject to only minimal judicial review in subsequent annulment or recognition proceedings.*
>
> *The rationale for this presumption is that requirements for cooling off, negotiation or mediation inherently involve aspects of the arbitral procedure, often requiring interpretation and application of institutional arbitration rules or procedural provisions of the arbitration agreement. Equally important, the remedies for breach of these requirements necessarily involve procedural issues concerning the timing and conduct of the arbitration. In both cases, these issues are best suited for resolution by arbitral tribunal, subject to minimal judicial review, like other procedural decisions.*
>
> *Similarly, 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."*

ii) Paulsson, in Jurisdiction and Admissibility in Global Reflections on International Law, Commerce and Dispute Resolution, ICC Publishing, 2005 at 616–617, concludes:

> *"To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:*
>
> > *If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.*

> *If the reason would be that the claim should not be heard at all (or at least not yet) the issue is ordinarily one of admissibility and the tribunal's decision is final.*
>
> *… Once it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason ….. to recognise its authority to dispose conclusively of other threshold issues. Those are matters of admissibility, alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such."*

iii) Mills, in Party Autonomy in Private International Law (CUP 2018) at 6.4.1, considers that "…*presuming there are no other reasons to question the arbitration agreement, the question of whether the condition has been satisfied is a matter that should be resolved by the arbitral tribunal (as a dispute arising out of the contract), not a matter for a court."*

and in Arbitral Jurisdiction, in the Oxford Handbook of International Arbitration (OUP 2020) at 6–7 he adds:

> *"… the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be properly brought. In particular, it considers the question of whether there are any conditions attached to the exercise of the right to arbitrate which have not been fulfilled. Those conditions might be, for example, a limitation period applicable to the right to commence arbitration, or a requirement to mediate and/or negotiate before arbitral proceedings may be commenced".*

iv) Merkin and Flannery on the Arbitration Act 1996 at 30.3 (pp319-20), after noting the then (December 2019) lack of decision or even debate in a judicial context in an English court as to whether some matters thought to be jurisdictional are in fact not issues of jurisdiction at all and are more properly to be treated as issues of admissibility, conclude that, although on occasion it may be difficult to know where one ends and the other begins, in broad terms if the issue concerns whether the claim has been brought too late, or too early, it is more likely to be a question of admissibility rather than jurisdiction.

15. Mr Malek also drew my attention to important decisions in other jurisdictions:

i) in the US Supreme Court, Breyer J, delivering the opinion of the Court in **BG Group v Republic of Argentina** 134 S.Ct.1198 (2002) (US Supreme Court), made it clear in relation to a similar issue of allegedly premature arbitration (at [7]–[8]) that a dispute about a procedural condition precedent to arbitration should be resolved by the arbitral tribunal.

ii) In two appellate decisions in the Singapore Court of Appeal (**BBA v BAZ** [2020] 2 SLR 453 and **BTN v BTP** [2020] SGCA 105) the unanimous

decisions were very clear. At [73ff] in the first judgment, there was specific discussion of the distinction between jurisdiction and admissibility in the context of allegedly premature arbitration. The views to which I have referred of Paulsson and Merkin and Flannery are specifically approved. At [74] of the first decision an earlier decision of the Court is approved: "*Jurisdiction is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it*". At [70] of the second decision (which deals with different issues) the passage I have quoted in paragraph 14(ii) above from Paulsson is quoted and approved, as is the further passage in the same publication: "*tribunals' decisions on objections regarding preconditions to arbitration, like time limits, the fulfilment of conditions precedent such as conciliation provisions before arbitration may be pursued, mootness and ripeness are matters of admissibility, not jurisdiction".*

iii) In paragraph 41.3 of his skeleton, Mr Malek referred to "*numerous decisions of international courts and tribunals*", which he lists and includes in his bundle of authorities, including a decision of an UNCITRAL Tribunal (**Lauder v Czech Republic** 3 September 2001)in which a six month waiting period was held to be a question of admissibility, not jurisdiction.

16. The international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction, but at the end of the day the matter comes down at English law to an issue as to whether the question of prematurity falls within s 30(1) (c) of the 1996 Act. I do not accept Mr Lightfoot's case that much depends upon the precise wording of the clause. I do not see that there would be any difference between 'No arbitration shall be brought unless X' and ' In the event of X the parties may arbitrate'. As Mr Lightfoot himself submitted, s 30 (1) (a) and (b) give a binary choice, and on the face of it (c) does not. The subsection could have said 'whether [or not] the matters have been submitted to arbitration', which might have given more support for his argument.

17. No explanation was given as to the difference in wording between the subsections by the Departmental Advisory Committee on Arbitration Law (DAC), in its Report on the Act. Merkin and Flannery have a very short section in their work on the 1996 Act at 30.12 as to (c), as follows:

> *"The word 'matters' is not defined, and it is difficult to see how it could be: the word appears in widely differing contexts throughout the Act. In this provision, however, the word 'matters' would seem to be most akin to 'claims' or 'causes of action". This appears to be how the word has been regarded judicially. In* ***Gulf Import and Export Co v Bunge SA [****2008] 1 Lloyds 316 Flaux J considered that the word 'matters' in section 30 (1) (c) referred to the claims that can be submitted to arbitration, not the way in which discretion is exercised in relation to a claim that has been validly submitted to arbitration. We would tend to agree, even though it is plausible that the word 'matters' could be interpreted as 'issues'."*

18. I consider that, to accord with the views of Paulsson, as approved in the Singapore Court of Appeal (at [77] of **BBA v BAZ**), if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction and subject to further recourse under s 67 of the 1996 Act, whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility, the tribunal decision is final and s30 (1) (c) does not apply. The short passage in the Singapore Court of Appeal set out in paragraph 15 (ii) above is useful : "*Jurisdiction* [and so susceptibility to a s 67 challenge] *is commonly defined to refer to "the power of the tribunal to hear a case", whereas admissibility refers to "whether it is appropriate for the tribunal to hear it*". The issue for (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.

19. Such a conclusion accords with the Guidance given by the Chartered Institute of Arbitrators in its International Arbitration Practice Guideline: Jurisdictional Challenges, last revised in November 2016, and still in force, as setting out*" the current best practice in international commercial arbitration for handling jurisdictional challenges*." It reads as follows, in material part, at page 3:

> *"6. When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, i.e. whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge for the arbitrators' jurisdiction to decide the claim itself."*

And at page 15:

> *"After deciding upon the jurisdictional challenges, arbitrators may also be called upon to decide on the admissibility of the claim. This may include a determination as to whether a condition precedent to referring the dispute to arbitration exists and whether such a condition has been satisfied. It also involves challenges that the claim is time-barred."*

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.

21. I consequently agree with the conclusions of the Arbitrators (paragraph 110 of the Award) that *" if 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*". In any event I am satisfied that s 30 (1) (c) and s 67 of the 1996 Act are not engaged in respect of a challenge that the claim was made prematurely to the Arbitrators.

Consent/Waiver

22. The Defendant submits that the Claimant plainly consented to the RFA being served on 30 August 2019, and that, if non-compliance there was with the three month period, and if this be a question of jurisdiction for me to decide, there was consent and/or waiver and the Claimant would be barred by s 73 of the 1996 Act (loss of right to object) and Article 40 of the ICC Rules (waiver).

23. The starting point is the Emergency Arbitrator, to whose jurisdiction I have already concluded (in paragraph 5 above) that the Claimant was obliged to consent, and to which, on any view of the statements by its counsel to the Emergency Arbitrator Professor Douglas QC on 6 September 2019, it did consent: "*The fact that we have actually submitted to the arbitral proceeding means that we have consented to these actions"* (there was a dispute between the parties as to whether this extended, as Mr Malek contended, to submission to the substantive arbitration rather than just to the Emergency Arbitrator, but I resolve that in favour of the Claimant).

24. Appendix V Article 1 (6) of the ICC Rules relating to an Emergency Arbitrator provides that "*the President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary."* Thus, just as in a court where an injunction is granted before the issue of proceedings, there will ordinarily be a simultaneous order for the subsequent issue of those proceedings, so the Emergency Arbitrator will ensure that substantive arbitration proceedings are issued, and the ordinary timescale is 10 days, unless the Emergency Arbitrator otherwise determines.

25. The matter was discussed at the telephone hearing before the Emergency Arbitrator on 27 August. All parties clearly had well in mind the provisions of clause 6.9 of the MLA. Mr Savage for the Defendant suggested that the Emergency Arbitrator defer service of an RFA (in accordance with Appendix 5 Article 1(6)) until October 14, being the end of this three month period: and he asked counsel for the Claimant to agree to such a course.

26. The Claimant however did not agree, and insisted that the Defendant complied with the Rules and served the RFA on 30 August :

> *" Our instructions [are] that SL Mining compl[y] with the time frame… …we….feel that it is proper that they comply with the Rules. So we – our instructions are not to consent to the proposed extension. If we were looking at the three month window, that would have been a window to… negotiate and discussions towards a negotiated settlement, not to be an arbitration. But now that they went down this route, our instructions [are] that SL Mining file papers within the Rules, as provided in the Rules."*

27. Professor Douglas consequently ordered service of the RFA on 30 August, which was done. He had suggested that there would be the possibility of serving the RFA but coupling it with a request for a stay of the arbitration, so that the negotiating period

could be fulfilled. When the RFA was served on 30 August, it did include an expression of willingness for a stay if so ordered, but none was ever sought or agreed.

28. With or without a stay, I am satisfied that the Claimant, by insisting on service of the RFA on 30 August, consented to such service, and thereby the commencement of the Arbitration, and consequently waived the effect of the three month period (if it otherwise applied).

Clause 6.9 (c)

29. I turn to the issue of the construction of clause 6.9 (c) and whether, had it not been waived, and if, contrary to my conclusion, the Issue of non-compliance is before me pursuant to s 67, it barred the issue of the RFA prior to October 14.

30. There is no dispute before me between the parties that, as the Arbitrators found, and in accordance with the judgement of Teare J in **Emirates**, the condition precedent was mandatory, not directory. The issue is as to its construction. The clause is very different from that considered by Teare J which provided that "*if no solution can be arrived at between the parties for a continuous period of four weeks then the non-defaulting party can invoke the arbitration clause***".** The Arbitrators found (at paragraph 114 of the Award) that "*the time period is not set out as an independent condition; it is tied to the objective laid out in Sub-Clause (b) of "reach[ing] an amicable settlement". In other words, the time period is not presented as an independent waiting period. Had the parties wished to impose an independent waiting period, separate from the good faith endeavours obligation, it would have been easy for them to separate the two obligations*", and they contrast the provision in **Emirates**. The Claimant submits that the clause simply provided that no arbitration could be commenced until the expiry of the three month period. The Defendant submits that it is not a simple time bar, but provides a maximum period during which it can become clear whether there is an ability to settle in accordance with the best endeavours obligation.

31. The Claimant submits (i) that there is at least an analogy with s 3 of the Sierra Leone State Proceedings Act 2000, which provides for a three month period before any claim against the Government may be enforced by a suit against the Government and (ii) that if the clause is not to be construed as a simple time bar, then difficult questions of fact would become necessary to resolve.

32. However I am entirely satisfied that, unlike the State Proceedings Act, this is not an absolute bar to bringing proceedings for three months, as could have been provided for, but that it gives a window during which the parties can explore settlement, but always subject, as the Arbitrators concluded, to earlier proceedings if the objective of amicable settlement could not be achieved. As to the difficulty of resolving the issue of inability to settle, that is what the parties have specified, and it is an issue best resolved by Arbitrators rather than by the Court (in accordance with the decision I have already reached above). It is in my judgment significant that the time scale in clause 6.9 (c) is subsidiary to the obligation to attempt an amicable settlement, set out first, in (b). I agree with the Arbitrators' conclusion in paragraph 114 of the Award.

33. Before the Arbitrators there were considerable arguments on both sides as to bad faith, as to whether there were on either side genuine attempts or intentions to settle, and the Arbitrators concluded as follows, at paragraph 157(2) of the Award:

> *"*[The Claimant] *failed to negotiate the existing dispute under the contract in good faith and sought instead to renegotiate the terms of the contract. This not only breached the terms of the contract, which require good faith negotiations, but rendered the negotiations futile. This occurred against a background of measures taken by* [the Claimant] *which greatly affected* [the Defendant's] *investment and perhaps threatened the financial viability of* [the Defendant]. *In all the circumstances,* [the Defendant] *was not required to wait until the end of the three months period before commencing the arbitration."*

34. On the construction of clause 6.9 (c) which I prefer, and to which in the event neither counsel took issue, bad faith is not significant or necessary to be found. The issue is whether objectively the parties would, as at the date of the RFA, 30 August, be unable to reach an amicable settlement by 14 October. The investigation of 'futility' rather than inability leads to consideration of motives and is, as I put it in argument, too emotive a question: and it leads to such broad brush statements as that made by Mr Yardley for the Claimant, in his second witness statement, that "*the records of the parties' without prejudice discussions further demonstrate that neither party considered the negotiations… to be futile*" (in my judgment, not a relevant question). The question posed by clause 6.9 (c) is whether the parties "*shall be unable to reach an amicable settlement*" by 14 October, i.e. the test is an objective one, as at the material date, in this case 30 August. 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.

35. If, contrary to my conclusion, I were to be deciding this issue, I would look, as I have, at the masses of evidence put before me as to events between July and September 2019. Allegations and cross-allegations are made in the two witness statements by Mr Yardley and two witness statements by Mr Mattai for the Claimant and the lengthy witness statement from Mr Savage and one from Mr Dean for the Defendant, with pages of exhibits in support of each. I see drastic action taken against the Defendant by the Claimant after a change of Government in 2018, a temporary suspension of the licence on 3 July allegedly without notice, a criminal investigation of the Defendant's employees, including questioning and confiscation of passports, in July, prohibition of shipping on 24 July, and counter-action by the Defendant in the issue of Emergency Arbitrator proceedings, leading to interim orders against the Claimant, which were resolutely not complied with. I see allegations by the Claimant of corruption and bribery by the Defendant and by the Defendant of greed, oppression and ulterior motives by the Claimant – all very far from "amicable" - and then, after the issue of the Emergency Arbitrator procedures by the Defendant, the Claimant insisted, as set out above, on the commencement of arbitration in accordance with the ICC Rules.

36. Mr Lightfoot showed me documents evidencing that without prejudice meetings were continuing, and that offers and counter-offers were being made, though even in that context there was what was described as an *impasse* and a *stalemate*. But the massive

gulf between the parties is wholly apparent. There is not even any evidence in the witness statements for the Claimant – and I would not in fact have expected it – that the parties were even close to some kind of settlement. 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.

37. Consequently, I am satisfied that if the 3 month period was not, as I conclude it to have been, waived by the Claimant's consent to the arbitration proceedings commencing on 30 August, as at 30 August, on any objective analysis, the parties would be unable by 14 October to reach an amicable settlement, and there was therefore no failure to comply with clause 6.9 (c).

Conclusion

38. Of the four issues that I have set out in paragraph 6 above, I have run together the third and fourth. I am satisfied that the Defendant wins on each issue, and that there is no basis for any challenge under s67 to the Award. This is not a challenge to the jurisdiction, and, if it were, the Claimant would fail, because it consented to the RFA on 30 August, and, in any event, as at 30 August there was no bar to the commencement of arbitration by the Defendant.