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Charting a New Path to Commercial Arbitration: Sierra Leone to Accede to the New York Convention

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Sierra Leone's inaugural Commercial Law Summit was held this March (2017) on the theme of facilitating responsible private sector development through improvements in commercial law justice (Hebert Smith Freehill and UK-Sierra Leone Pro-Bono Network, 'Conference Pack', 2017). The summit provided a distinctive opportunity for the main stakeholders in commercial law and justice to map out the reform priorities with respect to the promotion of responsible private sector development. Commercial arbitration was identified as one of the key areas to urgently address, given the apparent gap in terms of its insignificant and minimal use as a dispute resolution mechanism, thereby contributing to the slow private sector development. Arbitration is seen as an important tool to protect foreign investors and to promote foreign direct investments. One of the apparent lacuna in this regard is the country's failure to ratify the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention' or 'Convention').

The Changing Political View and Judicial Approach to Commercial Arbitration

The impetus to chart a new path to commercial arbitration, especially international commercial arbitration, may have been largely externally influenced. For starters, the summit which pointed the spotlight on the issue was organized by foreign institutions (Hebert Smith Freehill LLP and UK-Sierra Leone Pro-Bono Network). Further, a seeming race to the top (to entice investors) appears to have been developing in the Mano River Union sub-region, as Sierra Leone's neighbouring countries, Guinea and Liberia, have ratified the Convention (Convention Contracting States). The summit's arbitration workshop participants proposed, as a matter of high priority, the establishment of a new legislative framework for domestic and international commercial arbitration and accession to the New York Convention. In their reaction speeches, the Chief Justice and Attorney-General & Minister of Justice respectively echoed the judicial and governmental commitments to purposively address and/or implement the proposals.

In the Justice Sector Reform Strategy and Investment Plan III for Sierra Leone, acceding to the New York Convention is a key national priority.[1)] The Judiciary's Strategic Plan 2016-2021 talks of strengthening ADR as pro conflict resolution and court decongestion strategies.[2)] These emerging policy indications defer from the prevalent judicial approach to commercial arbitration, anchored in the obsolete and/or inadequate Arbitration Act 1960 ('Act').[3)] Judicial intervention regarding commercial arbitration has mostly related to the determination of the validity of arbitration agreements. There is no recent example or case law dealing with attempts to enforce an

arbitral award, whether domestic or foreign.

Based on the existing case law, there is a strong judicial resistance to accept parties' intention to arbitrate their commercial disputes. However, this robust resistance is being positively influenced by governmental policy and creeping judicial activism. The courts of superior judicature in Sierra Leone[4] have unwaveringly endorsed the common law rule which prohibits parties from ousting the jurisdiction of the courts by contract (*Kill v. Hollister* (1746) 1 Wils. 129). This means the courts are not bound to accept parties' agreement to arbitrate, because such agreements are deemed to be ouster of jurisdiction *by contract*, and hence not a bar to court actions. At the same time, where a valid arbitration agreement exists, section 5 of the Act gives the High Court discretion to stay judicial proceedings pending arbitration. However, when exercising their discretion under section 5, the courts have consistently upheld the abovementioned prohibition on contractual ouster of jurisdiction rule. In the leading Court of Appeal case of *Kabia v. Kamara* (1967/68 ALR SL CA, 455) Sir Bankole-Jones in giving the court's opinion, which is still the statement of the law, stated:

> I interpret [the arbitration] clause as being merely an agreement between the parties to refer certain matters to arbitration. I think it has for a long time been the law that a mere agreement between the two parties to arbitration cannot be pleaded in bar of an action brought in respect thereof Scot v. Avery. [The arbitration clause] in my opinion is nothing more than a contract to refer. It may be the ordinary arbitration clause but it is certainly not a submission for the arbitrator is neither chosen nor appointed. The learned Trial Judge was therefore right in holding that [the] clause was not a bar to the action.[5]

Therefore, the restrictive interpretation and application of section 5 of the Act has provided little scope for arbitration to flourish. Firstly, the section has a strict waiver rule according to which any procedural step taken after filing an appearance to a judicial action is deemed to be a waiver of the intention to arbitrate.[6] Secondly, the discretion to grant an application for stay of proceedings has been disproportionately limited by the courts. In this line, judges routinely and wrongly refer to the restrictive *forum non conveniens* standards in the English cases of *The Eleftheria* ((1969) 2 All ER 641) and *Spiliada Maritime Corp v. Consulex Ltd.* ((1986) 3 All ER 843) adopted in Sierra Leone in *A. P. Moller v. Hadson Taylor & Co* (C.A. 6th March 1990) as the criteria to determine applications for stay of proceedings pending arbitration (*Technoscavi v. Civil Engineering Company and Another* (CC 424/2007 (2007) SLHC 40)).

In *Attorney General and Ministry of Justice v. Cape Management and Entertainment* (CC 352/07 (2007) SLHC 31), the High Court rejected an application for a stay of proceedings pending arbitration on the grounds, *inter alia*, that the bare reference clause was insufficient since a terminated contract having an arbitration clause could not be held to be valid. In the aforementioned *Kabia v. Kamara* case, Sir Bankole-Jones held that a party is estopped from relying on an arbitration clause after wholly repudiating the container contract. This approach clearly rejected the separability doctrine. The same principle was applied by the High Court in *Riga Shipyards v. Owners and/or Persons Interested in the Vessel M/V Redcat* (CC 105/2012). This conservative judicial approach limited the use of arbitration to resolve commercial disputes.

An opposite stance, however, could be gleaned from recent court decisions. In 2013, in *Courtville*

Investment v. Sierra Leone Transport Authority (FTCC: 059/13 (2013) SLHC 59), Chief Justice Charm, then judge, stayed the court proceedings and referred the dispute to be resolved by arbitration as initially agreed by the parties. In *Madam Abi Haruna v. Delian Shengai Ocean Fishery Co. Ltd.* (FTCC 122/15 (2015) SLHC 122), Sengu Koroma J. in determining whether a corporation agreement which provided for dispute resolution by the China International Economic and Trade Arbitration Commission (CIETAC) was valid, opined (*obiter*) that the doctrine of separability in the English Arbitration Act 1996, confirmed in the English Court of Appeal case of *Habour Assurance Co. (UK) Ltd. v. Kansa General International Assurance Co. Ltd.* ([1993] 3 ALL ER 897), was a mere restatement of a common law rule, and hence applicable in Sierra Leone. This view contradicts the binding reasoning in *Kabia v. Kamara*. Thus, although the view of Sengu Koroma J. is *per incuriam*, it, however, illustrates a creeping trend in courts' practice to honour the agreement of parties to arbitrate their disputes.

A New Legislative Framework for Arbitration

Given the inadequacy of the Act and the demonstrable restrictive/conservative view of the courts on arbitration in Sierra Leone, a new legal framework is needed to implement the new governmental policy, and to comply with the obligations under the New York Convention when ratified. If the primary obligations under the Convention are to uphold a valid and binding arbitration agreement and for the recognition and enforcement of foreign arbitral awards, then the new law in Sierra Leone has to provide for the same. The Law Reform Commission has produced an advanced copy of the Arbitration Bill, which if passed will repeal the present statute. Although the intent here is not to analyze the bill, it must be said that its basic framework provides the basis to bolster commercial arbitration and accession to the Convention. The bill, if and when enacted, will mainstream commercial arbitration in Sierra Leone for good.

Conclusion

Arbitration has risen to become the dispute resolution mechanism of choice for international commerce. In international investment circles, the quest for neutrality and security of investments put States under some unseen pressure to reform their regulatory framework to allow for resolution of commercial disputes based on parties' autonomy. The seeming pressure from investors is nudging the Government of Serra Leone towards urgent reforms on the one hand; and on the other hand, the emerging judicial activism is slowly eroding the restrictive principles and providing the impetus for judicial deference towards arbitration in Sierra Leone. The enactment of the Arbitration Bill will certainly chart a new path in commercial arbitration (domestic and international) in Sierra Leone, with hopes for a consequent accession to the New York Convention.

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uncover potential conflicts of interest.

References

?1 Sierra Leone Justice Sector Reform Strategy and Investment Plan III (JSRSIP III), 14-15.

?2 Sierra Leone Judiciary Strategic Plan 2016-2021, 18-19.

?3 *See* Arbitration Act 1960, Cap 25 of the Laws of Sierra Leone 1960. This Act was inherited from the 1950 English Arbitration Act (which has been revised in England in 1975 and 1996). The Act in Sierra Leone does not have the basic provisions to comply with the obligations in the Convention. It has no provisions for stay nor enforcement of foreign arbitral awards.

?4 The Constitution of Sierra Leone 1991, s 120(4), which provides that the superior courts of judicature 'shall consist of the Supreme Court of Sierra Leone, the Court of Appeal and the High Court of Justice which shall be the superior courts of record of Sierra Leone'.

?5 *Kabia v. Kamara* (1967/68 ALR SL CA, 455, 459. See *Scott v Avery* 10 ER 1121 (1856); 25 LJ Ex 308; 5 HLC 811.

?6 The law has been further obfuscated by the Court of Appeal's decision in *Ogoo and Another v Huawei Technologies Limited and Another* (CIV. APP 31/2010 [2012] SLCA 01), where it held that the failure to submit to arbitration in accordance with the terms of an agreement is not an irregularity but a question of jurisdiction.

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