Sierra Leone Accedes to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards While Faced with First ICSID Dispute

By:

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On 28 October 2020, Sierra Leone became the 166th State to accede the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"),[1] which will become effective on 26 January 2021.

Notably, in the accession process, Sierra Leone has exercised its right under Article I(3)[2] of the Convention to limit the scope of the Convention to arbitral awards made in the Territory of another Contracting State, to disputes arising out of legal relationships, whether contractual or not, which are considered commercial under the Laws of Sierra Leone and to arbitration agreements

concluded and arbitral awards rendered after the date of its accession to the Convention.

Sierra Leone Hit by Parallel ICC and ICSID Proceedings Related to Ban on Iron Exports

In the background of the accession is Sierra Leone's first ICSID case,[3] filed last year by U.S. metal trading company incorporated in the U.K., Gerald International. That case was brought under the U.K.-Sierra Leone BIT.[4] The dispute arose over the suspension in July 2019 of iron ore exports, and subsequently in September 2019 of the cancellation of the mining license awarded by the government of Sierra Leone in 2017. Gerald International brought the dispute over its rights held by its wholly owned local subsidiary, SL Mining, under the mining license to operate the mine on the Marampa site.

The ICSID dispute runs in parallel to the ICC proceedings instituted by the local subsidiary of Gerald, SL Mining, on the same factual basis.[5] Last summer SL Mining filed at the ICC an Emergency Application pursuant Article 29 of the ICC Arbitration Rules, asking to lift the ban on exports from Marampa.[6] On September 8th 2019, the Emergency Arbitrator ("EA") ordered Sierra Leone to lift the ban on exports,[7] but Sierra Leone refused to comply.[8] This is an exceptional measure, as emergency measures were only granted in 10 % of emergency requests at the ICC since they were permitted under the 2012 addition of EA proceedings in the ICC's arbitration rules.

The Tribunal is constituted of Prof. Dr. August Reinish, an Austrian national, who serves as the President of the Arbitral, Prof. Dr. Guido Santigo Tawil, an Argentinian national, appointed by the Claimant, and Ms. Olufunke Adekoya, SAN, a dual citizen of the U.K. and Nigeria, appointed by the Respondent.

On 15 May 2020 the Claimant filed a Request for Provisional Measures pursuant Article 47 of the ICSID Convention and Article 39 of the ICSID Arbitration Rules. The Provisional Measures Requests sought to enjoin Sierra Leone to suspend criminal proceedings initiated against five employees of SL Mining[9], to allow those employees to return to the Marampa site and to release the documents seized by the Government of Sierra Leone. On 28 July 2020, the Tribunal issued its 60 pages long Decision on the Request for Provisional Measures[10] rejecting the Claimant's request, however urging Sierra Leone to "to convey to

the authorities competent to decide on the bail conditions the Tribunal's views in order to consider adapting the current bail conditions so as to allow the Claimant's employees to return to the Marampa mine site".[11]

In this highly contentious dispute marked by provisional measures and emergency applications, the tribunal reminded the parties of "their continuing duty to act in good faith during these proceedings and to refrain from taking any action that could affect the integrity of the arbitration or aggravate the dispute".

SL Mining and Gerald are represented by King and Spalding, whilst Sierra Leone retained Jenner & Block for the ICC and ICSID proceedings.

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[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959.

[2] Article I(3) of the New York Convention : When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

[3] *Gerald International Limited v. Republic of Sierra Leone*, ICSID Case No. ARB/19/31.

[4] Sierra leone – UK Bilateral Investment Treaty, entered into force 20 Noveber 2001. Accessible at : https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2903/sierra-leone---united-kingdom-bit-2000-.

[5] *SL Mining Limited v. Sierra Leone* ICC Case No. 24708/TO (EA).

[6] SL Mining served a notice of dispute on 14 August 2019 to Sierra Leone : “as endowed under clause 6.9(c) the MLA and or other agreements. We will be seeking material damages and immediate lifting of the export ban”, para 26. Accessible at : https://www.italaw.com/sites/default/files/case-documents/italaw10760.pdf.

[7] *SL Mining Limited v. Republic of Sierra Leone*, ICC case, *ibid*, 8 September 2019, Order.

[8] In that effect, SL Mining brought the dispute to an ICC Arbitral Tribunal, which issued an Order on 13 February 2020 addressing the failure to comply (see SL Mining’s press release).

[9] Initially, those employees have been detained however they have been released on bail after the Request for Provisional Measures has been filed. In consequence, the Claimant asked the Tribunal to enjoin Sierra Leone to modify the conditions of the bail to allow those employees to return to the operation site.

[10] *Gerald*, Procedural Order No. 2 (Decision on the Claimant’s Request for Provisional Measures) of 28 July 2020.

[11] *Gerald*, *ibid* : “the Tribunal urged the Respondent to convey to the authorities deciding on the bail conditions to adapt those conditions by taking in account the fact that Sierra Leona can exercise its sovereign right to prosecute criminal investigation while allowing the employees to return on the operation site”, para 226.

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