COULD PARLIAMENT HAVE PASSED INTO LAW THE LONDON MINING COMPANY LEASE AGREEMENT HOOK, LINE AND SINKER?

Introduction:

On the 17th November 2009, Parliament passed into law the Mines and Minerals Act of 2009, Act No. 12 of 2009. On the 30th December 2009, the President of Sierra Leone signed into law the said Act of Parliament. Essentially, the 2009 Mines and Minerals Act is, in many respects, a significant and progressive departure from the Mines and Minerals Decree of 1994, which was later adopted as an Act of Parliament in 1996. By its short title, it consolidates and amends the law relating to mines and minerals, promotes local and foreign investment in the mining sector by "introducing new and improved provisions for exploration, mine development and marketing of minerals and mineral secondary processing for the benefit of the people of Sierra Leone", ensures that management of the mineral sector "is transparent and accountable in accordance with international best practice", promotes "improved employment practices in the mining sector", improves the welfare of communities adversely affected by mining, and, *inter alia*, introduces measures to reduce the harmful effects of mining activities on the environment.

Significant and far-reaching as the above objectives are, a number of other essentially progressive issues were raised with the Mines and Minerals Bill of 2009 before it was enacted by Parliament into law; paramount amongst which was the fear of centralizing the activities and mandate of all that concerns mines and minerals in Sierra Leone in the hands of the Minister responsible for Mines and Minerals alone, assisted only by an *Advisory* Mines and Minerals Board, which can do no more than *advise* the Minister on policy and related issues. I particularly had an impressive pre-legislative session with many Parliamentarians in Freetown, who agreed in principle that maximum care would be taken in analyzing the Bill, engaging their constituents on the contents of the Bill and then amending it as far as possible before it was passed into law.

Unfortunately, this was never to be as the Act came out shortly after the pre-legislative session with almost the same contents in many respects as the Bill. My understanding was that the Bill, designed for the whole of Sierra Leone and her children unborn, was politicized along party lines, with the Minority Party in Parliament walking out to permit the Majority Party assisted by some Paramount Chiefs and well-wishers the authority to enact the Bill on simple majority. In

this regard, Sierra Leoneans were made to obey and comply with laws that they had limited knowledge about and input into, save that which a simple majority of law-makers approved of.

The London Mining Lease Agreement dated 31st December 2009:

Barely a day after the 2009 Mines and Minerals Act was signed into law by the President of Sierra Leone, the Minister responsible for Mines and Minerals, Hon. Alpha B. S. Kanu, and Mr. Davis F. Keili, the Managing Director of London Mining Company, signed/executed the London Mining Lease Agreement. On the part of Government, the Agreement was witnessed by a certain Mr. Umaru B. Wurie who signed both as Ambassador and Permanent Secretary, although it is unclear to me as to why Mr. Wurie witnessed the Agreement as "Ambassador". The timing of this Agreement particularly meant that the provisions of the 2009 Mines and Minerals Act were fresh in the minds of the Minister and his Permanent Secretary and that they knew or ought to have known that they could not have done anything in the Agreement that contravenes the 2009 Mines and Minerals Act. In fact, the Hon. Minister has himself at several public discussions consistently and passionately defended the London Mining Lease Agreement as being consistent with the laws of Sierra Leone, pro-people and investment-friendly. At one radio forum, the Hon. Minister even lost his steam in responding to claims by Mr. Abu Brima of Network Movement for Justice and Development (NMJD) that the London Mining Lease Agreement was against the contents, spirit and intention of the 2009 Mines and Minerals Act. Let's see what the reality is.

The London Mining Lease Agreement Vs. the 2009 Mines and Minerals Act:

As noted earlier, the 2009 Mines and Minerals Act is now the fundamental law on mines and minerals in Sierra Leone; it is the parent Act to which reference is made for all subsequent Agreements between Government as "Lessor" and all "Mining Lessees". In my humble opinion, such parent Act, which touches and concerns the livelihood and breadbasket of Sierra Leoneans, can only be altered, amended or revoked by a precise and unambiguous Act of Parliament subsequent thereto; and not merely by the doctrine of implied repeal or amendment that could confuse, toy with or render ineffective the yet-to-be-amended parent Act. Being a fundamental principle of legislative engagement which law-makers are familiar with, I trust that they must have taken it on board in passing into law the London Mining Lease Agreement, which, I am informed, has recently been enacted by Parliament and is awaiting gazetting as required by law.

Firstly, section 3(a) of the Agreement provides in clear and unambiguous terms that if the London Mining Lease Agreement and additional Mining Leases (which are yet to be contracted) are inconsistent with the 2009 Mines and Minerals Act, being the parent law, the London Mining Lease Agreement and the 'unforeseen' additional Mining Leases "shall prevail". Unfortunately, I have heard the Hon. Minister say on radio that this is not the case, but fell short of telling the public what the case is. The case, as I understand it, is that the 2009 Mines and Minerals Act can only be legally operative if it does not contravene the Lease Agreement, otherwise it is ousted. The question therefore is, could Parliament have amended or repealed the much-talked about development-oriented 2009 Mines and Minerals Act by mere implication or reference without an Amending Act to that effect? What message does this send, considering that the new 2009 Act sought to veer way from all past regressive tendencies that either mocked our laws (as with the Sierra Rutile (Ratification) Agreement of 1989, which also had a similar clause) or gave a lot to investors in the guise of guaranteeing future revenue generation that never really materialized?

Secondly, section 3(b) of the London Mining Lease Agreement explicitly provides that the mining lease shall be for an initial "period of 25 years and shall be renewable for a further period of 15 years upon an application made in writing by LONDON MINING at least one year before the expiration of the original term and such renewal shall be upon the terms and conditions set out in [the London Mining Lease Agreement], in accordance with applicable law." To all intents and purposes, the foregoing section 3(b) of the Agreement contravenes sections 111 and 112 of the 2009 Mines and Minerals Act, which provides as follows: (at section 111) that "subject to section 112 the period for which a large-scale mining license [such as the London Mining Lease] is granted shall be stated in the license *and shall not exceed twenty-five years or the estimated life of the ore body proposed to be mined, which ever is shorter*", and (at section 112(1)) that "the holder of a large-scale mining license may apply to the Minister [responsible for Mines and Minerals] for *subsequent renewals of his license* in respect of all or part of the large-scale mining license area at any time not later than one year before the expiry of such license". Thus, even if the application for renewal is made shortly after the grant of the main lease, it must be made *subsequent* to the main lease, not as part and parcel of the main lease, and preferably sometime after having assessed the performance and output of the mining license holder. Furthermore, it is clearly not within the purview of the 2009 Mines and Minerals Act to posit a subsequent lease agreement on the same terms as the main lease (except if London Mining Company requests to

amend it), especially without the benefit of determining the performance and output of the Company. Without more, the London Mining Lease is safely a forty-year Lease Agreement.

Thirdly, the provision in section 4(a)(ii) of the London Mining Lease Agreement requiring the Company "to remove and sell for export any surplus scrap metal not required for the conduct of normal operations situated within the Mining Lease Area, free of any government charges, levies, duties or royalties" is unsupported by law. In view of the income that scrap metals generate in this current economic era, it is unclear as to why scrap metals collected by the Company during mining operations for iron ore can be obtained by the Company without any charge, levy, duty or royalty to Government. This provision certainly demands explanation.

Additionally, the provision in section 4(e) of the London Mining Lease Agreement requiring the Company to have "the right to export all iron ore and associated minerals or mineral concentrates raised or obtained in the course of mining operations to any other country…" is ambiguous and vague in view of the fact that the terms "associated minerals" or "mineral concentrates" are not defined in the Lease Agreement. Considering that the Company shall be operating and exporting directly from Pepel to the outside world, it would be fair to know and determine what they export, in what quantity and at what value. Sierra Leone being endowed with several other minerals, precious minerals inclusive, the 2009 Mines and Minerals Act at section 165(1)(b) provides that "minerals shall not be removed from any land from which they have been obtained, nor disposed of, in any manner, except by the holder of a mineral right in accordance with the terms of the mineral right concerned". The Lease Agreement, at section 2(a), requires the Company "to explore for and mine iron ore and associated minerals" and gives the Company further right, at section 4(e) above, to export *all iron ore and associated minerals or mineral concentrates,* without defining "associated minerals" and "mineral concentrates". A prudent law-maker would certainly require such clarification in the interest of his/her electorates. The fact that the term: "associated minerals" is defined in section 1 of the 2009 Mines and Minerals Act is not enough, giving that the Lease Agreement appears to supersede the Mines and Minerals Act.

Furthermore, section 5(b) of the London Mining Lease Agreement requires that "royalty at the rate of 3% of the gross sales price, "free on board" the vessel at the Sierra Leone offshore loading facility for shipment payable by LONDON MINING in respect of such shipment, after deducting any Sales Tax, Value Added Tax, Goods and Services Tax, export duty, levy or excise

payable to GOSL [Government of Sierra Leone], or any department of GOSL, shall be paid to GOSL…". On the contrary, the 2009 Mines and Minerals Act at section 148(2)&(3) provides that royalty of 3% shall be payable for "all other minerals [inclusive of iron ore in this case]" on the "market value" of such minerals, which, for the purposes of the calculation of royalty, is defined as "the sale value receivable in arms length transaction without discount, commissions or deductions for the mineral or mineral products on disposal as defined in regulations". Section 154 of the Act also defines "arms length sales" as, *inter alia*, the selling of mineral products obtained under mining operations "in accordance with generally accepted international business practices" as well as the selling of exported minerals "at the best available international market prices at the time the contract for sale is made". Therefore, it is against the 2009 Mines and Minerals Act to calculate payment of royalty to Government only after *deducting* Sales Tax, Value Added Tax, Goods and Services Tax, export duty, levy or excise payable to GOSL.

Finally, and without prejudice to other flaws that may be identified in the London Mining Lease, the Lease Agreement provides at section 5(c)(i) that the Company shall be liable for the payment of taxes at the "fixed rate of 6% per annum for a period of ten years from the date of [the] Agreement and thereafter at a fixed rate of 30% per annum or in accordance with the prevailing rate applicable to companies generally as set forth in the Income Tax Act 2000…". On the contrary, the Income Tax Act 2000 provides at the Sixth Schedule, paragraph 1 that "the rate of tax applicable to companies under section 21 [of the said Income Tax Act, which deals with companies involved in the mining sector] for the year of assessment commencing after 1st April 1999, shall be 37 and one half percent, subject to any additional tax on profits agreed between the Ministry responsible for mineral resources and the company concerned". Also, at paragraphs 4 and 5 of the Sixth Schedule, it is stated that "the holder of a mining lease shall pay a minimum income tax of 3 and one half percent of turnover where his chargeable business income is below 7% of turnover in any year of assessment, subject to section 69(3) of the Income Tax Act 2000" and that "a loss in any year of assessment may be carried forward as a deduction against income of the subsequent year of assessment". Paragraph 7 of the Sixth Schedule of the said Income Tax Act requires, *inter alia*, the Ministry responsible for Mines and Minerals to *advise* the Income Tax Commissioner of 'any "appropriate price" determined by the Minister responsible for mineral resources and the circumstances of that determination'. Whilst it is unclear as to whether the Minister responsible for Mines and Minerals advised the Income Tax Commissioner of the

6% and 30% tax rates granted London Mining Company afore-stated, it is certain that the 37.5% tax rate per annum outlined in the Schedule is the standard tax payable by mining companies, and that paragraphs 4 and 5 of the Sixth Schedule mentioned above are meant to respond to either situations of loss or any situation in which the annual turnover of the company is below 7% of the year of assessment of income tax. Any amendment to the Schedule ought to have been by specific regulation or law to that effect in order to avoid selective legislations for specific business establishments, especially where a general law is in force governing such situations.

Conclusion:

From the foregoing analysis, Parliament, having just enacted the 2009 Mines and Minerals Act, is now saddled with the grave legislative dilemma of whether it considers the 2009 Mines and Minerals Act as a statute of general application to all matters pertaining to mineral rights and licenses in Sierra Leone without exception or whether it intends to use the supposed London Mining Lease (Ratification) Act of 2010 as a statute of specific application to be archived as a precedent in circumventing the parent 2009 Mines and Minerals Act. Either way it goes, Parliament has to be clear on the issues outlined in this analysis in order for the general public to be certain that the 2009 Mines and Minerals Act and the Income Tax Act 2000 (as amended) are still wholesomely in force.

N/B: All underlined or italicized words and phrases stated herein are used to portray emphasis.

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