WHAT'S THE MATTER?

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Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Others **[2023] UKSC 32 represents the first time the interpretation and application of the stay provisions of section 9 of the Arbitration Act 1996 (UK) (the Act) have been considered by the United Kingdom Supreme Court. The key issue here was whether Mozambique was attempting to litigate 'matters' it had agreed to arbitrate. The focus was on which 'matters' were encompassed within the arbitration agreement.**

Background

The Republic of Mozambique government (**Mozambique**) wished to capture greater profits from tuna fishing and extracting gas resources within its Exclusive Economic Zone. It sought ships, aircraft and local infrastructure including a shipyard to achieve this. Mozambique created three *special purpose vehicle* companies which it wholly owned that entered into three supply contracts with Privinvest for the projects. Financing came from Credit Suisse companies. Privinvest subcontracted with other companies in its group. Mozambique had to provide sovereign guarantees for the supply contracts, and the guarantees were covered by English law within the jurisdiction of England and Wales. Disputes emerged and

Tuna scandal

→ UK Supreme Court declines an application to stay the matter, in favour of trial.

Mozambique filed proceedings in England.

Mozambique advanced bribery, unlawful means conspiracy and dishonest assistance claims.[1] Its standing to sue was based on these allegations which arose from the procuring of the guarantees. It alleged a US$2billion fraud in what became known as the *"tuna bonds"* scandal. The supply contracts had three arbitration clauses within them, seated in Switzerland, but Mozambique was not a party to the supply contracts. However, for the purposes of the argument on the preliminary issue, the parties agreed under Swiss law that the Court should proceed as if Mozambique was bound by the arbitration agreements. This point was without prejudice to Mozambique's rights at trial. The sub-contracts had English choice of law terms. Privinvest and a sub-group of other defendants argued Mozambique's claims should be arbitrated and applied to the English High Court for a stay of proceedings under section 9 of the Act. The section 9 argument was a preliminary issue in the context of complex litigation.

Privinvest argued that the supply contracts had been performed and the goods delivered but Mozambique disagreed. Mozambique maintained the supply contracts were instruments of fraud or shams. Mozambique argued that Privinvest's stated defences to its above claims were not relevant "matters" which fell within the scope of the arbitration agreements.

The relevant parts of section 9 of the Act hold (emphasis added):[2]

9 Stay of legal proceedings.

(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be

1 Collectively, 'economic torts'.

2 Section 9 of the Act gives effect to article II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention").

> referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

English lower Court decisions

The principal focus of the High Court judgment was whether Mozambique's claims fell within the scope of the three arbitration agreements. Justice Waksman held that Mozambique's claims did not fall within the scope of the three arbitration clauses. He declined to grant the stay.

The Court of Appeal disagreed and held that the reasonably foreseeable defences Privinvest raised were matters sufficiently connected to the supply contracts and accordingly fell within the scope of the arbitration agreements.

The Court of Appeal applied the *granular* test of Justice Popplewell in *Sodzawiczny v Ruhan*:[3]

> the court should treat as a 'matter' in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.

Lord Justice Carr for the Court of Appeal maintained:[4]

> …the validity and genuineness of the supply contracts were bound to be raised by Privinvest as part of its defence against the allegations of dishonesty. They would be a matter in dispute as the Republic did not accept that the supply contracts were valid commercial contracts.

The Court of Appeal granted the stay but the Supreme Court later granted leave to appeal.

Interpretation of arbitration agreements and the Supreme Court decision

England adopts a pro-arbitration approach which involves taking a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved.[5] This is the context in which section 9 fell to be interpreted.

The Supreme Court outlined:[6]

> In this case, the substance of the controversy is whether the transactions, including both the supply contracts and the guarantees, were obtained through bribery and whether the defendants had knowledge at the relevant time of the alleged illegality of the guarantees and Mr Chang's lack of authority to execute them. An assertion of the extent to which each of the supply contracts gave value for money provides no answer to the assertion by the Republic that there was such bribery and such knowledge.

The Supreme Court unanimously upheld Mozambique's interpretation of section 9. None of the claims Mozambique made against Privinvest were stayed. The judgment focused on two issues: (a) the meaning of *matter* under section 9 of the Act; and (b) the scope of the arbitration agreements. The Supreme Court expressly disagreed with the granular test in *Sodzawiczny v Ruhan*.[7]

Lord Justice Hodge for the Court traversed caselaw from several

3 *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm), [2018] Bus LR 2419 at [43], emphasis added.
4 As summarised by the Supreme Court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32 at [37].
5 *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38, [2020] 1 WLR 4117.
6 *Enka Insaat ve Sanayi AS*, above n 5, at [93]. Mr Chang was the former Mozambican Minister of Finance with purported authority to sign the sovereign guarantees.
7 *Sodzawiczny*, above n 3.

jurisdictions[8] to come up with an international consensus on the determination of *matters* which must be referred to arbitration:[9]

1. First, the court adopts a two-staged process:[10]
   a. Identify the "matter". The Court must find the substance of the dispute and not be overly respectful to the claimant's pleadings. The Court should have regard to the actual and foreseeable defences.
   b. Then ask: Is the "matter" covered by the arbitration agreement?
2. The "matter" does not need to encompass the whole of the dispute. A partial stay is permissible.[11]
3. The "matter" should not be *peripheral or tangential*. It should be an essential part of the claim or defence.
4. The test entails a matter of judgement and the application of common sense.[12]
5. When turning to '1b' (above), the Court should have regard to the context in which the "matter" arises in the legal proceedings and recognise a party's autonomy to choose which of several claims it wishes to advance.[13] Mozambique had conceded two issues should go to arbitration but the balance should go to trial.

Lord Justice Hodge also noted that the grant of a stay would be refused if a party *could have no real or proper purpose* for seeking a stay.[14] The Judge also declined to grant a stay on the partial defence based on Privinvest's quantification of damages if the economic torts were proved.

The substantive trial is listed for three months, and began on 2 October 2023 in the Commercial Court, London.

Conclusion

This decision contains an important discussion of the concept of a *matter*. Because the decision encapsulates article II(3) of the New York Convention,[15] further worldwide jurisdictions will be affected by this decision. New Zealand's version of the stay power is found at Schedule 1, article 8 of the Arbitration Act 1996. The domestic provisions should be interpreted on broad principles of general acceptance, in keeping with this decision.

On the same day as this decision was handed down, the Privy Council issued a judgment which also has ramifications for the stay of arbitral proceedings. *FamilyMart v Ting Chuan*[16] is considered in this edition of ReSolution. The legal analysis in the two decisions is more or less identical.

8 Hong Kong, Australia, British Virgin Islands, Cayman Islands and Singapore.
9 *Enka Insaat ve Sanayi AS*, above n 5, at [71]–[80].
10 *Enka Insaat ve Sanayi AS*, above n 5, at [48], [72]–[73].
11 *Enka Insaat ve Sanayi AS*, above n 5, at [74].
12 *Enka Insaat ve Sanayi AS*, above n 5, at [77].
13 *Enka Insaat ve Sanayi AS*, above n 5, at [78]–[80].
14 *Lombard North Central plc v GATX* [2013] Bus LR 68.
15 160 states have signed the New York Convention.
16 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33.