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What ‘Matters’ in a Stay of Proceedings Under Section 9 of the English Arbitration Act 1996? – Republic of Mozambique v Prinvest Shipbuilding SAL (Holding) [2023] UKSC 32

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The UK Supreme Court (‘UKSC’) addressed the meaning of ‘*matter*’ in Article II(3) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (‘NYC’) in its judgment of 20 September 2023 in *Republic of Mozambique v Prinvest Shipbuilding SAL (Holding)* [2023] UKSC 32 (‘*Mozambique v Prinvest*’). This post examines the judgement of the UKSC and its possible implications.

Summary of the Facts

The case concerns the development of Mozambique’s exclusive economic zone, in particular to opportunities offered by its coastline and territorial waters for tuna fishing and gas exploitation.

Through three special purpose vehicles (the ‘SPVs’), Mozambique entered into three contracts with Prinvest Shipbuilding SAL and related companies for the supply of various vessels and associated shipping infrastructure. The dispute arose after Mozambique alleged that the Prinvest companies and others were paying bribes to Mozambique’s officials and employees of Credit Suisse involved in the funding of the transactions, exposing it to a potential liability of approximately US\$2billion under the Guarantees and further macro-economic losses (*Mozambique v Prinvest* at [4]). The dispute also became known as the ‘tuna bonds’ or ‘hidden debts’ scandal.

In 2019, Mozambique brought claims in England and Wales seeking damages resulting from it entering into the Guarantees. Waksman J in the court of first instance decided that the issues arising from Mozambique’s claims were not sufficiently connected with the individual supply contracts and that there were no ‘matters’ in respect of which the legal proceedings had been brought which were subject to the arbitration clauses. Following an appeal to the Court of Appeal, the UKSC was then asked to decide whether claims brought in the English court should be stayed in favour of arbitration governed by Swiss law. Therefore, the main issue was whether Mozambique’s claims were ‘matters’ which fell within the scope of the arbitration agreements under section 9 of the *English Arbitration Act 1996* (‘EAA 1996’).

The Reasoning of the Supreme Court

Mozambique appealed to the UKSC on the meaning of a ‘matter’ in respect of which legal proceedings were brought. It argued that the validity and commerciality of the supply contracts are ‘mere factual issues’ which would not amount to a legal defence to its claims and would therefore not amount to ‘matters’ in respect of which the proceedings were brought. In contrast, Prinvest argued that the allegations of corruption in relation to the conclusion of the supply contract entitled the Respondent to have the legitimacy of the supply contracts determined by the forum chosen in the supply contracts.

In deciding the questions put before it, the UKSC examined [Section 9 of the EAA 1996](#), which gives effect to [Article II\(3\) of the NYC](#). In particular, section 9(4) of the EAA 1996 requires a court to grant a stay of proceedings brought by a claim or counterclaim in respect of a matter which is to be referred to arbitration under the arbitration agreement between the parties, unless the said agreement is ‘*null and void, inoperative, or incapable of being performed.*’

At the outset, the UKSC, led by Lord Hodge, Deputy President, emphasised the pro-arbitration approach of English law. He said that this might involve:

‘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’ [46].

In analysing section 9, the UKSC adopted a two-stage test. First, the court noted that it must identify the matter or matters which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement. The court must ascertain the substance of the dispute(s) between the parties, without being overly respectful of the formulations in the claimant’s pleadings, and have regard to the defences raised or reasonably foreseeable.[48] In doing so, the judgment in *Sodzawiczny v Ruhan* [2018] was referred to. Therein, Popplewell J stated that a ‘matter’ should be ‘*any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.*’ ([43], per Popplewell J.) Popplewell J maintained that the court needs to identify ‘*any and all issues which may be the subject matter of an arbitration agreement*’ and consider ‘*the nature and substance of the claim and the issues to which it gives rise, rather than simply to the form in which it is formulated in a pleading.*’ ([43], per Popplewell J.)

Secondly, the ‘matter’ need not encompass the entire dispute between the parties; section 9 has expressly provided for stays to be granted in relation to part of the court proceedings.

Thirdly, a ‘matter’ is a substantial issue that is legally relevant to a claim or a defence, or a foreseeable defence, which is susceptible to determination by an arbitrator as a discrete dispute, rather than an issue that is peripheral or tangential.

Fourthly, the test entails a matter of judgment and the application of common sense, rather than a ‘mechanic exercise.’ The issue needs to be ‘reasonably substantial’ and ‘relevant to the outcome of the legal proceedings.’

And fifthly, when turning to the second stage of the analysis, the court must consider the context in

which the ‘matter’ arises in the legal proceedings and acknowledge a party’s autonomy to choose which of several claims it wishes to advance.

The substance of the dispute concerned whether the transactions, contracts and guarantees, were obtained through bribery, and whether Privinvest had knowledge at the relevant time of the alleged illegality of the transactions. The Court found that it was not necessary to examine the validity of the contracts; and that a defence that the contracts were valid and on commercial terms would not be relevant to the question of Privinvest’s liability – it would only be relevant in relation to the quantification of the loss suffered by Mozambique. As the validity and commerciality of the contracts were not essential to any relevant defence, the court held that they were not ‘matters’ within the meaning of section 9 in relation to the question of Privinvest’s liability (*Mozambique v Privinvest* [86]-[94]). The court further found that there was no case law in which section 9 had been invoked to obtain a stay solely in relation to a dispute of the quantification of a claim. [98]

In addition, the UKSC examined the scope of the arbitration agreements. It held that in ascertaining the scope of an arbitration agreement, regard must be given to what rational businesspeople would contemplate [105]. In the context of multiple arbitration clauses focused on individual contracts, rational business people would likely intend that any disputes arising out of their contractual relationship be decided by the same tribunal. Therefore, there was no question of the arbitration clauses extending to cover Mozambique’s allegations on which it relies to establish Privinvest’s legal liability.

Comment on Implications

Overall, the UKSC reiterated the pro-arbitration approach of English law and the general presumption in favour of an expansive interpretation of arbitration agreements. It demonstrated the need for courts to stay court proceedings in favour of arbitration where the relevant issue falls within the scope of the arbitration agreement, to give effect to the principle of party autonomy. This approach has been seen in earlier decisions, such as in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, where Lord Hoffmann in the House of Lords authoritatively stated that:

‘the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.’

The UKSC’s approach is further in line with the ruling in *Sodzawiczny v Ruhan* [2018], which was considered the authority on a stay of legal proceedings under section 9 until now. Simultaneously, the judgment also clarifies that there are limitations to the pro-arbitration approach specifically with regards to granting a stay of proceedings in favour of arbitration and a requirement to carefully analyse the arbitration agreement. The judgment signifies that a stay of proceedings in favour of arbitration will likely be granted if the relevant issue falls within the scope of the arbitration agreement; but if it is outside of its scope, the court proceedings will likely continue.

In that regard, the UKSC has also provided clarity and a uniform approach on the scope and meaning of ‘matter’ as also reflected under the NYC by adopting a two-stage inquiry. An issue in

the legal proceedings would be considered a ‘matter’ if it has been so agreed to by the parties in the applicable arbitration agreement. Importantly, the UKSC has focused on the substance of the claim, rather than the form; it has emphasised the importance to examine the facts and circumstances of the specific dispute, rather than adopting a ‘one size fits all’ approach. If the issue in question is not a substantial and essential element of the claim or counterclaim (i.e., defence to the claim) and its outcome, then it will not be considered a ‘matter’ under section 9. It is argued that the judgment will be of international significance and will be informative for other courts, when deliberating on the effect of [Article II \(3\) of the NYC](#). More specifically, by examining the jurisprudence of other common law jurisdictions, it is believed that this ruling would be greatly influential in other common law countries which are signatories to the NYC, and whose jurisprudences were referred to in the UKSC’s reasoning.

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