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Supreme Court provides guidance on "matters" falling within scope of an arbitration agreement

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Introduction

Recently, the Supreme Court handed down a key judgment in relation to the circumstances in which, pursuant to section 9 of the Arbitration Act 1996, a party can obtain a stay of proceedings in respect of a "matter" to be referred to arbitration under an arbitration agreement.

In *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others*,[(1)] the Supreme Court ruled that the claims asserted by the Republic of Mozambique, including bribery, unlawful means conspiracy and dishonest assistance, were not "matters" falling within the scope of various arbitration agreements. This judgment provides clarity on the application of section 9, stating that the courts must adopt a pragmatic approach to interpreting the substance of claims being asserted and whether those claims fall within an arbitration agreement.

Background

Section 9 of the Arbitration Act 1996 (the Act) provides that a party to an arbitration agreement may apply to the court to stay legal proceedings in respect of a "matter" which should be referred to arbitration under the arbitration agreement. In such circumstances, the Court shall grant a stay unless it considers the agreement to be "null, void, inoperative, or incapable of being performed".

Facts

This case concerns an alleged $2 billion fraud, known as the "tuna bonds" scandal, relating to contracts entered into as part of the Republic of Mozambique's development of its Exclusive Economic Zone through, among other things, tuna fishing and the exploitation of its gas resources.

The dispute originates from three Swiss law governed supply contracts entered into in 2013 and 2014 between three special purpose vehicles wholly owned by Mozambique and three Privinvest shipping companies. Each supply contract contained an arbitration agreement in respect of either "all disputes arising in connection with" or "any dispute, controversy or claim arising out of, or in relation to" the relevant supply contract. The arbitration agreements were governed by Swiss law and provided for Swiss-seated arbitration. As agreed by the parties, the Supreme Court assumed that under Swiss law the parties to the section 9 proceedings that had not signed the arbitration agreements were bound by them nevertheless.

To finance the purchase of equipment and services under the supply contracts, each special purpose vehicle entered into loan agreements with London-based banks, and Mozambique provided sovereign guarantees in respect of those loans. The loan agreements and guarantees were governed by English law and provided for the exclusive jurisdiction of the English courts.

In 2019, Mozambique brought claims for bribery, unlawful means conspiracy, dishonest assistance and knowing receipt against the Privinvest entities in the English court under the guarantees. Mozambique alleged that Privinvest and its ultimate owner had bribed representatives of Mozambique and the relevant banks in order to procure the transactions.

The Privinvest entities applied for a stay under section 9 of the Act, asserting that all the claims were matters falling within the arbitration agreements.

At first instance, the High Court held that the claims were not within the scope of section 9 because the claims were not sufficiently connected with the supply contracts. On appeal, the Court of Appeal reversed that decision, holding that the allegations went to the validity of the supply contracts, which were "matters" which fell within the scope of the arbitration agreements. The matter was then appealed to the Supreme Court.

Decision

The Supreme Court's judgment focused on two issues:

- the meaning of a "matter" under section 9 of the Act; and
- the scope of the arbitration agreements.

Acknowledging that section 9 gives effect to article II(3) of the 1958 New York Convention,[(2)] the Supreme Court drew on the jurisprudence of Hong Kong, Singapore, Australia as guides to interpretation of that section. In doing so, the Supreme Court held that an international consensus existed in leading jurisdictions in the common law sphere on the determination of "matters" which must be referred to arbitration pursuant to an arbitration agreement. The Court set out the following five principles.

- A two-stage methodology should be applied to a section 9 (or equivalent) stay application: first, a determination of what matters have, or will foreseeably be, raised in the court proceedings and second, in respect of each matter, an assessment of whether they fall within the scope of the arbitration agreement. In identifying the matters raised in the legal proceedings, the court must assess the substance of the dispute(s) between the parties (including possible defences).
- A "matter" need not contain the full dispute between the parties and may apply only to the extent that the legal proceedings are to be referred to arbitration.
- A "matter" needs to be a substantial issue which is legally relevant to a claim or defence which may be determined by an arbitrator in separate dispute (rather than being merely peripheral or tangential to the issues of the legal proceedings).
- The determination of the substance and relevance of the "matter" requires judgment and the application of common sense. Such an exercise is not limited to identifying issues capable of falling within an arbitration agreement but necessarily involves an assessment of whether each issue is reasonably substantial and relevant to the outcome of the legal proceedings subject to the stay application.
- Regard must be given to the context in which the "matter" arises in the legal proceedings as well as its true nature, when assessing whether it is a matter falling within the scope of the arbitration agreement. In respect of this, the Supreme Court accepted that this principle relied on a common-sense approach rather than any settled position in foreign jurisprudence.

Applying these principles to the matters before the English courts, the Supreme Court held the following.

Mozambique's claims

In determining Mozambique's claims for bribery, unlawful means conspiracy and dishonest assistance, or Privinvest's defences, the validity of the supply contracts would not be relevant. Similarly, a defence based on the commerciality of the agreements would not be relevant to determining Mozambique's claims, only the quantification of any loss suffered.

Accordingly, Mozambique's claims where not "matters" for the purposes of section 9 required to be referred to arbitration under the arbitration agreements. Some might view the Supreme Court's application of the principles clarified by the judgment to the facts of the case as somewhat limiting the scope of standardised wording in arbitration agreements; the Court of Appeal's finding that the fraud allegations were sufficiently connected to the supply contracts and accordingly fell within the scope of the arbitration agreements could be seen as a more conventional, pro-arbitration interpretation. But here the claims were concerned principally with the ancillary guarantees.

Partial defence on quantum

Privinvest's partial defence on quantum (concerning the value provided by each of the supply contracts and the extent to which this should reduce any damages awarded to Mozambique), did not fall within the scope of the arbitration agreements. Notably, the contracts included non-identical arbitration agreements. This, the court held, evidenced the parties' intention that each arbitration agreement was entered into for the purpose of determining disputes arising under a specific contract.

Accordingly, applying a narrow and common-sense interpretation, the defence on quantum did not fall within the scope of the arbitration agreements. The Supreme Court confirmed that the scope of the arbitration agreement was a question of contractual construction and that "rational businesspeople would not seek to send to arbitration such a subordinate factual issue [quantification] in such legal proceedings". In support of its conclusion, the Supreme Court noted that there were no recorded cases under section 9 of the Act of a partial stay being granted for the purposes of quantification to be decided by an arbitral tribunal.

With the Supreme Court having lifted the stay, Mozambique's underlying claims against Privinvest have proceeded to trial before the English courts.

Comment

This judgment provides guidance to those considering whether to seek a stay of proceedings pursuant to section 9 of the Act.

While the English courts maintain a pro-arbitration stance, they will nevertheless adopt a pragmatic, common-sense and commercial approach to construing arbitration agreements and will not stay proceedings if the "matter" in dispute falls outside of the scope of an arbitration agreement. The court will look beyond the presentation of the pleadings to the underlying "matter" in dispute.

That could mean that, as in this case, sensitive disputes with a connection to complex transactions and multi-party agreements containing arbitration agreements will be heard in public court proceedings. The judgment emphasised, however, that in construing arbitration agreements the courts will seek to give effect to the intentions of the contracting parties as to what is within and outside the scope of the agreement. It will be interesting to see how the principles set out by the Supreme Court will be applied in future judgments.

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Endnotes

(1) [2023] UKSC 32.

(2) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.