Press Summary

20 September 2023

Republic of Mozambique (acting through its Attorney General) (Appellant) v Privinvest Shipbuilding SAL (Holding) and others (Respondents)

[2023] UKSC 32
On appeal from: [2021] EWCA Civ 329

Justices: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt, Lord Richards

Background to the Appeal

Between 2013 and 2014, three corporate vehicles (the "**SPVs**") wholly owned by the Republic of Mozambique ("**Mozambique**") entered into supply contracts (the "**Contracts**") with three of the respondents (the "**Privinvest companies**") for the development of Mozambique's exclusive economic zone. The Contracts are governed by Swiss law. Two of the Contracts provide for dispute resolution by arbitration of "all disputes arising in connection with" the relevant project governed by the Contract. The third Contract provides for dispute resolution by arbitration of "any dispute, controversy or claim arising out of, or in relation to" the relevant Contract (the "**arbitration agreements**").

The SPVs borrowed the purchase funds from various banks, for which borrowing Mozambique granted sovereign guarantees (the "**Guarantees**"). The Guarantees are governed by English law and provide for dispute resolution in the courts of England and Wales.

Mozambique accuses the Privinvest companies and others of paying significant bribes to Mozambique's officials, and exposing it to a potential liability of approximately US$2bn under the Guarantees. Accordingly, in 2019 Mozambique brought claims in England and Wales seeking damages resulting from its entering into the Guarantees.

The respondents ("**Privinvest**") say that the Contracts have essentially been performed. Mozambique does not accept that what Privinvest has provided conforms to contract or is of material benefit to it. Privinvest asserts that it provided valuable goods and services and that the Republic has squandered them and sabotaged the project for reasons of internal politics.

While Mozambique is not a signatory to the Contracts, Privinvest contends that, as a matter of Swiss law, Mozambique is bound by the arbitration agreements within them. On that

basis, Privinvest sought a stay of all Mozambique's claims pursuant to section 9 of the Arbitration Act 1996 (the "**1996 Act**"). Section 9 provides that a party to an arbitration agreement (such as those in the Contracts) against whom legal proceedings are brought in respect of a "matter", which under the agreement is to be referred to arbitration, may apply to the court to stay the proceedings so far as they concern that matter. On such an application the court must grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

As a preliminary question, the issue arose as to whether Mozambique's claims in the legal proceedings were "matters" which fell within the scope of the arbitration agreements under section 9 of the 1996 Act. At first instance, the High Court held the claims were not. The Court of Appeal disagreed on appeal. Mozambique now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. Lord Hodge gives the judgment, with which Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Richards agree.

Reasons for the Judgment

(1) The meaning and ascertainment of a "matter"

As section 9 of the 1996 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**"), the Supreme Court holds that it is appropriate to consider other countries' jurisprudence as guides to section 9's interpretation, to the extent that they have similarly worded statutory provisions, and to adopt broad and generally accepted principles in interpreting the 1996 Act **[53]-[55]**.

The Supreme Court notes that English law, like many other legal systems, adopts a pro-arbitration approach. It is in this context that section 9 of the 1996 Act must be interpreted **[45]-[47]**. Following its review of several jurisdictions' case law, the Supreme Court holds that there is also a general international consensus on the determination of "matters" which must be referred to arbitration among the leading arbitration jurisdictions in the common law world that are signatories of the New York Convention **[49]-[52]; [56]-[71]**.

First, in applying section 9 of the 1996 Act, the court will adopt a two-stage test: first, the court 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 to the formulations in the claimant's pleadings, and have regard to the defences raised or reasonably foreseeable **[48]; [72]-[73]**.

Secondly, the "matter" need not encompass the whole of the dispute between the parties; section 9 has expressly provided for stays to be granted in relation to part of the court proceedings **[74]**.

Thirdly, a "matter" is a substantial issue that is legally relevant to a claim or a defence which is susceptible to determination by an arbitrator as a discrete dispute, rather than an issue which is peripheral or tangential. If the "matter" is not an essential element of the claim or

of a relevant defence to that claim, it is not a "matter" in respect of which the legal proceedings are brought **[75]-[76]**.

Fourthly, the test entails a matter of judgment and the application of common sense **[77]**.

Although there may not yet be a consensus among the relevant signatories to the New York Convention, the Supreme Court finds that common sense lends further support to a fifth point: when turning to the second stage of the analysis, the court must 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 **[78]-[80]**.

The Supreme Court holds that Mozambique, in seeking damages resulting from entering into the Guarantees, is asserting that it did not get value for the monetary obligations it entered into **[85]**. The substance of the controversy is whether the transactions, including the Contracts and the Guarantees, were obtained through bribery, and whether Privinvest had knowledge at the relevant time of the alleged illegality of the Guarantees **[93]**. In relation to each of Mozambique's allegations, the Supreme Court notes that it would not be necessary for the court to examine the validity of the Contracts. Moreover, a defence that the Contracts were valid and on commercial terms would not be relevant to the question of Privinvest's liability: it would be relevant only in relation to the quantification of the loss suffered by Mozambique **[86]-[91]**. As the validity and commerciality of the Contracts are not essential to any relevant defence, the Supreme Court holds that they are not "matters" under section 9 of the 1996 Act in relation to the question of Privinvest's liability **[94]**.

The Supreme Court notes that the extent of loss and damage allegedly suffered by the claimant may often be a substantial issue which is in dispute between the parties. The extent to which Privinvest gave value for money in its performance of the Contracts will be a relevant issue in the quantification of the Republic's claims. The Supreme Court, however, finds that there is no case law in which section 9 of the 1996 Act has been invoked to obtain a stay solely in relation to a question of the quantification of a claim. As the Supreme Court has decided the appeal by reference to the scope of the arbitration agreements, it is not necessary to decide whether the quantification of Mozambique's claims is a "matter" in the legal proceedings. **[95]-[98]**.

(2) The scope of the arbitration agreements

The question of the scope of each of the arbitration agreements is a question of construction, governed by Swiss law **[99]**.

The Supreme Court holds that the court, in ascertaining the scope of an arbitration agreement, must have regard to what rational businesspeople would contemplate. As Waksman J pointed out, the context is one of multiple arbitration clauses focused on individual contracts [**103**]. Rational businesspeople are likely to intend that any disputes arising out of their contractual relationship be decided by the same tribunal **[105]**. In this case, there is no question of the arbitration agreements extending to cover the Republic's allegations on which it relies to establish Privinvest's legal liability **[106]**. Section 9 of the 1996 Act must be applied with common sense [**107**]. With respect to the dispute over the partial defence to the quantification of Mozambique's losses, rational businesspeople would not seek to send such a subordinate factual issue to arbitration. Construed accordingly, the partial defence does not fall within the scope of the arbitration agreements **[107-109]**.

References in square brackets are to paragraphs in the judgment

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: Decided cases - The Supreme Court