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Does Your Arbitration Agreement 'Matter?': Recent Guidance From the English Supreme Court

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It is often assumed that arbitration agreements will catch all possible disputes arising from a given relationship, with the result that those disputes will have to be resolved confidentially. A recent decision of the English Supreme Court highlights that this may not always be the case.

What was the dispute about?

The dispute concerned a series of commercial contracts entered into by (among others) the Republic of Mozambique (ROM), three special purpose vehicles created by ROM (the SPVs) and several shipping companies (referred to collectively in the judgment as Privinvest).

Privinvest entered into three supply contracts with the SPVs in connection with certain development projects in Mozambique. Those contracts were governed by Swiss law and included arbitration clauses providing disputes were to be resolved by arbitration seated in Switzerland.

The SPVs procured financing from several well-known banks in order to fund the sums owed under the supply contracts, with ROM guaranteeing performance of their obligations. The loan agreements were governed by English law and

contained an exclusive jurisdiction clause in favour of the English Court.

In 2019, ROM commenced litigation in the English High Court against Privinvest alleging a $2 billion fraud involving claims of bribery, conspiracy and dishonest assistance in relation to the procurement of the guarantees provided (the ROM Litigation). Privinvest (and others) in turn commenced arbitrations against ROM and the SPVs pursuant to the arbitration agreements contained in the supply contracts.

What were the key issues for the Court to decide?

Privinvest applied to the English Court for a stay of ROM's claims in the ROM Litigation in favour of arbitration pursuant to section 9 of the Act which provides:

"A party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which is to be referred to arbitration under the agreement may apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."[1]

In its first decision on the application of section 9 of the Act, the Supreme Court had to determine whether the "*matters*" with which the ROM Litigation was concerned were indeed matters that the parties had agreed to resolve by arbitration and whether to stay the ROM Litigation accordingly.

What was the result?

The Supreme Court unanimously found that ROM's claims in the ROM Litigation were not "*matters*" that the parties had agreed to resolve by arbitration and refused Privinvest's application for a stay.

Considering the jurisprudence of several leading arbitral jurisdictions in reaching judgment, the Supreme Court found there was consensus that a two-stage process should be adopted in considering the application: first, the Court must identify the "*matter(s)*" in respect of which litigation had been brought; and second, the Court must ascertain in relation to each matter whether it fell within the relevant arbitration agreement. In particular, the Court found that for the

COMMENT

It is often assumed (and intended) that arbitration agreements will catch all possible disputes arising from a given relationship.

This decision highlights that this may not always be the case. It is a reminder that parties should consider: (1) the nature and scope of their arbitration agreements when drafting their contracts, particularly those used within a series of transactions, to ensure that they function as intended; and (2) at the outset of a dispute, the particular forums which may be available for bringing such claims irrespective of any prior agreement. Public litigation may be a useful tool for parties bringing or defending claims where a risk of reputational damage exists.

Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors [2023] UKSC 32

[1] Section 9(1) of the Arbitration Act 1996

[2] *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32 at [75]

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