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THE UK SUPREME COURT PROVIDES ITS LONG-AWAITED RULING ON S.9 ARBITRATION ACT 1996 STAYS IN THE "TUNA BONDS" SCANDAL.

In a recent decision of the UK Supreme Court in *Republic of Mozambique (acting through its Attorney General) v Privinvest Shipbuilding SAL (Holding) and Others* [2023] UKSC 32, the Republic of Mozambique has won a long running battle on a preliminary issue concerning a stay under s.9 of the Arbitration Act 1996 (the 1996 Act). The win for Mozambique ends the stay and means the trial on the substantive issues can proceed.

This decision is the first in which the Supreme Court has interpreted s.9 of the 1996 Act and provides much needed clarity on the approach which courts must adopt when granting arbitration stays.

Notably, this decision was then immediately followed by the Privy Council judgment in *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 in which it confirmed and upheld the analysis set out in *Mozambique* (perhaps unsurprisingly as both decisions were delivered by Lord Hodge). The Supreme Court's analysis in *Mozambique* will therefore be binding on all Commonwealth countries whose final appeal court is the Privy Council.

What's the "matter"?

Also known as the "*tuna bonds*" or "*hidden debts*" scandal, the long-running dispute between the Republic of Mozambique and a group of defendants (the **PRIVINVEST DEFENDANTS**) concerned a US$2 billion fraud relating to the development of Mozambique's Exclusive Economic Zone. The claims brought by the Republic of Mozambique against the Privinvest Defendants included claims of bribery, unlawful means conspiracy, dishonest assistance and knowing receipt.

The Privinvest Defendants applied to stay the English court proceedings under s.9 of the 1996 Act on the basis that supply contracts entered into between the relevant parties contained Swiss-law arbitration agreements.

S.9 of the 1996 Act requires courts to stay proceedings "*in respect of a matter which…is to be referred to arbitration*" so long as the arbitration agreement is not null and void, inoperative or incapable of being performed. As Mrs Justice Carr observed in the Court of Appeal: "*the power to stay under s.9 is not discretionary: if the "matter" in question falls within the scope of the arbitration agreement, the court must grant the stay*" unless the arbitration agreement is null and void, inoperative or incapable of being performed.

The Privinvest Defendants alleged that all of the Republic's claims were "matters" falling within the scope of the arbitration agreements and, accordingly, a s. 9 stay of the proceedings should be given. The application failed at first instance before Mr Justice Waksman but the decision was overturned in the Court of Appeal.

The Decision of the Supreme Court

In a unanimous judgment given by Lord Hodge, the Supreme Court interpreted the word "matter" in s.9 of the 1996 Act and closely reviewed the leading authorities on the subject, leading it to overturn the Court of Appeal and rule that none of the Republic's claims in issue on appeal were "matters" in respect of which proceedings were brought within the terms of the arbitration agreements.

In coming to its decision, the Supreme Court said that, on any interpretation of s.9, the court must adopt a two-stage test:

1. first, the court must identify the matter or matters in respect of which the legal proceedings are brought; and

2. second, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement(s) on its true construction.

On this first issue, the Supreme Court confirmed that a "matter" is a substantial issue which is legally relevant to a claim or a defence, rather than an issue which is peripheral or tangential. Further, at paragraph 77 of the judgment, the Supreme Court stressed that ultimately any analysis of what a "matter" is will require a common-sense approach.

Conclusions and Key Takeaways

The Supreme Court's decision on what constitutes a "matter", and whether it falls within the scope of an arbitration agreement, is certainly helpful and provides important guidance to any party who wishes to issue, or has already issued, proceedings in circumstances where a valid arbitration agreement exists between the parties. That is particularly so in fraud-related claims in which defendants (and sometimes claimants) will no doubt prefer the private and confidential nature of arbitral proceedings.

The Supreme Court's analysis also helpfully confirms that, where a "matter" only has a tangential connection with an agreement containing an arbitration clause, or is not an essential element of the claim or of a relevant defence, the courts will be slow to grant a stay of the proceedings.

HFW are currently acting for clients in relation to an appeal in the Isle of Man due to be heard on 26 – 27 October 2023. The appeal directly concerns arbitration stays and the guidance set out in Mozambique *and* FamilyMart.

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