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OUT OF SCOPE? COURTS REFUSE TO STAY COURT PROCEEDINGS THAT FALL OUTSIDE AN ARBITRATION CLAUSE

In two recent decisions, the English courts have considered the circumstances in which they will stay court proceedings on the basis that claims fall within the scope of an arbitration agreement. In *Mozambique v Privinvest*, the Supreme Court has for the first time provided guidance on the stay provisions in section 9 of the Arbitration Act 1996, which was applied by the High Court in *Município de Mariana v BHP*. The decisions are an important reminder for commercial parties that complex disputes involving factual and legal issues that extend beyond a contract containing an arbitration clause may find their way into the courts.

The *Mozambique v Privinvest* dispute

The Supreme Court's decision arose out of court proceedings concerning disputed financing transactions in connection with the development of the Republic of Mozambique's exclusive economic zone. The project was facilitated through Swiss law governed supply contracts between Mozambique-owned entities and project contractor companies in the Privinvest group, financed by loans from London-based banks guaranteed by Mozambique. The loan facility agreements and guarantees were governed by English law and contained exclusive jurisdiction clauses in favour of the English courts. The proceedings raised complex disputes between Mozambique, the Privinvest companies, the financing banks and individuals involved in the project.

The Privinvest companies applied to stay Mozambique's claims against them under section 9 of the Arbitration Act arguing that those claims were within the scope of arbitration agreements in the supply contracts.

Section 9 provides that a party may apply for a stay in court proceedings in respect of a "matter" that under an arbitration agreement "is to be referred to arbitration". The court must stay the proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed.

The Supreme Court's decision

The High Court dismissed the Privinvest companies' application to stay the proceedings, but the Court of Appeal took the opposite view. The Supreme Court unanimously overturned the Court of Appeal's decision and dismissed the Privinvest companies' application, finding that Mozambique's claims where not "matters" within the scope of the arbitration agreements.

The test - what is a "matter" within the scope of an arbitration agreement?

Drawing on English and international case law (e.g. Singapore, Hong Kong, Australia), the Supreme Court found there is "a general international consensus" among leading common law international arbitration centres on the determination of "matters" which must be referred to arbitration, which the Supreme Court distilled into 5 principles: [1]

1. **A two-stage test applies.** First, the court must identify what matters have been raised or will foreseeably be raised in the court proceedings by assessing the substance of the dispute(s) including likely defences. Secondly, the court must determine whether each matter falls within the scope of the arbitration agreement.
2. **A "matter" need not cover the whole of the dispute.**
3. **A "matter" is a substantial issue that is legally relevant to a claim or defence**, which may be decided by an arbitrator as a standalone dispute, not an issue that is peripheral or tangential to the subject of the proceedings.
4. **Evaluating the substance and relevance of a "matter" requires judgment and common sense**, rather than a mechanistic exercise. It is not enough simply to identify that an issue could fall with the scope of an arbitration agreement.
5. **The true nature of the "matter" must be considered, but also the context in which it arises**. The Supreme Court believed that while there may not yet be international consensus on this fifth point, this was the common-sense approach.

[1] Section 9 gives effect to international law rules in the New York Convention (article II(3)). Provisions like section 9 can be found in the national arbitration laws of other New York Convention countries, which the Supreme Court decided could assist it in interpreting section 9.

Mozambique's claims were not "matters" within the arbitration agreements

Applying the relevant principles, the Supreme Court held that Mozambique's claims were not "matters" for the purposes of section 9. The substance of Mozambique's claims arose largely out the guarantees it provided in connection with the project. None of Mozambique's claims or Privinvest's defences turned on the validity or otherwise of the supply contracts. The quantification of the loss and damage allegedly suffered by a claimant may be a substantial matter in dispute, which, in this case, arose from the implementation of the supply agreements. But, the Supreme Court found it unnecessary to decide whether this met the threshold as it found that the dispute on quantification of damages fell outside the scope of the arbitration agreements.

Privinvest's partial defence that the value Mozambique received under the supply contracts might reduce the amount of any damages awardable did not fall within the scope of the arbitration agreements. Applying Swiss law (the law governing the supply contracts, which the Supreme Court noted was analogous to English law), the Supreme Court held that rational businesspeople are likely to intend that any dispute arising out of their contractual relationship be decided by the same tribunal and in *most* cases the matter covered by an arbitration agreement would encompass the claims made in the legal proceedings. However, in this case, the Supreme Court believed that rational businesspeople would not intend to arbitrate the quantification of damages, which was a subordinate factual issue.

The High Court and the Supreme Court gave weight to the fact that the supply contracts included different arbitration agreements, which, in the courts' view, evidenced the parties' intention that each arbitration agreement was entered into for the purpose of determining disputes arising solely under the contract in which the arbitration agreement was contained.

The *Município de Mariana v BHP* proceedings

The proceedings concern claims arising out of the 2015 collapse of the Fundão dam in Brazil which was owned and operated by a Brazilian-incorporated joint venture between Vale and BHP Brasil, a Brazilian subsidiary of the BHP Group (see our earlier briefing). Claims were brought against BHP Group plc and BHP Group Ltd. The BHP defendants brought proceedings against Vale seeking a contribution to any sums that BHP might be found liable to pay to the claimants. Following earlier unsuccessful attempts to strike out the contribution claims and challenge the English courts' jurisdiction, Vale sought to stay the claims against it under section 9. Vale argued that the dispute fell within the scope of an arbitration clause in a Brazilian law governed shareholders agreement between Vale, BHP Brasil and the joint venture company, even though the BHP defendants were not signatories to the agreement.

The High Court held that on the facts, under Brazilian law, the BHP defendants were not bound by the arbitration clause. The general starting point is that it would be unusual for a party to be bound by an arbitration clause to which on its face it never agreed.

Even though Vale's application failed at that point, the judge went on to consider if the proceedings fell within the scope of the arbitration clause. Applying the Supreme Court's test in *Mozambique v Privinvest*, the judge held that there were no allegations of breach of the shareholders' agreement in the claimants' claims against the BHP defendants, nor in the BHP defendants' claims against Vale, and no such allegations were implicit within the proceedings to make them substantial issues. Although Vale had referred to breaches of the shareholders' agreement in its defence, the judge considered these references to be "artificial" and "designed to bring the claims made against Vale within the arbitration clause". As result, Vale's application to stay the proceedings against it failed.

Practical takeaways for commercial parties

The decisions highlight the challenges that may come into play when disputes arise out of complex transactions. The arbitration-friendly English courts will generally aim to give effect to the presumptions that rational businesspeople intend for all disputes arising between them to be heard in the same forum (the 'one-stop shop' principle) and typically a non-party will not be considered bound by an arbitration clause. However, each case will turn on its facts and these presumptions do not negate the need to analyse the meaning and effect of each arbitration agreement under the relevant laws, and the substance of the claims and likely defences. The dividing line between disputes which fall within or outside the scope of an arbitration clause can be particularly difficult to pinpoint in multi-party and multi-contract transactions, which may include mismatching dispute resolution provisions in different contracts. It is possible that complex disputes involving factual and legal issues that are wider than the contract(s) containing arbitration clauses may find their way into the courts. Commercial parties should seek specialist legal advice when negotiating dispute resolution provisions in complex transactions to ensure their intentions are properly reflected in the drafting.

Slaughter and May acted for Credit Suisse, one of the banks that financed certain transactions at issue in the underlying *Mozambique v Privinvest* court proceedings. Following settlements reported on 1 October 2023, and on 7 November 2023, the litigation has been successfully resolved so far as concerns Credit Suisse.

Slaughter and May act for BHP Group (UK) Ltd and BHP Group Ltd in the *Município de Mariana v BHP* proceedings.

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