Neutral Citation Number: [2021] EWCA Civ 329

Case No: A4/2020/1467

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Justice Waksman
CL-2019-000127

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2021

Before:
LORD JUSTICE HENDERSON
LORD JUSTICE SINGH
and
LADY JUSTICE CARR DBE

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Between:

THE REPUBLIC OF MOZAMBIQUE (acting through its Attorney General)	**Claimant/ Respondent**
- and –	
(1) CREDIT SUISSE INTERNATIONAL **(2) CREDIT SUISSE AG** **(3) MR SURJAN SINGH** **(4) MR ANDREW PEARSE** **(5) MS DETELINA SUBEVA**	**Defendants**
(6) PRIVINVEST SHIPBUILDING SAL (HOLDING) **(7) ABU DHABI MAR INVESTMENTS LLC** **(8) PRIVINVEST SHIPBUILDING INVESTMENTS LLC** **(9) LOGISTICS INTERNATIONAL SAL (OFFSHORE)** **(10) LOGISTICS INTERNATIONAL INVESTMENTS LLC**	**Defendants/Appellants**
(11) CREDIT SUISSE SECURITIES (EUROPE) LIMITED **(12) MR ISKANDAR SAFA**	**Defendants**

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Duncan Matthews QC, **Ben Woolgar and Frederick Wilmot-Smith** (instructed by **Signature Litigation LLP**) for the **Appellants**
Nathan Pillow QC, Richard Blakeley and Ryan Ferro (instructed by **Peters & Peters Solicitors LLP**) for the **Respondent**

Hearing dates: 17 & 18 February 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 11 March 2021.

LADY JUSTICE CARR DBE:

Introduction

1. This is an appeal against the judgment of Waksman J ("the Judge") dated 30 July 2020[1] ("the Judgment") whereby he dismissed the application of the Appellants (together "the Privinvest companies") for a stay pursuant to s. 9 of the Arbitration Act 1996 ("s. 9") ("the 1996 Act") of the proceedings brought against them by the Respondent, the Republic of Mozambique ("the Republic"). The Judge did so on the basis that, on a proper construction and applying Swiss law, none of the Republic's pleaded claims against the Privinvest companies fell within the scope of three arbitration agreements (together "the Arbitration Agreements").

2. Three corporate vehicles wholly owned by the Republic ("the SPVs") entered into three Supply Contracts with three of the Privinvest companies ("the Supply Contracts") by which the SPVs acquired valuable goods and services in connection with the Republic's development of its Exclusive Economic Zone ("EEZ"). The SPVs borrowed the purchase funds from the First and Second Defendants, Credit Suisse International and Credit Suisse AG (together "Credit Suisse"), and a third bank, VTB Capital plc ("VTB"). In turn, the Republic gave sovereign guarantees over that borrowing ("the Guarantees").

3. The Republic claims that it has been the victim of a conspiracy involving the various named Defendants. It brings claims for deceit, bribery, conspiracy to injure by unlawful means, dishonest assistance, knowing receipt and also makes proprietary claims. The Republic accuses the Privinvest companies (and their ultimate owner and controller, now the Twelfth Defendant (Mr Iskandar Safa ("Mr Safa")), of paying very significant bribes to its corrupt officials, exposing the Republic to a potential liability of some US$2 billion under the Guarantees.

4. The Supply Contracts are governed by Swiss law and contain the Arbitration Agreements which are in favour of arbitration under the rules of the International Chamber of Commerce ("the ICC") or the rules of the Swiss Chambers' Arbitration Institution ("the SCAI"). Although the Republic is not a signatory to the Supply Contracts, the Privinvest companies contend that, as a matter of Swiss law, it was a party to them, and that the Republic's claims in these proceedings fall within the scope of the Arbitration Agreements. The Judge rejected that latter contention, resolving it as a preliminary issue in favour of the Republic (on the assumption that the Republic was a party to the Arbitration Agreements).

5. Further to a review by the Republic in accordance with CPR PD52C 27.10, the contested issues on appeal have narrowed to the following:

    i) Whether the Judge erred in his construction of the Arbitration Agreements, specifically whether he was wrong to conclude that they should be construed narrowly (Ground 1);

[1] The final version of the Judgment (albeit dated 30 July 2020) was an amended version distributed to the parties on 31 July 2020.

ii) Whether the Judge erred in failing to find that the Republic's allegations of bribery, dishonest assistance, unlawful means conspiracy, knowing receipt and claims for proprietary relief fell within the scope of the Arbitration Agreements (Ground 2).

6. The Republic resists the appeal, save in two discrete respects relating to the Judge's findings on scope in relation to allegations that i) the Supply Contracts were instruments of fraud, alternatively a sham and ii) the entry into the Supply Contracts was one of the (six) unlawful means in the conspiracy to which the Privinvest companies are alleged to have been party (referred to respectively as the "IFA" (the instrument of fraud allegation) and the "UMIFA" (the unlawful means instrument of fraud allegation)). The Republic no longer seeks positively to uphold the Judge's findings that the IFA and the UMIFA were matters falling outside the Arbitration Agreements. Its position is that whether or not those matters are stayed does not materially affect the substantive or practical outcome of the appeal. The IFA is not a claim as such; no relief is sought pursuant to it. The UMIFA is only one of multiple alleged unlawful means for the purpose of the conspiracy claim.

7. Subject always to the court's view, the Republic does not therefore stand in the path of a declaration that the IFA and UMIFA are within the scope of the Arbitration Agreements, and of a stay of the proceedings against the Privinvest companies to that extent. This has been described by the Privinvest companies as "the Concession"; it is a development which has loomed large in the submissions made on their behalf.

8. Beyond that, the Republic contends that the stay application (and now this appeal) are "contrived, both as to…purpose and premise". As to purpose, amongst other things, a stay would not extricate the Privinvest companies from these proceedings in any event (because of the existence of Part 20 proceedings brought against them by Credit Suisse and the Eleventh Defendant ("Credit Suisse Europe")). As to premise, the Republic's claims arise from and concern the Guarantees (which are governed by English law and fall within the exclusive jurisdiction of the courts of England and Wales; they are at best only peripherally related to the Supply Contracts (to which the Republic was not a named party or signatory)). The Judge was right for the reasons that he gave, and for the further reasons set out in a Respondent's Notice.

9. The court has had the benefit of able submissions on both sides, including oral argument from Mr Matthews QC for the Privinvest companies and Mr Pillow QC for the Republic.

The facts in overview

10. The SPVs are Proindicus SA ("Proindicus"), Empresa Moçambicana de Atum SA ("EMATUM") and Mozambique Asset Management ("MAM"). Each is a Mozambique company wholly owned by the Republic and set up for the purpose of entering the Supply Contracts as follows:

i) On 18 January 2013 between Proindicus and the Sixth Defendant, Privinvest Shipbuilding SAL (Holding) ("Holding"), a Lebanese company ("the Proindicus Contract"). Under the Proindicus Contract, Holding was to supply ships, aircraft and local infrastructure so as to enable the Republic to police its extensive coastline and exclusive territorial waters. This is important because

of the abundance of fish there, especially tuna, and the prospect of significant gas exploitation within those waters;

ii) On 2 August 2013 between EMATUM and the Seventh Defendant, Abu Dhabi Mar Investments LLC ("Mar"), a company incorporated in the UAE ("the EMATUM Contract"). Under the EMATUM Contract, Mar was to supply a large fishing fleet for the Republic;

iii) On 1 May 2014 between MAM and the Eighth Defendant, Privinvest Shipbuilding Investments LLC ("Shipbuilding"), also a company incorporated in the UAE ("the MAM Contract"). Under the MAM Contract, Shipbuilding was to create a shipyard for and provide related services and further vessels to the Republic.

11. Each Supply Contract contained a Preamble recording the Republic's interest in the subject-matter of the contract in question. Each Supply Contract used the defined term "Project" and referred to specific "Assets" and "Services"; in each Supply Contract the obligations of the relevant Privinvest company were "owed solely to the Customer [defined as the SPV] and not to any other person or entity".

12. The Proindicus and EMATUM Contracts provided expressly that their governing law was Swiss law and contained the following arbitration clause ("the ICC Arbitration Agreement"):

> "All disputes arising in connection with this Project, if not amicably resolved between the parties, shall finally be settled by ICC arbitration held in Genève, Switzerland. Such arbitration shall be undertaken in accordance with the ICC rules in force at the date hereof."

13. The MAM Contract also provided expressly that its governing law was Swiss law and contained the following arbitration clause ("the SCAI Arbitration Agreement"):

> "Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of [SCAI] in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.
>
> …….The Customer…hereby expressly….acknowledges and agrees that this contract is independent from and not accessory, collateral, or otherwise connected with any other contract which the Contractor (or any party connected with the Contractor) has entered into with anyone affiliated to or connected with the Customer."

14. Holding, Mar and Shipbuilding each subcontracted its role almost immediately after execution of the Supply Contract in question (and on a "back to back" basis) as follows:

i) Holding to Logistics International SAL (Offshore), a Lebanese company ("Logistics Offshore"), on 2 January 2013 (two days after the Proindicus Contract) ("the Proindicus Sub-Contract");

ii) Mar to Logistics Offshore on 11 September 2013 (some 5 weeks after the EMATUM Contract) ("the EMATUM Sub-Contract");

iii) Shipbuilding to the Tenth Defendant, Logistics International Investments LLC, a UAE company ("Logistics Investments") on 23 May 2014 (22 days after the MAM Contract) ("the MAM Sub-Contract").

(together "the Sub-Contracts")

15. The EMATUM and MAM Sub-Contracts are expressed to be governed by English law, with an exclusive jurisdiction clause in favour of the courts of England and Wales. The Proindicus Sub-Contract contained no such clause.

16. Under each of the Supply Contracts, the relevant SPV was liable to pay the purchase price to the supplier upfront, whereupon the Supply Contract in question became deemed "[e]ffective". The funds for this purpose were borrowed initially from Credit Suisse (for the Proindicus and EMATUM Contracts) and from VTB (for the MAM Contract). The finance from VTB was arranged by VTB and Palomar Capital Advisors AG ("Palomar"), a company incorporated in Switzerland said to have been part of the Privinvest group of companies and now in administration. The three loans ("the Facility Agreements") are expressed to be governed by English law, with exclusive jurisdiction clauses in favour of the courts of England and Wales.

17. The borrowing by the SPVs was guaranteed by the Republic through the Guarantees, each of which was dated shortly after the relevant Supply Contract and signed by the Republic's then Minister of Economy and Finance, Mr Manuel Chang, as follows:

i) On 28 February 2013 between the Republic and Credit Suisse, nominally securing a six-year US$372 million term facility agreement between Proindicus and Credit Suisse;

ii) On 28 August 2013 between the Republic and Credit Suisse, nominally securing loan participation notes issued to finance a seven-year US$850 million term facility agreement between EMATUM and Credit Suisse;

iii) On 20 May 2014 between the Republic and VTB and Palomar, nominally securing a US$540 million five-year facility agreement between MAM and VTB and Palomar.

18. The Guarantees are expressed to be governed by English law, each with an exclusive jurisdiction clause in favour of the courts of England and Wales.

19. Holding, Mar and Shipbuilding received payment in full under the Supply Contracts (direct from the lenders). The Republic is said to have accrued a total present liability under the Guarantees of some US$2.1 billion. Of a US$504 million syndicated loan to Proindicus by Credit Suisse, only US$11.8 million has been repaid. The balance of the loan in respect of the EMATUM Contract has been refinanced, including by the issue by the Republic of fixed rate notes and falling due in 2023 ("the 2023

Eurobonds") (given in exchange for earlier loan participation notes issued by the Republic falling due in September 2020) ("the 2020 Notes").

20. On 19 December 2018 the United States Department of Justice commenced criminal proceedings against, amongst others, the Third to Fifth Defendants ("the CS Team Defendants") (who were employees at the material time of Credit Suisse Europe) and Mr Jean Boustani ("Mr Boustani"), said to be the lead salesman and negotiator for the Privinvest companies in relation to their dealings with the Republic and Credit Suisse. The CS Team Defendants pleaded guilty to federal offences during the course of 2019. Mr Boustani was acquitted by a jury (following a six-week trial) in December 2019.

Procedural overview

21. The Republic commenced the present proceedings in February 2019[2]. It issued separate proceedings against Mr Safa; those proceedings (in which, broadly speaking, the same allegations were made against Mr Safa as are made against the Privinvest companies) were consolidated by order of the Judge dated 30 July 2020.[3]

22. By its Amended Consolidated Particulars of Claim ("ACPOC") the Republic alleges that bribes (amounting to at least $143 million) were paid to:

    i) Certain officials of the Mozambique state (and other individuals) (including Mr Chang, the National Director for International Affairs in the Analysis Division of the Republic's Intelligence and Security Service, a political adviser and a personal secretary to the former President Guebuza, the former President's son and associates of his son);

    ii) Mr Boustani;

    iii) The CS Team Defendants.

23. As against the Privinvest companies, and as set out more particularly below, the Republic pleads:

    i) That they are liable (together with all the other defendants) as joint tortfeasors for bribery;

    ii) That they are liable (together with all the other defendants save for Credit Suisse Europe) for conspiracy to injure by unlawful means; dishonest assistance; knowing receipt and on proprietary claims.

24. The Privinvest companies' position is that the Supply Contracts were valid, genuine and commercial contracts, from which the Republic was to benefit. Witness statements were served from those involved within the Privinvest companies in support of the application for a stay seeking to confirm this, and to the effect that the

[2] The Eleventh Defendant was the subject of a subsidiary claim which was consolidated with these proceedings in April 2020. The Republic has not sued VTB in these proceedings. VTB has sued the Republic and two of the SPVs in three separate proceedings in England and Wales, in which the Republic disputes jurisdiction.

[3] Mr Safa's application for a stay, parasitic upon the outcome of the Privinvest companies' application for a stay, was also refused. Mr Safa does not appeal that refusal. His challenge based on invalid service has been dismissed and is not a matter the subject of this appeal.

Privinvest companies performed fully their obligations under the Supply Contracts to the extent possible.

25. The CS Team Defendants deny being part of any conspiracy against the Republic or related wrongdoing against it. The Third Defendant, Mr Surjan Singh ("Mr Singh"), admits receiving secret commissions from the Privinvest companies; the Fourth Defendant, Mr Andrew Pearse ("Mr Pearse"), admits receiving payments from the Privinvest companies but denies that they were illicit; the Fifth Defendant, Ms Detelina Subeva ("Ms Subeva"), admits receiving funds from Mr Pearse which she understood to have come from the Privinvest companies. In their Defences, Credit Suisse and Credit Suisse Europe admit that bribes were paid to the CS Team Defendants and infer that the payments to officials of the Republic were bribes. They deny any wrongdoing as against the Republic.

26. In June 2020 Credit Suisse and Credit Suisse Europe issued Part 20 proceedings against the Privinvest companies and ten individuals, including those alleged to have been the recipients of bribes (as set out above).

27. By application notices dated 11 November 2019 the Privinvest companies applied for stays under s.9[4], contending as follows:

    i) Although not stated on the face of the Supply Contracts, the Republic is in fact a party to the Arbitration Agreements (amongst other things) as a matter of Swiss law because it was the beneficiary of those contracts;

    ii) Logistics Offshore and Logistics Investments can invoke the Arbitration Agreements under Swiss law because they "interfered with" the Supply Contracts in the sense that they performed them and became parties thereto;

    iii) As a matter of scope, the Republic's claims against the Privinvest companies fall within the Arbitration Agreements.

28. The Republic takes issue with each of these propositions. At a directions hearing in April 2020 the Judge resolved to proceed by way of preliminary issue hearing on the last of them. By the agreement of the parties, he was to decide the issue on the assumption that the Republic is bound by the Arbitration Agreements ("the Assumption")[5].

29. Since the Judgment, the Republic has served Re-Amended Consolidated Particulars of Claim ("RACPOC") and the Privinvest companies and Mr Safa have served a joint (and very full) Defence.

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[4] Logistics Offshore and Logistics Investments also sought stays on case management and *forum non conveniens* grounds. The application based on *forum non conveniens* was not in fact pursued and there is no appeal against the Judge's dismissal of their application for a stay on case management grounds.

[5] There has been some debate as to the scope of the Assumption. At [45] of the Judgment, the Judge records the agreed assumption to be that "the Republic, though not an express party to any of the Supply Contracts, is nonetheless bound by the relevant arbitration clauses". The Privinvest companies contend that in real terms the assumption must be that the Republic was not only bound by the relevant arbitration clauses but also party to the Supply Contracts as a whole. In its skeleton argument for the scope hearing below the Republic identified the assumption as recorded in the Judgment and went on to say: "As to timing: the Republic became bound to the Proindicus, EMATUM and MAM Supply Agreements on 18 January 2013, 2 August 2013 and 1 May 2014 respectively."

30. Further, as set out in the Judgment (at [24] to [40]), in 2019 the Privinvest companies commenced various arbitrations in Switzerland (under the ICC or SCAI Rules) against Proindicus, EMATUM, MAM and the Republic.

The Preliminary Issue Hearing and Judgment

31. The preliminary issue hearing spanned three days in May 2020. Written statements were adduced on both sides. The Judge also received written and oral expert evidence on Swiss law as follows:

    i) From Dr Sébastien Besson ("Dr Besson") for the Privinvest companies;

    ii) From Professor Corinne Widmer Lüchinger ("Professor Widmer") for the Republic.

32. At the outset of the Judgment, the Judge recorded the Assumption. However, he stated this could not alter the fact that the claims for his consideration are made on the basis that the Republic is not a party. The Republic's losses can only be referable to its liabilities under the Guarantees.

33. The Judge rehearsed a summary of the pleaded claims and then set out the parties' positions on the application, which he described as "diametrically opposed".

34. He then considered the interpretation of arbitration clauses under Swiss law. He recorded that, although the wording of the ICC Arbitration Agreement and the SCAI Arbitration Agreement was different, it was not suggested that anything turned on such difference. Both clauses refer to "disputes" and neither was confined to claims made under the Supply Contracts (as denoted by the words "in connection with this Project" and "in relation to this contract" respectively).

35. There was much common ground between the experts and he did not distinguish between them in terms of general plausibility. The Judge doubted whether, ultimately, "there was much difference between Swiss Law and English Law on the question of interpretation".

36. He reviewed the expert evidence, commenting amongst other things as follows:

    i) Given that there was no evidence of matching subjective intent (a factor relevant to the Swiss law of contractual interpretation), the clauses had to be interpreted objectively;

    ii) There was a supplemental principle of interpretation in this context called *in favorem arbitri*. This reflected the civil law concept of "effet utile" which would not assist in the present case, given that there was no issue as to whether the clause would work or work fully, depending on the interpretation chosen. Secondly, it reflected the underlying idea that parties to an arbitration agreement must be deemed to have intended that arbitration should be the single forum for the resolution of all disputes arising between them, as opposed to the court: the "one-stop shop" principle. He accepted that as a Swiss law concept (albeit as no more than a subset of the objective test);

iii) The application of a one-stop shop approach becomes problematic when, as here, there are three separate relevant arbitration clauses, each of which is said to capture all the claims in the main action. At the very least, the fact that the context includes the making of three different arbitration agreements is relevant to the interpretive exercise.

37. He made the following findings as to Swiss law interpretive principles relating to arbitration clauses:

i) The exercise of construing the scope of the clause is objective; it includes deciding what the putative contracting parties would have intended, acting reasonably and in good faith, and it must be undertaken in context;

ii) There is a supplemental interpretive principle called *in favorem arbitri* but it cannot be applied without regard to the language and context of the particular clause;

iii) If there are multiple arbitration clauses involved, that is a relevant consideration;

iv) Where the words "in connection with" the contract are used this is a broad expression but the connection must be "sufficient"; sufficiency has to be viewed in the context of the particular case.

38. The Judge next considered the law, recording the common ground that a stay under s. 9 can be applied *pro tanto* and referring to *Tomolugen v Silica* [2015] SGCA 57 ("*Tomolugen*") and *Sodzawiczny v Ruhan* [2018] 2 Lloyd's Rep 280 ("*Sodzawiczny*").

39. The Judge went on, in overview, to recognise that the overall misconduct alleged arises out of the alleged corrupt procuring by the Defendants of a number of transactions with the SPVs or the Republic which consist of the Supply Contracts, their financing and the Guarantees. However, the emphasis in the main action on the provision of the Guarantees and the description of that as "a key aim of the conspiracy" was not artificial, but "the" key element (from the Republic's point of view). The fact of multiple arbitration clauses suggested that in general terms, a "narrower approach to the sufficiency of the connection" is required. A further contextual point was that the EMATUM and MAM Sub-Contracts prescribed English governing law and conferred exclusive jurisdiction on the English courts (and the Proindicus Sub-Contract contained no dispute resolution clause):

> "The more disparate and disjointed the collection of dispute resolution clauses…the more one should conclude that so far as is consistent with the language of the relevant arbitration clauses, they should be confined to their immediate contractual context…"

40. The Judge concluded that, although the Supply Contracts were "important background", the bribery, dishonest assistance, knowing receipt and proprietary claims, as well as the IFA, were not sufficiently connected with the Supply Contracts as to fall within the Arbitration Agreements. The remedies claimed were not concerned with the proceeds of sale from the Supply Contracts. As for the conspiracy

claim, the entry by Holding, Mar and Shipbuilding into the Supply Contracts was one of several separate unlawful means relied upon. The principal contention for the Privinvest companies, namely that its inclusion was sufficient to "infect" the entire conspiracy claim, could not "possibly be right". Although, through the IFA, there was a connection to the Supply Contracts, the conspiracy claim as a whole was a completely different "ball-game" involving allegations and consequences going far beyond the confines of each individual Supply Contract. In circumstances where the Judge was rejecting the contention that any individual claim fell within one of the Arbitration Agreements, the Privinvest companies' overarching contention (that cumulatively the case was "all about" the Supply Contracts) did not arise. Finally, the IFA was also outwith the Arbitration Agreements.

The Republic's pleaded case against the Privinvest companies

41. At the time of the hearing before the Judge, the Republic's case against the Privinvest companies was set out in the ACPOC. In the introductory section, the Republic summarised its claim as follows:

> "26. This claim arises out of three transactions between the SPVs and the Privinvest Group financed using sovereign guarantees signed by Mr Chang purporting to act on behalf of the Republic:
>
> 26.1. in February-June 2013 Proindicus purported to enter into a transaction financed using a sovereign guarantee for the purpose of acquiring vessels and equipment to monitor and protect the Republic's Exclusive Economic Zone (the "**Proindicus transaction**"). As described further below, the relevant sovereign guarantee nominally secured syndicated lending arranged by CSI;
>
> 26.2. in August 2013 EMATUM purported to enter into a transaction financed using a sovereign guarantee for the purpose of developing a tuna fishing fleet and a land operations coordination centre (the "**EMATUM transaction**"). As described further below, the relevant sovereign guarantee nominally secured loan participation notes due September 2020 (the "**2020 Notes**"). The 2020 Notes were exchanged in 2016 (the "**EMATUM exchange**") for fixed rate notes issued by the Republic and due 2023 (the "**2023 Eurobonds**"); and
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> 26.3. in May 2014 MAM purported to enter into a transaction financed using a sovereign guarantee for the purpose of creating maintenance and repair facilities to repair the vessels being sold to Proindicus and EMATUM, and other vessels used in connection with the offshore gas and oil industry (the "**MAM transaction**"). As described further below, the relevant sovereign guarantee nominally secured a loan arranged by Palomar Capital and VTB Capital Plc ("**VTB**").

> 27. The Proindicus transaction, EMATUM transaction, and MAM transaction are referred to collectively hereinafter as the "**three transactions**".
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> 28. In summary, the Republic's case is that:
>
> 28.1. the three transactions involved the payment of large bribes to government officials of the Republic, including to Mr Chang;
>
> 28.2. the three transactions involved a conspiracy on the part of the First to Tenth Defendants to injure the Republic and thereby enrich themselves at the expense of one of the poorest countries in the world;
>
> 28.3. the Privinvest Defendants paid bribes or secret commissions to the CS Deal Team. Mr Pearse, Head of Credit Suisse's Emerging Markets Global Financing Group, accepted more than US$45 million in illicit payments from the Privinvest Defendants;
>
> 28.4. the Privinvest Defendants paid to Credit Suisse so-called "contractor fees";
>
> 28.5. Mr Chang did not have authority to sign the sovereign guarantees, which were unconstitutional and illegal under Mozambican law;
>
> 28.6 the bribes and the three transactions including in particular the sovereign guarantees were together the key elements of a fraudulent scheme designed to obtain, and to render the Republic liable for, c.US$2 billion; and
>
> 28.7. CSI, CSAG and Mr Singh deceived the Republic into entering into the EMATUM exchange."

42. Section C of the ACPOC rehearsed "The Facts". Each of the three transactions (as defined) was addressed in a separate section. By way of illustration, in relation to the Proindicus transaction, there were allegations first in relation to events in 2011 and 2012, including as to bribery agreements between Mr Boustani and representatives of the Republic and then the enlisting by the Privinvest companies of Credit Suisse to provide finance. Then under the sub-heading "Proindicus transaction", the following appears:

> "62. By letter dated 18 January 2013 [Holding] stated that in the "spirit of cooperation and partnership" it would commit to transferring US$13 million to the bank account of Proindicus upon the Proindicus Supply Contract entering into force.
>
> 63. On or about 18 January 2013 Proindicus purported to enter into a contract with [Holding] styled as a "Contract for Providing an EEZ Monitoring and Protection Solution for the

> Republic of Mozambique"…On the face of the Proindicus Supply Contract, for a stated price of US$366 million, the supplier was to supply various assets and services including radar stations, vessels and aircraft to enable the Republic to monitor and protect its Exclusive Economic Zone."

43. The IFA in relation to the Proindicus Supply Contract was then pleaded:

> "64. The Proindicus Supply Contract was an instrument of fraud, alternatively a sham. The parties to it did not intend it to be a genuine procurement contract for the supply of goods and services at market value, but a vehicle for the enrichment of the First to Tenth Defendants at the expense of the Republic. The Republic will rely on the following facts and matters (without limitation and pending disclosure) in support of that allegation: s(i) the bribery used to procure the contract as set out in Schedule 2, and the Privinvest Defendants' knowledge therefrom that the counterparty's loyalty had been purchased; (ii)…the payment of contractor fees; (iii) …no honest and reasonable government official could countenance a contract on such one-sided terms; (iv) the price paid to the supplier bore no resemblance to the market value of the goods and services supplied; (v) subsequent changes to the assets to be supplied which substituted inappropriate and less valuable types of assets with no corresponding change to the contract price; and (vi)…the payment of money from Privinvest Defendants to Proindicus to prop it up."

44. The Proindicus Guarantee and the Proindicus Facility Agreement were then pleaded.

45. A similar pattern was adopted (and similar allegations repeated) in respect of the EMATUM and MAM transactions: the relevant Supply Contract was pleaded, followed by the IFA, followed by the relevant Guarantee and Facility Agreement.

46. In Section D the Republic set out its claims:

i) As against Credit Suisse, that the Proindicus and EMATUM Guarantees did not give rise to valid, legal and binding obligations;

ii) As against all Defendants, bribery:

> "129. The bribes and secret commissions the Republic presently understands to have been received by inter alios the CS Deal Team Defendants and the Mozambican Officials from the Privinvest Defendants are set out in Schedule 2 hereto…
>
> 131. In the premises, the Defendants were each involved in and/or facilitated and/or assisted in the bribery so as to make themselves liable as joint tortfeasors for the tort of bribery. The Republic is entitled to and claims against each

> Defendant for bribery (subject to any necessary election between remedies):
>
> 131.1 damages….
>
> 131.2 restitution of all bribes paid or received;
>
> 131.3 an account to the Republic of the profits made from their bribery and an order that they pay the same to the Republic;
>
> 131.4 a declaration that all bribes received have at all time been held on trust for the Republic; and
>
> 131.5 an order permitting the Republic to trace into and assert a proprietary claim to the traceable proceeds of the bribes";

iii) As against all Defendants (save for Credit Suisse Europe), conspiracy to injure by unlawful means:

> "132. On a date or dates presently unknown, the First to Tenth Defendants or a combination of them wrongfully and with intent to injury the Republic by unlawful means conspired and combined together to defraud the Republic and to conceal such fraud and the proceeds of the fraud from the Republic. A key aim of the conspiracy was to render the Republic liable under the sovereign guarantees.
>
> 133. The following unlawful means by which the Republic was injured are relied on:
>
> 133.1 the bribery pleaded at paragraphs 129-131 above;
>
> 133.2 the entry by [Credit Suisse] into the Proindicus and EMATUM Guarantees with the knowledge particularised….
>
> 133.3 the entry by [Holding, Mar and Shipbuilding] into the Supply Contracts which were, as alleged at paragraphs 64, 79 and 87 above, instruments of fraud, alternatively shams;
>
> 133.4 the dishonest assistance given to the breach by the Mozambican Officials of their fiduciary duties to the Republic pleaded at paragraphs 137-138 below;
>
> 133.5 the knowing receipt by the Defendants of the proceeds of the breach by the Mozambican Officials of their duties to the Republic pleaded at paragraphs 139-140 below;

> 133.6 the deceit [by Credit Suisse and Mr Singh] pleaded...below.
>
> 134. In furtherance of the conspiracy, the First to Tenth Defendants or a combination of them have concealed and sought to continue to conceal their unlawful means…..
>
> 135. The First to Tenth Defendants are jointly and severally liable to the Republic in damages for unlawful means conspiracy.";

iv) Breach by the Mozambican Officials of fiduciary duties owed to the Republic;

v) As against all Defendants (save for Credit Suisse Europe), dishonest assistance:

> "137. By reason of the matters herein, and in particular at paragraphs 62-93 and 136 above….the First to Tenth Defendants dishonestly assisted in the Mozambican Officials' breach of fiduciary duties. Such assistance included:
>
> 137.1 each Defendant's involvement in and/or facilitation and/or assistance in the bribery as alleged at paragraphs 129-131;
>
> 137.2 [Credit Suisse's] entry into the sovereign guarantees and facility agreements with the knowledge particularised…above; and
>
> 137.3 the entry [by Holding, Mar and Shipbuilding] into the three supply agreements with the SPVs.
>
> 138. In the premises, the Defendants are each liable to account to the Republic and/or to pay equitable compensation."

vi) As against all Defendants (save for Credit Suisse Europe), knowing receipt of "fee income or other payments directly or indirectly from the Republic in respect of any of the transactions described herein" (see paragraphs 139 to 140);

vii) As against all Defendants (save for Credit Suisse Europe), an account of profits and/or equitable compensation and a "proprietary claim to the traceable proceeds of all amounts received as a result of the breaches of fiduciary obligation by the Mozambican Officials" (see paragraphs 141 to 142);

viii) Claim for deceit against Credit Suisse and Mr Singh.

47. At Section E the Republic set out its Particulars of Loss, including all amounts paid by the Republic "in respect of the Proindicus, EMATUM or MAM transactions or which the Republic is liable to pay", all payments made by the Republic under the

2023 Eurobonds, all fees and expenses incurred by the Republic in the EMATUM exchange and macro-economic losses.

48. As indicated, subsequent to the Judgment (on 27 October 2020), the Republic obtained permission to file and serve Re-Amended Consolidated Particulars of Claim ("RACPOC"). The Privinvest companies (and Mr Safa) filed and served a joint Defence in January 2021.

An overview of the parties' positions on appeal

49. The parties' respective positions are set out in detail in their skeleton arguments. What follows is a summary only of the arguments advanced in writing and orally.

The position of the Privinvest companies

50. The overarching submission for the Privinvest companies is that, however the Republic seeks to "dress up its claims" against them, the claims arise "in connection with" or "out of" or "in relation to" the Supply Contracts, and thus are caught by the Arbitration Agreements. Once the Concession, rightly made, is acknowledged, the "rest of the dominoes" on the appeal fall in favour of the Privinvest companies. Had the Judge started with the IFA, as he should have done, and concluded correctly that it fell within the scope of the Arbitration Agreements, he would (or should) have concluded that the balance of the issues also fell within scope.

51. In relation to Ground 1, although the Privinvest companies submit that the outcome of the appeal does not turn on it, it is said that there was no proper basis for the narrow approach adopted by the Judge. Neither reason that he gave was sufficient to justify his conclusion that he should reject the general rule that arbitration agreements are to be interpreted broadly.

52. The existence of multiple arbitration clauses was irrelevant. Amongst other things, this is not a case involving a series of agreements between the same parties. Further, despite holding that there was no essential difference between English and Swiss law, the Judge's conclusion is said to be starkly at odds with the assumption identified in *Fiona Trust & Holding Corp and others v Privalov and others* [2007] UKHL 40; [2007] 4 All ER 951 ("*Fiona Trust"*) (at [13] per Lord Hoffmann) (and recently endorsed by the Supreme Court in *Enka Insaat ve sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117 (at [107])), namely that the parties are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. An arbitration clause should be construed accordingly unless the language of the clause makes it clear that certain questions are intended to be excluded. Relying on paragraph 28 of Dr Besson's report in particular, Swiss law is said to take a similar approach; Professor Widmer did not suggest that there was a narrow test to be adopted. The Judge was wrong to ignore Dr Besson's evidence that one could take account of the possibility of case management when construing the Arbitration Agreements; Swiss curial law's permissive approach was part of the relevant and admissible background. Further, the separate and subsequent Arbitration Agreements in the EMATUM and MAM Supply Contracts were prima facie irrelevant.

53. The Judge's reliance on the Sub-Contracts as a relevant "contextual point" was misplaced: it was wrong as a matter of Swiss law and unsupported by evidence. Specifically, there was no evidence that the parties subjectively had the (jurisdiction clauses in the) Sub-Contracts in mind at the time of the Supply Contracts (such intentions being relevant as a matter of Swiss law), and there was no basis for recourse to the Sub-Contracts by reference to their objective intentions. The Republic's suggestion that the Sub-Contracts are a legitimate aid to construction because the "Effective Date(s)" for the Supply Contracts post-dated the Sub-Contracts is wrong: as a matter of Swiss law the Supply Contracts came into existence on the day that they were signed but remained conditional until the Contract Price was paid.

54. Turning to Ground 2, it is said that the factual aspects under the IFA (pleaded by way of example at paragraph 64 of the ACPOC) (ie the alleged bribery, payment of contractor fees, one-sided terms, price paid, subsequent changes to the assets and payment of money to the SPV in question) are a fundamental and necessary part of the claims which need to be made good for any of the causes of actions to be sustained. If those issues are not ventilated, the causes of action cannot succeed. The alleged wrongdoing in procuring the suite of contracts – the Supply Contracts, the Financing Agreements and the Guarantees – lies at the heart of the Republic's claims. The Financing Agreements and the Guarantees are parasitic upon the Supply Contracts.

55. It is also suggested that the Judge created an inconsistency in considering the question of sufficiency of connection on the basis that the Republic was not a party to the Supply Contracts. Given the Assumption, he ought to have proceeded on the basis that it was. Beyond this, the Privinvest companies challenge the Judge's reasoning and conclusions in relation to the IFA and each of the individual causes of action:

    i) The Judge's reasons for concluding that the bribery claim was outwith the Arbitration Agreements are unsustainable. He commented that the tort of bribery was not dependent on the making of a particular contract with the result that the IFA was not an essential element of the claim. This addressed the wrong question, which was whether the bribery claim was within scope. Further, the inducement of a contract is never an essential element of the tort of bribery. His reliance on the fact that an account of profits, under which the Republic could claim the proceeds of the Supply Contracts, would not be ordered until the end of trial was also misguided. Amongst other things, the fact that a remedy might only be elected later could not enable the Republic to avoid the Arbitration Agreements. Further, the Judge failed to address correctly the Privinvest companies' argument by reference to the Swiss law principle of *culpa in contrahendo*, namely that a breach of a duty of care or loyalty may be committed during the pre-contractual phase. Bribery of a contractual counterparty's officers or agents would inevitably constitute such a breach. Such pre-contractual duties as the Republic alleged were breached were intimately connected with the ultimate contract procured, with the result that the bribery claims fell within scope;

    ii) Equally, the Judge's reasons in relation to the claim for dishonest assistance are unsustainable. He wrongly attached weight to his view that entry into the Supply Contracts was a less direct form of assistance than facilitating the alleged bribes and so did not "really [add] much to the claim";

iii) As for the claim for knowing receipt, the only receipt alleged by the Republic against the Privinvest companies was receipt of the proceeds of the Supply Contracts. A claim to such proceeds would depend upon the Republic establishing an entitlement to rescission, requiring adjudication on a matter within the scope of the Arbitration Agreements. The Judge impermissibly relied upon the Republic's skeleton argument to the effect that it made no knowing receipt (or proprietary claim) in respect of such proceeds;

iv) Given that the unlawful means alleged (bribery, entry by the Privinvest companies into the Supply Contracts, dishonest assistance and knowing receipt) are said all to be within the scope of the Arbitration Agreements, so too is the claim in conspiracy.

The position of the Republic

56. For the Republic it is said in broad terms that the Privinvest companies' case is pervaded with both logical and legal fallacies; it is wholly lacking in the necessary analytical rigour. The premise that the Republic's claims against the Privinvest companies are unsustainable without the IFA is fundamentally erroneous. All of the Republic's causes of action against the Privinvest companies are available even if the Supply Contracts were entirely valid, lawful and commercial. That is why the Republic made the Concession. The Republic's position has always been that its claims have only (at best) been peripherally related to the Supply Contracts; the whole nature of its claim is in respect of its putative liability under the Guarantees. Once the Concession is made, there is nothing onto which s. 9 can latch.

57. In any case, it is said that the two grounds of appeal are erroneous. The Judge's construction of the Swiss-law governed Arbitration Agreements was correct. It followed his careful consideration of the Swiss law. Having determined the correct principles to apply, his application was "without fault" and the result was the right one. The Republic emphasises that the Judge's conclusion as to the meaning of Swiss law provisions are findings of fact. The findings, the application of which depended on his understanding derived from them, are to be given particular weight in circumstances where the Judge heard oral evidence from the experts: see *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755; [2010] Bus LR 586 (at [28] to [29] per Moore-Bick LJ).

58. In relation to Ground 1, the Republic suggests that the Judge did not in fact find that the Arbitration Agreements should be "construed narrowly". Instead, he found that the fact of multiple arbitration clauses suggested a narrower approach to the question of sufficiency of connection. He was entitled to rely on the presence of multiple arbitration agreements and the Sub-Contracts as relevant interpretative context for the objective exercise of contractual construction. And even if he was wrong to do so, the correct objective construction of each Arbitration Agreement was that the parties intended that the scope of each Arbitration Agreement was confined to the legal relationship constituted by the four corners of the relevant Supply Contract.

59. As for Ground 2, the Republic contends that the challenge involves a direct attack on the Judge's application of Swiss law, with which the court should not interfere. Turning to the individual causes of action:

i) bribery: the Judge's reference to the IFA was a product of the Privinvest companies' misconceived case that the IFA demonstrated that the bribery claims related to the Supply Contracts. The Judge was correct to hold that the tort of bribery was not dependent on the making of a particular contract. The damages claimed for bribery are referable to the Guarantees and not the Supply Contracts. The most that the Republic needs to prove in terms of causation is that any one of the bribes brought about the Republic's entry into the Guarantees;

ii) dishonest assistance: the bribery allegation does not require to be arbitrated; the claim for an account of profits could not elevate the entirety of the dishonest assistance claim to a matter that could only be arbitrated. As to entry into the Supply Contracts, the fact of entry is not in dispute; the propriety of such entry is immaterial to the relevant question which is whether it factually amounted to an act of assistance. Thus there is no dispute or difference amounting to a "matter" for the purpose of s. 9;

iii) conspiracy: the Privinvest companies are jointly and severally liable in respect of each of the unlawful means alleged, including Credit Suisse's entry into the Guarantees and the Republic's claims in deceit against Credit Suisse and Mr Singh. None of those are matters which require to be arbitrated. Even if one or more of the unlawful means alleged fell within the scope of the Arbitration Agreements, "that could not possibly infect the entire conspiracy claim";

iv) knowing receipt and proprietary claims: it is obvious that the Republic is not claiming the proceeds of the Supply Contracts.

60. As an overarching submission, the Republic emphasises that it is for the Privinvest companies to establish an "absolute right" to arbitrate some or all of the claims against them.

S.9

61. S. 9 provides materially:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter….
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

62. Ss. 9(1) and (4) are based on Article II of the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Their purpose is to give effect to (and respect) the parties' agreement to arbitrate. What it means is that the parties have agreed, not only that the matters under the agreement should be

arbitrated, but that they should not be decided by a court (see for example *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc* [2020] EWCA Civ 759; [2020] Bus LR 2025 (per Males LJ at [73])). 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 a stay, unless it is satisfied that the arbitration agreement is void, inoperative or incapable of being performed (see s. 9(4)). The burden of proving (on the balance of probabilities) that the legal proceedings are brought in respect of a matter that must be referred to arbitration is on the party seeking the stay. If the burden is not discharged, the court has no jurisdiction under s. 9 (see *JSC Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784; [2013] 2 Lloyds Rep 242 (at [73])).

63. A "matter" is not the same as a cause of action; it includes any issue capable of constituting a dispute under the relevant arbitration agreement. And a mandatory stay under s. 9(4) can be applied pro tanto (as reflected in the words "so far as they concern that matter" in s. 9(1)).

64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the "matters" in respect of which the proceedings are brought; secondly, to assess whether those matters are "matters" which the parties have agreed are "to be referred to arbitration". That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context. Not every matter that could theoretically be arbitrable is one that the parties are necessarily to be taken to have agreed as a matter that must be referred to arbitration.

65. The relevant principles were summarised neatly and sufficiently for present purposes by Popplewell J (as he then was) in *Sodzawiczny*[6]:

> "43. The approach to what constitutes a "matter" in section 9 "in respect of which" the proceedings are brought should be capable of application in all these different circumstances and many in between, all of which are contemplated by the section. As a matter of principle the approach should therefore be as follows:
>
> (1) The court should treat as a "matter" in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement.
>
> (2) Where the issues have been identified at the time the court is making the inquiry, there is no difficulty in conducting that exercise. Where the issues are not fully identified or developed at that stage, the court should seek to identify the issues which it is reasonably foreseeable may arise. In this respect I agree with Andrew Smith J at paragraph [14] of the Lombard North Central case.

[6] Adopted most recently in *Premier Cruises Ltd v DLA Piper Rus Ltd and another* [2021] EWHC 151 (Comm) at [39] and [40].

> (3) The court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search is not for the main issue or issues, or what are the most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement. If the court proceedings will involve resolution of any issue which falls within the scope of the arbitration agreement between the parties, the court must stay the proceedings to that extent. This is necessary to give effect to the principle of party autonomy which underpins the Act. If a dispute is arbitral, effect should be given to the parties' bargain to arbitrate it. That applies to any dispute with which the court proceedings are, or will foreseeably be, concerned. Again I would respectfully agree with Andrew Smith J in the Lombard North Central case at paragraph [15] to this effect.
>
> (4) Further, in considering the claim, the Court should look at the nature and substance of the claim and the issues to which it gives rise, rather than simply to the form in which it is formulated in a pleading. As Andrew Smith J put it in the Lombard North Central case at paragraph [14], the latter "would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded." The same is true of identified or foreseeable defences. Section 9 is concerned with substance not form.
>
> 44. The objection that this approach leads to fragmentation of proceedings is not a sufficient reason for departing from these principles. The desideratum of unification of process must give way to the sanctity of contract, as the mandatory terms of section 9(4) intend. Fragmentation is implicit in the pro tanto wording of section 9, and is in any event often a consequence of the consensual nature of arbitration agreements (for example in string contracts). The risk of fragmentation is reduced by the expansive approach which is taken to the construction of arbitration clauses, but it may be the inevitable result of upholding the parties' bargain. If so, the adverse consequences can be ameliorated, if not altogether avoided, by the case management power of the court to stay proceedings in so far as they fall outside the scope of an arbitration agreement… "

66. The position identified by Popplewell J was consistent with (and followed) the earlier decision of the Singapore Court of Appeal in *Tomolugen*, to which reference should also be made. There Sundaresh Menon CJ (at [111]) addressed the "methodological question", comparing characterisation "at a high level of abstraction" with "a more

granular approach". At [113][7] he commented that the courts should guard against taking "an excessively broad view of what constitutes a "matter" or treating it is a synonym for the court proceedings as a whole":

> "… In our judgment, when the court considers whether any "matter" is covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In most cases, the matters would encompass the claims made in the proceedings. But that is not an absolute or inflexible rule…."

67. Sundaresh Menon CJ went on (at [121]) to stated that an overly broad approach would be:

> "…ill-suited to the reality that disputes may be complex and engage disparate factual and legal issues. Characterising a "matter" at an unduly high degree of abstraction may carry with it the elegance of simplicity and convenience. But, any attempt to boil down a complex dispute to a singular aspect of its essence would be contrived…."

68. Ultimately, whether or not a matter is one "which under the agreement is to be referred to arbitration" turns on the scope of the relevant arbitration agreement, properly construed in context.

Discussion and analysis

69. As indicated, the analysis proceeds on the assumption that the Republic is bound by the Arbitration Agreements. Equally, whilst Logistics Offshore and Logistics Investments were not themselves party to the Supply Contracts, none of the parties sought to draw any material distinction between their position and that of Holding, Mar and Shipbuilding for the purpose of the preliminary issue. As set out above, it is the Privinvest companies' position that Logistics Offshore and Logistics Investments are entitled to invoke the Arbitration Agreements, a matter to be determined in due course if necessary.

70. It is trite law that an arbitration agreement is a contractual agreement to which statute dictates that mandatory effect must be given in so far as it applies: *Sodzawiczny* at [44]. The application of s. 9 can give rise to particular difficulties both as a matter of analysis and procedure, but the sanctity of the parties' agreement takes priority.

71. Thus, whether or not there is futility in practical terms of any stay is immaterial. Equally, the fact that there may be (on the facts of this case particularly acute) unwelcome case management complications if all or parts of claims are stayed is

[7] In a passage cited with approval in *Autoridad del Canal de Panamá v Sacyr SA* [2017] 2 Lloyds Rep 351 ("*Panama Canal*") (at [129] per Blair J) and in *China Export v Emerald* [2018] EWHC 1503 (at [58] per Sir Richard Field).

irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this.

72. I also accept that there is a two-stage test (although the considerations that arise may overlap and it may be convenient to consider the questions together): first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated. Further, the court looks to substance and not form, adopting a practical and common-sense approach. It should guard against placing undue weight on what may be nuanced emphases or artificial characterisations adopted for tactical or other purposes. This is of course not to say that the parties' pleaded position is to be ignored, but rather to emphasise that the search is for the reality of the dispute.

Ground 1

73. The Judge made the following clear findings as to Swiss law, having read and heard the evidence of the experts:

i) The exercise of construing the scope of the clause is objective; it includes deciding what the putative contracting parties would have intended, acting reasonably and in good faith, and it must be undertaken in context;

ii) There is a supplemental interpretive principle called *in favorem arbitri* but it cannot be applied without regard to the language and context of the particular clause;

iii) If there are multiple arbitration clauses involved, that is a relevant consideration;

iv) Where the words "in connection with" the contract are used this is a broad expression but the connection must be "sufficient"; sufficiency has to be viewed in the context of the particular case.

74. There is no proper basis to interfere with these findings, nor was it suggested that there was. What is challenged in reality is not the Judge's findings on Swiss law, but rather his analysis in the later "Overview" section in the Judgment when, faithful to his findings on Swiss law, he carried out the exercise of viewing "sufficiency in the context of the particular case".

75. Centrally, the Privinvest companies criticise what is said to be a finding by the Judge that the Arbitration Agreements fell to be construed narrowly. The Privinvest companies' case here is overstated: I do not consider that, fairly read, the Judge made that finding, at least no such finding in such stark terms. What he in fact said (at [95]) was that the fact of multiple arbitration clauses suggested that:

> "…in general terms, a narrower approach to the sufficiency of the connection is required."[8] (emphasis added)

[8] It is right that, in the very final short section of the Judgment when considering the IFA, the Judge referred to a "narrow" approach (by reference back to [95] to [97] of the Judgment). However, I consider the manner in which he expressed himself in the "overview" section of his reasoning to be the more reliable as an accurate reflection of his thinking.

76. This was a broad conclusion to which the Judge was entitled to come on the basis of his earlier conclusions that i) *in favorem arbitri* was a supplemental principle that did not override the objective exercise required by Swiss law and ii) the relevant connection between the matters said to be arbitrated and each Arbitration Agreement had to be sufficient, something to be viewed in the context of the particular case.

77. It is clear that the Judge took into account the presence of multiple arbitration clauses and the existence of the EMATUM and MAM Sub-Contracts (each of which followed within days of execution of the relevant Supply Contracts) as "contextual points" only.

78. The Judge was entitled to accept the evidence of the Swiss law experts that the existence of multiple arbitration agreements was a relevant factor. All three Supply Contracts were said by the Privinvest companies to be part of "a package", to be considered together. As for the Sub-Contracts (with their English governing law and exclusive English court jurisdiction clauses), they were expressly "back to back" with the Supply Contracts. The Judge was entitled to rely, to the limited extent that he did, on their existence, and to take the view that the Swiss version of the "one-stop shop" principle carried less force in these circumstances.

79. The Privinvest companies suggest that the Judge made a finding that Swiss law was the same as English law, and so criticise him for not heeding the jurisprudence in *Fiona Trust*. I do not consider that the Judge made any finding that Swiss law was the same as English law. What he said (at [73] of the Judgment, in the context of introducing the expert evidence on Swiss law,) was this:

> "…at the end of the day, I doubt whether there was much difference between Swiss law and English law on the question of interpretation."

80. This was no more than a passing comment before setting out his "observations and findings" on the expert evidence. In any event, *Fiona Trust* does not countermand a context-sensitive approach to construction (see [5] per Lord Hoffmann).

81. In summary, I see no good reason for interfering with the Judge's findings as to the general approach to be taken to the question of construction as a matter of Swiss law[9].

82. However, as will become apparent, whether or not the Judge was right to adopt a "narrower" approach does not make a material difference to the outcome on appeal. What lies at the heart of this appeal is whether or not the Judge's application of the law to the facts of the case is sustainable. This is the issue raised under Ground 2, to which I now turn.

Ground 2

83. It is important to bear in mind that this appeal is limited to a review and does not proceed by way of re-hearing (see CPR 52.21(1)). The position is therefore to be

[9] Including his finding that none of the Arbitration Agreements was confined to claims made under (ie pursuant to) the Supply Contract.

judged by reference to the position as it was before the Judge. In particular, the correctness or otherwise of the Judge's decision is to be assessed on the basis of the ACPOC, not the RACPOC[10]. And, although the Concession has now been made, it had not been made at the hearing below and in any event falls for independent scrutiny by the court.

84. I accept at the outset that sufficiency of connection is a nuanced concept in respect of which there is scope for reasonable disagreement. It was for the Judge to carry out what was an evaluative exercise in context. An appellate court should be slow to interfere - absent an obvious error of principle or approach – with the Judge's conclusions on the application of the law to the facts.

85. Although the Judge considered the IFA last, it is convenient to consider it first on appeal, not least given the importance attached by the Privinvest companies to the consequences of the Concession (or, more accurately, of a finding that the Judge was wrong to decide that the IFA fell outside the scope of the Arbitration Agreements). It is also logically the anterior question.

86. The Judge's reasoning with regard to the IFA is, with respect, difficult to follow. It may be that the Judge was (even if only sub-consciously) influenced by the instinctive desire to avoid fragmentation. (By the time that he reached this part of his decision, he had rejected the submission that any of the causes of action fell within the scope of the Arbitration Agreements. Nevertheless, as the authorities make clear, this would not have been a permitted consideration.)

87. The Judge first found that, as a matter of objective intent, it was unlikely that the parties would have agreed to a stripping out of one particular allegation for arbitration. That reasoning depends on the correctness of his findings on scope elsewhere (addressed below); but in any event whether a plea is within scope depends on the substance of what is pleaded and the construction of the arbitration agreement in question (and not on what other matters are pleaded). He further relied on the fact that the IFA did not involve any legal analysis of any particular contractual term (as opposed to the commerciality of the contract as a whole). This distinction is, with respect, illogical. On either basis the terms of the contract are in issue; and it can be said that an allegation relating to the commerciality of the contract as a whole is more, not less, closely connected to the contract (and a paradigm example of the type of issue suitable for determination by an arbitral tribunal).

88. The Judge then relied on the fact that no relief was claimed pursuant to the IFA. Since a "matter" includes issues and not just causes of action, this was immaterial. Finally, he compared the facts of the present case with those in *Tomolugen* (and examples there given), although he recognised that any such comparison could only provide "a useful pointer".

89. In my judgment it is clear that the IFA was sufficiently connected to the Supply Contracts and so fell within the scope of the Arbitration Agreements. The IFA was an allegation that the Supply Contracts were "instruments of fraud" or "shams". It is hard to imagine a plea more directly related to a contract (apart from a direct claim for

[10] Although, given that the focus is on substance and not form, I do not consider that the outcome would be any different by reference to the RACPOC, and neither side contended that it would.

breach). It is an allegation going to the validity of the Supply Contracts. As the Republic in fact accepted in its pleading for the hearing of the preliminary issue on scope, a dispute relating to the validity of the Supply Contracts fell within the scope of the respective Arbitration Agreements. As indicated, the Republic did not press on the court its contention (raised by way of Respondent's Notice) that the IFA is a matter of English public policy, as the law of the *lex fori*, and not Swiss law, and so the parties cannot have intended that it be addressed in a Swiss arbitration (and under Swiss law). I would have found it a very difficult proposition to accept, given the actual agreement between the parties (in the Arbitration Agreements).

90. I would therefore allow the appeal against the Judge's conclusion that the IFA was not sufficiently connected to the Arbitration Agreements. It falls within scope and the Privinvest companies are entitled to relief accordingly.

91. As set out above, the Republic anticipates this development by contending that it does not "need" the IFA to succeed on its claims against the Privinvest companies. The IFA forms no part of its claims against them[11]; the court can proceed as if the IFA (and the UMIFA) were deleted from its pleaded claim against the Privinvest companies. Thus the IFA can be ignored for all purposes so far as the claims against the Privinvest companies are concerned; whether or not the Supply Contracts were valid and genuine is simply not in issue between them. Adopting a granular analysis of each of the claims advanced, none touch on anything the subject-matter of the Arbitration Agreements.

92. This of course was not a position advanced before the Judge and it did not otherwise arise for him, given his finding on the IFA.

93. The central flaw in the Republic's approach is that it addresses the question of what is and is not a "matter" for the purpose of s. 9 solely from the Republic's perspective as claimant. The fact that the Republic does not deem it necessary to succeed on the IFA in order to succeed on its claims against the Privinvest companies does not mean that the IFA is not a "matter" for the purpose of s. 9. This is to ignore reasonably foreseeable defences.

94. The Judge fell into the same error. Thus, by way of example, at [94] of the Judgment when considering the emphasis on the provision of the Guarantees, he viewed the matter only "from the Republic's point of view". At no stage does he appear to have considered the question of reasonably foreseeable defences when identifying the scope of matters for the purpose of s. 9.

95. As set out above, the search under s. 9 is for the substantial issues to which the claim gives rise, including identified or reasonably foreseeable defences. The rationale for the inclusion of reasonably foreseeable defences is obvious: it is to give effect to the principle of party autonomy. Otherwise, where there is an arbitration agreement wide enough to cover the dispute comprised by the defence, the parties' agreement that it should be decided in arbitration would be frustrated (see in particular [43(4)] and [46] of *Sodzawiczny*).

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[11] Although the Republic makes it very clear that it will advance the IFA against the other defendants. As a matter of substance, it does not for one moment accept that the Supply Contracts were genuine and valid commercial contracts.

96. Even with the IFA effectively removed from the pleaded claim against the Privinvest companies, the validity and genuineness of the Supply Contracts (and the circumstances surrounding their entry and their performance) are matters bound to be relied upon by the Privinvest companies at least as part of the defence of the allegations of dishonesty maintained against them[12]. At the very least, it is reasonably foreseeable that they will be issues raised by way of defence. They are substantial (and not peripheral or tangential) matters: the Supply Contracts (and the Sub-Contracts) were the only contracts into which the Privinvest companies entered and, as considered further below, were an integral part of what was a suite of inter-connected transactions.

97. Further, they are issues which will be in dispute: the Republic does not accept that the Supply Contracts were *bona fide*. (The position might be different if the Republic not only abandoned the IFA but also accepted (for all purposes) that the Supply Contracts were unobjectionable, valid and genuine contracts. But that is clearly not (and could never in reality be) its position, given (amongst other things) its allegation of a single fraudulent (conspiratorial) scheme.)

98. Thus, at the first stage of the exercise, the matters in respect of which the proceedings are brought against the Privinvest companies include the question of whether or not the Supply Contracts were valid and genuine commercial contracts. The Republic cannot avoid that conclusion simply by referring to the scope of what is necessary for it to establish its claims against the Privinvest companies (without the IFA) (as opposed to the scope of the issues naturally arising as a result in the proceedings against the Privinvest companies as a whole).

99. I turn then to the second stage of the exercise, and whether or not the defence (that the Supply Contracts were valid, genuine and *bona fide* commercial contracts) is sufficiently connected to the Supply Contracts. The defence is the mirror reflection of the IFA: it asserts the integrity of the Supply Contracts as opposed to alleging their dishonesty. Like the IFA, and even adopting the narrowest of tests, it is clearly sufficiently connected to the Arbitration Agreements: it relates directly to the Supply Contracts, raising a dispute as to their validity, genuineness and commerciality.

100. It is also a defence that arises in response to every cause of action pleaded against the Privinvest companies: bribery, dishonest assistance, conspiracy and knowing receipt (and the proprietary claims).

101. The result is that all of the claims against the Privinvest companies are matters which fall within the scope of the Arbitration Agreements. Objectively construed, this is what the parties are to be taken to have intended, acting reasonably and in good faith.

102. For the sake of completeness, I would add this: the Privinvest companies' position has been to accept that the plea at paragraph 133.2 of the ACPOC (relating to the entry by Credit Suisse into the Proindicus and EMATUM Guarantees as one of the unlawful means of conspiracy) is not within scope because it "does not relate to the Privinvest companies". I am not convinced that this concession is correct. As I understand the

[12] As Mr Matthews for the Privinvest companies confirmed: even if the IFA is to be treated as removed from the proceedings against the Privinvest companies, they would nevertheless "have to" rely upon the validity, genuineness and commerciality of the Supply Contracts as part of their denial of dishonesty.

Republic's case, the Privinvest companies are said to be jointly and severally liable in the tort of conspiracy for the actions of Credit Suisse and Credit Suisse Europe because of their allegedly dishonest conspiratorial agreement[13]. If this is correct, I would hold that the allegation at paragraph 133.2 falls within scope since again, it will raise (by way of defence) the issue of the validity, genuineness and commerciality of the Supply Contracts.

103. The conclusion at paragraph 101 above sits comfortably with a common-sense (and still granular) approach to the issues raised in the Republic's claims against the Privinvest companies. The underlying analysis reveals the fundamental artificiality of seeking to strip the question of the validity and genuineness of the Supply Contracts out of the relevant factual equation.

104. I do not accept that, as appeared to be suggested for the Privinvest companies, there is an automatic fall-out of – or "domino" effect on - the causes of action against the Privinvest companies, once it is accepted that the IFA is within the scope of the Arbitration Agreements.

105. However, the Republic's analysis appears to me to be devoid of reality. The claims arise out of a series of interdependent contracts: the Supply Contracts (which came first), the Facility Agreements and the Guarantees supporting them. The Republic was not a third party guarantor; the purpose of the Supply Contracts was to protect the EEZ. The Supply Contracts, with the Facility Agreements, the Guarantees and the bribes were together (and each) the key elements of an allegedly fraudulent scheme designed to obtain, and to render the Republic liable for, around US$2 billion. The fact that a key aim of the conspiracy was pleaded as being the provision of the Guarantees does not alter this. It is not said to be the sole aim. Even if it was, the Supply Contracts were a key element of what is said to have been a single fraudulent scheme allegedly designed to achieve that aim. This is the position not only as a matter of substance, but also form: it is reflected in particular in paragraphs 26 to 28 of the ACPOC.

106. An analysis of the individual causes of action bears this out.

The claim for bribery

107. On any fair reading, the factual premise of the bribery claim is that bribes were paid to secure the three transactions, including the Supply Contracts. Indeed, the Republic expressly pleaded that the bribery was used to procure the Supply Contracts (in the IFA):

> "…28.1 the three transactions involved the payment of large bribes to government officials of the Republic, including to Mr Chang;…
>
> 64….The Republic will rely on the following facts and matters in support of [the IFA]: (i) the bribery used to procure the [Supply Contract] as set out in Schedule 2….

[13] Contrast the position in relation to the claim for dishonest assistance. The Privinvest companies are (rightly) not said to be (jointly and severally) liable for the alleged dishonest assistance by Credit Suisse by entering into the Guarantees and the Facility Agreements alleged at paragraph 137.2 of the ACPOC. Paragraph 137.2 of the ACPOC is not part of the claim against the Privinvest companies.

II. Claim for bribery

129. The bribes and secret commissions the Republic understands to have been received by *inter alios* the CS Deal Team Defendants and the Mozambican Officials from the Privinvest Defendants are set out in Schedule 2 hereto."

108. Schedule 2 sets outs the bribes (or kickbacks) alleged. It is to be noted that the Mozambican Officials alleged to have been recipients extend well beyond Mr Chang (the signatory of the Guarantees). Allegations are made that Mr do Rosario, Mr Matusse, Ms Dove, Mr Nhangumele, Mr Langa and Mr Ndambi Guebuza, each also received very substantial bribes or kickbacks.

109. The Judge recorded the Republic's pleaded case (at [99][14] of the Judgment):

"It is obviously correct that part of the Republic's case on bribery is that the reasons for paying the bribes included the procuring of the Supply Contracts along with their financing and on the Guarantees."

110. I do not accept that, as a matter of substance, the pleaded case that the bribes were paid to procure the Supply Contracts can be ignored on the basis of the Republic's suggestion that the pleaded allegation in paragraph 64 (and 79 and 87) of the ACPOC is a particular which is relevant only to the unlawful means pleaded at paragraph 133. That this would be wholly artificial is borne out for example i) by the summary of the Republic's claim at paragraph 28; and ii) by the fact that Schedule 2, to which the bribery allegations refer, does not seek to distinguish between bribes paid to secure the Guarantees as distinct from bribes paid to secure the Supply Contracts. That is not surprising: as already indicated, one cannot sensibly divorce bribes paid to procure the Guarantees from bribes paid to procure the Supply Contracts or bribes paid to secure the Facility Agreements. The bribes are alleged to have been paid in furtherance of the alleged fraudulent scheme involving all three transactions. This is the substance – or the reality - of the dispute, including the bribery claims. Indeed the Republic may well never be able to prove whether or not a particular bribe was paid for the purpose of procuring any specific one of the three transactions or another (as opposed to procuring the scheme as a whole): it would no doubt nevertheless wish to contend that it could succeed on its bribery claims in such circumstances, the Guarantees being part of the overall package.

111. Although I do not consider that the Judge was right to take into account the question of timing of any election as to remedy, the Republic's claim for an account of profits (under which the Republic could claim the proceeds of the Supply Contracts) does not inform the outcome on appeal to any material extent. Nor am I persuaded that any reliance by the Privinvest companies on the doctrine of *culpa in contrahendo* advances their position. It involves a detailed analysis of the evidence of Swiss law. There is a dispute as to whether the doctrine was relied upon fully or fairly below. The Judge was entitled to focus on the "overarching" question of sufficiency of connection.

[14] And at [102] of the Judgment.

112. Further, and in any event, the bribery claim will give rise (inevitably and at least reasonably foreseeably) to a staunch defence by the Privinvest companies of the validity, genuineness and commerciality of the Supply Contracts.

The claim for dishonest assistance

113. There are two acts of dishonest assistance alleged by the Republic against the Privinvest companies:

    i) Bribery;

    ii) Entry by Holding, Mar and Shipbuilding into the Supply Contracts[15].

114. As set out above, the Judge ought to have held that the allegations of bribery fall within the scope of the Arbitration Agreements. As for the entry into the Supply Contracts, the Judge commented that this was a "less direct form of assistance" (than the bribes) which did not "really [add] … much to the claim". I do not consider that this consideration was relevant to the question of sufficiency of connection.

115. As with the UMIFA (which the Republic no longer positively asserts was outside the scope of the Arbitration Agreements), the Judge ought to have held that the second act of alleged assistance, namely entry into the Supply Contracts, is sufficiently connected to the Arbitration Agreements. The Republic's position (to the effect that the fact of entry into the Supply Contracts is not in dispute and the propriety of that entry is immaterial to the only relevant question (of causation)) is counter-intuitive. First, in order to be relevant the Supply Contracts must have involved or caused a breach of fiduciary duty on the part of the Mozambican Officials and so in some way have been improper. Secondly, dishonesty on the part of the Privinvest companies is an essential ingredient of the cause of action against them.

116. Further and in any event, the dishonest assistance claim will give rise (inevitably and at least reasonably foreseeably) to a staunch defence by the Privinvest companies of the validity, genuineness and commerciality of the Supply Contracts.

The claim for knowing receipt and proprietary claims

117. The Republic's position in respect of its knowing receipt/proprietary claim against the Privinvest companies is somewhat unsatisfactory. Whilst it eschews any claim for sums received by the Privinvest companies under the Supply Contracts, there is no attempt to identify any other assets received by the Privinvest companies traceably representing the Republic's assets.

118. The short answer here, again, is that the claims will give rise (inevitably and at least reasonably foreseeably) to a staunch defence by the Privinvest companies of the validity, genuineness and commerciality of the Supply Contracts.

The claim for unlawful means conspiracy

119. The Republic relies on six unlawful means:

[15] It is not clear to me how Logistics Offshore and Logistics International are said to be liable for these acts, but that is immaterial for present purposes.

i) Bribery (as pleaded);

ii) Entry by Credit Suisse into the Proindicus and EMATUM Guarantees with the knowledge (as pleaded);

iii) The entry by Holding, Mar and Shipbuilding into the Supply Contracts, alleged to be instruments of fraud, alternatively shams (as pleaded) (the UMIFA);

iv) The dishonest assistance given to the breach by the Mozambican Officials of their fiduciary duties (as pleaded);

v) The knowing receipt "of the proceeds of the breach by the Mozambican Officials of their fiduciary duties" (as pleaded);

vi) Deceit on the part of Credit Suisse and Mr Singh.

120. The Judge held that it could not be right that the inclusion of the UMIFA could "infect" the entire conspiracy claim, proceeding on the basis that none of the other matters fell within scope. However, as set out above, even without consideration of the further matters identified in paragraphs 121 and 122 below, the Judge ought to have held that four out of the six means relied upon fell within scope (ie the bribery, the UMIFA, dishonest assistance and knowing receipt allegations).

121. Further, the essence of the conspiracy claim is the alleged conspiratorial agreement or combination. The Republic pleads that one aim of that agreement or combination was to render the Republic liable under the Guarantees. But, as set out above, it is to take too artificial an approach to isolate the Guarantees from the Supply Contracts which they supported. The substance of the dispute relates to a single fraudulent scheme involving all three transactions, namely the Supply Contracts, the Facility Agreements and the Guarantees. The conspiracy claim is a matter sufficiently connected to the Arbitration Agreements to fall within scope.

122. Further and in any event, once reasonably foreseeable defences are taken into account, the Judge ought to have held that the conspiracy claim as a whole was a matter sufficiently connected to the Arbitration Agreements: the validity of the Supply Contracts is a matter upon which the Privinvest companies will wish to rely in support of their denial of participation in any conspiratorial agreement or unlawful means of the type alleged.

123. Overall the Judge, properly applying his findings of Swiss law, ought to have held that there was a sufficient connection between i) the IFA and each of the causes of action (in bribery, dishonest assistance, unlawful means conspiracy and knowing receipt (and the claim for proprietary relief) and ii) the Arbitration Agreements for those matters to fall within scope. Objectively construed, this is what the parties are to be taken to have intended, acting reasonably and in good faith.

Conclusion

124. For these reasons, I would allow the appeal. The Republic's claims against the Privinvest companies fall within the scope of the Arbitration Agreements. Whether or not the Republic is in fact a party to the Arbitration Agreements and whether or not

Logistics Offshore and Logistics Investments can invoke the Arbitration Agreements remains to be seen.

Lord Justice Singh:

125. I agree.

Lord Justice Henderson:

126. I also agree.