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What's in Santa's sack: what matters are caught by an arbitration clause?

by Markus Esly

Parties agree to arbitrate because they consider that to be the most appropriate method for finally resolving disputes that might arise out of their legal relationship. A positive choice to include an arbitration agreement in your contract will (in most cases) bring with it a further choice, namely to exclude the substantive jurisdiction of the national courts which would otherwise be able to hear claims between the parties. As you know, arbitration agreements are construed widely. English law takes the view that businessmen want all claims arising from one contract to be resolved before one tribunal.

However, in complex disputes involving multiple contracts and parties, the straightforward proposition that an arbitration clause automatically excludes litigation does not always hold true.

The English Commercial Court has considered whether claims in complex litigation were caught by an arbitration agreement in a recent case, *The Republic of Mozambique* v *Credit Suisse International and Others* [2020] EWHC 2012 (Comm). The Republic of Mozambique was held to be entitled to pursue claims in the English Courts arising out of what it says was a major fraud, resulting in hundreds of millions of dollars of losses. This was notwithstanding the fact that three contracts relating to the allegedly fraudulent transaction provided for arbitration in Switzerland.

This article reviews just how widely arbitration clauses cast their net and what claims in Court might nevertheless be allowed to slip through.

Compulsory stay in favour of arbitration

In all arbitration proceedings where the seat is in England or Wales, Section 9 of the Arbitration Act 1996 applies. That provision allows a party to any English court proceedings to apply for an order that there be a stay of the litigation in favour of arbitration proceedings. The subsection states that:

> "*(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 had been brought to stay the proceedings so far as they concern that matter…*"

The ingredients for a successful application for a stay include the existence of a valid arbitration agreement. Section 9(4) goes on to say that a stay will be granted unless the opposing party can show that the arbitration agreement is "… *null and void, inoperative, or incapable of being performed.*"

English law will uphold arbitration clauses wherever possible, and generally takes the view that if the parties have referred to arbitration in their contract, they meant it. By way of example, in *Exmek Pharmaceuticals SAC* v *Alkem Laboratories Ltd* [2015] EWHC 3158 (Comm), a distribution agreement provided for the "… *the exclusive jurisdiction of the Courts of the UK*", but it also contained an arbitration clause pursuant to which all disputes that could not be resolved "… *shall be referred to arbitration before any legal proceedings are initiated. The arbitration shall be conducted in the UK in accordance with the provisions of the law in the UK in effect at the time of the arbitration.*" Burton J resolved this apparent conflict by finding that the parties had indeed intended to refer their disputes to final and binding arbitration proceedings under English law (even though they erroneously referred to

the "*UK*"), while the English Courts would have exclusive supervisory jurisdiction over the arbitration, as set out in the Arbitration Act 1996.

English law also applies a presumption that an arbitration agreement applies to all disputes concerning the transaction in question, be they contractual or tortious. In the *Fiona Trust* case ([2007] UKHL 40), the House of Lords held that arbitration agreements should be construed in a common sense manner, and that (per Lord Hoffmann):

> "… *the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction* …"

Arbitration clauses may state that they apply to all disputes "… *arising out of or in connection with …*" the relevant contract, and some provisions expressly say that they capture disputes relating to the existence or validity of the contract. The English Courts have confirmed that such wide wording will extend to allegations that the contract is not binding, void or illegal, and will encompass claims for rectification, variation, settlement, misrepresentation, duress, mistake or claims in tort that are connected to the agreement (see for instance *El Nasharty* v *J Sainsbury plc* [2003] EWHC 2195 (Comm)).

For the purposes of this article, it is assumed that there is a valid arbitration agreement: large international contracts frequently feature effective arbitration provisions incorporating the rules of major arbitral institutions such as the ICC or the LCIA. Having an effective arbitration clause alone cannot, however, avoid the issue of whether any court proceedings are being brought in "*respect of a matter which … is to be referred to arbitration*". If they are, then the proceedings will be stayed "*… so far as they concern that matter*". As we will see, litigation may not be stayed completely, as any claims concerning other "*matters*" can still continue. An order for a stay will be limited to the court proceedings in respect of which it is made and will not compel the claimant to refer the "*matters*" in question to arbitration.

Substance, not form

A party who sees a strategic advantage in litigating instead of arbitrating may be tempted to formulate, or even dress up, its claims so that they appear as far removed as possible from the contract containing the arbitration clause. When considering an application for a stay, the English Courts will look at the substance of the issues between the parties that have been brought before the Court, rather than at how the claims have been pleaded.

The decision in *Autoridad del Canal de Panama* v *Sacyr SA* [2017] EWHC 2228 (Comm) is an example of how such an enquiry will be conducted.

The case concerned disputes that arose out of the widening of the Panama Canal. The main contract for the design and construction of the works was subject to the laws of Panama, and provided for ICC arbitration in Miami, Florida. A contractor entity had given advance payment guarantees ("APGs"), governed by English law and subject to the exclusive jurisdiction of the English Courts. These APGs were in respect of repayment by the contractor of advances paid by the employer. To make matters more complicated, there were also (earlier) guarantees from the contractor entity acting as the guarantor for the same repayments, but the dispute resolution in those guarantees mirrored the main contract – providing for Panamanian law, ICC arbitration in Miami. This summary is somewhat of a simplification case: there was a complex series of assignments of the main contractual

obligations and multiple overlapping guarantees by contractor group companies, but the result is that the relevant parties had accepted both the ICC arbitration agreements and the English exclusive jurisdiction clauses.

Checkmate by negative declaration?

The employer made the advance payments. Soon enough, disputes arose under the main contract. Eventually, the matters in dispute extended to the contractor's obligation to repay the advances. The contractor commenced ICC arbitration proceedings seeking interim measures from an emergency tribunal, including an order that the employer agree to a particular extended timetable for repayment pending a final determination of what sums were repayable. The emergency tribunal declined jurisdiction, on the basis that the (later) APGs had an English exclusive jurisdiction clause. The employer then brought Commercial Court proceedings in London, seeking to enforce the APGs and demanding repayment of the advances. The contractor's next moves in this trans-Atlantic game of disputes chess were to refer the disputes under the main contractor to another ICC tribunal in Miami, seeking (*inter alia*) a negative declaration that no repayments were due under the Panamanian law guarantees (but no such declaration was sought under the APGs – due to the English exclusive jurisdiction clause), and to apply to the Commercial Court for a stay of the employer's APG litigation under Section 9 of the Arbitration Act 1996.

That application came before Blair J, together with an application for summary judgment by the employer, who contended that since the APGs were 'on demand' instruments, the contractor could have no defence to the claim. On the latter point, the judge concluded that in fact, the APGs were not on demand bonds but true guarantees – such that the secondary liability of the guarantor to make the repayments depended on establishing a primary liability by the contractor under the main contract. Since the defences that the contractor could potentially rely on under the main contract raised factual as well as legal issues, the matter was not suitable for determination on a summary basis. That conclusion was relevant to the stay application. As the APGs were true guarantees and not on demand bonds, it followed that, in deciding a claim under the English law APGs, the Commercial Court would have to consider whether the contractor was liable, or had any defences, under the main contract – an agreement which contained a valid ICC arbitration clause, and which was governed by the laws of Panama.

What is the matter?

Turning to the question of whether the claim to enforce the APGs was in respect of a "*matter*" that the parties had agreed to refer to arbitration, Blair J reviewed Australian and Singapore authorities in the absence of many significant English decisions on the point. In particular, he noted the decision of the Court of Appeal of Singapore in *Tomolugen Holdings Ltd* v *Silica Investors Ltd* [2015] SGCA 57 (concerning a stay provision in the Singapore International Arbitration Act that is similar to Section 9 of the English statute). In that case, Sundaresh Menon CJ held that in considering whether any "*matter*" is covered by an arbitration agreement, the court:

> "*… 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 matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule …*"

In doing so, it was important to identify:

> "*the … "substance of the controversy", rather than the formal nature of the proceedings ... [T]he court must consider the substance of the controversy as it appears from the circumstances in the*

> *evidence on the application (and not just the particular terms in which the Claimant has sought to formulate its claim in court). ...*"

Reverse party autonomy

Blair J noted that the case before him had brought about an unusual set of circumstances that had not yet been considered by the English Courts:

> "*… the starting point is the principle that on the application of a party, agreements to arbitrate will be enforced by the court, by way of a stay under s. 9 of the Arbitration Act if the legal proceedings are brought in England, and by way of an anti-suit injunction if the legal proceedings are brought outside England. This fundamental principle is based on respect for party autonomy. What marks the present case out is that the defendants seek to apply the principle notwithstanding that under the contracts on which the claimant sues, the parties have agreed that the English courts shall have exclusive jurisdiction—in other words, party autonomy goes the other way. There is no other case that has been cited in which s. 9 has been invoked in such circumstances.*"

The judge contrasted the cases advanced by the parties. The guarantors argued that a stay was necessary because the primary, and indeed the only substantive issue, was whether there were any defences under the main contract open to the contractor which would prevent the advances from being repayable (seeing as the guarantor could avail itself of those defences). The parties had agreed to refer that "*matter*" to arbitration. The employer's case was that the court should adopt a more nuanced approach, and that a stay should not automatically be granted because there was a common issue, arising under the main contract, in the Commercial Court proceedings and in the arbitration. The employer also submitted that a stay would deprive it of the benefit of the exclusive jurisdiction clauses in favour of the English Court, to which the guarantors had agreed in the APGs.

Blair J concluded that the employer's court action to enforce the APGs should not be stayed. He was mindful of the fact that a stay under Section 9 could not be circumvented by framing the relief sought in a particular manner, but found that no such concern arose here. The "*matter*" in the proceedings before him was whether the contractor's guarantors were liable under the APGs to make the repayments pursuant to English law. The employer was entitled to enforce the APGs through the exclusive jurisdiction clause, without being made to enforce the underlying indebtedness in the main contract through arbitration proceedings, or having to bring a claim (also in arbitration) under the Panamanian law guarantees. Blair J found that this result was "*consonant*" with the commercial common sense of the transaction, since:

> "*… There is nothing unusual in a party holding more than one security for the same obligation. It is up to that party which security it chooses to enforce.*"

The decision in *Autoridad del Canal de Panama* shows that the English Courts, while supporting arbitration wherever possible, will also hold the parties to their agreements: here, the contractor had agreed to an exclusive jurisdiction clause, and was ultimately held to that bargain. While there clearly was an overlap between the issues in the main contract arbitration and the English proceedings, this was not sufficient to warrant a stay. Even though the APGs were true guarantees and placed the guarantor under (only) a secondary liability, they were self-standing contracts of surety governed by English law. Blair J's decision also serves as a reminder that multiple overlapping contracts with different applicable laws and jurisdiction clauses are a recipe for parallel or satellite proceedings, and ought to be avoided unless there are good reasons for them.

Form an orderly queue

It should also be recalled that the English Court has wide case management powers. In *Autoridad del Canal de Panama,* the Commercial Court noted that if it became apparent during the further course of proceedings to enforce the APGs, the defences advanced turned out to raise substantial issues under the main contract that were just about to be decided by the arbitrators, then a case management stay might become appropriate, and the parties could make further applications. Blair J noted:

> "*If a party has contractual rights, it is entitled to enforce them in the contractual jurisdiction. On the other hand, it is not correct … that because of the exclusive jurisdiction clause the defendants* [who had unsuccessfully applied for a stay] *have "a mountain to climb". In circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense.*"

However, the procedural position at the time of the application was not such that a case management stay was appropriate. The arbitrations were not far advanced and there was, therefore, no reason to prevent the employers from making progress with enforcing the APGs in the Rolls Building in London (the home of the Commercial Court).

A one-stop shop

In *Sodzawiczny* v *Ruhan* [2018] 2 Lloyds Rep 280, the Commercial Court returned to the question of what constitutes a "*matter*" for the purposes of Section 9 of the Arbitration Act. The case concerned a long-running dispute about the ownership of assets out of which the claimant was, on his case, to be compensated for his work in setting up data centres for the defendant. The claimant's remuneration, valued at £22 million, comprised assets held in a complicated company structure that was managed by solicitors through an offshore trust. The solicitors eventually became defendants in the case themselves. Assets were transferred out of the trust structure, without the claimant's knowledge, before the claimant had been paid. Litigation ensued. The claimant pursued a range of defendants, including the original counterparty for the data centre project, the companies in the structure and the solicitor-trustees. The parties eventually entered into a deed of settlement, under which the claimant was to be paid £12 million. That settlement deed included an LCIA arbitration clause, expressed to capture "… *any dispute arising out of or in connection with the performance or non-performance of this Agreement …*".

The claimant received only £5 million of the settlement sum. The companies forming part of the structure became insolvent after the settlement deal had been struck. The claimant's investigations uncovered evidence of further transfers of assets out of these companies into the hands of individuals in the defendants' camp, including the solicitor-trustees. The claimant then commenced proceedings in court against the solicitor-trustees for breach of their fiduciary duties to the relevant corporate entities and for deceit. The claimant's case included an allegation that the settlement agreement itself had been procured by fraud and was thus ineffective. Popplewell J held that all those claims were covered by the arbitration agreement in the deed of settlement. This, the judge found, was a case where the "… *presumption in favour of one-stop adjudication …*" applied. He noted that rational businessmen who entered into a settlement agreement would want to ensure that a single tribunal, appointed pursuant to the dispute resolution clause in that contract, had jurisdiction over all disputes that could subsequently arise – and such future disputes might cover the precise nature of the pre-existing rights or claims that had been

settled, and also the validity of the settlement agreement itself, which an aggrieved party might in future seek to impeach. It therefore made sense for arbitrators appointed under the settlement agreement to consider all disputes, including claims which did not yet exist or were unknown to the parties at the time of settlement (it is possible to settle such claims, but clear wording must be used).

Popplewell J identified four points of principle which a court asked to identify a "*matter*" for the purposes of a stay application under Section 9 should have in mind. Firstly, a "*matter*" is any issue that can constitute a dispute or difference that is within the scope of the arbitration clause. Secondly, the court should have regard to the maturity of the dispute. If the parties have already set out their claims in some detail, then identifying the issues that fall within the arbitration agreement may not present the Court with a great deal of difficulty. But where the dispute is still in its infancy, and only general assertions have been made, the Court will have to form its own view and identify the issues which it is reasonably foreseeable may arise. Thirdly, the Court should stay proceedings with respect to any issue that falls within the arbitration agreement. The aim is not to identify a substantial or main issue in the litigation which would warrant a stay of the entire proceedings because the parties have agreed to refer that key point to arbitration. Instead:

> "*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 …*"

Popplewell J's fourth point was to reiterate that the focus should be on substance and not form, including as regards foreseeable defences (since an application for a stay under Section 9 is to be made before a defence is filed). This was not a concern on the facts before him, such that the proceedings were stayed in favour of arbitration.

Fraud on a major scale tips the balance

In *The Republic of Mozambique* v *Credit Suisse International*, Waksman J reached a different conclusion concerning other allegations of fraud. The case arose out of three supply contracts entered into in early 2013 between companies owned by the Republic of Mozambique and companies that form part of the Privinvest group, a major shipbuilding and infrastructure concern. One contract was for the supply by Privinvest of naval vessels, aircraft and associated infrastructure (including a coastal surveillance system) that would allow Mozambique to patrol and police its coastline and territorial waters, which contained important natural resources - both an abundance of fish, notably tuna, and potentially significant gas deposits. Another contract was for a substantial fishing fleet. A third involved the construction of a shipyard. All three supply contracts were governed by Swiss law and provided for arbitration in Switzerland. Two of the three arbitration clauses were in identical terms:

> "*All disputes arising in connection with this Project, if not amicably resolved between the parties, shall finally be settled by ICC arbitration held in Geneva ….in accordance with ICC Rules….*"

The third contract provided for arbitration before the Swiss Chambers of Commerce.

The very substantial payments due by Mozambique's special purpose vehicles under the supply contracts were financed by loans from Credit Suisse and VTB. Mozambique itself issued three sovereign guarantees in respect of the loan agreements (one for each supply contract). Mozambique's three guarantees were governed by English law and contained exclusive jurisdiction clauses in favour of the English Courts.

Privinvest performed the supply contracts, and properly so as it has argued in the ensuing arbitration and litigation. It received payment in full directly from Credit Suisse and VTB, without Mozambique's special purpose vehicles paying anything. This left Mozambique with a liability under the sovereign guarantees of US$ 2.1 billion. In 2016, when Mozambique sought to refinance some of the debt, irregularities came to light which led to numerous international donors, including the IMF, withdrawing aid and plunging Mozambique into a deep recession from which it is still recovering. The Mozambique authorities have since investigated the transaction, announcing that they have uncovered vast and brazen corruption, and that the supply contracts, loan agreements and sovereign guarantees were all tainted by bribery. It is alleged that, in addition to certain corrupt Government officials, Credit Suisse was implicated in the fraud, chiefly through the actions of one of its ex-employees, Mr Andrew Pearse.

Before turning to the London litigation which raised a Section 9 issue, it is worth recalling that the transaction, referred to in the media as the Mozambique tuna bond scandal, has led to criminal prosecutions – including in the United States. Mr Pearse became the US Department of Justice's lead witness in a prosecution for corrupt practices of Mr Jean Boustani, a high-ranking Privinvest executive who it is said worked closely with Mr Iskandar Safa, a Lebanese national and billionaire owner of Privinvest. In early 2019, Mr Pearse was arrested in London and extradited to the United States. In July 2019, Mr Pearse pleaded guilty to wire fraud in a Brooklyn federal court. He admitted that he had persuaded Credit Suisse, where he says he had an accomplice who was also paid off, to finance the transactions with Mozambique, whilst receiving bribes of (he says) US$ 45 million in total from Privinvest.

Martinis and brown envelopes

Mr Pearse's motivation for this, according to his testimony in Federal Court, was that he needed the money to leave Credit Suisse, set up his own financing boutique and start a new life with his secret lover, also a colleague (who could blame him). His lover and the accomplice at Credit Suisse also pleaded guilty to fraud in the United States. Through Mr Pearse's efforts, allegedly working with Mr Boustani for Privinvest, Credit Suisse (it is said) was persuaded to lend ever-increasing amounts to Mozambique, with Mr Pearse, according to his own admissions, receiving more bribes. Mr Pearse told the US Court that he negotiated his first bribe while enjoying a Martini at a luxury hotel in Maputo, the capital of Mozambique. Other kickbacks were agreed at poolside meetings. Mr Pearse gave evidence that the illicit payments were received in Abu Dhabi, where, with the help of Mr Boustani, he had been able to obtain residency - posing as a tube welder during the immigration screening. He told prosecutors how he enjoyed the new lifestyle his dealings brought, traveling with his lover to Bali, the Seychelles and Jamaica, and hiring an ex-professional New Zealand Rugby player to coach his son's team in the South East of England, where Mr Pearse continued to live.

However, crime of course does not pay and Mr Pearse's undoing was a matter of time. When difficulties with the implementation by Privinvest of the Mozambique projects became apparent, and Credit Suisse was about to decline further advances amidst a sharp fall in the oil price in late 2014 and early 2015, Mr Pearse said that Mr Boustani threatened to email the accomplice at Credit Suisse using that person's work email address to ask for repayment of the bribes that they had received. Seeking to avert disaster, Mr Pearse and the accomplice are then said to have hastily drawn up a raft of fake documents to explain the sums received from Privinvest while traveling by Eurostar to Paris. Credit Suisse subsequently repackaged some of the Mozambique loans and sold them to investors – the so-called tuna bonds – including in the United States. US investors started to suffer heavy losses as the value of these bonds fell sharply when the total extent of Mozambique's indebtedness and the state of the project finally became clear. This led the Department of Justice to investigate. Prosecutors followed a trail that started with personal email addresses of the conspirators which had found their way (probably by mistake) into deal documents. They were able to obtain private messages between the fraudsters from email and internet service providers, which contained incriminating evidence. It was the Department of Justice's case that, of the

US$ 2 billion borrowed by Mozambique, at least US$ 200 million was paid away illicitly. It should be noted, however, that Privinvest denies any wrongdoing, Mr Boustani was acquitted of any crimes by a Brooklyn jury in early December 2019, and Credit Suisse's position is that it was itself misled and deceived by rogue employees working hand-in-hand with the perpetrators of the fraud and so cannot be held responsible for any unlawful actions. In February 2020, the Swiss authorities started an investigation into the matter, prompted by requests for legal assistance from Mozambique. More recently, in October 2020, Mozambique issued requests for the extradition of Mr Pearse, his lover, and his accomplice at Credit Suisse, to face criminal charges in the Courts of Maputo.

Mozambique seeks redress in the Commercial Court

It was against that background that in February 2019, Mozambique commenced the Commercial Court proceedings against Credit Suisse, Privinvest, Mr Pearse, his lover, and the accomplice at Credit Suisse. Mozambique's chief complaint, and the fundamental basis of its claim, was that the supply contracts were instruments of fraud, or sham agreements. Instead of being the result of a genuine procurement process, Mozambique alleged that the entire transaction was a vehicle by which the defendants had enriched themselves at the expense of Mozambique. Specific allegations advanced by Mozambique included the payment of bribes to secure the award of the contracts, the payment of certain 'contractor fees' by Privinvest entities to the bank (such that the loans agreements were then issued, guaranteed by Mozambique), and the one-sided terms and conditions of the supply contracts: these required payment of the entire price upfront when this (allegedly) bore no relation to the market value of the vessels and goods and services to be supplied, left the suppliers free to subcontract all the work as they saw fit, and contained onerous and questionable provisions by which the scope could be changed so as to make the deliverables less valuable without the Mozambique buyer entities being able to prevent this. It was also alleged that the Government officials who signed the sovereign guarantees had no authority to do so, such that these agreements were *ultra vires* and did not bind the Republic of Mozambique.

There were parallel arbitration proceedings at the time of the Commercial Court claim. The Privinvest parties had initiated arbitrations in Switzerland before Mozambique had served its Commercial Court proceedings on them, with knowledge that litigation was pending against them in England. In the Swiss arbitrations, Privinvest alleged various breaches of the supply contracts by the Mozambique SPVs, arguing that it had suffered serious reputational losses because the project had become widely known as a failure (or worse), and alleging that the commencement of litigation in London was yet a further breach by the Republic of Mozambique itself. The latter point was based on the scope of the arbitration agreements in the supply contracts under Swiss law, which Privinvest argued extended to Mozambique and not just the SPVs who were signatories to those contracts.

In the Commercial Court, the parties had agreed that Mozambique should be deemed to be bound by the arbitration agreement. In their application for a stay under Section 9, the defendants argued that the 'instrument of fraud' allegation – that the supply contracts were sham agreements by which the defendants intended to enrich themselves unlawfully – fell squarely within the arbitration clauses in each of those contracts. To determine whether that was indeed the case, and what "*matters*" might fall within the scope of the arbitration agreement, Waksman J had to apply Swiss law, having had the benefit of expert evidence from both parties (foreign law is treated as a matter of fact to be established by expert evidence in the English Courts). He noted that Swiss law, like English law, sought to give a wide effect to arbitration agreements, through a supplemental principle of interpretation called "*in favorem arbitri*" that would however have to yield to the express words used by the parties in the arbitration clause (as would the *Fiona Trust* presumption under English law). However, the force of that presumption was lessened in the particular circumstances, since as the judge noted:

> "*… 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 of the claims … Thus, in theory, there would have to be three separate arbitrations. But if so, the utility of the one-stop shop principle appears to me to be somewhat limited …*"

Similarly:

> "*The fact that one has three separate arbitration clauses suggests, objectively, that all those parties must have intended that each provision is a dispute resolution procedure principally intended for that particular contract. In general, that militates against, rather than for, the inclusion under each clause of the claims made generically against parties who are not restricted to the Suppliers and which in theory would have to be arbitrated three times over. … it cannot be assumed at the outset that they would be consolidated or jointly managed.*"

Turning to the approach to identifying a "*matter*" under Section 9, the judge noted that while it was not necessary for the relevant issue to be the main or most substantial one in, it needed to be at least "*reasonably substantial*". Waksman J then considered the foundation of Mozambique's claim, which rested on the defendants fraudulently procuring three sets of contracts: first, the supply contracts (with the arbitration clauses), second, the loan agreements financing the project (ensuring that the allegedly inflated prices were paid) and third, the sovereign guarantees (leaving Mozambique with the vast liability at the end of the day).

The individual claims had no sufficient connection with the arbitration clauses

Waksman J reviewed the individual claims brought by Mozambique and the various causes of action pleaded, concluding that none of them was sufficiently closely connected to one of the arbitration clauses in the supply contracts to warrant a stay of the litigation.

At the outset, Mozambique had pleaded a claim for bribery. The judge noted that bribery, a tort in English law, did not require that any particular contract was concluded as a result of the payment. As a free-standing tort, this claim was not caught by the arbitration agreements in the supply contracts. The primary remedy sought under this heading was limited to the amount of the bribes, and any proceeds or profits resulting from the bribers themselves. That did not extend to the proceeds of, or payments made under, the supply contracts. Mozambique had pleaded an alternative claim, for an account of profits, which might in theory extend to sums paid under the supply contracts. However, that remedy might never become relevant (not least because it could only be ordered at the end of a trial, if Mozambique succeeded). The judge did not think that this made the bribery claim a relevant "*matter*" to be referred to arbitration for the purposes of Section 9. He reached the same conclusion in relation to a claim for dishonest assistance – that the Mozambique officials accused of taking bribes had been dishonestly assisted by the defendants – which the judge felt was essentially the same in substance as the bribery claim.

Mozambique also pursued a claim for conspiracy, which as pleaded had the following ingredients: (i) the fact that Government officials were bribed, (ii) the entry by Credit Suisse into the sovereign guarantees in the knowledge that the supply contracts with Privinvest had been obtained through bribery, (iii) the fact that the supply contracts themselves were sham agreements or 'instruments of fraud', (iv) the dishonest assistance which the corrupt Mozambique officials were said to have received from the relevant defendants and, finally, (vi) the knowing receipts by the defendants of the proceeds. Waksman J noted that while the 'instrument of fraud' allegation, which concerned the supply contracts, was part of the conspiracy claim, that claim:

> "*… a whole is a completely different "ball-game" involving allegations and consequences going far beyond the confines of each individual Supply Contract.*"

To find that the conspiracy claim was a "*matter*" to be referred to arbitration would have required the Court to reach an untenable conclusion, namely that:

> "*… each set of parties to the three different arbitration clauses would have reasonably contemplated in good faith that a wide-ranging conspiracy claim brought against them and others, where the* [instrument of fraud allegation] *is only one out of five unlawful means and which itself seeks no relief should be litigated in three arbitrations.*"

Waksman J did not think that they could, objectively, be held to have done so. Turning to the 'instrument of fraud' allegation itself, the judge noted that this was not in fact a separate claim, but rather an element or building block of Mozambique's causes of action that had been pleaded. Nonetheless, he found that a "*matter*" did not necessarily have to be a claim, but could be something that fell to be decided as part of claims in an arbitration. In this case, the assertion was not sufficiently connected to the arbitration clauses. Relevant factors leading the judge to that conclusion included the absence of any specific relief claimed as a consequence of the 'instrument of fraud' allegation, the fact that it did not involve a contractual analysis or interpretation of any term in the supply contracts (instead, it was said that these contracts were so one-sided that no reasonable and honest official could have agreed to them), and the absence of an allegation of a breach of the supply contracts.

Conclusion

The English Courts will not hesitate to grant a stay under Section 9 wherever a party seeks to circumvent an arbitration clause by going to court, and the *Fiona Trust* presumption, that all disputes arising out of a legal relationship should be resolved by the same arbitrators, remains firmly in place. The two cases in which a stay of court proceedings in favour of arbitration proceedings was not granted involved exceptional factors. In *Autoridad del Canal de Panama*, the parties were held to their contractual bargain, because they had agreed to an exclusive jurisdiction clause in favour of the English Courts, albeit in respect of a secondary liability of a guarantor that depended on breaches of a contract with an arbitration clause. That reasoning, it is suggested, can readily be understood.

In *The Republic of Mozambique* v *Credit Suisse International*, the Commercial Court was faced with a claim alleging a web of deceit and corruption, which went beyond the three supply contracts that provided for arbitration. However, these arbitration clauses were widely worded:

> "*All disputes arising in connection with this Project, if not amicably resolved between the parties, shall finally be settled by ICC arbitration held in Geneva … in accordance with ICC Rules….*"

At first blush, the opposite conclusion to that reached by Waksman J may appear to be more attractive, since Mozambique's fraud claims do in fact arise "*in connection with*" the relevant project. The judge's refusal of a stay is, it would seem, a product of how the fraud claims were pleaded, which one imagines was itself driven by the evidence available to Mozambique. If there had been a straightforward claim against a party to a supply contract that the contract was void for bribery, and that the contractual counterparty had been complicit in that bribery, there would be a very good argument to be made that this would have been a "*matter*" for an arbitral tribunal sitting in Geneva.