[2023] UKSC 32
On appeal from: [2021] EWCA Civ 329

JUDGMENT

Republic of Mozambique (acting through its Attorney General) (Appellant) *v* Privinvest Shipbuilding SAL (Holding) and others (Respondents)

before

Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lord Richards

JUDGMENT GIVEN ON
20 September 2023

Heard on 24 and 25 January 2023

Appellant
Nathan Pillow KC
Richard Blakeley
Ryan Ferro
(Instructed by Peters & Peters Solicitors LLP)

Respondents
Duncan Matthews KC
Ben Woolgar
Frederick Wilmot-Smith
(Instructed by Signature Litigation LLP)

Defendants/Respondents
(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
(1) Credit Suisse International
(2) Credit Suisse AG
(3) Mr Surjan Singh
(4) Mr Andrew James Pearse
(5) Ms Detelina Subeva
(11) Credit Suisse Securities (Europe) Limited
(12) Mr Iskandar Safa

LORD HODGE (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Richards agree):

1. This appeal is concerned with the interpretation and application of section 9 of the Arbitration Act 1996 ("the 1996 Act"). In the context of a complex litigation a preliminary issue has been identified for determination concerning the scope of the relevant arbitration agreements and whether the matters in the legal proceedings before the English courts are matters which the parties have agreed to send to arbitration.

2. Section 9 of the 1996 Act provides:

> "(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."

1. The factual background

(a) The transactions: an overview

3. The disputes between the Republic of Mozambique ("the Republic") and the respondents have arisen from three transactions in 2013 and 2014, in which three special purpose vehicles ("the SPVs"), each of which is indirectly wholly owned by the Republic, borrowed money from London-based banks apparently to finance the purchase of equipment and services under three supply contracts with the sixth to eighth defendants ("the Privinvest supply companies") in connection with the Republic's development of its Exclusive Economic Zone ("EEZ"), in particular through tuna fishing and the exploitation of its gas resources. As explained in 1(c) below, each of the Privinvest supply companies in back-to-back agreements sub-contracted its role to another Privinvest entity, the ninth and tenth defendants. I refer to the various Privinvest companies together as "Privinvest". The London-based banks from whom the SPVs

borrowed the funds to purchase the goods and services were Credit Suisse International ("CSI"), Credit Suisse AG ("CSAG") and Credit Suisse Securities (Europe) Ltd ("CSSE") (together "Credit Suisse") and another bank, VTB Capital plc ("VTB"). Each of the supply contracts contained an arbitration agreement which I discuss in part 1(c) below. The borrowing was secured by sovereign guarantees which were signed by Mr Manuel Chang, who was then the Republic's Minister of Finance, purportedly acting on behalf of the Republic.

(b) The legal proceedings

4. The Republic commenced proceedings in February 2019. In its Amended Consolidated Particulars of Claim ("ACPOC") which were before Waksman J, the Republic claims that it is the victim of a conspiracy involving the defendants, including Privinvest and its ultimate owner and controller, Mr Iskandar Safa, whom it accuses of paying very substantial bribes (over US$136 million) to inter alios corrupt officials of the Republic and employees of Credit Suisse involved in the funding of the transactions, Mr Surjan Singh, Mr Andrew James Pearse, and Ms Detelina Subeva (the third, fourth and fifth defendants, respectively, whom I describe as "the CS team defendants") and Mr Jean Boustani, who was said to be the lead salesman and negotiator for Privinvest in their dealings with the Republic and Credit Suisse. The conspiracy is said to have exposed the Republic to a potential liability of about US$2 billion under the guarantees and further macro-economic losses mentioned below. The Republic brings claims for bribery, conspiracy to injure by unlawful means, dishonest assistance, and knowing receipt, and makes proprietary claims.

5. In its defence, which was supplied after Waksman J had issued his decision and without prejudice to its section 9 challenge, Privinvest admits that certain payments were made by the sixth and ninth defendants (Privinvest Shipbuilding SAL (Holding) and Logistics International SAL (Offshore)) but denies that they were bribes and that Privinvest was involved in any conspiracy. Privinvest contends that the payments were, variously, investments, consultancy payments or legitimate remuneration for services rendered, or legitimate political campaign contributions, all of which were unconnected with the supply contracts and funding transactions or the guarantees which Mr Chang signed purportedly on behalf of the Republic. Privinvest contends that the supply contracts were valid, genuine and commercial contracts from which the Republic was to derive benefit.

6. On 19 December 2018 the United States Department of Justice commenced criminal proceedings against, among others, the CS team defendants, and Mr Jean Boustani. The CS team defendants pleaded guilty to federal offences during 2019. Mr Boustani was acquitted after a trial by a jury in December 2019.

7. In their defence to the Republic's action, the CS team defendants deny being part of any conspiracy against the Republic or related wrongdoing against it. Mr Singh, the third defendant, admits receiving secret commissions from Privinvest. Mr Pearse, the fourth defendant, admits receiving payments from Privinvest but denies that they were illicit. Ms Subeva, the fifth defendant, admits receiving funds from Mr Pearse which she understood to have come from Privinvest.

8. In their defences Credit Suisse admit that improper payments were made to the CS team defendants and infer that the payments to officials of the Republic were bribes. In June 2020 Credit Suisse issued Part 20 proceedings against Privinvest and ten individuals, including those alleged to have been the recipients of bribes.

9. Privinvest applied for a stay under section 9 of the 1996 Act by application notices dated 11 November 2019. At a directions hearing in April 2020 Waksman J resolved to address by way of preliminary issue Privinvest's contention that the Republic's claims against Privinvest fall within the arbitration agreements contained in the supply contracts entitling it to a mandatory stay of the legal proceedings under section 9 of the 1996 Act. The parties agreed that the judge was to decide the issue on the assumption that, as a matter of the governing Swiss law, both the Republic and the Privinvest subcontractors (the ninth and tenth defendants) are bound by those arbitration agreements. This appeal relates to the determination of that preliminary issue.

10. Since the judgment by Waksman J, which I summarise in part 2(a) below, the Republic has served Re-amended Consolidated Particulars of Claim ("RACPOC") and Privinvest and Mr Safa have served a joint and detailed defence. Further, in 2019 Privinvest commenced various arbitrations in Switzerland against the SPVs and the Republic. Those arbitrations have effectively come to an end without any determination of the merits of the Privinvest claims.

(c) The supply contracts, the arbitration agreements and the subcontracts

11. The SPVs which entered into the supply contracts are Proindicus SA ("Proindicus"), Empresa Moçambicana de Atum SA ("EMATUM") and Mozambique Asset Management SA ("MAM").

12. On or about 18 January 2013 Proindicus and Privinvest Shipbuilding SAL (Holding) ("Holding") executed a supply contract. The Proindicus contract was apparently for the supply of ships, aircraft and local infrastructure to enable the Republic to police its coastline and its EEZ. The contract is governed by Swiss law. The contract became effective upon payment of the total ex works price of US$366 million (less fees payable to Credit Suisse) on 22 March 2013. The Republic is neither a named

party nor a signatory of the Proindicus supply contract. Privinvest alleges that as a matter of Swiss law the Republic is nevertheless a party to the contract.

13. As in the courts below, the parties have agreed for the purpose of the preliminary issue which is the subject of this appeal that the court is to proceed on the assumption that the Republic is bound by the arbitration agreements in this and the EMATUM and MAM supply contracts.

14. Clause L of the Proindicus supply contract contains a choice of law clause and an arbitration agreement. The clause provides:

> "The governing law of this Contract (including all or any disputes pertaining to negotiations, formation or its execution) shall be Swiss law, excluding the convention of the United Nations on contracts concerning the international sale of goods dated 11.04.1980 (UNCITRAL/CISG).
>
> The Customer and the Contractor base their relation with regards to this Project on the principles of good will and good faith.
>
> 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."

15. On or about 2 August 2013 EMATUM and Abu Dhabi Mar Investments LLC ("Mar") executed a supply contract for the provision of assets and services to supply a large fishing fleet for the Republic. The contract provided for the construction of a land operations coordination centre, three trimarans, 21 longliners and three bait fishing trawlers, and the supply of basic operators training to EMATUM. The purchase price was US$785.4 million. On 11 September 2013 the parties agreed that the contract would take effect on payment of US$492 million, which was paid in full, minus fees to Credit Suisse, on that date.

16. Clause J of the EMATUM supply contract contains a choice of law clause and an arbitration agreement, which (subject to the omission of "dated 11.04.1980 (UNCITRAL/CISG)" in the first paragraph) is identical to the first and third paragraphs of clause L in the Proindicus supply contract set out in para 14. above. The parties agree

that the EMATUM supply contract and the arbitration agreement are governed by Swiss law.

17. On or about 1 May 2014 MAM and Privinvest Shipbuilding Investments LLC ("Shipbuilding") executed a supply contract for the provision of assets and services apparently to create a shipyard for the construction locally of vessels using intellectual property licensed to MAM as well as other equipment for the offshore oil and gas industry and to offer maintenance and servicing of vessels associated with that industry. The MAM supply contract became effective on the payment of the total ex works price of US$500 million, which sum, minus fees and "interest support", was paid to Shipbuilding on 11 June 2014. The MAM supply contract was amended by an amendment and restatement on 22 December 2014.

18. Clause K of the MAM supply contract contains a choice of law clause and an arbitration agreement, which the parties agree are governed by Swiss law. Clause K provides:

> "The governing law of this Contract (including all or any disputes pertaining to negotiations, formation or its execution) shall be Swiss law, excluding the convention of the United Nations on contracts concerning the international sale of goods.
>
> 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 the Swiss Chambers' Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.
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> The number of arbitrators shall be three. The seat of the arbitration shall be Zurich and the arbitral proceedings shall be conducted in English. The Customer (for itself and for all parties claiming under it) hereby expressly waives any and all rights to claim sovereign immunity or any claims under a group of companies or analogous doctrine and 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 to the Contractor) has entered into with anyone affiliated to or connected with the Customer."

19. Each of the Privinvest companies which entered into these supply agreements subcontracted its role on a back-to-back basis to other Privinvest companies as follows: (i) on 20 January 2013 Holding subcontracted with Logistics International SAL (Offshore) (the ninth defendant) for the supply of certain of the assets to be supplied under the Proindicus supply contract; (ii) on 11 September 2013 Mar subcontracted with Logistics International SAL (Offshore) (the ninth defendant), for the performance of Mar's obligations under the EMATUM supply contract; and (iii) on 23 May 2014 Shipbuilding subcontracted with Logistics International Investments LLC (the tenth defendant) for the performance of obligations under the MAM supply contract. The Holding sub-contract did not contain a choice of law or jurisdiction agreement. The Mar and Shipbuilding subcontracts contained an English choice of law clause and gave exclusive jurisdiction to the courts of England and Wales.

20. Privinvest says that the supply contracts have essentially been performed and that the goods have been delivered. The Republic does not accept that what Privinvest has provided conforms to contract or is of material benefit to it. That dispute is relevant to Privinvest's applications for a stay, as discussed below.

(d) The financing of the supply transactions

21. On 28 February 2013, CSI, CSAG and Proindicus (as borrower) entered into a six-year US$372 million term facility agreement to finance the contract price under the Proindicus supply contract. On the same date, Mr Chang, purportedly acting on behalf of the Republic, signed a guarantee between the Republic, CSI and CSAG which nominally secured Proindicus' obligations under the Proindicus facility. After variations were made to the Proindicus supply contract, Mr Chang signed (purportedly on behalf of the Republic) letters confirming the Proindicus guarantee.

22. On 30 August 2013, CSI, CSAG and EMATUM (as borrower) entered into a seven-year US$850 million term facility letter to finance the contract price of the EMATUM supply contract. On the same day, Mr Chang, purportedly on behalf of the Republic, signed a guarantee between the Republic, CSI and CSAG which nominally secured EMATUM's obligations under the EMATUM facility. The loan in respect of the EMATUM supply contract has since been re-financed.

23. On 20 May 2014, VTB, Palomar Capital Advisors AG ("Palomar") and MAM (as borrower) entered into a five-year US$540 million facility agreement to finance the contract price under the MAM supply contract. On the same day, Mr Chang signed a guarantee (purportedly on behalf of the Republic) between the Republic, VTB and Palomar which nominally secured MAM's obligations.

24. Each of the facilities and the guarantees contains an English choice of law clause and gives exclusive jurisdiction to the courts of England and Wales.

(e) The composite transactions

25. The close connections between the supply contracts, the loans to each of the SPVs to fund the supply contracts, and the Republic's guarantees of those loans are obvious and the Republic in its claims pleads that there were three composite transactions involving (i) the supply contracts between the SPVs and the Privinvest supply companies, (ii) the financial facilities, and (iii) the purported sovereign guarantees of the Republic which secured the financial facilities.

2. The proceedings and judgments of the courts below

26. As I have mentioned in para 9. above, Waksman J resolved that there would be determined as a preliminary issue whether, as Privinvest claims, all the Republic's claims fall within the scope of the arbitration agreements in the supply contracts.

(a) Waksman J's judgment on the scope issue

27. Waksman J heard submissions on the preliminary issue over three days on 26-28 May 2020. The parties served witness statements and led evidence of Swiss law experts who were cross-examined on their reports concerning the principles of Swiss law on the interpretation of arbitration clauses. In a reserved judgment handed down on 30 July 2020 ([2020] EWHC 2012 (Comm)), Waksman J determined the preliminary issue in favour of the Republic. He dismissed the section 9 applications and the case management stay applications which were parasitic upon the section 9 applications.

28. As the parties have accurately recorded in their statement of facts and issues, Waksman J concluded that none of the following claims fell within the scope of any of the arbitration agreements:

> (i) The Republic's claim in bribery, asserting that Privinvest bribed Mozambican officials and the CS team defendants, and are therefore liable as joint tortfeasors for the tort of bribery;
>
> (ii) The Republic's claim in dishonest assistance, asserting that Privinvest dishonestly assisted the Mozambican government officials' breaches of fiduciary duty, by their involvement in the bribery and their entry into the supply contracts;

(iii) The Republic's claim that Privinvest are liable in knowing receipt and assertion of proprietary claims to the traceable proceeds of amounts received by Privinvest as a result of the breaches of duty by the Mozambican officials;

(iv) The Republic's claim in unlawful means conspiracy, asserting that Privinvest are liable as co-conspirators with Credit Suisse, Mr Safa and the CS team defendants for the Republic's losses stemming from any or all of six alleged unlawful means; and

(v) One of the six unlawful means relied on by the Republic, which was pleaded as "the entry by the Suppliers [ie the sixth to eighth defendants] into the Supply Contracts which were, as alleged at paragraphs 64, 79, and 87 above, instrument[s] of fraud, alternatively shams." Waksman J described this allegation as the "Instrument of Fraud Allegation" or "IFA" and in this judgment I shall describe the unlawful means conspiracy claim relating to it as the "UMIFA".

29. In his judgment Waksman J focused on the allegation by Privinvest that the IFA was covered by the arbitration clauses and that the IFA was an essential element of all the claims made against Privinvest. In para 81 he summarised his findings on the principles in Swiss law for interpreting arbitration clauses as follows:

> "(1) The exercise of construing the scope of the clauses 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;
>
> (2) There is an interpretive principle called in favorem arbitri but it cannot be applied without regard to the language and context of the particular clause;
>
> (3) If there are multiple arbitration clauses involved, that is a relevant consideration;
>
> (4) 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."

Those findings as to Swiss law have not been challenged on this appeal.

30. Waksman J referred to section 9 of the 1996 Act and stated (para 83) that the issue of law which arises is how to approach the identification of the "matter" which is caught by the arbitration clause, in respect of which the legal proceedings have been brought. In addressing this question, he derived considerable assistance from the judgment of the Singapore Court of Appeal delivered by Sundaresh Menon CJ in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; [2016] 1 SLR 373 ("*Tomolugen*") and the judgment of Popplewell J in *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm); [2018] Bus LR 2419 ("*Sodzawiczny*") each of which I discuss below. He analysed the Republic's claim as being the alleged corrupt procuring by the defendants of transactions with the SPVs or the Republic, which were (i) the supply contracts, (ii) the financial facilities, and (iii) the guarantees. The alleged corrupt scheme involved all three elements of which the guarantees were the key element for the Republic as they exposed the Republic to loss (paras 93-94).

31. Waksman J concluded that the disputes within and arising from the Republic's claims did not have a sufficient connection with the individual supply contracts. In reaching that view, Waksman J took account of there being three separate arbitration clauses in three separate supply contracts which suggested that the parties intended that in each agreement the dispute resolution procedure was principally for the particular supply contract. Further, the EMATUM and MAM sub-contracts prescribed English law and the exclusive jurisdiction of the English courts, and there was no arbitration clause in the Proindicus sub-contract. He stated (para 97):

> "The more disparate and disjointed the collection of dispute resolution clauses (or absence in the case of the Proindicus sub-contract), 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. In other words, the potency of the Swiss version of the 'one-stop shop principle' is much attenuated."

32. The judge then analysed each of the claims listed in para 28. (i)-(iv) above and concluded that each was not sufficiently connected to the supply contracts to fall within the relevant arbitration clauses. He held that the IFA was connected to the supply contracts but concluded, for the reasons which he set out in paras 114-117 of his judgment, that it was insufficiently so connected. Concluding that there were no "matters" in respect of which the legal proceedings had been brought which were subject to the arbitration clauses, he dismissed Privinvest's application for a section 9 stay.

33. Privinvest applied to the Court of Appeal for permission to appeal and Males LJ granted permission to appeal on 28 October 2020. In advance of the appeal hearing the Republic confirmed that it did not contest the appeal in so far as it concerned

Privinvest's argument that two of the Republic's allegations fell within the scope of the arbitration agreements, namely (i) the allegation that the supply contracts were instruments of fraud or alternatively shams (the IFA) and (ii) the allegation that entry into the supply contracts, which were instruments of fraud or shams, was one of six unlawful means in the conspiracy to which Privinvest is alleged to have been a party (ie the unlawful means instrument of fraud allegation or UMIFA). The Republic repeated that concession before this court and does not pursue the UMIFA against Privinvest (subject to the question whether the Logistics entities (the 9th and 10th defendants) are each a party to the arbitration agreements in question), but retains the allegation in relation to the other defendants.

(b) The judgment of the Court of Appeal

34. The Court of Appeal (Henderson, Singh and Carr LJJ) in a judgment dated 11 March 2021 ([2021] EWCA Civ 329) allowed Privinvest's appeal. Carr LJ, who delivered the leading judgment, analysed the Republic's pleaded case as it existed before Waksman J (ie the ACPOC) between paras 41 and 47 of her judgment. In summary the claims were:

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

(ii) As against all defendants, bribery of the CS team defendants and the Mozambican officials;

(iii) As against all defendants (save for CSSE) conspiracy to injure by unlawful means, which means were (a) the bribery, (b) the entry by Credit Suisse into the Proindicus and EMATUM guarantees, (c) the entry by Holding, Mar and Shipbuilding into the supply contracts which were instruments of fraud or shams, (d) the dishonest assistance given to the breach of fiduciary duty by the Mozambican officials, (e) the defendants' knowing receipt of the proceeds of the breach of fiduciary duty by the Mozambican officials, and (f) deceit by Credit Suisse and Mr Singh. The defendants (save for CSSE) concealed their unlawful means;

(iv) Breach by the Mozambican officials of their fiduciary duties owed to the Republic;

(v) As against all defendants (save for CSSE), dishonest assistance in the breach of duty by the Mozambican officials, including (a) facilitation of the bribery, (b) Credit Suisse's entry into the facility agreements and guarantees, and

(c) the entry by Holding, Mar and Shipbuilding into the three supply agreements with the SPVs;

(vi) As against all defendants (save for CSSE), knowing receipt of fee income and other payments from the Republic in respect of the transactions;

(vii) As against all defendants (save for CSSE), an account of profits and/or equitable compensation and a proprietary claim to the traceable proceeds of amounts received as a result of the breaches of fiduciary duty by the Mozambican officials; and

(viii) A claim for deceit against Credit Suisse and Mr Singh.

35. In her analysis of section 9 of the 1996 Act Carr LJ correctly recognised its purpose of giving effect to the parties' agreement to arbitrate and the mandatory nature of the stay if a "matter", in respect of which legal proceedings had been brought, fell within the scope of the arbitration agreement. She stated, again correctly, that a "matter" is not the same as a cause of action and that section 9(4) of the 1996 Act allowed for a pro tanto stay. She also correctly recognised that there were two stages to the inquiry by the court when addressing an application for a section 9 stay: (i) to identify the matters in respect of which the proceedings are brought, and (ii) to assess whether those matters are matters which the parties have agreed to refer to arbitration. The latter question involved the proper construction in context of the scope of the relevant arbitration agreement. A "matter", she stated (para 63), "includes any issue capable of constituting a dispute under the relevant arbitration agreement". In support of her analysis, she drew on two cases. First, she referred to and quoted as a sufficient summary of the relevant principles paras 43 and 44 of the judgment of Popplewell J in *Sodzawiczny*, which I set out and discuss below. Secondly, she stated that this summary followed and was consistent with the judgment of Sundaresh Menon CJ in *Tomolugen* (paras 111, 113 and 121) which I also discuss below. In her discussion and analysis, she emphasised the sanctity of the parties' agreement and stated (para 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 irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this."

36. Turning to the grounds of appeal advanced by Privinvest, she rejected the challenge to the judge's analysis of Swiss law, a matter with which this court is not concerned.

37. On the second ground of appeal, which is relevant to the current appeal, she considered that the IFA, that is the allegation that the supply contracts were instruments of fraud or shams, was sufficiently connected to the supply contracts and accordingly fell within the scope of the three arbitration agreements. The allegation went to the validity of the supply contracts. Carr LJ rejected the Republic's contention that it did not need the IFA to succeed in its claims against Privinvest. This was because the Republic and the judge had ignored reasonably foreseeable defences. She stated, correctly in my view, that the search under section 9 was for "the substantial issues to which the claim gives rise, including identified or reasonably foreseeable defences" (para 95). Even if the Republic removed the IFA from its pleaded claim against Privinvest, the validity and genuineness of the supply contracts were bound to be raised by Privinvest as part of its defence against the allegations of dishonesty. They would be a matter in dispute as the Republic did not accept that the supply contracts were valid commercial contracts.

38. Carr LJ concluded that at the first stage of the two-stage exercise, the "matters" in respect of which the legal proceedings were brought against Privinvest include the question whether the supply contracts were valid and genuine commercial contracts. At the second stage of that exercise, that question was sufficiently connected to the supply contracts. She stated that it was a defence to all the claims against Privinvest with the result that all those claims fall within the scope of the arbitration agreements (para 101): "[o]bjectively construed, this is what the parties are to be taken to have intended, acting reasonably and in good faith". In support of this conclusion Carr LJ went on to discuss each of the Republic's claims, concluding that as a matter of Swiss law the judge should have held that there was a sufficient connection between (i) the IFA and each of the causes of action, and (ii) the arbitration agreements for those matters to be within the scope of the arbitration agreements. The Court of Appeal therefore allowed Privinvest's appeal and by order dated 22 March 2021 declared that all of the Republic's claims fell within the scope of the arbitration agreements.

39. On 4 April 2022 this court granted permission to appeal.

(c) Further proceedings

40. The current appeal is concerned only with section 9 of the 1996 Act and the scope of the arbitration agreements. The question whether the Republic and the subcontractors, the ninth and tenth defendants, were parties to the arbitration agreements in the supply contracts as a matter of Swiss law and other questions concerning the liability of the defendants are to be addressed in a trial in the Commercial Court

commencing in October this year. If it were to be determined that under Swiss law the Republic was not a party to the arbitration agreements, the matters raised in this appeal would not be relevant to the liability of any of the defendants in this action. It is also relevant in this appeal that, as I have said, Credit Suisse have made Privinvest Part 20 defendants in the action. Thus, the matters, which Privinvest seeks to send to arbitration in relation to the Republic's claims against it, will in any event be addressed by the court in that trial as Credit Suisse are not parties to any arbitration agreement with Privinvest in relation to the transactions which are the subject of the parties' disputes.

3. The Republic's challenge

41. The Republic pursues two grounds of appeal. First, it argues that the Court of Appeal erred in concluding that a defence, which ex hypothesi is arbitrable, automatically renders the claimant's claim an arbitrable matter, requiring a mandatory stay of both the claim and the defence. In oral submissions Mr Nathan Pillow KC, on behalf of the Republic, realigns his challenge. He argues that, in contrast with the approach of Waksman J, the Court of Appeal erred by failing to analyse, in accordance with Swiss law, the sufficiency of the connection with the particular supply contract of each party, of each claim, and of each of the other supply contracts and subcontracts which were entered into at different times. The second ground of appeal turns on the meaning of a "matter" in respect of which the legal proceedings are brought. It is in essence that, once one sets to one side the IFA assertion and the UMIFA claim, which the Republic concedes fall within the scope of the arbitration clauses and will not be advanced against Privinvest in these proceedings (see para 33 above), the Republic's claims and the foreseeable relevant defences to those claims are not "matters" in respect of which the legal proceedings are brought. The Republic argues that the validity and commercial soundness of each of the supply contracts are mere factual issues, which, if proven, do not amount to a relevant legal defence to the Republic's claims. They are not on the critical path to the establishment of the Republic's claims or the rebuttal of those claims. They are therefore not "matters" in respect of which the legal proceedings are brought. At most, the validity and commerciality of the supply contracts might weigh in the balance when forming a view as to Privinvest's intention. They are peripheral to the substance of the dispute between the parties.

42. Mr Duncan Matthews KC, on behalf of Privinvest, submits that the case involves allegations of corruption in relation to the conclusion of the supply contracts. He submits that it is artificial for the Republic to argue that the dispute is only about the Republic's liability under the guarantees. The creation of the SPVs and the security for the banks' funding of the acquisition of the goods and services through the Republic's guarantees were simply the mechanism by which the Republic chose to obtain the benefits of those goods and services. Privinvest is entitled to have the legitimacy of the supply contracts determined by the forum chosen in the supply contracts.

43. I focus on the second ground of appeal in this judgment, and the conclusions which I reach on that ground make it unnecessary to consider the first ground of appeal in any detail.

4. Analysis

(a) The meaning and ascertainment of a "matter"

44. In addressing the Republic's challenge, I address, first, jurisprudence in relation to section 9 of the 1996 Act and similar legislative provisions in other influential centres of international arbitration on the meaning of a "matter" in respect of which legal proceedings are brought.

45. Section 9 of the 1996 Act needs to be seen in its wider statutory context. It is trite that English law, like many other legal systems, adopts a pro arbitration approach. Section 1 of the 1996 Act sets out the general principles which govern Part 1 of the Act, which includes section 9. Section 1 provides:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly-
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

46. A pro arbitration approach may involve a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved. In *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117 ("*Enka Insaat*"), Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):

> "In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that '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' (see para 13, per Lord Hoffmann).
>
> Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, 'is now firmly embedded as part of the law of international commerce'. In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:
>
> 'In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a "pro-arbitration" presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).'"

47. We are not at this stage of the discussion concerned with the interpretation of the arbitration agreements in this appeal, but the liberal approach to the interpretation of arbitration agreements, which is also reflected in Swiss law (see para 29. above), forms part of the context in which the court must interpret section 9 of the 1996 Act.

48. Section 9 involves a two-stage process. First, the court must identify the matter or matters in respect of which the legal proceedings are brought. Secondly, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement on its true construction.

49. In its judgment in this case the Court of Appeal at para 65 expressed the view that the relevant principles in addressing these questions were "summarised neatly and sufficiently for present purposes" by Popplewell J in *Sodzawiczny* in which he stated (emphasis added):

> "43. … 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 in the *Lombard North Central plc* case [2013] Bus LR 68, para 14.
>
> (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 plc case, para 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 plc* case, para 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…"

50. I have emphasised the passages in Popplewell J's judgment above as Mr Pillow submits that it was an error to broaden the concept of "matter" in those passages to cover any issue which falls within the scope of the arbitration agreement. In my view, those emphasised passages, if taken in isolation, have the capacity to mislead as to the state of the law when one considers the generally accepted principles laid down by international jurisprudence, including two cases on which Popplewell J relied and which I discuss below, namely Andrew Smith J's judgment in *Lombard North Central plc v GATX Corpn* [2012] EWHC 1067 (Comm); [2013] Bus LR 68 ("*Lombard North Central*") and the judgment of Sundaresh Menon CJ in the Singapore Court of Appeal in *Tomolugen*. No judicial summary of the law should be treated as if it were a statutory text. It may be that Popplewell J considered that his summary was implicitly qualified by the reasoning in those cases because he stated that he was following the central reasoning in *Lombard North Central* and *Tomolugen*. In any event his summary needs to be assessed in the light of those cases as well as other international jurisprudence.

51. In *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] Ch 333 ("*Fulham*"), a case which has been followed in many jurisdictions, the Court of Appeal granted a stay of an unfair prejudice petition under section 994 of the Companies Act 2006 ("the 2006 Act") to enable the parties to resolve their underlying dispute by arbitration. Patten LJ, giving the leading judgment, treated as "matters" falling within the arbitration clause of the rules of the Football Association Premier

League Ltd ("FAPL") the allegation that there had been unfair prejudice to Fulham Football Club Ltd ("the Club") and the remedies which the Club sought, of an order restraining the chairman of the FAPL from participating in future player transfer negotiations and an order that he cease to be chairman of the FAPL. The effect of his judgment was that the whole subject matter of the Club's petition under section 994 of the 2006 Act, including the provision of a remedy, was treated as a matter to be referred to arbitration. Patten LJ recognised that an arbitral tribunal could not decide whether an order to wind up a company should be made, as that was within the exclusive jurisdiction of the court. But the arbitral tribunal could decide whether a complaint of unfair prejudice had been established and provide remedies set out in section 996 of the 2006 Act.

52. In *Lombard North Central* (paras 14 -17) Andrew Smith J discussed the question how the court determines whether legal proceedings are in respect of a referred matter. Popplewell J in *Sodzawiczny* referred to several points in Andrew Smith J's discussion, namely (i) the need to identify issues which may foreseeably arise, (ii) that legal proceedings are not in respect of a referred matter only when they are principally to resolve a dispute about a referred matter, and (iii) the focus on the substance of the claim or claims in the legal proceedings rather than solely their formulation in the claimant's pleadings. There were other points in Andrew Smith J's reasoning to which he did not refer. Significantly, and in my view correctly, Andrew Smith J stated (para 15) that a party might not be entitled to a stay of legal proceedings if he could have no real or proper purpose for so wishing. He also stated (para 17):

> "It does not follow that, wherever legal proceedings involve dispute about a referred matter, the defendant will necessarily be able to have them stayed however peripheral the referred matter might be to the proceedings as a whole. It might be that, while the referred matter is stayed for determination in arbitration, the proceedings could otherwise proceed."

This latter point foreshadowed dicta in *Tomolugen* which I discuss below.

53. In the context of international arbitration, section 9 of the 1996 Act gives effect to article II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention") which provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration,

> unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

54. In *Enka Insaat* this court observed that more than 160 states had signed the New York Convention and stated (para 126):

> "The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 ("*Gol Linhas*") the Judicial Committee of the Privy Council, in a judgment delivered by Lord Hamblen and Lord Leggatt, discussed the international origin of a legislative provision in the Cayman Islands (section 4 of the Foreign Arbitral Awards Enforcement Act) which is to the same effect as section 9 of the 1996 Act and stated (para 75):

> "As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called 'domestic precedents of antecedent date', but rather should be construed 'on broad principles of general acceptation'; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning."

55. It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of section 9 of the 1996 Act in so far as they have statutory provisions which are worded in a similar way and to adopt broad and generally accepted principles in conducting the exercise of statutory interpretation.

56. In *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd and another* [2014] 4 HKLRD 759 ("*Quiksilver*") the Court of First Instance in Hong Kong addressed an application to stay or dismiss a petition by a shareholder to wind up two solvent joint venture companies on the just and equitable ground. The judgment of Harris J is not concerned with a mandatory stay under the Hong Kong legislation, which is the equivalent of section 9 of the 1996 Act, because the legislation spoke of the court "before which an action is brought" and Harris J held that an "action" did not include an application to wind up a company. Nonetheless, he considered that similar principles applied to a discretionary case management stay. Harris J recognised and it was common ground that an arbitral tribunal could not make a winding up order which affected third parties but held that the precise relief sought in the court application was not critical. He stated (para 22) that the correct approach is "to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement." Harris J analysed the substantive dispute between the parties to be the basis on which the joint venture was to end, being either a buy-out by Glorious Sun or a winding up at the instance of Quiksilver. That commercial dispute was arbitrable and, if Quiksilver were to prevail in the arbitration, the stay of the winding up petition could be lifted and the court would not need to re-hear the substantive arguments, which would have been determined in the arbitration.

57. It is necessary to examine at greater length the judgment of Sundaresh Menon CJ in *Tomolugen*. In this case the Court of Appeal of Singapore was addressing an application for a mandatory stay under section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), which provides:

> "(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

58. The application was by Lionsgate Holdings Pte Ltd ("Lionsgate") for a mandatory stay for arbitration of court proceedings raised by a minority shareholder in a

company ("AMRG"), Silica Investors Ltd ("Silica"), under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) for relief for oppressive or unfairly prejudicial conduct. The defendants in the court proceedings were AMRG, the shareholders of AMRG, including Lionsgate, and the directors and former directors of AMRG and related companies. Lionsgate, which was the wholly owned subsidiary of Tomolugen Holdings Ltd, the majority shareholder in the company, had sold shares in the company to Silica in a share sale agreement which contained an arbitration clause. Lionsgate argued that part of the dispute in the court action fell within the arbitration clause of the share sale agreement and to that extent the legal proceedings should be the subject of a mandatory stay. It, and the other defendants, sought a discretionary case management stay of the remainder of the legal proceedings, pending the outcome of the arbitration. Much of the judgment of the Court of Appeal, delivered by Sundaresh Menon CJ, concerned the question of arbitrability, with which this appeal is not concerned. But the judgment also contained an important discussion of the concept of a "matter".

59. The Court of Appeal (paras 15-19) analysed the allegations made in the section 216 application under four broad categories (1) the share issuance allegation, (2) the management participation allegation, (3) the guarantees allegation, and (4) the asset exploitation allegation.

60. In para 105 Sundaresh Menon CJ stated that the requirement to arbitrate a matter could give rise to procedural complexity involving two different fora where a dispute between common parties raised issues and only some of the issues fell within the scope of an arbitration agreement. Such procedural complexity and inconvenience did not render a matter non-arbitrable and provide a ground for refusing a stay of the legal proceedings.

61. Between paras 108 and 122 of the court's judgment Sundaresh Menon CJ addressed the question whether a "matter" should be interpreted broadly by identifying the essential dispute or the main issue, as Silica urged, or more granularly, as Lionsgate submitted. He stated (para 108) that establishing whether the dispute pertained to a matter that is subject to the arbitration agreement involves the two stages which I have stated in para 48 above: first, the court must identify the matter or matters in respect of which the legal proceedings are brought and then, secondly, the court must ascertain whether the matter or matters fall within the scope of the arbitration agreement on its true construction. At the first stage, the court proceedings which are sought to be stayed may involve more than a single matter. In addressing the differing submissions of the parties, Sundaresh Menon CJ stated (para 113) that the starting point of the analysis was the language of section 6 of the IAA. Section 6 of the IAA mandates a stay only "so far as" the court proceedings relate to the matter or matters which are the subject of the arbitration agreement. This, he stated, militates against taking "an excessively broad view of what constitutes a 'matter' or treating it as a synonym for the court proceedings as a whole". He continued (para 113):

> "In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common-sense enquiry 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." (Emphasis in the original)

62. In support of this view Sundaresh Menon CJ then addressed jurisprudence from Australia (*ACD Tridon v Tridon Australia* [2002] NSWSC 896), the British Virgin Islands (*Ennio Zanotti v Interlog Finance Corp* Claim No BVIHCV 2009/0394 (8 February 2010)) and England (*Lombard North Central*) before concluding at para 122:

> "We therefore consider that a 'matter', for the purposes of s 6 of the IAA, should not be construed in either an overly broad or an unduly narrow way. On the specific facts of this case, each of the four categories of allegations made in the Suit raises substantial issues that are neither peripheral nor tangential to Silica Investors' claim for relief under s 216 of the Companies Act. We accordingly find that each category is a separate 'matter' for the purposes of Lionsgate's stay application under s 6 of the IAA."

63. Thereafter, the court turned to the second stage of the analysis. The court interpreted the arbitration clause and applied it in the context of the particular dispute to determine which of the categories of allegation (para 59 above) fell within the scope of the arbitration agreement. It was not in dispute that the third and fourth categories did not, and the court therefore focused on the first two categories. In each category the court examined the substance of the controversy and concluded that the share issuance allegation was not within the scope of the arbitration agreement but that the management participation allegation was.

64. The survey and summary of international authorities in *Tomolugen* has been influential in several first instance decisions by experienced commercial judges in the United Kingdom. See for example, *Autoridad del Canal de Panamá v Sacyr, SA* [2017] EWHC 2228 (Comm); [2018] 1 All ER (Comm) 916 ("*Autoridad del Canal de Panamá*"), Blair J at para 129; *China Export & Credit Insurance Corpn v Emerald Energy Resources Ltd* [2018] EWHC 1503 (Comm); [2019] 1 All ER (Comm) 351, Sir Richard Field at paras 58-60; and *Tugushev v Orlov* [2021] EWHC 926 (Comm); [2021] 2 Lloyd's Rep 205, Sir Nigel Teare at paras 22-25.

65. Turning to Australian jurisprudence, *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164 ("*WDR Delaware*") was concerned with an application for a stay under section 7(2) of the International Arbitration Act 1974 and section 8(1) of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Australia. The relevant statutory provisions were as follows. Section 7(2) of the International Arbitration Act 1974 provided:

> "Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the *determination of a matter that*, in pursuance of the agreement, *is capable of settlement by arbitration*;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings *or so much of the proceedings as involves the determination of that matter*, as the case may be, and refer the parties to arbitration in respect of that matter." (Emphasis added)

Article 8(1) of the Model Law provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

66. Hydrox Ltd was a joint venture company. The legal proceedings in question were for (i) a declaration that the affairs of Hydrox Ltd had been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR, and (ii) an order for the winding up of Hydrox Ltd. It was common ground that the disputes between the shareholders were within the scope of the arbitration clause in the joint venture agreement. The principal dispute before Foster J was whether some or all of the claims in the court proceedings were arbitrable and, if so, whether the whole or only part of the court proceedings should be stayed.

67. In relation to the latter question Foster J between paras 102 and 123 of his judgment set out his analysis of how the court identifies the matters which are the subject of the legal proceedings. In summary, he reasoned: (i) that the nature and extent of the matters are ordinarily to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based; the task is to ascertain the substantive questions in dispute, (ii) that multiple matters may exist within the one court proceeding, (iii) that a matter is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings, (iv) that a matter may or may not comprise the whole subject matter of any given proceeding, and (v) that the court must first identify the matter or matters to be determined in the court proceeding before asking whether those matters fall within the scope of the arbitration agreement, and, if so, whether they are arbitrable.

68. In support of his third proposition, that a matter is something more than a mere issue or question which might fall for determination in proceedings, Foster J cited the judgment of the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning")*. That case was concerned principally with section 7(2) and (4) of the International Arbitration Act 1974 (then named the Arbitration (Foreign Awards and Agreements) Act 1974), and the question whether a liquidator was a person "claiming through" the company in liquidation which was a party to an arbitration agreement, and therefore entitled to a stay of legal proceedings for arbitration. The High Court held that the liquidator, who had rejected a creditor's proof of debt for goods allegedly sold under a licence agreement which contained an arbitration clause, was a person claiming through the company under section 7(4) and was entitled to a stay under section 7(2). Deane and Gaudron JJ in a joint dissenting judgment discussed the meaning of the word "matter" in section 7(2) at pp 351-352. They observed that "matter" was not defined in the 1974 Act but that, in any context, it was "a word of wide import" and stated:

> "In the context of s. 7(2), the expression 'matter … capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter … capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. … It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

Deane and Gaudron JJ went on (p 353) to reject the argument that section 7(2) did not apply to proof of debt proceedings, stating that the operation of the section is not confined to proceedings in which the parties seek the same relief as might be sought in arbitration proceedings.

69. The High Court of Australia, in a joint judgment of Kiefel CJ and Gageler, Nettle and Gordon JJ in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, paraphrased the judgment of Deane and Gaudron JJ in *Tanning*, and stated (para 68) that it was sufficient that the defence puts in issue "among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy". The meaning of the judgment in *Tanning* was not a matter of controversy in that appeal. It is of note that the Australian legislation, where it speaks of a matter that, in pursuance of the agreement, is capable of settlement by arbitration, uses language which is not present in the other statutory provisions which I have reviewed. It is not necessary to decide the question in this appeal, but I do not construe the Australian jurisprudence as requiring that the proposed arbitral proceedings must determine the existence of a legal right or liability before legal proceedings may be stayed for arbitration in whole or in part. I therefore doubt whether the different statutory wording in the Australian legislation gives rise to different results from among others the test in section 9 of the 1996 Act.

70. The Judicial Committee of the Privy Council ("the Board") in a judgment in the Cayman Islands case of *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn* [2023] UKPC 33 ("*Ting Chuan*"), hands down its judgment on the same day as this judgment. The Board holds that, in the law of the Cayman Islands, legal proceedings may be stayed to obtain an arbitral determination, in the form of a declaration, of a substantial factual dispute which is an essential step in the legal proceedings. In that case, the matters to be sent to arbitration are whether a shareholder in a joint venture company has lost trust and confidence in the majority shareholder's conduct and management of the company's affairs and whether the fundamental relationship between the two shareholders in the joint venture has irretrievably broken down. Those matters may be determined by an arbitral tribunal before a court would decide whether it is just and equitable that the company be wound up.

71. In my view there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration. I summarise my understanding of that consensus in the following paragraphs.

72. First, as I have stated (para 48 above) the court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly,

the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement.

73. In carrying out this exercise the court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means. The exercise involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim.

74. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is silent as to the stay of the court proceedings, legislation implementing this provision of the New York Convention has generally made express provision for a stay pro tanto. Section 9 of the 1996 Act has done so expressly. The "matter" therefore need not encompass the whole of the dispute between the parties.

75. Thirdly, a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence to that claim, it is not a matter in respect of which the legal proceedings are brought. I agree with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* that a "matter" requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. I agree with Foster J's third proposition in *WDR Delaware* that a "matter" is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.

76. A focus on the substantial nature and relevance of a referred matter to the legal proceedings is consistent with international jurisprudence, including *Lombard North Central*, *Quiksilver*, *Tomolugen* and *Ting Chuan*. It is also consistent with the Australian jurisprudence in *Tanning* and *WDR Delaware.*

77. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a question of judgment and the application of common sense rather than a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay whether in whole or in part. In so far as the summary of the law in *Sodzawiczny*, if read by itself, may suggest otherwise, it is in error.

78. The existing jurisprudence also supports a fifth point. There may not yet be a consensus on this matter, but common sense lends further support. When turning to the second stage of the analysis (para 48 above), namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.

79. In *Autoridad del Canal de Panamá* context played a central role in the decision. Blair J dealt with an application for a stay under section 9 of the 1996 Act in relation to legal proceedings in England to enforce guarantees which contained clauses that made English law their governing law and gave the English courts exclusive jurisdiction. The English law guarantees were given in the context of major contracts to expand the Panama Canal after the contractor experienced cash flow problems and obtained several advance payments to allow the works to continue. The canal authority ("ACP") had previously obtained guarantees subject to Panamanian law with arbitration clauses governed by "US law" in which the seat of the arbitration was Miami, to secure the contractor's obligations under the construction contract and both the earlier and future advance payments. ACP obtained the English law guarantees when it agreed to make further advance payments and extend the repayment date of the existing advance payments. Blair J (paras 131-138) rejected the application for a stay on the ground that the matter whether the contractor was bound to repay the advance payments ("the repayment issue") in the context of ACP's claim did not fall within the scope of the arbitration clauses. He accepted that the repayment issue was a substantial matter in the English legal proceedings but held that the substance of the controversy in the English proceedings was whether the defendants were liable under the English law guarantees. This was a matter referred to the exclusive jurisdiction of the English courts. ACP was entitled to choose which of its securities (ie guarantees) to enforce. It made no demand under the guarantees which had arbitration clauses or under the main contract. In that context, the claim to enforce the English law guarantees with their exclusive jurisdiction clauses, and the repayment issue did not fall within the scope of the arbitration clauses in the guarantees which ACP did not choose to enforce.

80. Blair J decided the case by stating (para 137(6)) that the "matter" in respect of which the legal proceedings had been brought was whether the defendants were liable under the English law guarantees and that, in that context, the repayment issue was not a matter which the parties had agreed to refer to arbitration. He saw this as an answer to the first stage question, although he had stated (in para 137(1) of his judgment) that the repayment issue was the most substantial issue arising under the English law guarantees. I would be inclined to answer the question in that case at the second stage of the analysis: even if it were a substantial matter in the legal proceedings, the context in which the matter arose in the legal proceedings could exclude the matter from the scope of the arbitration agreement. ACP had elected to advance a claim under the English law guarantees and that claim was reserved to the exclusive jurisdiction of the English courts. Subject to that qualification, I agree with Blair J's approach which recognises the

significance of the context in which a matter arises in legal proceedings and a party's autonomy to choose which of several claims it wishes to advance.

(b) Application of the law to the facts of this appeal

(i) The matters in respect of which the legal proceedings are brought

81. The first of the two stages set out in para 48. above is to identify the matter or matters in respect of which the legal proceedings are brought.

82. In the ACPOC the Republic states (para 26) that the claim arises out of three transactions between the SPVs and Privinvest financed by sovereign guarantees signed by Mr Chang. The Republic states that the three transactions (i) involved the payment of bribes to Mozambican officials, and (ii) involved a conspiracy by the first to tenth defendants to injure the Republic. It narrated that Privinvest paid bribes to the CS team defendants and so-called "contractor fees" to Credit Suisse. It asserted that Mr Chang did not have authority to sign the guarantees. It pleaded that the bribes and the three transactions, in particular the guarantees, were together the key elements of a fraudulent scheme designed to obtain about US$2 billon from the Republic. Finally, it asserted that CSI, CSAG and Mr Singh deceived the Republic into entering into the EMATUM exchange.

83. The remedies which the Republic seeks are: (i) declarations that it is not liable to CSI and/or CSAG in respect of the sovereign guarantees, (ii) compensation and indemnity in respect of its loss and damage caused by (a) bribery, (b) the conspiracy to injure the Republic by unlawful means, (c) the defendants' dishonest assistance of the breach of fiduciary duties by the Mozambican officials (d) the defendants' knowing receipt of payments derived from such breach of fiduciary duty, and (iii) a proprietary claim based on the sums received by the defendants as a result of such breach of fiduciary duty. There was a separate claim against CSI, CSAG and Mr Singh for fraudulent misrepresentations in relation to the EMATUM guarantee which led to the restructuring of the funding of the EMATUM transaction, which is not relevant to the application for a stay.

84. As I have said, the Republic has since conceded that the IFA assertion and the resulting UMIFA claim fall within the scope of the arbitration agreement in relation to each supply contract and it is no longer pursuing those claims in this action (see para 33 above). A claimant is entitled to decide on which of several available claims it wishes to pursue in a litigation: see *Autoridad del Canal de Panamá*, paras 137(4); 138.

85. The international jurisprudence, which I have summarised above, establishes that the court, in addressing the first stage of the section 9 exercise, is not tied to the pleadings but should look to the substance of the claims and likely defences. Standing back from the detail, it is clear, first, that in seeking damages resulting from the entering into the guarantees as part of the three transactions, the Republic is asserting that it did not get value for the monetary obligations which Mr Chang purportedly entered into on its behalf. Were it otherwise, the Republic would not be seeking the repayment of any sums for which it might be held liable under the guarantees. I will return to this point when I consider the defences which Privinvest may and does advance. Secondly, it is clear that, having withdrawn the IFA and UMIFA allegations (para 33 above), no challenge is made to the validity of the supply contracts; instead, damages and indemnities are sought.

86. The Republic's first claim for damages and indemnity relates to its allegations of bribery. Leggatt J in *Anangel Atlas Cia Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.1)* [1990] 1 Lloyd's Rep 167, 171 succinctly described a bribe as:

> "a commission or other inducement, which is given by a third party to an agent as such, and which is secret from his principal."

The components of a claim for bribery are (i) that a secret payment or other inducement has been made to an agent which gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal, and (ii) the recipient of the bribe (or the person at whose order the bribe is made) must be someone with a role in the decision-making process in relation to the transaction in question. But the payment need not be linked to a particular transaction, it is sufficient that the agent is tainted with bribery at the time of the transaction between the payer of the bribe and the principal. The agent and the payer of the secret commission are jointly and severally liable not only to account to the principal for the amount of the bribe but also for damages for fraud for any loss suffered by the principal. See *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm), paras 104-111 per Christopher Clarke J (his judgment was later overturned on a different point).

87. It is clear from this description of a claim for bribery that the Republic's claim based on bribery does not require an examination of the validity of any of the supply contracts. Nor is it necessary to prove dishonesty or that any fraudulent representation was made to the principal. Further, a defence that the supply contracts were valid and were on commercial terms would not be relevant to the question of a defendant's liability to account for the bribe. The law assumes that the price of the goods and services purchased by or on behalf of the principal was increased by at least the amount of the bribe*: Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch 119, para 53 per Lawrence Collins J. In this case, although this matter

need not be proved, it is not disputed that the cost of the payments said to be bribes was financed by Credit Suisse's lending which the Republic purportedly guaranteed. A defence of the commerciality of a supply contract, ie that the Republic received value for the monetary obligation which it undertook in entering into a guarantee, would be relevant only in relation to the quantification of the Republic's claim for damages and indemnity beyond the amount of the bribes.

88. The Republic's second ground of claim is unlawful means conspiracy. If parties intend to injure a claimant, if they inflict damage on it, and if they use unlawful means to do so, they are guilty of the tort of unlawful means conspiracy: *Lonrho plc v Fayed* [1992] 1 AC 448, 465-466 per Lord Bridge of Harwich. The Republic's case of unlawful means conspiracy seeks to prove that there was a conspiracy by the defendants to defraud the Republic by making the Republic liable under the guarantees. The alleged unlawful means include (i) the bribery, (ii) the entry by CSI and CSAG into the Proindicus and EMATUM guarantees with the knowledge of both the bribery and the invalidity of the guarantees under Mozambican law, both as a matter of vires and as a matter of the limits on Mr Chang's authority, (iii) the dishonest assistance discussed in para 90. below, (iv) the knowing receipt by the defendants of the proceeds of the breach by the Mozambican officials of their duties to the Republic, and (v) deceitful representations by CSI, CSAG and Mr Singh in relation to the EMATUM guarantee. This appeal is not concerned with the fifth ground of unlawful means.

89. Once again, a defence that the supply contracts were valid and were on commercial terms would not be a relevant defence in relation to the unlawful means asserted. The validity of the contracts is no longer in question as the Republic has departed from its claims of UMIFA as stated in para 33 above. In the context where it is alleged that very large bribes were paid both to senior Mozambican officials and to the CS team, it would be fanciful to suggest that the uncontested payments, which the Republic claims were bribes and Privinvest asserts were legitimate, did not enhance the price of the supply contracts. The defence would therefore be relevant only in relation to the quantification of loss suffered by the Republic beyond the sums paid as bribes if the Republic establishes its case that there was such a conspiracy and that the payments were bribes.

90. The Republic's claim for dishonest assistance focuses on the assistance given to the breach by the Mozambican officials of their fiduciary duties to the Republic through the payment of bribes and facilitation or assistance in such payments, through CSI and CSAG's entering into the guarantees with the knowledge of the bribes and the illegality of the guarantees, and Privinvest's entry into the three supply contracts with the SPVs. The Republic asserts that it has pleaded Privinvest's entry into the supply contracts simply as a factual step in the facilitation of the breach of duty by the Mozambican officials. At this stage in the proceedings the court has no basis for going behind that assertion.

91. In my view, what I have said in para 89. above in relation to defences to the claim for unlawful means conspiracy applies equally to the claim for dishonest assistance.

92. The Republic's claim for knowing receipt and its proprietary claim which appears to relate to such receipt are not fleshed out in the pleadings so far as they relate to Privinvest. Privinvest, relying on dicta in *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846, para 4 per Lord Nicholls of Birkenhead, and *Fairfield Sentry Ltd v Migani* [2014] UKPC 9, [2014] 1 CLC 611, para 18 per Lord Sumption, submits that such a claim depends upon the Republic being entitled to rescind the supply agreements. It is not clear to me on the skeletal pleadings of the ACPOC on what basis the Republic can assert that Privinvest was unjustly enriched by the proceeds of the supply contracts when it does not challenge the validity of those contracts. In the absence of further specification, there is force in Mr Pillow's submission that this is properly regarded as a strike out argument, rather than a section 9 stay point. I do not consider it further.

93. One must have regard to the substance of the controversy between the Republic and Privinvest in order to render ineffective the artificial manipulation by a claimant of its pleadings to circumvent an arbitration agreement which covers that substance: *Lombard North Central* para 14; *Autoridad del Canal de Panamá*, para 128. In this case, the substance of the controversy is whether the transactions, including both the supply contracts and the guarantees, were obtained through bribery and whether the defendants had knowledge at the relevant time of the alleged illegality of the guarantees and Mr Chang's lack of authority to execute them. An assertion of the extent to which each of the supply contracts gave value for money provides no answer to the assertion by the Republic that there was such bribery and such knowledge.

94. The assertion that the "matters" in respect of which the legal proceedings are brought are allegations of corruption in relation to the conclusion of the supply contracts states the matter too broadly. I do not accept the submission that the IFA is interwoven into the claims of bribery, unlawful means conspiracy and dishonest assistance simply because the funds to pay the payments, which on the Republic's assertion are bribes, came out of the contract price of the supply contracts for which the Republic may have liability under a guarantee or the replacement funding for the EMATUM guarantee. Standing back from the detail, if there were bribes, the bribes would have been to obtain the supply contracts and the Republic's guarantees. It may well be that the price fixed in one or more of the supply contracts was such as to fund the payments which are alleged to be bribes. But that is simply the mechanism by which the payments were funded. In my view, the Court of Appeal in para 96 of the judgment was correct as a matter of law to consider whether a "matter" was a substantial matter in the legal proceedings, but erred in stating that the validity and genuineness of the supply contracts are substantial matters on which Privinvest is bound to rely without going on to consider whether those were matters essential to a relevant defence to the Republic's surviving claims. Further,

while the Republic may indeed believe that Privinvest knew, when entering into the supply contracts and subcontracts, that it was providing substandard goods and services at inflated prices, it is not an essential part of its claims, and proving the opposite is not an essential part of a relevant defence to those claims. I therefore conclude that, in relation to the question of Privinvest's liability, the commerciality of the supply contracts or the value for money given by the implementation of those contracts are not matters in respect of which the legal proceedings were brought.

95. Regardless of that conclusion, it is argued that the quantification of the Republic's financial claims against the defendants arising out of the assertions of liability discussed above is itself a "matter" in the legal proceedings.

96. The Republic did not particularise its claim for losses in the ACPOC but, so far as relevant, those losses are pleaded to include (i) all amounts paid by the Republic or which the Republic is liable to pay in respect of the three transactions, (ii) the Republic's macro-economic losses including those suffered as a result of the withdrawal of funding by international donors and the International Monetary Fund in response to those transactions. The extent to which Privinvest gave value for money in its performance of the supply contracts will be a relevant issue in the quantification of the Republic's claims for damages and/or indemnification as Privinvest asserts that it provided valuable goods and services and that the Republic has squandered them and sabotaged the project for reasons of internal politics.

97. There is a dispute in relation to the quantification of the Republic's claims. The alleged bribes to inter alios Mozambican officials and the CS team defendants amount to US$136 million. Further, Mr Pillow informs the court that the guarantees cover another US$100 million apparently incurred to Credit Suisse as lender arrangement fees and to the joint venture company, Palomar, as running fees. There is also the claim for macro-economic losses which is unspecified in the ACPOC but, as Mr Pillow explains, was stated in the later pleadings as amounting to, or including, the loss of international grants of over US$1 billion and additional interest costs of over US$260 million. These are substantial sums but they have to be seen in the context of a dispute in which the Republic is seeking to extricate itself from or obtain damages for a potential liability under the guarantees of approximately US$2 billion, the bulk of which relates to the sums paid to Privinvest under the supply contracts.

98. There is obvious force in the argument that the establishment of a credit against a claim for damages or indemnification is not the substance of a legal dispute if one were to focus principally on the legal contentions on liability which arise in a litigation. It appears from counsel's submissions that there has not been a case in which section 9 has been invoked only in relation to a dispute about quantification of a claimant's financial claims. Against that, if the court adopts, as it must, a common sense approach to the substance of a commercial dispute, the extent of loss and damage allegedly suffered by

the claimant may be a substantial matter which is in dispute between the parties. In this case, the loss allegedly suffered by the Republic which arises from the implementation of the supply contracts is, notwithstanding the other claims, a significant part of the commercial dispute between the parties. It is, however, unnecessary to decide whether or not this is sufficient to make it a "matter" within the legal proceedings in the light of my conclusion at the second stage of the analysis, to which I now turn.

(ii) Whether the dispute on quantification is within scope of each of the arbitration agreements?

99. The question of the scope of each of the arbitration agreements is a question of construction of the individual agreement which in turn is a question of Swiss law: see paras 12., 16., and 18. above. Waksman J's summary of the relevant Swiss law (para 29. above) is not challenged.

100. The principal focus of Waksman J's judgment was on whether the Republic's claims fell within the scope of the three arbitration agreements. I agree with him that, with the exception of the IFA and the UMIFA (which are conceded by the Republic since he issued his judgment and are no longer part of the Republic's case against Privinvest: para 33 above), those claims do not fall within the scope of the three arbitration clauses.

101. In view of that conclusion, the remaining question is whether, in the context of the legal claims which the Republic pursues, the partial defence on quantum, namely that each of the supply contracts gave something of considerable value which the Republic has squandered, gives rise to a dispute referable to arbitration under the arbitration agreement contained in each of the supply contracts which the Privinvest supply companies entered into with the SPVs. The question in Swiss law is whether this dispute in its context in the legal proceedings is sufficiently connected to the particular supply contract to fall within the scope of the arbitration agreement contained therein.

102. I have set out the relevant arbitration agreements between each of the Privinvest supply companies and the particular SPV in paras 14., 16. and 18. above. The Proindicus and EMATUM supply contracts speak of "all disputes arising in connection with this Project" and the MAM contract speaks of "any dispute, controversy or claim arising out of, or in relation, to this contract". Those are words of broad import. In relation to each supply contract the arbitral tribunal need look no further than the value which was or, but for the alleged actions of the Republic, would have been conferred on the Republic by Privinvest's alleged performance of that particular contract. But, as Mr Pillow submits, this is not the whole picture.

103. Waksman J at para 95 of his judgment stated that the existence of multiple arbitration clauses in this case suggests that a narrow approach to the sufficiency of the connection is required. He stated that the parties must have intended that each provision was a dispute resolution procedure principally intended for that particular contract. That appears to be a common sense proposition in the context of a dispute involving many parties and many contracts.

104. Waksman J also correctly observed that the EMATUM and MAM sub-contracts prescribed English law and the jurisdiction of the English courts and that there was no arbitration clause in the Proindicus subcontract. But weight cannot be attached to that observation at this stage because of the assumption about Swiss law on which the preliminary issue has been argued, namely that the Republic and the subcontractors have adhered to the supply contracts. Whether that assumption is correct will be a matter for the forthcoming trial.

105. The court in ascertaining the scope of an arbitration agreement must have regard to what rational businesspeople would contemplate. The Swiss law principle of in favorem arbitri in the construction of an arbitration agreement reflects the idea that parties to an arbitration agreement are deemed to have intended that arbitration should be the single forum for resolution of their disputes rather than the court. See Waksman J's judgment at para 77. This is analogous to the approach in English law set out by this court in *Enka Insaat* at para 107 which I have quoted in para 46 above: rational businesspeople are likely to intend that any dispute arising out of their contractual relationship be decided by the same tribunal. That consideration is consistent with the comment of Sundaresh Menon CJ in *Tomolugen* at para 113 that *in most cases* the matter covered by the arbitration agreement would encompass the claims made in the legal proceedings (para 61 above).

106. In this case the arbitration agreements do not. For the reasons discussed above, there is no question of the arbitration agreements extending to cover the Republic's allegations on which it relies to establish the legal liability of Privinvest. It is in the context of those legal claims that Privinvest seeks credit, by way of reduction of the damages claimed by the Republic, for the value of the goods and services which the Republic received under the supply contracts.

107. It does not matter that the parties to those contracts may not have foreseen at the time when each supply contract was entered into that there might be a multi-party litigation encompassing the three supply contracts and involving not only the Privinvest supply companies but also their subcontractors, Credit Suisse and the CS team defendants. The question for the court is whether the partial defence on quantum arising in the context of these legal proceedings, in which the legal claims are not within the scope of the arbitration agreements, is a matter which the parties are to be treated as having agreed to refer to arbitration. In my view, it is not. Section 9 of the 1996 Act is

to be applied with common sense. Rational businesspeople would not seek to send to arbitration such a subordinate factual issue arising in such legal proceedings and the arbitration agreements must be construed accordingly.

108. While each case must be assessed in the light of its particular circumstances, I am supported in this conclusion by the fact that there are no recorded cases under section 9 of the 1996 Act of the court granting a partial stay of legal proceedings for the determination by an arbitral tribunal of a dispute about the quantification of damages claimed in those legal proceedings in which the contested legal claims were beyond the scope of an arbitration agreement. In other words, there is no evidence of court decisions effecting the bifurcation of a dispute as to quantification of damages from contested claims as to liability.

109. I therefore conclude that there should not be a partial stay of the legal proceedings in relation to this factual dispute concerning the quantification of the Republic's claims. The trial scheduled for this autumn can proceed to address that issue in the Republic's claims against Privinvest.

110. There is a further consideration. If the arbitration agreements had covered this partial defence on quantum there would in any event be an issue as to whether Privinvest could have a proper purpose in seeking a stay for arbitration of this matter when it will require to address the matter in the trial because of its constituent entities' status as Part 20 defendants at the instance of Credit Suisse. If this issue is adjudicated upon in the trial, the matter will potentially be in the public domain and the parties will not have the advantage of privacy which an arbitration may give. I respectfully disagree with the Court of Appeal's statement in para 71 of the judgment that it is immaterial to a question of a mandatory stay under section 9 whether there is futility in practical terms in the grant of such a stay. In my view, Andrew Smith J was correct in *Lombard North Central* at para 15 of his judgment where he stated that if the parties have agreed to refer a matter to arbitration, a party who so wishes should be entitled to enforce the agreement and have the court stay the legal proceedings for that purpose "unless he could have no real or proper purpose for so wishing." It is difficult to see a real and proper purpose in the context of this action as it goes to trial.

5. Conclusion

111. I would allow the appeal.