WHAT MATTERS?

9 OCTOBER 2023 • ARTICLE

It's not often that two seminal judgments at the highest level come out on the same day on the interpretation and application of a section in the applicable arbitration statute in England and Wales and the Cayman Islands relating to a stay of legal proceedings in favour of arbitration.

> "In both cases, there were underlying contracts containing an arbitration agreement. The common question to be resolved was which of the issues in dispute were 'matters' which should be referred to arbitration."

Both cases, *Republic of Mozambique v Privinvest Shipbuilding SAL Holdings and others (2023) UKSC 32* ("*Mozambique*") and *FamilyMart China Holdings Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation (2023) UKPC 33* ("*FamilyMart*"), focussed on what constitutes a "matter" to be referred to arbitration and the scope of relevant arbitration agreements.

In *Mozambique*, the issue arose in the context of disputes involving multiple parties relating to financing the purchase of equipment and services in connection with the Republic of Mozambique's development of its Exclusive Economic Zone. In *FamilyMart*, the context was a dispute between two shareholders in a Cayman holding company regulated by a shareholders' agreement ("SHA") which – through subsidiaries – operated a substantial convenience store business in the PRC.

In both cases, there were underlying contracts containing an arbitration agreement. The common question to be resolved was which of the issues in dispute were "matters" which should be referred to arbitration and was there any bar to some of those issues being referred to arbitration (if not all the matters could be).

MOZAMBIQUE

Background

The Republic of Mozambique (the "Republic"), through three SPVs, entered into three separate supply contracts with Privinvest, who sub-contracted in turn to two other Privinvest entities. The SPVs borrowed from three Credit Suisse companies and another bank, which was not involved in the action. Each supply contract was governed by Swiss law and had similar (though not completely identical) arbitration agreements under different institutional rules. All the parties to the Court proceedings were party to, or linked as, individuals to the supply contracts, the financial facilities, or the alleged sovereign guarantees of the Republic.

The Republic brought tortious claims against Privinvest in London for bribery, dishonest assistance, and knowing receipt, and against a range of defendants (including Privinvest) for unlawful means conspiracy. The facilities and guarantees all had English court jurisdiction clauses. Significantly, Privinvest pursued a partial quantum defence relating to a credit sought for the value of goods and services supplied by it under the supply contracts, which was potentially arbitrable under the supply contracts. In overturning the Court of Appeal's judgment, the Supreme Court addressed the application of section 9 of the Arbitration Act[1] and the scope of the arbitration agreements.

"Having considered these authorities and concluded that there was a general consensus amongst leading arbitration centres on what was a 'matter', the Supreme Court proceeded to summarise the principles."

Other jurisdictions' approach on what is a "matter"

In its judgment, the Supreme Court first considered the jurisprudence in other leading arbitration centres (Hong Kong, Singapore and Australia) on the equivalent of section 9 and what is a "matter", since section 9 has its genesis in Article II (3) of the New York Convention 1958.

In Hong Kong, at first instance, *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd (2014) 4 HKLRD 759* ("*Quiksilver*") was concerned with a petition to wind-up two solvent companies on the just and equitable ground. Section 20 of the Hong Kong Arbitration Ordinance differs from section 9 of the Arbitration Act, in that section 20 refers to the "Court before which an action is brought" as opposed to section 9, which refers to a party "against whom legal proceedings are brought". Therefore, whereas the reference to "legal proceedings" under section 9 would include a petition to wind-up,[2] the reference to an "action" under the Hong Kong Arbitration Ordinance would not. In *Quiksilver*, though the Court considered a stay of the petition therefore was not mandated by the Hong Kong Arbitration Ordinance, nevertheless it looked at the substance of the dispute, concerning the terms on which the JV was to end, and held that since the substance of the dispute was arbitrable, the petition should be stayed on a discretionary basis, in favour of arbitration.[3]

In Singapore, in *Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57* ("*Tomolugen*"), the Court of Appeal was asked to stay an unfair prejudice petition brought by a minority shareholder arising out of a share sale agreement containing an arbitration agreement. The Court held that a stay was only mandated if the court proceedings related to a matter or matters which were the subject of an arbitration agreement. The Court of Appeal's approach was a far more nuanced enquiry than merely looking at the substance of the dispute (as in *Quiksilver*) and emphasised the need to be practical and apply common sense. In this respect, the Court of Appeal warned against an overly broad or narrow approach.[4]

In Australia, the Supreme Court examined the position in *WDR Delamare Corp v Hydrox Holdings Pty Ltd (2016) FCA 1164* and held that a matter is something more than a mere issue or question which might fall for determination.

Finally, the Supreme Court in *Mozambique* referenced the Cayman Islands decision in *FamilyMart* (considered in more detail below) in which it was held that a winding-up petition should be stayed pending determination of certain factual disputes in arbitration.

What is a "matter"?

> "As for the scope of the arbitration agreements, it was held that Privinvest's partial quantum defence to tortious claims, which were not themselves arbitrable, did not constitute a matter referable to arbitration."

Having considered these authorities and concluded that there was a general consensus amongst leading arbitration centres on what was a "matter", the Supreme Court proceeded to summarise the principles as follows:

- by reference to the substance of the dispute(s) between the parties, the Court must determine what are the matters which the parties have raised or might raise and whether each matter falls within the scope of the arbitration agreement;
- the matter need not cover the whole of the dispute between the parties;
- the matter is a substantial issue legally relevant to a claim or defence or potentially so, is more than a mere question or issue and is one that can be determined by an arbitrator as a discrete dispute;
- determining what is a matter is a question of judgment and of applying common sense, it must be substantial (not peripheral) and involves examining its relevance to the outcome of the proceedings; and
- in considering whether the matter falls within the scope of the arbitration agreement, regard must be had not only to the true nature of the matter but also the context in which the matter arises in the proceedings.

Decision

The Supreme Court concluded that Privinvest's liability to the Republic did not depend on the commerciality of the supply contracts and nor was there any need to consider the value for money of those contracts.

As for the scope of the arbitration agreements, it was held that Privinvest's partial quantum defence to tortious claims, which were not themselves arbitrable, did not constitute a matter referable to arbitration. The Republic's appeal was allowed and so, save for two matters which it acknowledged as relating directly to the supply contracts and conceded as being referable to arbitration, the other claims would continue in the Commercial Court.

FAMILYMART

Background

The *FamilyMart* case had a different and simpler factual matrix. It concerned a just and equitable winding-up petition brought by a minority shareholder against (inter alia) the majority shareholder, which the majority shareholder sought to stay under the arbitration agreement in the SHA. There was no issue that the dispute fell within the scope of the arbitration agreement. The difference between the parties was whether the fact that it was a winding-up petition made the matters raised not susceptible to arbitration.

Similar to Mozambique, the Board had to consider: (1) what was a matter, (2) the meaning of legal proceeding (whether this included a petition), (3) whether the arbitration agreement was inoperative, (4) whether the statute providing for a stay allowed a partial stay and (5) whether under inherent jurisdiction a discretionary stay was justified if a mandatory stay under statute was not available.

The issues

It was held, following Fulham,[5] that a petition is a legal proceeding. As to "matter", the Board cited *Lombard North Central plc v GATX Corp (2012) EWHC 1067*, in which the Court had recognised that section 9 permitted a partial stay of proceedings and that the nature of arbitration is that it may only refer certain disputes to arbitration.[6] Similarly, reference was made to the Hong Kong decision in *Quiksilver* and to the Singapore case of *Tomolugen*, which considered arbitrability and what was a "matter" (as considered above in relation to the *Mozambique* case).

> "The Supreme Court and Board took account of the courts' approach in other jurisdictions with leading arbitration centres and endorsed a common approach to determining what is a 'matter' for the purposes of a stay to arbitration."

The Board also cited *Sodzawiczny v Ruhan (2018) EWHC 1908* concerning an application for a section 9 stay of an action based on a defence which it was claimed fell within the scope of an arbitration agreement. There, the Court held that a defence was just as capable of constituting a "matter" as a claim. The Board recognised that this could lead to fragmentation of proceedings, but that this was the result of holding parties to their bargain of agreeing arbitration.[7]

The Board concluded that the Cayman statute allows a *pro tanto*, (i.e., partial) stay of proceedings. The Board considered that a court facing a stay application should approach this in a practical and common-sense way and if a matter is within the scope of the arbitration agreement, it should give rise to a mandatory stay pro tanto of the legal proceedings.

Meaning of "operative"

The Board in *FamilyMart* also considered an additional matter, which was not in issue in the *Mozambique* case, whether the arbitration agreement was inoperative because the issue in question was not arbitrable. A distinction was drawn by the Board between subject-matter non-arbitrability (i.e., due to statute or public policy) and remedial non-arbitrability (where remedies are beyond the arbitral tribunal's powers). One key example of the latter is the power to wind-up a company which may only be ordered by the Court; by contrast, an inter party remedy such as a share buyout is within the power of an arbitral tribunal because it does not involve third parties.

Decision

The Board concluded that an agreement to refer matters under a SHA to arbitration was not a contractual prohibition against filing a petition to wind-up. Nevertheless, it held that there was no bar to two matters, relating to the loss of trust and confidence of the minority shareholder in the majority shareholder and whether the relationship between the two shareholders had fundamentally broken down, being referred to arbitration. The determination of those two matters in arbitration was held to be an essential precursor to the decision of the Court whether it was just and equitable to wind-up the company and order relief. Thus, the Board ordered a mandatory stay of the two factual matters to arbitration and a discretionary stay for the other matters which sought relief, pending the outcome of the arbitration.

Comment

The Supreme Court and Board took account of the courts' approach in other jurisdictions with leading arbitration centres and endorsed a common approach to determining what is a "matter" for the purposes of a stay to arbitration.

The relationship between winding-up proceedings and arbitration continues to raise issues about the competing policy aims of insolvency law and arbitration law.[8] *FamilyMart* does not seek to resolve the differences, but the decision does represent a willingness to try to find common ground, given the international nature of arbitration and the common roots underpinned by the New York Convention on recognition and enforcement of awards.

FOOTNOTES

[1] Section 9(1) provides: "A party to an arbitration agreement against whom legal proceedings are brought (whether by 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 the matter" (emphasis added).
[2] Fulham FC V Richards (2012) Ch 333 at para 33D.
[3] Quicksilver and Fulham were both approved in China International Business School v Chengwei Evergreen Capital LP (2021) HKCFI 3513, itself cited in FamilyMart, where a discretionary stay of a petition was granted in favour of arbitration of disputes between shareholders.
[4] The Court of Appeal held that a dispute over minority oppression or unfairly prejudicial conduct by the majority in a company is arbitrable though some of the relief, such as the grant of an order for winding up, cannot be made by a tribunal.
[5] See footnote 2 above.
[6] Also in issue was whether proceedings are "in respect of" a matter referred to arbitration, which it was held depends on the nature of the claim and not on the formulation of the claim in the claim form or pleadings.
[7] However, as Popplewell J observed in Sodzawiczny v Ruhan, this difficulty can be ameliorated by the court exercising its case management powers to order a stay of the proceedings which fall outside the arbitration agreement until the arbitration has been concluded.
[8] As exemplified by Salford Estates No 2 Ltd v Altomart (2015) Ch 589 and the various pre-arbitration or pro-insolvency approaches taken in other common law jurisdictions in applying that decision.

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