

English Courts Provide Guidance on Staying Court Proceedings in Favour of Arbitration

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By: James Rogers, Kenneth Beale

English courts possess broad powers to ensure parties that agree to arbitrate are held to their agreement. This includes the ability to grant a stay of proceedings under s.9 of the Arbitration Act 1996 ("the AA 1996") if domestic court proceedings are initiated in breach of an arbitration agreement. Recent rulings of the Supreme Court and Privy Council provide welcome clarity on how the courts approach staying proceedings involving, respectively, allegations of bribery and winding-up petitions.

1) UK Supreme Court: Republic of Mozambique (acting through its Attorney General) (Appellant) v Prinvest Shipbuilding SAL (Holding) and others (Respondents) [2023] UKSC 32

Background

These proceedings are the latest to reach the courts in a long-running dispute arising out of the alleged 'tuna bond' fraud that damaged the Republic of Mozambique's ("the Republic") finances and triggered a potential liability of \$2 billion.

In 2013, special purpose vehicles ("SPVs") owned by the Republic entered into three supply agreements with Prinvest, a shipbuilder, and others for the supply of goods and services, including fishing vessels. These supply contracts were funded by loans from London-based banks, which the Republic guaranteed. The supply contracts were governed by Swiss law with arbitration in Zurich, while the guarantees were governed by English law, but granted exclusive jurisdiction to the English courts. Upon entering the supply contracts, the Prinvest companies entered into back-to-back subcontracts, two of which gave exclusive jurisdiction to the English courts, while one contained no jurisdiction clause at all.

Soon after entering the loans, the SPVs defaulted amid the alleged looting of hundreds of millions of dollars, leaving the Republic exposed under the bank guarantees. The Republic commenced English court proceedings against Prinvest, the banks, and others, alleging a wide-ranging fraudulent scheme. By the time the case reached the English Supreme Court, the Republic's claims included bribery, dishonest assistance, knowing receipt, and unlawful means conspiracy.

The defendants sought a stay under section 9 of the 1996 Act, which provides that the court must grant a stay in respect of a “matter”, which under the arbitration agreement has been referred to arbitration, unless the arbitration agreement is null and void, inoperative, or incapable of being performed.

Should The “Matters” Before The Court Be Heard In Arbitration?

The Supreme Court reiterated that s.9 requires a two-stage process. The first stage is to identify “matters” in respect of which the legal proceedings are brought before the court. The second stage is to ascertain whether those matters fall within the scope of the arbitration agreement. In addition, the Supreme Court provided much-needed clarity about how to approach the two-stage exercise:

1. The court must identify the substance of the core dispute, examining the pleadings but not being overly constrained by tactical pleadings aimed at avoiding arbitration.
2. A “matter” need not encompass the entire dispute.
3. A “matter” is a substantial issue legally relevant to a claim, defence, or foreseeable defence, suitable for arbitration as a distinct dispute.
4. The evaluation involves judgement and common sense.
5. The court must consider the context in which the matter arises in the legal proceedings. For instance, parties with alternative claims in different fora are entitled to choose which claim they wish to advance.

Applied to the facts of this case, the Supreme Court concluded that the Republic’s claims did not require assessing the validity or commerciality of the supply contracts. As even if the supply contracts were found to be valid and on commercial terms, that would not be a defence to the claims. These issues were therefore not “matters” in the court proceedings, justifying the refusal of a s.9 stay.

2) UK Privy Council: FamilyMart China Holding Co Ltd (Respondent) v Ting Chuan (Cayman Islands) Holding Corporation (Appellant) (Cayman Islands) [2023] UKPC 33

Background

In 2011, FamilyMart, a major Japanese convenience store franchise chain, entered into a shareholders’ agreement (“SHA”) with Ting Chuan, a Chinese investment vehicle, to expand into the Chinese market. Under the SHA, FamilyMart was the minority shareholder in a Cayman Island joint venture company (“the Company”). The SHA, governed by Cayman Island law, stipulated that all disputes were to be resolved by ICC arbitration in Beijing. Disputes arose when FamilyMart alleged improper diversion of Company profits by the majority-appointed directors.

FamilyMart filed a winding-up petition in the Cayman Islands seeking just and equitable relief to wind-up the Company, and in the alternative, to buy out Ting Chuan's stake.

Relying on the SHA's arbitration agreement, Ting Chuan sought to stay the winding-up petition. FamilyMart argued that the issues before the Cayman court were non-arbitrable, rendering the arbitration agreement inoperative.

Is a Winding-up Petition Arbitrable?

On appeal from the Cayman courts, the Privy Council, sitting in London, grappled with the applicable stay provision under Cayman Island law set out in s.4 of the Foreign Arbitral Awards Enforcement Act ("the FAAEA"), which, consistent with s.9 of the AA 1996, required the court to consider "matters" for the purposes of granting a stay.

The Privy Council adopted the two-stage test set out in the *Mozambique* case discussed above, first determining what matters are raised in the winding-up proceedings, then determining, in relation to each matter, whether it falls within the scope of the arbitration agreement.

Complications arose in this case given the inherent conflict between international arbitration and insolvency policy. The public policy behind arbitration requires that arbitration agreements are upheld regardless of the position the parties find themselves in. This contrasts with the policy behind insolvency law, where the aim of proceedings is to maximise the value of the insolvent party's assets and appropriately distribute those between third-party (often unrelated) creditors, by way of a centralised process. Having established that the certain matters were in principle within the scope of the arbitration agreement, the focus of the inquiry turned to whether those "matters" were non-arbitrable as a matter of insolvency law and policy. The Privy Council deemed arbitrable the questions of whether FamilyMart had lost trust and confidence in Ting Chuan and whether the relationship had broken down. These were factual matters to be determined by arbitration and therefore "matters" for the purpose of s.4 of the FAAEA thus entitling a stay of court proceedings.

In contrast, matters concerning the granting of remedies, including whether it is just and equitable that the Company be wound-up, and whether buy-out relief or a winding-up order should be granted, were deemed non-arbitrable. These remedies belong to the exclusive jurisdiction of the courts, as they involve interests of third parties and engage statutory regimes.

Nonetheless, using its case management powers, the court granted a discretionary stay of the entire winding-up petition pending resolution of the factual matters reserved for the arbitrators, as these threshold questions had to be answered before the court could opine on the appropriateness of the request to wind-up the Company.

Comment

These decisions provide much-needed clarity on the application of s.9 of the AA 1996 and whether a “matter” is referable to arbitration. Both decisions also demonstrate the Court’s willingness to uphold arbitration agreements, while also providing valuable insights for practitioners navigating the often complex intersection of arbitration, fraud, and insolvency. The English Court’s pragmatic approach to these issues is consistent with a pro-arbitration policy, which attempts to respect the autonomy of the parties while also ensuring cases progress efficiently, effectively, and in accordance with reasonable commercial expectations.

Related Attorneys



James Rogers

Partner

jrogers@jenner.com

+44 330 060 5463



Kenneth Beale

Partner

kbeale@jenner.com

+1 202 637 6380

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International Arbitration

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