



What's the matter?

Bajul Shah and Erin Hitchens



Introduction

- Stays under s.9 Arbitration Act 1996
- International context
- How is “matter” identified
 - *Mozambique v Prinvest* [2023] UKSC 32
- Examples from case law

ss.9(1) and 9(4)

s.9(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.”*

s.9(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.*

s.9 – General Points

- Validity and scope of arbitration agreement – proper law
- Whether “inoperative” – includes arbitrability issues
- All types of legal proceedings:
 - winding up and unfair prejudice petitions
 - counterclaims
- Scope of s.9 - “matter”

International origins

- Article II(3) UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”)

“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.”

Singapore

- *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57
- s.6 International Arbitration Act:

“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.”

Australia

- *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164
- Section 7(2) of the International Arbitration Act 1974

“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.”

Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP

[2022] UKPC 21

“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.... in the interests of uniformity the words should not be given a local interpretation controlled by... ‘domestic precedents of antecedent date’, but rather should be construed ‘on broad principles of general acceptance.’”

Mozambique v Prinvest

[2023] UKSC 32

Lord Hodge:

“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.”

Mozambique v Prinvest - facts

- “Tuna Bonds” case - development of an Exclusive Economic Zone in Mozambique
- Republic’s SPVs purchased equipment and services from Prinvest entities
- 3 supply contracts – arbitration clauses – Swiss law
- Financed by borrowings from Credit Suisse entities
- Borrowings guaranteed by Republic

Mozambique v Prinvest - disputes

- Republic's allegations: victim of a conspiracy
- Bribery by Prinvest owner
- Exposed Republic to US\$2bn liabilities under guarantees
- Claims in fraud in England
- Prinvest: s.9 stay application
- Stay refused - dispute not involve "matters" caught by arbitration clause

Identifying a “matter”

- 2 stage process:
- What the are the “matters” which the parties have raised or will foreseeably arise in the Court proceedings
- In relation to each such matter, does it fall within the scope of the arbitration agreement

First stage

- Look at substance of dispute
- Consider both claims and (potential) defences
- A substantial issue that is legally relevant to a claim or defence and susceptible to determination by the arbitrator as a separate issue
- If not an essential element of claim or defence – not a “matter”
- More than a mere issue or question
- “*practical and common-sense way*”

Shareholder disputes

- *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57
- *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164
- *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855

FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn

[2023] UKPC 33

Five “matters”:

- (1) Whether minority shareholder had lost trust and confidence in majority and in the conduct and management of the Company’s affairs.
- (2) Whether the fundamental relationship between minority and majority had irretrievably broken down.

FamilyMart v Ting Chuan (2)

- (3) Whether it is just and equitable that the Company should be wound up.
- (4) Whether minority shareholder should be granted the alternative relief, which it preferred, of an order requiring majority to sell its shares to the petitioner, and a valuation of those shares.
- (5) Whether, if such alternative relief is not appropriate, a winding up order should be made.

Mozambique v Prinvest

- Republic conceded issue of validity of supply contracts were caught by arbitration clauses
- But bribery, unlawful means conspiracy, dishonest assistance claims held not to be “matters”
- Claims not require examination of validity of supply contracts.
- Validity or commerciality of contracts not relevant or essential to defences
- Partial defence to quantum - not within scope of arbitration clause

Sodzawiczny v Ruhan

[2018] EWHC 1908

- Fraud claims re profits from sale of data warehouses business in 2012
- Profits held in Liechtenstein structures.
- Settlement Deed in 2014: wide releases and promise not to sue on released claims
- LCIA arbitration clause in Deed

Sodzawiczny v Ruhan

[2018] EWHC 1908

- “Tier 1” claims – profits held on trust for S, D failed to account
- “Tier 2” claims – if Tier 1 claims were settled, deceit/wrongdoing induced S to enter into Deed and his loss is value of his Tier 1 claims
- Tier 1 claims: 2 matters - (i) the causes of actions for breach of trust; (ii) whether such claims settled
- Tier 2 claims: 4 matters – (iii) whether Tier 1 claims settled; (iv) whether Deed procured by wrongdoing; (v) whether Tier 2 claims settled by Deed; (vi) validity of Tier 1 claims because Tier 2 claim was for value of Tier 1 claim



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