IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Case Nos: **CL-2019-000127** and **CL-2019-000482**

[2020] EWHC 1709 (Comm)

Date: **8 April 2020**

Before :

MR JUSTICE WAKSMAN

Between :

THE REPUBLIC OF MOZAMBIQUE
(acting through its Attorney General)

Claimant/Respondent

- and -

(1) CREDIT SUISSE INTERNATIONAL
(2) CREDIT SUISSE AG
(3) MR SURJAN SINGH
(4) MR ANDREW JAMES PEARSE
(5) MS DETELINA SUBEVA
(6) PRIVINVEST SHIPBUILDING S.A.L., ABU DHABI (BRANCH)
(7) ABU DHABI MAR LLC
(8) PRIVINVEST SHIPBUILDING INVESTMENTS LLC
(9) LOGISTICS INTERNATIONAL SAL (OFFSHORE)
(10) LOGISTICS INTERNATIONAL INVESTMENTS LLC

Defendants/Applicants

And Between :

THE REPUBLIC OF MOZAMBIQUE
(acting through its Attorney General)

Claimant/Respondent

- and -

MR ISKANDAR SAFA

Defendant/Applicant

Mr Joe Smouha QC, Mr Nathan Pillow QC, Mr Scott Ralston and Mr Ryan Ferro (instructed by **Peters & Peters Solicitors LLP**) for the Claimant

Mr Andrew Hunter QC, Mr Sharif Shivji QC, Mr Tom Gentleman and Mr Andrew Scott (instructed by **Slaughter and May**) for the First and Second Defendants in CL-2019-000127

Mr Neil Calver QC, Mr Ben Woolgar and Mr Frederick Wilmot-Smith (instructed by **Quinn Emanuel Urquart & Sullivan UK LLP**) for the Seventh to Tenth Defendants in CL-2019-000127 and the Defendant in CL-2019-000482

APPROVED JUDGMENT

MR JUSTICE WAKSMAN

Introduction

1. This has been, in effect, a case management conference in relation to how to progress applications made by certain defendants to staying the proceedings against them pursuant to section 9 of the Arbitration Act 1996. In that regard, there are two related sets of proceedings before me. Both of them concern claims made by the Republic of Mozambique.

2. The first claim ("the Main Action"), was issued on 27 February 2019, though not served until 22 July 2019. It is made against the following defendants: first of all, Credit Suisse International and Credit Suisse AG, who are, respectively, English and Swiss companies (D1 and D2); Mr Singh, Mr Pearse and Ms Subeva, who were employees of Credit Suisse (D3 to D5,); Privinvest Shipbuilding SAL, Abu Dhabi Branch (D6); Abu Dhabi Mar LLC (D7); Privinvest Shipbuilding Investments LLC (D8); Logistics International SAL (D9); and Logistics International Investments LLC (D10).

3. These are or were all entities which formed part of a very large private shipping group. D6 -- and there is an issue over its continued existence or otherwise -- is a Lebanese company. D7 and D8 are UAE companies. D9 is a Lebanese company. D10 is a UAE company.

4. The second claim, issued on 31 July 2019, was against Mr Iskandar Safa ("the Safa Action"), said to be the ultimate beneficial owner and controlling mind of D6 to D10. The Republic says that it served the claim form on Mr Safa validly at an address here shortly after its issue pursuant to section 1140 of the Companies Act 2006. However, Mr Safa has applied to set aside service on the basis that it was not valid if in fact he was neither present nor resident in England at the time, which he says was the position. Current case-law says that that would make no difference, and would therefore favour valid service, but the Court of Appeal has heard an appeal on this point on 28 January 2020 in the case of *Idemia France SAS v Decatur Europe Ltd & Ors* [2019] EWHC 946 (Comm). The judgment from the Court of Appeal is awaited. I refer to this issue as "the Service Point".

5. The claims made in both actions were issued just shy of one potentially applicable limitation period based on the execution of sovereign guarantees on the part of the Republic back in 2013.

Background

6. It is common ground that three supply contracts were entered into with some of the Privinvest Defendants as suppliers. The customers were all special purpose vehicles (SPVs), owned by the Republic and set up for the purpose of these contracts. They were all Mozambique companies. I now go to the individual written contracts.

7. The first is made between one of the SPVs, Proindicus SA, and, on the face of it, D6. It is for the supply of ships and aircraft and local infrastructure so as to enable Mozambique to police its very extensive coastline and exclusive territorial waters. This is important because of the abundance of fish, especially tuna, in those waters and the prospect of significant gas exploration within those waters.

8. Clause L is headed "Applicable law in arbitration". It says that the governing law was Swiss law. It says that:

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

9. That contract was made on 18 January 2013.

10. The second contract is made by the second SPV, Empresa Mocambicana de Atum SA, which has been abbreviated to EMATUM, and that is with D7. That is for the supply of a large fishing fleet. It was made on 2 August 2013. The arbitration clause there, having stated that the applicable law is Swiss law, says that:

> "All disputes arising in connection with this Project…. shall be finally settled by ICC arbitration held in Geneva…in accordance with ICC Rules..."

11. The third contract was made between the third SPV, Mozambique Asset Management SA ("MAM") and D8, for the creation of shipyard and related services and further vessels. It was made on 1 May 2014. The arbitration clause here is differently worded. Again, Swiss law applies, but it then states:

> "Any dispute, controversy or claim arising out of or in relation to this contract, including validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with Swiss rules of international arbitration of the Swiss Chambers Arbitration Institution…..in accordance with these Rules."

12. In all these cases, the Privinvest entities then effectively subcontracted the role of supplier to D9 in the case of Proindicus, D9 again in the case of EMATUM, and D10 in the case of MAM. I refer to those two defendants collectively, where appropriate, as "Logistics".

13. Each subcontract is in fact expressed to be governed by English law, with an exclusive jurisdiction clause in favour of the England and Wales court.

14. The total sums due under the supply contracts were financed by various loan agreements made with the SPVs by a number of banks, including in particular Credit Suisse, VTB and some others. The Republic itself then guaranteed the SPVs performance of their respective obligations under the loan agreements by three separate sovereign guarantees. The Privinvest entities received payment in full for the three contracts directly from Credit Suisse and the other banks.

15. The Privinvest Defendants say that the supply contracts have essentially been performed and delivered save for some issues around the edges, and that the Republic has conceded this in the Swiss Arbitrations. The Republic does not accept that characterisation of the performance or that it has made such a concession. Either way, any such issues (which I do not determine here) are not of any significance for present purposes.

16. So far as I am aware, the SPVs did not themselves make any payments under the supply contracts. As for the Republic, the position is as follows: broadly speaking, it has accrued a total present liability under the guarantees of some $2.1 billion. In more detail, and in relation to Credit Suisse, there was a $504 million syndicated loan made by Credit Suisse in relation to Proindicus, of which only $11.8 million has been repaid. On the EMATUM contract, 30% of a $500 million loan, arranged by Credit Suisse (but which had no position of its own within it) has been repaid. The balance has been refinanced on one or more occasions. The finance for the MAM contract came from VTB.

17. The Republic alleges first that bribes were paid to (a) certain officials of the Mozambique state, (b) other individuals in Mozambique, (c) a Mr Jean Boustani, the lead salesman and negotiator for Privinvest Companies on the contracts, and D3 to D5. There were US criminal proceedings against Mr Boustani in which he was acquitted. The amount of bribes was said to be $143 million according to Schedule 2 to the Particulars of Claim here, but information from the US proceedings suggests that the total amount of the bribes are around $200 million.

18. Secondly, the Republic alleges that the supply contracts were themselves very one-sided, for example supplying assets worth far less than the price payable. Indeed, they are referred to in the Amended Particulars of Claim as “shams” or “instruments of fraud”.

19. I now need to read some paragraphs of the Particulars of Claim verbatim. Paragraph 132, which is under the heading "Conspiracy to injure by unlawful means", states as follows:

> "On a date or dates presently unknown, the defendants, or a combination of them, wrongfully and with intent to injure the Republic by unlawful means, conspired and combined together to defraud the Republic and to conceal such fraud and the proceeds of the fraud from the Republic. A key element of the conspiracy was to render the Republic liable under sovereign guarantees."

20. I then read paragraph 133:

> "The following unlawful means by which the Republic was injured are relied on:
>
> 133.1. The bribery pleaded [above].
> 133.2. The entry by Credit Suisse into the Proindicus and EMATUM Guarantees with the knowledge particularised [above].
> 133.3. The entry by the Suppliers into the Supply Contracts which were, as alleged [above], instrument[s] of fraud, alternatively shams.
> 133.4. The dishonest assistance given to the breach by the Mozambican Officials in breach of their fiduciary duties to the Republic [above].
> 133.5. Knowing receipt by the Defendants of the proceeds of the breach by the Mozambican Officials of their duties to the Republic pleaded [above].
> 133.6. Deceit pleaded [below]."

21. Then paragraph 135 states:

> "As a result of the conspiracy to injure the Republic, it has suffered or continues to suffer loss and damage. Particulars of causation and loss are pleaded below. The defendants are jointly and severally liable to the Republic in damages for unlawful means conspiracy."

22. Then 154, "Particulars of losses" states:

> "The Republic has suffered and continues to suffer loss as a result of the defendants' wrongdoing. Losses will be subject to further particularisation but will include:
>
> 154.1. all amounts paid by the Republic in respect of the Proindicus, EMATUM and MAM transactions on which or the Republic is liable to pay.
> 154.2. All payments made by the Republic under the 2023 Eurobonds.
> 154.3. All fees and expenses incurred by the Republic in the EMATUM exchange.
> 154.4. The Republic's macroeconomic losses, including those losses suffered as a result of the financial crisis in 2016 resulting from the withdrawal of funding by international donors and the IMF."

23. Then in the Prayer, and as against Credit Suisse, there is a claim for a declaration that the Proindicus Guarantee is not valid or enforceable and further or alternatively, an order, to the extent necessary, setting aside the Proindicus Guarantee or declaring it has been validly terminated or that it is void.

24. As against each defendant, the following claims are made:

> "3. Damages.
> 4. Indemnification and/or contribution.
> 5. An order that each defendant holds bribes received on trust from the Republic.
> 6. An account of all sums or assets received by each defendant which can be traced from the bribes.
> 7. An order that each defendant transfer the said money or assets to the Republic.

8. An account of all profits made by each defendant, and, if necessary, enquiries.
9. Restitution.
10. Equitable compensation.
11. Compound or simple interest."

25. So far as Mr Safa is concerned, it is also alleged that he was party to the conspiracy. Brief details of claim are set out in the claim form, including common law damages and equitable compensation, indemnity and contribution, account of profits and compound interest in equity.

The section 9 challenges.

26. While D6 entered an acknowledgement of service challenging jurisdiction, it has not actually taken any steps to do so in time. Indeed, the Privinvest Defendants say that it no longer exists.

27. D7 to D10 all say that they were parties to the arbitration agreements as set out in the supply contracts, and that (1) as a matter of scope, both forms of arbitration clause cover the claims made by the Republic here ("the Scope Point"); (2) the Republic is in fact a party to the arbitration agreements as a matter of Swiss law because it was the beneficiary of the underlying contracts ("the Beneficiary Point"); and (3) D9 and D10, though not parties to the arbitration agreements expressly, can invoke the arbitration clauses under Swiss law because they "interfere with" the contracts in the sense that they performed them ("the Interference Point").

28. For its part, the Republic contests each of those points. The challenges were made by applications in September and November 2019.

The Swiss law arbitrations.

29. [Redacted]
30. [Redacted]
31. [Redacted]
32. [Redacted]
33. [Redacted]
34. [Redacted]
35. [Redacted]
36. [Redacted]

37. It has been stated in broad terms -- and there is no real dispute about this -- that, on that basis, a decision might be expected by around June 2022. If there is an appeal process, which in theory is available, then that would not be likely to come to an end before the end of 2022 or early 2023.

The parties' positions on case management of the section 9 challenges.

38. Privinvest says as follows:

    (1) Any consideration of the section 9 challenges should be deferred until after the arbitrators have decided the question of jurisdiction at the trial to which I have just referred. In the meantime, the claims against D7 to D10 must be stayed;

    (2) If that application is not successful, then the alternative is for the court to order a trial of all of the section 9 issues. Privinvest says that that would take five or six days. I have already told the parties that such a trial could be dealt with in January 2021. On that basis, it would save at least 18 months to two years from what the position would be under the arbitral tribunal.

39. I interpose here to say that at one stage it was mooted that perhaps the trial itself could be expedited, but I am afraid that under the current circumstances, there is no prospect whatever of that happening, so we are looking at January 2021.

40. The Privinvest Defendants also say that certain other matters which I will call collectively the residual matters, should also be held over until trial. They are:

    (a) the Service Point by Mr Safa;

    (b) a freestanding application by Mr Safa for a stay of the proceedings against him while the section 9 matter is dealt with ("the Mr Safa Stay Application"); and

    (c) a claim for a case management stay by D9 and D10 which only arises if they lose their section 9 challenges ("the D9/D10 Stay Applications").

41. The position of the Republic is as follows: it says there should be no deferral, and it also says that there should not be a trial covering all issues. Instead, it contends that the hearing in May, which has already been fixed and for which the Court can provide at least three days, should deal with some, as it were, preliminary points which, in the case of the first three, may be determinative of the section 9 challenge, and, in respect of the other two, are short and self-contained. They are these:

(1) the Scope Point;

(2) the Beneficiary Point;

(3) the Interference Point;

(4) the Service Point; and

(5) Mr Safa's Stay Application and

(6) The D9/D10 Stay Applications.

42. The Privinvest Defendants in turn reject all of that analysis.

43. As noted above, all of these questions effectively raise case management decisions concerning the section 9 issue, and the preliminary issues arise in that context.

44. I just want to refer, as a matter of generality, to some passages from the decision of the Court of Appeal in *Ahmad Al-Naimi v Islamic Press Agency Incorporated* [2000] 1 Lloyd's Law Reports 522. At 525, in the lead judgment of Waller LJ, he adopted what had been said by His Honour Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194 when considered how the court should approach a section 9 application:

> "There will however be cases where it would be right to defer the decision, particularly, for example, if the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients. In some cases it would be better for the court to [make that decision]; in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that a court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67 or, under section 69 ..."

45. The only caveat to this stated by Lord Justice Waller was that:

> "If the court decides that it is the court which should determine whether the matters the subject of the action are the subject of an arbitration clause, unless the parties were agreed that the matter should be resolved on affidavit, then, if there is a triable issue, directions should be given for trying that issue."

46. Waller LJ went on to say:

> "... it seems unlikely, in the absence of agreement that issues should be tried on witness statements alone, that a court, which (a) formed the view that there were triable issues relating to facts material to the jurisdiction question; (b) had an application before it to cross-examine the makers of those statements; and (c) had decided that the court should resolve the matter as opposed to an arbitrator would not other than direct a trial of the issue."

47. What he is saying there is it would be unlikely that, in those circumstances, the court "would do other than direct a trial of the issue".

48. And then:

> "... the court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of section 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first. If, for example, the court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause ..."

And that in those events:

> "... it would only be a short step to deciding the real issues, [and if that were the case] it will often be sensible for the court ... [to] leave it to the arbitrator."

49. Over the page, he says this:

> "I of course accept that there may be situations when despite that agreement the court may simply feel that it cannot resolve the issue without hearing the witnesses. But it also seems to me that the court should be looking for the most economical way of deciding what is, after all, a dispute about where the real disputes should be resolved. On an application under section 9 a court is bound to have to consider the affidavit evidence, and to spend time in so doing. There is bound to be argument about the strength or otherwise of the case as to whether the arbitration clause covers the subject matter of the action in considering what course to take. It thus also seems to me that in the interest of good litigation management and the saving of costs, the court should see whether it can resolve that point on the affidavit evidence. Certainly it should try and do so if both parties are agreed that they would like the matter resolved on the affidavits. I would add that in addition, if the parties do not come agreed, as in the instant case, depending on how important any factual disputes appear to be to the ultimate resolution of the disputes as to jurisdiction, it may be worth exploring whether they would agree, or even in some circumstances where the disputes on fact seem immaterial, using the powers under CPR 32.1."

50. In relation to the case with which he was dealing in the Court of Appeal, where the judge below had not wished to deal with the matter on affidavits, Waller LJ said that in that case it was possible to do so and the judge should have grasped that particular nettle because:

> "The factual disputes are in reality very small, and it is possible to form a clear conclusion as to what would be likely to be the position if a full trial of the jurisdiction issue were ordered."

51. Hence a full trial was not necessary.

Deferral of the claims against D6 to D10 altogether

52. I therefore turn to the first question, which is deferral of the claims against D6 to D10 pending the decision of the arbitrators. In this regard, I refer to the case of *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi TBK Ltd & Anr ("The Barito")* [2013] 2 Lloyd's Rep 421, a decision of Mr Justice Popplewell, as he then was. At page 439, he said that:

> "(7) In deciding whether to order the trial of the arbitrability issue under s 9(1) or s 9(4), or whether to grant a stay under the inherent jurisdiction to permit the arbitrability issue to be resolved by the tribunal, the court will consider all the circumstances of the case. Factors which are likely to be of significance include the following:
>
> (a) Whether the arbitrability issue is likely to fall to be resolved by the court in any event ...
>
> (b) Whether the resolution of the arbitrability issue will involve findings of fact or law which impact on the substantive rights and obligations of the parties in relation to their underlying dispute, or only affects the question whether such rights and liabilities are arbitrable. In the latter case, the court can conduct the inquiry without risk of interfering with [the defendant's] right to have his chosen tribunal decide the disputes, because if the issue is resolved in D's favour, there will be a stay in favour of the tribunal without the court having trespassed into considering issues which affect the merits of the underlying dispute. On the other hand where, as is not uncommon, the determination of the issue whether there is an effective agreement to arbitrate is bound up with the issues which arise in relation to the underlying dispute, there is a balance of prejudice to each party to be taken into consideration. It may be more efficient and just to leave the arbitrability issue to be dealt with by the tribunal where, if the issue is resolved in D's favour, he can at the same time obtain an award on the merits from his chosen tribunal. Against this is to be weighed the risk of any prejudice to C in being subjected to the process and decision of a tribunal on which he may not have agreed to confer jurisdiction.
>
> (c) The length and cost of the inquiry into the arbitrability issue and how quickly it will be resolved ...
>
> (d) Whether there have been or will be related proceedings addressing the arbitrability issue ...
>
> (e) The degree of connection between the arbitrability dispute and England. In this context the law applicable to the arbitrability issue may be of significance ...
>
> (f) The strength of the arguments on the arbitrability issue. The court will not conduct a mini trial ... [but] if the court can determine on a brief perusal of the materials before it that one party has a very strong case on the arbitrability issue, the court will take this into account ...
>
> (g) The nature and quality of the arbitral tribunal and arbitral process, including the supervisory jurisdiction of the curial court."

53. It can be seen from this that, although he sets out the factors which he says are likely to be significant, he does not suggest that this is an exhaustive or mandatory list.

54. It is necessary first just to rehearse the effect of any deferral on the proceedings here. There would be around two-and-a-half to three-year delays because, on Privinvest's case at least, it would require a stay of the claim against it in the meantime. As to that, I accept the points made by the Credit Suisse defendants, who were not affected by the arbitration agreements, that if a stay was granted against the claims against Privinvest, we could not sensibly go ahead and on this scenario actually try the conspiracy claims against Credit Suisse but not the others. They are, to use the time-honoured phrase, inextricably linked, and it would not be practical or fair to do that.

55. Just to flesh out those points in a little more detail, Credit Suisse say that the Privinvest Defendants lie at the heart of the claim, with Mr Safa being the controlling mind, and that if the claim was to fail against Privinvest, then it would likely fail against Credit Suisse as well. Thus the claim against the latter depends on the claim against the former, for example in relation to the bribery of officials. It is not suggested that Credit Suisse made any bribes to the Republic. It also relies on the fact that there is intended Part 20 proceedings to be brought by Credit Suisse against the Privinvest Defendants. The true

loser here at the moment is Credit Suisse, because the vast majority of the loans have not been repaid to it and the other banks.

56. Credit Suisse therefore says that if wrongdoing was to be proved here as against Privinvest, Credit Suisse was not the conspirator but actually the victim, and of course that is an analysis with which the Republic, by its Amended Particulars of Claim, disagrees. But it is obvious, as Credit Suisse say, that if you start to have split trials of these claims, there is a real risk of irreconcilable judgments and, in my judgment as well, a great deal of duplication of costs.

57. For those reasons, as articulated by Credit Suisse, their "inextricably linked" point is clearly correct. Therefore, the likely effect, certainly on Privinvest's own case, is that the proceedings here would grind to a halt for up to three years. That is not a very attractive start to this issue, which I think Mr Calver QC in the end was bound to recognise in his submissions.

58. But then the Privinvest Defendants say that another factor is that this court should leave it all to the expertise of the arbitrators; after all, although they are not Swiss, two of them are French and Belgian respectively, the third is English, and so two come from Civil Code countries. I do not think much of that argument. The Commercial Court is well used to dealing with Civil Code concepts and principles, especially the application of the doctrine of good faith, and in fact, in my view, the scope of the dispute on Swiss law is relatively narrow, though important.

59. So far as other points on delay are concerned, the Privinvest Defendants say the reality is that the Republic left it to the last minute to issue the claims against them; that is correct, but on the other hand, the section 9 applications have been brewing, as it were, since September and November of last year. The courts generally wish to deal with section 9 applications in the appropriate fashion as soon as possible, precisely because, in the meantime, they may have the potential to disrupt the orderly conduct of the main claim. That is particularly acute here because, of course, there are the other defendants, of whom Credit Suisse are two.

60. Mr Calver QC made the further point that, so far as the delay is concerned, if only the Republic had agreed to bifurcate, then the arbitrators would have heard that issue of jurisdiction ahead of the main trial and it could have been done and dusted within, say, three months of now. If so, the court, faced with that position would obviously have deferred. However, that is speculation. In any event, I have to

deal with the situation now, and I do not see that the Republic was doing anything wrong on the bifurcation issues as they arose there. I certainly do not regard it as some strategy of deliberate delay, if that was being suggested.

61. Now, it is true that if the court decides the section 9 issues, then its analysis may have some impact on the underlying merits of the claims in the Swiss arbitrations, but it is not a major problem here, in my judgment. It is often, as Mr Justice Popplewell pointed out, a consequence of determining issues like who are the parties to the arbitration clause. I do not see it as a significant factor in favour of Privinvest here. That is especially because that is not a simple two-party claim and the same two parties arbitrating. [Redacted]

62. [Redacted]

63. Having mentioned *The Barito* case, I was not treated to any analysis of how the factors there would play out in oral argument before me, but, in my judgment, this is a very different sort of case. It is worth pointing out that in *The Barito*, Mr Justice Popplewell in fact decided that the court here could and should decide the arbitral points. It did not leave it to the arbitrators.

64. But dealing briefly with the *Barito* factors, as it were:

(a) it is not said here the court has to deal with arbitral questions anyway;

(b) if there are some issues on jurisdiction bound up with the merits, I do not regard them as significant or prejudicial, and I have already made those points. The Interference and Beneficiary Points might trespass into the merits, but I have had no detailed evidence yet from the Privinvest Defendants as to how they intend precisely to establish those points, other than saying simply the Republic was the ultimate beneficiary and the Logistics entities did perform the underlying subcontracts. If that is said, it is not clear what the overlap would actually be.

(c) the length and cost of the arbitrability issue being decided here. That is in favour of the Republic, in my view. Five or six days can be made available in January, up to three years ahead of the ultimate results of the arbitrators' decision.

(d) does not arise here.

(e) as to connections with England, there is not much connection here, but the original forum non conveniens arguments made by the Privinvest Defendants have now been abandoned anyway. So I do not think this factor is worth very much.

(f) deals with the strength of the position of the parties in relation to the arbitrability issue. The Privinvest Defendants say they have a very strong case on section 9, and, indeed, Mr Calver articulated very succinctly in this hearing what that case was. But if there is anything in that, that surely entails dealing with it earlier rather than later if the result is so obvious.

(g) I have dealt with above.

65. For all of those reasons, in my view, the case against deferral here is overwhelming, and I reject it.

Dealing with certain issues ahead of the main trial

66. I therefore turn to the second question, which is whether one proceeds straight to a trial in January as opposed to dealing with certain of the issues under the section 9 applications ahead of that, and at the hearing which has already been fixed for 26 to 28 May.

67. The background again is that the section 9 applications are already more than six months old. In principle, I consider that if I can sensibly and fairly split off some issues, which may be determinative if they go one way, I should do so. I am not going to recite all the principles which the court should bear in mind on preliminary issues, save that I bear in mind one particular principle, as I always do, that caution is to be exercised lest one embarks on what turns out to be a "treacherous shortcut".

68. It is accepted that, on any view, there may need to be a trial, and so, in any event, what I will do today is earmark that trial for January so that those dates can be fixed now. Otherwise, it is a question of examining each issue which the Republic says can and should go to the May hearing. I bear in mind it is already 8 April. On the other hand, section 9 issues have been extremely well ventilated and both sides have had expert input on Swiss law already.

The Scope Point

69. The first of these is the Scope Point. In the course of argument, and prompted by some questions from me to Mr Smouha QC, Mr Calver QC referred to that and suggested that it followed that the claim was inadequately pleaded. He said that it needed to be repleaded, and that factor would knock out the May hearing as a possible hearing date without more. In particular, he said that the Republic had suggested that the key point was the procuring of the guarantee and the losses therefrom. But if so, that conflicts with paragraph 154.1, which claims losses against all defendants.

70. On a proper analysis, I do not think there is anything in this point. As a matter of fact, Mozambique's direct loss is as a result of its present liability under the guarantee. It has no direct claim against the Privinvest Defendants for the returns of the payments made to them. It was not a party to the supply contracts and, so far as the liability front is concerned, it has losses by reason of its liability under the guarantees of something in the region of $2 billion. However, as co-conspirators, each claim of loss can be made against all defendants, and that has been expressly pleaded in the paragraph of the amended particulars of claim to which I referred earlier.

71. It is fair to say that if the suggestion is that Credit Suisse would benefit from this plan, then that has not worked out terribly well, because Credit Suisse is the one party actually out of pocket. On the other hand, that does not mean that there was no point in Credit Suisse coming in to finance the deal. Banks make loans in order to make money from interest and fees, especially if, on the face of it, they have apparent security.

72. As for Privinvest, whose employee Mr Boustani, is said to have received $15 million in bribes, it is expressly pleaded that they would benefit from the monies they got from Credit Suisse and the other banks who financed the deals. Mr Smouha QC may have been somewhat reluctant to put this in terms of getting paid under the supply contracts, but that does not mean the particulars of claim are defective. It may or may not simply be a matter of characterisation which is capable of being dealt with in relation to that issue on the present pleadings.

73. I do not consider overall that the amended particulars of claim and the conspiracy claim in particular are defective. I asked the Republic whether in fact it wished to amend its case, and it said no, it stands or falls by what is pleaded so far. The test on the scope issue would be to ascertain what all of that entails for the purpose of then seeing whether it fits within the arbitration clause or not.

74. At one point, Mr Calver QC said that the claim must involve reliance upon the underlying contracts, and he quoted from paragraph 133.3, which I have read out. But that does not make the amended particulars of claim defective; it just goes to the question of merits on the scope issue, just as does Mr Smouha QC's riposte that while the supply contracts are essentially a building block to get to the giving of the guarantee, that does not mean that the case is about or in connection with those contracts for the purposes of the arbitration clauses. That again is a merits point going the other way.

75. At the end of the day, I do not consider that there is any real defect in the Amended Particulars of Claim which would prejudice the defendants in their preparation for the scope issue, should it be decided in May and not in January.

76. Having disposed of that preliminary argument, let me then deal with the other arguments on the Scope Point.

77. First of all, it seems to me to be a very self-contained point. It involves the interpretation of the clauses under Swiss law of two forms of arbitration agreement and whether the claims made by the Republic here are caught by either or both of them, if the Republic was indeed a party. The only two real points of alleged difficulty with an early determination of this issue I deal with below. Before coming to them, however, I should say that I am going to refer to document produced by the Republic on Sunday evening, just before the hearing started on the Monday, which is a synopsis of the parties' respective positions on Swiss law, stating where they agree and where they disagree. I shall simply call this "the Swiss Law Document". Mr Calver QC said that it may be overbroad, and there may be more nuanced arguments as well. That is possible, but it seemed to me to be a sensible working document for these purposes, and it is not suggested that it was materially inaccurate.

78. Having therefore introduced that document, and returning to the scope issue, the first alleged difficulty concerns an agreed part of the document at paragraph 6(a):

> "By the "subjective" test, the Court seeks to ascertain whether the parties had a true and common actual intention. The Court's ascertainment of a true and common intention is a question of fact. If the Court ascertains a true and common actual intention, that intention prevails."

79. Mr Calver QC said that Privinvest made use of all sorts of evidence on the subjective intention of the Privinvest Defendants, and that could then lead to some unacceptable form of mini-trial on the facts. As matters presently stand, I do not regard that as a very realistic argument. It is not clear so far what particular facts are going to be alleged by the Privinvest Defendants on subjective intention, but it would have to be something along the lines that Mr Safa thought that he understood the arbitration agreement in the supply contract would in fact extend to further claims about bribery and the other claims made by the Republic. That is somewhat unlikely. But it was not suggested that the Privinvest Defendants should not be allowed to adduce evidence. The point at the moment is I do not regard that as a serious trial management issue so far as having this matter determined in May.

80. The second alleged difficulty was the fact that the experts do differ on one point. Paragraph 9(a) is the Republic's position. It says that the principle of *in favorem arbitri*, in other words, the court should try and uphold the arbitration solution to a dispute, is inapplicable in the case of multiple relevant arbitrations. The Privinvest Defendants for their part say that it is not limited in that way where there is only one relevant arbitration agreement. Differences in wording between arbitration clauses will not make a substantial difference.

81. Then the Swiss Law Document went on to say:

> "An arbitration agreement governed by Swiss law will normally encompass: (i) disputes relating to the existence and validity of the contract; (ii) extra-contractual claims, including culpa in contrahendo, tortious and restitutionary claims; and (iii) claims in connection with certain ancillary or connected contracts."

82. Because of the use of expressions like "normally", if the experts started to opine on how that principle would actually be applied in this case, that would be trespassing beyond their expertise. In any event, I do not consider that, so far as experts are concerned, there is a particularly large dispute between them, although it may be an important one, or one that cannot sensibly be dealt with in the framework of the hearing at the end of May. Mr Smouha QC was keen to point out that that this did not mean that there was going to be some filleting exercise of any expert's report before the trial in May; if there were elements of the reports which were inadmissible, then I would simply be invited to disregard them.

83. The reference to the experts on foreign law being confined to what the law was, rather than applying it to the instant case, is well established. It was referred to in the *Idemia* case, see also Dicey and Morris, page 328, paragraph 9-019 and footnote 100.

84. So I do not think either of those two alleged difficulties are serious ones.

85. As to whether the Scope Point could be done within three days, of course, to some extent, that depends what else is on the agenda for the May hearing, but in principle it certainly could. Next is the question whether it can be prepared in time for the May hearing. In my view, it can. The Scope Argument has been very fully ventilated, up hill and down dale, if I may say so, and as I have already said, in seeking to show me how the Privinvest Defendants were bound to win on it, because it was such an obvious point, Mr Calver QC has already presented the essence of his case. But that, as I also indicated above, militates in favour of early disposal and not putting it off.

86. Next is the question whether this will be a useful exercise. I think it will be. If the Republic's argument wins, it is an end of the section 9 challenge by anyone. If the Privinvest Defendants win, then we have dealt with and got rid of a significant early dispute early on. It is essentially a process of analysis that will be informed by Swiss law principles of interpretation, but it is an exercise that judges of this court are very used to doing.

87. So I am going to order that the Scope Point is determined at the May hearing. Of course, as with any preliminary issue, if (contrary to my firm expectations) something crops up which means that, in the end, the Scope Point has got to go to trial, I can order that; but I must make clear that, at the moment, I regard that as extremely unlikely.

The Beneficiary Point

88. The next proposed preliminary point is the Beneficiary Point. So far as that is concerned, there is common ground between the parties that it is possible to bring in a third party, see paragraphs 3 and 4 of the Swiss Law Document. At paragraph 5(a), the Republic's position was the parties to the contract conferring a benefit cannot rely on Article 112 of the Swiss Code of Obligations as generating a right to invoke an arbitration agreement within the contract against a third-party beneficiary without that third party's consent. Paragraph 5(b), which is the Privinvest Defendants' position, is that a third-party beneficiary will be bound by an arbitration agreement. If the party to the contract brings a claim against such a third-party beneficiary which is subject to the arbitration agreement, the third party may enforce the benefit of that arbitration agreement.

89. Mr Smouha QC articulated the key difference here, being whether the consent of the beneficiary third party is a necessary element of the joinder or not. It is right that if I decide that issue in favour of the Republic, it is determinative, because it is the end of the Republic's joinder to the arbitration clause; that would in turn be the end of the section 9 claim, because the only claimant for these purposes is the Republic. If I found for the Privinvest Defendants on the law, it may lead to triable issues for the trial and the question of benefit. But there is a wrinkle here, because Privinvest does not accept, as Mr Smouha QC contended, that, if consent was necessary, there is simply no evidence of it or that it could not be shown if it had to. Mr Calver QC said that the position of the Privinvest Defendants is that the Republic absolutely did consent in the relevant way.

90. On balance, I think I should leave this to trial. I think it is better to decide this question in the context of the actual evidence of benefit and consent and so on, rather than determining the Swiss law points in a vacuum.

The Interference Point

91. I then turn to consider the Interference Point. That is dealt with in section D of the Swiss law document. It is common ground that arbitration agreements can be extended to a third party. That is in the sense of parties invoking the arbitration agreement.

92. The Republic says that the position is that the arbitration agreement can be extended to a non-signatory if the non-signatory has interfered in the conclusion or performance of the contract in such a way that the contracting party asserting the extension had legitimate reasons deserving protection to believe in good faith that the non-signatory party thereby intended to become a party. The extension of the arbitration agreement occurs because the non-signatory, by conduct, created the appearance to the contracting party of intending to be bound. That is the principle, says the Republic. A third party is not entitled to assert an arbitration agreement in the absence of the consent of the contracting parties, and it cannot, as it were, join the party unless the other relevant parties, which here would be the Republic and the SPVs, did not agree.

93. For its part, the Privinvest Defendants say that it can be extended to a non-signatory if the non-signatory has interfered with performance in a way that it is possible to infer an intention to be bound, and there may be exceptional circumstances where, by reason of conduct, it creates the appearance of intending to be bound.

94. So, again, the question of consent of the other parties who may be affected does not matter. Again, this would be determinative, at least so far as the Logistics entities are concerned, if the argument ran in the Republic's favour. On this point, however, Mr Calver QC says he has got a following wind because there is a decision of the Swiss Federal Court which is highly supportive of his position.

95. On balance, again, I think that it is better to have this point determined in the full context of all the relevant evidence and not in a vacuum. So that that should be left to trial as well.

96. Finally, in relation to both the Beneficiary and the Interference Points, I have now got to consider that the May hearing has already got the Scope Point in it, and I think that there was a risk that it simply may be too much to include the former points as well, even though it might be said to have had to be convenient to have the experts give evidence on all three points.

97. Those deal with the section 9 points.

Residual Points

The Service Point

98. The first is the Service Point. There is absolutely no reason, in my judgment, not to deal with this at the end of May. It is a very short point. Without the Court of Appeal decision, there is valid service. If the Court of Appeal decides by the end of May (and I suspect it will), then that is the end of the point, because I would be bound by whatever the Court of Appeal decides. Mr Calver QC says it is not so straightforward because he may wish to advance a new point that has not been covered by the Court of Appeal. I do not know exactly what it is, but if that would enable him, as it were, to sidestep the decision of the Court of Appeal, if it was adverse to him, then, in my judgment, it is better to deal with that upfront now.

99. If the Republic wins on the Service Point, that is it. Mr Safa has been validly served and, subject to any other case management directions I might make in the future, it will be able to get on and serve its Particulars of Claim against him and so on. The ascertainment of the Republic's position is something which ought to be determined sooner rather than later. In the end, I did not have the impression that Mr Calver QC was seriously opposed to this course of action. So that will be dealt with in May. If the Court of Appeal decision comes out significantly earlier than that hearing, then I will give either party permission to apply to decide the matter on paper if it is capable of being decided in that way.

Case Management Stay for Mr Safa

100. Then I come to the final specific issue, which is the case management stay sought by Mr Safa. Stays are exceptional, as I think both sides recognise. But the obvious time to consider that matter is in May, when all the other timing points will become relevant. There is no basis for leaving it over to January simply because there may be a trial of certain issues which are still live at that point.

101. There may be some sort of overlap with the Logistics entities' case management stay, which it is agreed must go to trial, but the fact is that Mr Safa's point is essentially a pre-section 9 trial point. Indeed, if the Service Point went against Mr Safa, then, without a stay of the claim against him, that will or might very well proceed in the way that I have indicated. It could go as far as defences and disclosure. If Mr Safa does not want that to happen, he has to apply for a stay in May and not leave it until January. So that goes into May as well.

The Position of D6 to D8

102. Finally, I deal with the position of D6 to D8. There are issues about the continued existence or otherwise of D6 as distinct from D8. D6 has not sought a section 9 stay and, strictly speaking, should now be serving a defence, but it has not done so. There are also questions over D7 and whether it has simply changed its name, or whether, as has been suggested in another document, actually there has been a successor to it in some way. In the end, Mr Pillow QC was not asking me to do anything about those defendants now, but he was laying down some markers which at the moment are somewhat hanging in the air. In my view, any dispute that needs to be determined in relation to those issues should, if at all possible, be decided in May. But I cannot say more than that because the disputes actually need to be crystallised.

103. As the Republic has raised the point, I think it is for them to take the first step, even if it is simply to invite Privinvest Defendants to agree on its analysis of those companies and the present relevance of their position to these proceedings. Once that has been done, it seems to me the correct course would be for the Republic or the Privinvest Defendants to have permission to apply, initially on paper, to put that into the May hearing.

104. That completes the question of what is going to be dealt with in May, the remainder being dealt with in the trial in January.

Further Matters

105. I make a few further points before concluding.

106. In my judgment, Credit Suisse must get on and serve its Part 20 application soon. There is a dispute as to whether, in relation to a new Credit Suisse entity, permission is required or not. That is not for me to decide today. But I am of the clear view that the Part 20 issue is something which can and must be

dealt with in May as well. I do not anticipate it will take very long, but it is the obvious time to do it when one is dealing with certain issues in May and then looking forward as a matter of trial management to the trial in January.

107. So far as the issues to be dealt with in May and their preparation is concerned, I was glad to hear from Mr Calver QC this morning that Mr Langford now regards himself as recovered from the coronavirus. There are still pressures upon him because I am told that his wife is ill with it and there are children in the household as well; however I do not regard those as significant obstacles to the ability of the Privinvest Defendants to prepare for the May hearing in the form which I have said it should take. Indeed, if I may say so, the Privinvest Defendants appear to have prepared very well and comprehensively for the hearing which we have just had.

108. At the May hearing, after I have decided the points, I will review the position so far as trial is concerned and make trial directions.

109. To that end, in my judgment, I do need to see Privinvest's detailed case on the whole of its section 9 challenges, quite apart from any evidence it may wish to serve in relation to the scope and the other May points. That will help me (indeed, I regard it as vital) for the directions going to trial, which I will deal with in May, just as with any case management conference.

110. I see no reason at all why, at the very least, Privinvest should not serve a detailed statement of case, now or in the near future, for all section 9 issues, to include the essential facts they rely upon, quite apart from the statements of law which have already been well ventilated, and that must be done well before the May hearing.

Conclusion

111. So, in summary, the May hearing will be from 26 to 28 May. I will deal with the Scope Point, the Service Point, the Safa Stay Point, any D6 to D8 point that needs a decision, and permission for the Part 20 applications.

112. The parties will need to agree directions for the service of evidence and expert evidence and submissions for the May hearing. There needs to be a date for the issue and service of the Part 20 claims. There needs to be the provision of a detailed statement of case on the section 9 from Privinvest.

113. That concludes my judgment.