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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Case No: CL-2019-000127

Date: 30 July 2020

Before :

MR JUSTICE WAKSMAN

Between :

THE REPUBLIC OF MOZAMBIQUE
(acting through its Attorney General)

Claimant

- 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. (HOLDING)
- (7) ABU DHABI MAR INVESTMENTS LLC
- (8) PRIVINVEST SHIPBUILDING INVESTMENTS LLC
- (9) LOGISTICS INTERNATIONAL SAL (OFFSHORE)
- (10) LOGISTICS INTERNATIONAL INVESTMENTS LLC
- (11) CREDIT SUISSE SECURITIES (EUROPE) LIMITED

Defendants

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, Second and Eleventh Defendants in CL-2019-000127
Mr Neil Calver QC, Mr Ben Woolgar and Mr Frederick Wilmot-Smith (instructed by **Signature Litigation LLP**) for the Seventh to Tenth Defendants in CL-2019-000127 and the Defendant in CL-2019-000482

Hearing Dates: 26 - 28 May 2020

JUDGMENT

INTRODUCTION

1. On 8 April 2020 I gave directions for the management of applications made by the Sixth to Tenth Defendants to stay the proceedings against them pursuant to section 9 of the Arbitration Act 1996 (“the Application”). In particular I directed that the issue as to the scope of the relevant arbitration clauses (“the Scope Issue”) should be heard ahead of other issues relating to the Application. The latter are due to be heard at a trial in early 2021. The extent to which that trial will take place depends on my determination of the Scope Issue. This is my judgment on that matter.
2. There are (now) two related sets of proceedings before me. Both of them concern claims made by the Republic of Mozambique.
3. The first claim, in which the Application is made, (“the Main Action”), was issued on 27 February 2019, though not served until 21 June (D1 to D5) and 19 August (D6 to D10). A subsidiary claim (CL-2019-000775) has been consolidated with and into the Main Action. The latter is (now) made against the following Defendants:
 - (1) Credit Suisse International Limited and Credit Suisse AG, who are, respectively, English and Swiss companies (D1 and D2) and Credit Suisse Securities (Europe) Limited, another English company (D11);
 - (2) Mr Singh, Mr Pearse and Ms Subeva, who were employees of D11 at the material time (D3 to D5 - “the CS Team Defendants”);
 - (3) Prinvest Shipbuilding SAL (Holding) (D6), a Lebanese company; Abu Dhabi Mar Investments LLC (D7) and Prinvest Shipbuilding Investments LLC (D8), both UAE companies; Logistics International SAL (Offshore) (D9), a Lebanese company; and Logistics International Investments LLC (D10) a UAE company. These are or were all entities which formed part of a very large private shipping group whose ultimate beneficial owner and controlling mind is said to be Mr Iskandar Safa. I refer to all of these Defendants collectively as “the Prinvest Defendants”.
4. The second claim, issued on 31 July 2019, is against Mr Safa himself (“the Safa Action”). It is not directly relevant here save that, broadly speaking, the same claims made against the Prinvest Defendants are made against Mr Safa.
5. Pursuant to a consent order made on 30 April 2020, a Consolidated Particulars of Claim in the Main Action was served on 4 May 2020 (“the Particulars of Claim”).

BACKGROUND

6. It is common ground that three written supply contracts (“the Supply Contracts”) were entered into with some of the Prinvest Defendants as suppliers (“the Suppliers”). The customers were all special purpose vehicles (SPVs), owned by the Republic and set up for the purpose of these contracts. They are all Mozambique companies. They are not parties to this action save for Proindicus SA which is now a Part 20 Defendant.
7. The first contract, made on or about 18 January 2013, is between Proindicus SA, and, on the face of it, D6 (“the Proindicus Supply Contract”). It was 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 there, especially tuna, and the prospect of significant gas exploration within those waters.
8. Clause L thereof is headed "Applicable law and Arbitration". It says that the governing law is Swiss law and 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. The second contract, made on or about 2 August 2013 is between Empresa Mocambicana de Atum SA (abbreviated to EMATUM), and D7 (“the EMATUM Supply Contract”). It is for the

supply of a large fishing fleet for the Republic. Clause J thereof is in the same terms as Clause L of the Proindicus Contract.

10. The third, made on or about 1 May 2014, is between Mozambique Asset Management SA ("MAM") and D8 for the creation of shipyard and related services and further vessels in and for the Republic ("the MAM Supply Contract"). The arbitration clause here is differently worded. Again, it states that Swiss law applies, but then provides:

"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."
11. In all three cases, the Suppliers sub-contracted their role to D9 in the cases of Proindicus and EMATUM, and D10 in the case of MAM. I refer to those two Defendants collectively, where appropriate, as "Logistics". The second and third sub-contracts are expressed to be governed by English law, with an exclusive jurisdiction clause in favour of the courts of England and Wales.
12. The total sums due under the Supply Contracts were financed by various loan agreements made with the SPVs by a number of banks. The finance for the Proindicus and EMATUM Supply Contracts came initially from Credit Suisse, more particularly, D1 and D2. The finance for the MAM Supply Contract came from VTB and was arranged by VTB and Palomar Capital Advisors AG ("Palomar Capital"). The latter company is said to have been part of the Privinvest group and is now in administration. The loans are expressed to be governed by English law, with an exclusive jurisdiction clause in favour of the courts of England and Wales.
13. The Republic itself guaranteed the SPV's performance of their respective obligations under the loan agreements by three separate sovereign guarantees made on or about 23 February 2013, 30 August 2013 and 20 May 2014 respectively. The first two were made between the Republic and D1 and D2 ("the Guarantees"). They were signed on behalf of the Republic by Mr Manuel Chang, its then Minister of Economy and Finance. The third was made between the Republic and VTB and Palomar Capital. The latter is not the subject of any claim in the Main Action. The guarantees are expressed to be governed by English law, with an exclusive jurisdiction clause in favour of the courts of England and Wales.
14. The Suppliers received payment in full for the Supply Contracts directly from Credit Suisse (D1 and D2) and the other banks. So far as I am aware, the SPVs did not themselves make any repayments under the loan agreements. As for the Republic, the position is as follows: broadly speaking, it has allegedly accrued a total present liability under the Guarantees of some \$2.1 billion. In particular, of a \$504 million syndicated loan made to Proindicus by D1 and D2, only \$11.8 million has been repaid. The balance of the EMATUM loan has been refinanced on one or more occasions including by the issue of what are known as the 2023 Eurobonds which were given in exchange for the earlier 2020 Notes issued by the Republic ("the EMATUM Exchange").
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 referred to below. The Republic does not accept that characterisation of the performance or that it has made such a concession. Either way, such issues are not significant for present purposes.

OVERVIEW OF THE CLAIMS

16. In the Particulars of Claim, the Republic alleges 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 some or all of the Privinvest Defendants and (d) the CS Team Defendants. The amount of bribes was said to be at least \$143 million according to Schedule 2 to the POC which sets out the bribes paid by the Privinvest Defendants. The Mozambican individuals said to have received bribes were Mr Chang, Mr Antonio do Rosário, National Director for International Affairs in the Analysis Division of the Republic's Intelligence and

Security service, Mr Manuel Matusse, a political adviser to former President Guebuza, Ms Maria Dove, personal secretary to former President Guebuza, Mr Armando Ndambi Guebuza, a son of former President Guebuza, and finally Mr Teófilo Nhangumele and Mr Bruno Langa, both associates of Mr Armando Ndambi Guebeza.

17. There were US criminal proceedings brought against Mr Boustani and D3 - D5 among others, pursuant to an indictment filed by the Department of Justice on 19 December 2018. Information from the US proceedings suggests that the total amount of the bribes is around \$200 million. On 2 December 2019, Mr Boustani was acquitted. Earlier in the same proceedings, on 20 May, 19 July and 6 September respectively, the CS Team Defendants pleaded guilty to US federal offences.
18. The following claims are made:
 - (1) As against D1 and D2 only, the Republic alleges that the Proindicus and the EMATUM Guarantees were null and void and it has no liability thereunder (“the Guarantee Claim”);
 - (2) As against all Defendants the Republic alleges that they are liable as joint tortfeasors for the tort of bribery (“the Bribery Claim”); the bribes are said to have been paid to the Mozambican individuals referred to above and the CS Team Defendants;
 - (3) The Republic seeks damages from D1 – D10 for conspiracy to injure by unlawful means (“the Conspiracy Claim”); as against those Defendants, the Republic also alleges that they dishonestly assisted breaches of fiduciary duties committed by the Mozambican officials who took the bribes (“the Dishonest Assistance Claim”) and/or that insofar as any of those Defendants received fees or payments from the Republic in respect of the Supply Contracts or Guarantees, such sums were received knowing that they were the result of the Mozambican officials’ breaches of fiduciary duty (“the Knowing Receipt Claim”); the Republic also makes proprietary claims in respect of all traceable proceeds of sums received by any of them as a result of the breaches of fiduciary duty and/or an account of profits (“the Proprietary Claim”);
 - (4) Lastly, a claim in deceit is made against D1, D2 and D3 (“the Deceit Claim”). This is not relevant for present purposes.

THE PRESENT PROCEDURAL POSITION

19. For obvious reasons D6 – D10 have not yet served a Defence. The CS Team Defendants have. In his Amended Defence dated 26 June 2020, D3 (Mr Singh) admits to having received \$5.7 million by way of secret commissions or “kickbacks” from the Privinvest Group. He says that this was in return for his support to increase the size of the loan to Proindicus and for the making of the loan to EMATUM. In his Re-Amended Defence dated 26 June 2020, D4 (Mr Pearse) admits that he received \$45 million worth of payments from the Privinvest Defendants but denies that these were secret commissions, bribes or otherwise illicit. In her Re-Amended Defence dated 26 June 2020, D5 (Ms Subeva) says that she was told by Mr Pearse that he had received \$1 million from Privinvest and Mr Boustani in return for reducing certain subvention fees payable by Privinvest to Credit Suisse in relation to the loan to Proindicus. She admits that upon being told by Mr Pearse that he had paid \$200,000 into her US bank account, which she understood had come from the monies he received from Privinvest, she retained that sum. All of the CS Team Defendants deny that they were part of any conspiracy to defraud the Republic or related wrongdoing as against it.
20. D1, D2 and D11 served their Consolidated Amended Defence and Counterclaim on 26 June 2020. In it, they admit that bribes were paid to the CS Team Defendants and infer that the payments made to Mozambican Officials were bribes. They deny any wrongdoing as against the Republic. On the same date, and pursuant to permission given by me on 25 June, they issued a Part 20 Claim against the Privinvest Defendants and a number of parties new to the Main Action, namely Mr Chang, Mr Rosário, former President Guebuza, Mr Armando Ndambi Guebuza, Mr

Nhangumele, Mr Langa, Mr Gregório Leão José, Ms Isaltina Lucas, and Proindicus SA. Some of those had, of course, already been identified as recipients of bribes by the Republic.

21. The Main Action has not proceeded further at the moment; the Court has been occupied principally with the management of the Privinvest Defendants' Section 9 challenges. However, on 1 July, I gave permission to the Republic to amend the Claim Form and Consolidated Particulars of Claim so as to correct the name of D6, which had originally been pleaded as "Privinvest Shipbuilding S.A.L Abu Dhabi (Branch)". The Privinvest Defendants contend that the material assets and liabilities of D6 have been transferred to D8 so that no claim can lie against D6. That is not a matter I need (or can) deal with now.

THE SECTION 9 CHALLENGES

22. The Privinvest Defendants contend as follows:
- (1) Although not stated on the face of the Supply Contracts, the Republic is in fact a party to the arbitration agreements within them as a matter of Swiss law because it was the beneficiary of those contracts ("the Beneficiary Issue");
 - (2) Again, although not stated on the face of the Supply Contracts, D9 and D10 can invoke the arbitration clauses under Swiss law because they "interfered with" the contracts in the sense that they performed them and became parties thereto ("the Interference Issue");
 - (3) Finally, as a matter of scope, both forms of arbitration clause cover all the claims made by the Republic against the Privinvest Defendants here; this is the Scope Issue.
23. For its part, the Republic contests each of those points. The Application was made in an Application Notice dated 11 November 2019. The Beneficiary and Interference Issues are the subject of the separate trial referred to in paragraph 1 above.

THE SWISS ARBITRATIONS.

24. A total of five relevant arbitrations have been commenced in Switzerland.

The First ICC Arbitration

25. On 11 March 2019 (ie after issue but before service of the Main Action here and with knowledge thereof), D7 and D8 commenced ICC arbitration number 24325 against Proindicus, EMATUM and the Republic itself for breach of the Proindicus and EMATUM Supply Contracts ("the First ICC Arbitration"). In summary they alleged that:
- (1) The two Supply Contracts were in fact made by the Republic "through" Proindicus and EMATUM so that it was a party along with the latter;
 - (2) The Republic, Proindicus and EMATUM failed to carry out their parts of the underlying contracts and so were in breach thereof. That has led to reputational losses on the part of D7 and D8 because the projects, it is said, would be viewed by the outside world as failures, thereby damaging their ability to be engaged on similar projects in other parts of the developing world;
 - (3) The commencement by the Republic of the proceedings here was itself a further breach of contract.
26. The Republic's answer in the arbitration, filed on 5 June 2019, stated that there is no arbitral jurisdiction over it because:
- (1) It was not a party to the Supply Contracts – it was not named as such nor did it sign as such;
 - (2) Further, and in any event,

“67...the arbitration agreements are not *bona fide* agreements. They are instruments of fraud that would not exist but for the payment of bribes and collusion between the Claimants, their representatives and their co-conspirators.

68. They are null and void, and do not bind the Respondents”.

(3) Even if somehow there was jurisdiction, it does not matter because the Supply Contracts are void (see above) and the claim made in the Main Action here is outwith the scope of the arbitration clauses if otherwise valid. On this latter point, the Republic sought a declaration that the Supply Contracts were void. That was the only substantive point taken by the Republic and only arises if jurisdiction against them is established.

27. On 6 December 2019, D7 and D8 sought an order from the arbitrators that the question of their jurisdiction should be bifurcated, ie split up, so that the tribunal should hear the jurisdiction points first, ahead of a trial on the merits. The Republic opposed this on various grounds one of which was that both sides’ arguments on jurisdiction and merits were intertwined. The arbitrators ruled on 9 January 2020 by Procedural Order Number 3. Their analysis of the bifurcation claim began with the position in the Main Action here. In paragraph 39 they referred to D7 and D8’s position that the Republic here was requesting a determination that the Supply Contracts were “null and void”. No such relief is in fact claimed here. The arbitrators went on to summarise various features of the Main Action.

28. I agree that the only formal ruling here is the arbitrators' decision as to whether to bifurcate or not, but it is worth citing the following paragraphs of their decision.

"45. The Tribunal considers that the above clearly shows that Mozambique’s claims before the English High Court are not based on the Supply Contracts. The Tribunal finds merit in Respondent 1’s assertion that, while the Supply Contracts form part of the factual milieu of the case before the English High Court, Mozambique’s claims therein do not include a claim for the declaration of the Supply Contracts themselves as null and void.

46. While there may be a possibility that the English High Court may make some factual findings as to the Supply Contracts, the Tribunal cannot conclude that this represents a high risk for the integrity of the present proceedings so as to justify granting Claimants’ Request for Bifurcation. In any event, the Tribunal notes that Claimants have requested a stay of the English High Court proceedings based on Section 9 of the Arbitration Act in consideration of the present proceedings.”

29. However, that part of the decision could not dispose of the bifurcation issues altogether because of the Republic's separate argument that the Supply Contracts, and therefore the arbitration clauses, did not bind them anyway because they were void. As to this the tribunal stated:

“50. ...[that case] would be intrinsically intertwined with the issue of the validity of the Supply Contracts themselves. Consequently, many of the factual and legal arguments and evidence on the jurisdictional issues would be the same for the merits issues. Bifurcation would thus be inoperative as the jurisdictional issues would be too closely intertwined with the merits to be separable.

51. The Tribunal further considers that it would not be time and cost-efficient to bifurcate the proceedings. Prinvest has mentioned in the English High Court proceedings that the jurisdictional issues would entail consideration of “‘very extensive evidence’, a ‘substantial factual investigation into the negotiation, structuring, and performance of the transactions,’ ‘production of documents’, ‘live evidence from witnesses of fact’, ‘extensive written evidence on foreign law [that is both Swiss law and potentially Mozambican law] and, possibly, live evidence from [those foreign law] experts...’”. These would certainly also be relevant for, and related to, the claims and evidence on the merits. As bifurcation would lead to a duplication of efforts in briefing these issues, it would not be cost or time-efficient.

52. Finally, the Tribunal considers that bifurcation would also be inefficient as it could, at best, only lead to the dismissal of the case against [the Republic], but not against [the SPVs]. Indeed, even if the Tribunal were to find that it has no jurisdiction over [the Republic] in a preliminary decision, the proceedings would still continue, as the Tribunal would still need to rule on the merits of the claims against [the SPVs].”

30. On that basis, the request for bifurcation was refused. On 23 January 2020, the arbitrators issued a procedural timetable which provided for a trial in December 2021.

31. On this occasion, the arbitrators also ruled that the Republic's claim that the Supply Contracts were void amounted to a counterclaim even though the point taken was essentially defensive. The only reason why there was a debate as to whether it was a counterclaim was because if so, D7 and D8 were entitled to make another round of written submissions. I do not consider that the status of the Republic's voidness point as a counterclaim is of any significance to the issues before me here.

The Second ICC Arbitration

32. On 18 December 2019, Privinvest Shipbuilding SAL (Holding) (ie D6 here) commenced a second ICC arbitration numbered 24980. It claimed that it was entitled to bring a claim under the Proindicus Contract and was doing so in the light of a further point taken by the Republic in the First ICC Arbitration that D8 was not entitled to bring any claim under the Proindicus Contract because the counter-party there was D6. It then made allegations similar to those in the First Arbitration. In its Answer dated 20 March 2020, the Republic did not accept that D6 had *locus* either. Otherwise it denied the claim in the same way that it had in the First Arbitration.

The First SCAI Arbitration

33. Meanwhile, on 14 March 2019, D8 had commenced an arbitration against the Republic and MAM in the Swiss Chambers' Arbitration Institution ("SCAI") Arbitration Court numbered 600552 ("the First SCAI Arbitration"). Allegations similar to those made in the First ICC Arbitration were made which were denied by the Republic in the same way in its Answer of 2 July 2019. The tribunal also denied a request for bifurcation made by D8 by its Procedural Order dated 9 January 2020 for essentially the same reasons as were given by the tribunal in the First ICC Arbitration.

The Third ICC Arbitration

34. On 18 December 2019, D9 and D10 (Logistics) commenced a third ICC arbitration numbered 24981 against the Republic, Proindicus and EMATUM ("the Third ICC Arbitration"). In substance the same allegations were made as in the First ICC Arbitration. The reason why D9 and D10 had commenced this further arbitration was said to be because they had been made Defendants in the Main Action here; moreover because they had been involved in the performance of the Supply Contracts and had been treated as parties thereto by the Republic, they had *locus* to bring the arbitration. They also alleged (as had D7 and D8, incorrectly) that the Main Action included a claim that the relevant Supply Contracts were void. D9 and D10 said that this was a matter covered by their arbitration clauses. They also sought consolidation of this arbitration with the First ICC Arbitration.
35. In its Answer dated 20 March 2020, the Republic stated that neither it, nor D9 or D10, were parties to the relevant Supply Contracts and otherwise raised points of defence similar to those made in the First ICC Arbitration.

The Second SCAI Arbitration

36. Also on 18 December 2019, D9 and D10 commenced an arbitration against the Republic and MAM in the Swiss Chambers' Arbitration Institution ("SCAI") Arbitration Court numbered 600583 ("the Second SCAI Arbitration"). Allegations similar to those made in the Third ICC Arbitration were made which were denied by the Republic in the same way in its Answer of 9 March 2020.

The Present Procedural Position

37. Both SCAI Arbitrations have been consolidated with each other.

38. The Arbitral Tribunals in the First ICC Arbitration and the SCAI Arbitrations consist of the same three individuals, and both sets of arbitrations are being managed together though not consolidated with each other.
39. By Procedural Order No. 8 dated 26 May 2020, a new, agreed timetable for the First ICC Arbitration was directed, culminating in a trial on jurisdiction and merits in the weeks commencing 28 March and 4 April 2022. A similar timetable was directed for the SCAI Arbitrations by Procedural Order No. 7, also dated 26 May 2020, made in those arbitrations.
40. As for the Second and Third ICC Arbitrations, on 5 March the ICC Court refused to consolidate them with the First ICC Arbitration. However, on 9 June 2020, the ICC Court appointed the same tribunal as that in the First ICC and the SCAI Arbitrations. On 14 July there was a joint CMC in the Second and Third ICC Arbitrations.

THE EVIDENCE

41. The following witness statements have been served in relation to the Application:
 - (1) For the Privinvest Defendants, the second witness statement of Robert Hickmott, of Quinn Emanuel, Urquhart & Sullivan UK LLP dated 11 November 2019, then acting for the Defendants, the first witness statement of Johannes Valentijn, a Project Manager at D8, dated 7 May 2020 and the first witness statement of Peter Kuhn a Manager in the Sales Department of German Naval Yards Kiel GmbH, part of the Privinvest group;
 - (2) For the Republic, the 8th and 11th witness statements of Keith Oliver of Peters & Peters Solicitors LLP, dated 20 January and 17 February respectively.
42. In addition, there has been both written and oral expert evidence on Swiss law. For the Privinvest Defendants, I heard from Mr Sébastien Besson of Levy Kaufman-Kohler, Attorneys at Law, Geneva. He is a practising lawyer and part-time academic. For the Republic, I heard from Professor Corinne Widmer Lüchinger, Faculty of Law, University of Basel. They produced a Joint Memorandum on areas of agreement and disagreement dated 16 May 2020. Their evidence is concerned with the principles of Swiss law applicable to the interpretation of arbitration clauses.
43. In addition to the parties' Skeleton Arguments, I also have the Republic's Statement of Areas of Agreement and Disagreement on Swiss Law together with the Statement of Privinvest Defendants' Position on the Scope Issue, the Statement of the Privinvest Defendants' Case on the s9 Trial Issues, and the Republic's Statement of Agreement and Disagreement on section 9 Trial Issues.

THE ISSUES IN THE CASE AS AGAINST THE PRIVINVEST DEFENDANTS

Introduction

44. In this case, the Republic's claim against the Privinvest and other Defendants are set out clearly in the Particulars of Claim. Both sides have made detailed submissions about what can or should be drawn from the Particulars of Claim for the purpose of the Scope Issue.
45. By agreement of the parties, the Scope Issue is to be decided on the assumption that the Republic, though not an express party to any of the Supply Contracts, is nonetheless bound by the relevant arbitration clauses. In that way, the Scope issue can be dealt with discretely. It means that if I were to find, for example, that there is no "matter" in the Particulars of Claim covered by those clauses, the Application must fail as a whole even if it could have been shown (by reference to the Beneficiary or Interference Issues) that the Republic must indeed be regarded as subject to those clauses.
46. However, this agreed assumption cannot alter the fact that the claims which I have to consider are made on the basis that the Republic was not a party to the Supply Contracts. Thus, even if it

wished to, it could not make any direct claim upon them, for example for damages for breach thereof or to avoid or rescind them.

47. Furthermore, the Republic's essential losses, as presently understood, can only be referable to its liabilities under the Guarantees since there is no other contract pursuant to which it can be made liable in respect of these matters. I deal with this point in more detail below.

Background to the Claims

48. It is not necessary to set out all of the pleaded background matters. I confine myself to the matters set out below.
49. The claims are said to arise out of three "transactions" involving the Republic and the SPVs on the one hand and the relevant Defendants on the other. Each "transaction" is said to encompass the underlying Supply Contract, the loan agreement made to the relevant SPV in order to pay the relevant Supplier, and finally the relevant Guarantee purportedly made by the Republic in favour of the relevant lender.
50. I have referred above to the allegation as to the payment of bribes by the Privinvest Defendants.
51. The following is said about the Proindicus Supply Contract:

"62. By letter dated 18 January 2013 the Sixth Defendant ("Privinvest Shipbuilding SAL") stated that in the "spirit of cooperation and partnership" it would commit to transferring US\$13 million to the bank account of Proindicus upon the Proindicus Supply Contract entering into force...

64. The Proindicus Supply Contract was an instrument of fraud, alternatively a sham. The parties to it did not intend it to be a genuine procurement contract for the supply of goods and services at market value, but a vehicle for the enrichment of the First to Tenth Defendants at the expense of the Republic. The Republic will rely on the following facts and matters (without limitation and pending disclosure) in support of that allegation: (i) the bribery used to procure the contract as set out in Schedule 2, and the Privinvest Defendants' knowledge therefrom that the counterparty's loyalty had been purchased; (ii) as pleaded in paragraphs 69, 74, 76 below, the payment of contractor fees; (iii) as pleaded at paragraph 123 below, no honest and reasonable government official could countenance a contract on such one-sided terms; (iv) the price paid to the supplier bore no resemblance to the market value of the goods and services supplied; (v) subsequent changes to the assets to be supplied which substituted in inappropriate and less valuable types of assets with no corresponding change to the contract price; and (vi) as pleaded at paragraph 62 above and paragraph 70 below, the payment of money from Privinvest Defendants to Proindicus to prop it up...

69. By an agreement styled as a Contractor Fee Letter dated 21 March 2013, Credit Suisse CSI and CSAG agreed to accept a fee of US\$38 million from Privinvest Shipbuilding SAL in consideration for arranging the Proindicus Facility three weeks earlier (clause 3). Mr Pearse was one of two signatories on behalf of Credit Suisse CSI and CSAG, signing in his capacity as a Managing Director, Emerging Markets, Fixed Income. Mr Boustani was one of two signatories for Privinvest Shipbuilding SAL...

123. As a review of the contracts would have disclosed, no honest and reasonable government official could countenance the one-sided terms of the Proindicus and EMATUM Supply Contracts. Without prejudice to the generality of that allegation, the following matters will be relied on in support of it:

123.1 the entire price was to be paid to the suppliers up front..

123.2 the suppliers were entitled to subcontract all or any part of the works to third parties of the suppliers' choice..

123.3 the prices stated could be increased by the suppliers to include "any other increased costs or expenses as a result of the operation of the provisions of this Contract...and

123.4 the delivery timetable under the EMATUM Supply Contract was "indicative only..."

52. I have not here cited all of the contents of the various paragraphs cross-referred to in paragraph 64. But the matters pleaded in paragraphs 62,69 and 123, along with allegations which I have already summarised, give a sufficiently full flavour. Similar allegations are made in respect of the EMATUM and MAM Supply Contracts. I shall refer to this allegation as the "Instrument of Fraud Allegation" ("IFA").
53. I now set out below the relevant claims and the essential components thereof although in a slightly different order to that in the Particulars of Claim, to make them easier to follow.

The Guarantee Claim (paragraphs 102-108 of the Particulars of Claim)

54. This is made against D1 and D2, being the other parties to the Guarantees. It alleges that the Guarantees are void and/or unenforceable as being tainted by illegality or that they are or should be rescinded. The two broad grounds are that (a) they were given *ultra vires* certain Mozambican laws and/or were signed by Mr Chang on behalf of the Republic without authority and/or (b) they were entered into by D1 and D2 in the knowledge that bribes had been or would be paid, that they were *ultra vires*, that Mr Chang was acting without authority or in breach of his fiduciary duty to the Republic and that the Proindicus and EMATUM Supply Contracts were instruments of fraud and/or shams.
55. This claim is of course outwith the arbitration clauses since it is not made against any of the Privinvest Defendants.

The Bribery Claim (paragraphs 129-131 of the Particulars of Claim)

56. This is made against all Defendants. As already noted the recipients of the bribes are said to be the CS Team Defendants and certain Mozambican individuals some of whom were officers of the Republic. I refer to the latter as “the Mozambican Officials”. The payors of the bribes are said to be some or all of the Privinvest Defendants.
57. Although, D1, D2 and D11 neither paid nor received any bribes, the claim is made against them on the basis of vicarious liability for the wrongdoing of the CS Team Defendants.
58. It is further alleged that all Defendants are liable as joint tortfeasors.
59. The relief claimed is for restitution of all bribes paid or received and an account of profits, proprietary relief and a separate claim for damages.
60. I have already noted in paragraphs 19 and 20 above that some or all of the underlying payments have been admitted by D1 – D5 and D11, with D1, D2 and D11 accepting that they were bribes.

The Dishonest Assistance Claim (paragraphs 136 - 138 of the Particulars of Claim)

61. This claim is made against D1 – D10. It begins by alleging that the Mozambican Officials were in breach of their fiduciary duties to the Republic by accepting the bribes (“the Breach of Duty”). It is then alleged that D1-D10 dishonestly assisted the Mozambican Officials in the Breach of Duty. That assistance included the facilitation of the bribery itself, D1 and D2’s entering into the Guarantees in the manner already alleged, and the Suppliers’ entry into the Supply Contracts. A claim for an account and/or equitable compensation is then made.

The Knowing Receipt Claim (paragraphs 139-140 of the Particulars of Claim)

62. As against D1-D10, it is alleged that insofar as they received any fees or other payments directly or indirectly from the Republic, in respect of the three transactions, they received them in circumstances where it would be unconscionable for them to retain them. In particular, they knew or were reckless as to whether such fees were derived from the Breach of Duty.

The Proprietary Claim (paragraphs 141-142 of the Particulars of Claim)

63. This alleges that the Republic is entitled to an account of profits and/or equitable compensation from D1-D10 “in the premises” and that the Republic is entitled to trace into the proceeds of any sums received by them as a result of the Breach of Duty.

The Conspiracy Claim (paragraphs 132-135 of the Particulars of Claim)

64. It is alleged against D1-D10 that they conspired to defraud the Republic by unlawful means with a “key aim of the conspiracy being to render the Republic liable under the sovereign guarantees”.
65. The unlawful means relied upon are:
- (1) The bribery;

- (2) The entry by D1 and D2 into the Guarantees with the knowledge alleged;
- (3) The entry by the Suppliers into the Supply Contracts which were instruments of fraud and/or shams;
- (4) The dishonest assistance given to the Mozambican officials;
- (5) Knowing receipt of the proceeds of the dishonest assistance.

66. It is then pleaded that the Republic suffered loss and damage as a result of the conspiracy.

Losses claimed (paragraphs 152-155 of the Particulars of Claim)

67. In summary, the losses claimed are as follows:

- (1) All amounts paid or payable by the Republic in respect of the three transactions. In reality, this means the sums paid or payable under the Guarantees;
- (2) All payments made under the 2023 Eurobonds;
- (3) Fees and expenses incurred in respect of the EMATUM Exchange;
- (4) Macro-economic losses including those relating to the damage to the Republic’s economy arising from the withdrawal of financial support from the IMF and other donors when they became aware of the “illegal and secret lending” made by D1 and D2.

The Application for Service Out of the Jurisdiction

68. It was necessary for the Republic to obtain permission to serve these proceedings on D6-D10 out of the jurisdiction. It made an application for such permission on 18 July 2019 and permission was granted on 16 August 2019. That permission was not subsequently challenged. However, both sides have relied upon different aspects of that application and the evidence filed in support, in aid of their respective characterisations of the claims in the Main Action. I did not find this to be of any real assistance.

THE PARTIES’ POSITIONS

69. The parties’ positions on the Scope Issue are diametrically opposed. In summary, the Prinvest Defendants contend as follows:

- (1) The IFA is itself covered by the arbitration clauses;
- (2) The IFA is an essential element of all the claims made against the Prinvest Defendants;
- (3) Accordingly, all the claims are caught by the arbitration clauses;
- (4) Alternatively, the IFA alone is caught by the arbitration clauses and therefore a mandatory stay of that issue follows. In that event (and depending on the outcome of the Application as a whole) a case management stay in respect of the remainder of the claims against the Prinvest Defendants would or might be sought.

70. The Republic for its part, contends as follows:

- (1) The IFA is not caught by the arbitration clauses;
- (2) None of the substantive claims are caught;
- (3) Accordingly, no part of the Main Action falls within the arbitration clauses;
- (4) Alternatively, and at worst, only the IFA itself is caught. In that event (and depending on the outcome of the Application as a whole) if a case management stay in respect of the remainder of the claims against the Prinvest Defendants was sought, it would be resisted. Accordingly, for the most part, the Prinvest Defendants would still have to defend the Main Action here.

THE INTERPRETATION OF ARBITRATION CLAUSES UNDER SWISS LAW

71. Although the wording of the arbitration clauses in the Proindicus and EMATUM Supply Contracts on the one hand, and that in the MAM Supply Contract on the other, are slightly different (see paragraphs 8 to 10 above) neither side contended that anything material turned on this difference. Both clauses refer to “disputes” and neither is confined to claims made under (i.e. pursuant to) the contracts as denoted by the use of the words “in connection with this Project” and “in relation to this contract” respectively.
72. In particular, the Republic accepts that if there had been in the Main Action a claim as against the Suppliers that the Supply Contracts were invalid or void, such a claim would fall within the arbitration clauses. However, no such claim is made. As already noted, it is made in the arbitrations but solely for the purpose of establishing that there was no operative arbitration clause or Supply Contract as a whole so far as the Republic is concerned.
73. The Swiss Law experts gave evidence about the proper approach to the construction of arbitration clauses in general. There was, in the end, much common ground between them and at least some of the differences between them seemed to me to be essentially ones of emphasis. Nor was this a case where one expert was manifestly more (or less) plausible or qualified than the other. Finally, at the end of the day, I doubt whether there was much difference between Swiss Law and English Law on the question of interpretation.
74. I now set out my observations and findings in respect of that evidence.
75. First, given that in this case there is no evidence of matching subjective intent (a factor relevant to the Swiss Law of contractual interpretation) the clauses must be interpreted objectively.
76. Dr Besson thought that while there was no principle that the particular words used in any arbitration clause could be disregarded, the Swiss Courts often interpreted clauses in the same way (i.e. to cover the dispute in question) where their words were different. Professor Widmer queried this but since she accepted that the words of both clauses here were broad nothing turns on this point in my view.
77. Both experts agreed that there was a supplemental principle of interpretation in this context called “*in favorem arbitri*”. However, while Dr Besson said that this principle would be applied in every case, Professor Widmer said that it would only apply in cases of doubt. It certainly could not be used to dislodge what would otherwise be the parties’ objective intentions or the clear language of the clauses. It seemed to me that this principle reflected first the civil (and EU) concept of “*effet utile*” i.e. one interprets a provision so far as possible to make it work, with which Dr Besson agreed. By definition that is likely to arise in practice only when there is an issue as to whether the clause would work or work fully, depending on the interpretation chosen. That is not an issue which arises here. Second, the principle reflected the underlying idea that parties to an arbitration agreement must be deemed to have intended that arbitration should be the single forum for the resolution of all disputes arising between them, as opposed to the court. This is familiar to English lawyers as the “one-stop shop” principle. I accept that there is such a Swiss law concept but it seemed to me to be no more than a subset of the objective test in the particular context of arbitration. For example, and as Dr Besson accepted, such a principle does not mean that one ignores the words of the clause so that any dispute between them must be deemed to be subject to the clause. Equally, he accepted that if one focuses on the need to show a connection between the dispute and the contract in question, it is not correct that “any” connection will do. It has to be a “sufficient” connection. Since there is no legal definition of sufficiency, he said that the question of sufficiency has to be determined in each case in a contextual fashion.
78. Further, the application of a one-stop shop approach becomes problematic when, as here, there are three separate relevant arbitration clauses each of which is said to capture all of the claims in the Main Action. Thus, in theory, there would have to be three separate arbitrations. But if so, the utility of the one-stop shop principle appears to me to be somewhat limited. This scenario was posited to the experts as an example. Dr Besson’s response was to say first that this may

simply show that the (different) parties to each clause were insufficiently organised or properly advised. I do not see how this is an answer. Second, he says that one can take into account the fact that the three separate arbitrations are likely to be consolidated or managed together. I can see that this might happen (and indeed it has largely happened here) but one surely cannot assume this at the outset. Third, he said that if a multiplicity of clauses creates a “tension” then so be it. But that is not really an answer either, since if at all possible, the process of interpretation should involve removing such tension. In my view, at the very least, the fact that the context here includes the making of three different arbitration agreements is relevant to the interpretive exercise. I accept of course that the arbitration agreements were not all made at the same time. However, at the time of the making of the Proindicus Supply Contract there must have been in contemplation at least the second and third such contracts.¹ Moreover, the immediate context for the EMATUM Supply Contract was the prior Proindicus Supply Contract and both of those would then have formed the immediate context for the final MAM Supply Contract. So any point on timing does not dispose of the matter.

79. On the other hand, I disagreed with the initial approach of Professor Widmer to the “multiplicity” point which seemed to envisage two stages of analysis where there were multiple relevant arbitration agreements. First, one had to “allocate” a claim to one of the contracts and then (and only then) consider if the arbitration clause covered it. That seemed a novel proposition and in the end her position was simply that the existence of multiple contracts and arbitration clauses was a relevant factor when considering the application of the objective test. I agree with that.
80. A further point made by Professor Widmer was that when one moved away from claims on the contracts themselves (including for these purposes their validity or otherwise) and considered a tort claim, it should only be viewed as covered if the injured party would putatively and in good faith have anticipated that the agreement in question would cover the tort in question. This led to a somewhat sterile debate as to whether what was to be anticipated was the commission of the tort or the fact that, if committed, it should be subject to arbitration. On this point, I agree with Dr Besson that this is too restrictive an approach. If (as Professor Widmer also maintained) all of this is a facet of the objective principle, then what one does is to see whether the tort claim in question had a “sufficient connection” to the contract. No separate principle of interpretation was needed, provided it was recognised that a tort claim as opposed to one made under the contract may be found to be outwith the clause. I think that ultimately Professor Widmer agreed with this approach. The objective test itself considers the question of what the parties must reasonably have intended and, in the civil law context, that would include acting in good faith.
81. On that basis, I find as follows so far as Swiss law interpretive principles of arbitration clauses are concerned:
- (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.

¹ The Prinvest Defendants’ own case is that “each project [was] designed to support the others as part of a package (as is explained in paragraph 10 of Mr Valentijn’s statement).” – see paragraph 27 (1) (b) of their Skeleton Argument. Mr Valentijn refers in paragraph 10 to the projects within each Supply Contract as forming part of an integrated project (“the Mozambique Project”) which the Prinvest Defendants were asked to deliver.

THE LAW

Introduction

82. Section 9 of the Act provides as follows:

“(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 had 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 is null and void, inoperative, or incapable of being performed.”

83. The issue of law which arises here is how to approach the identification of the “matter” which is caught by the arbitration clause, in respect of which proceedings have been brought. In a simple “one-claim” case, this is often a very straightforward exercise. The question is usually whether the claim falls within the clause or not. In complex litigation involving multiple claims and multiple defendants the exercise may be more difficult.

84. It is common ground that the mandatory stay imposed by s9(4) can be applied *pro tanto*. It may be found that Claim A in the case is caught by the clause while Claim B is not. If so, only Claim A is stayed, and the question will then arise as to whether Claim B should be the subject of a case management stay pending the arbitration. That issue can itself be difficult to resolve.

85. Two cases are of considerable assistance here. The first is *Tomulugen v Silica* [2015] SGCA 57, a decision of the Singapore Court of Appeal. The facts are instructive. An unfair prejudice claim was brought by a minority shareholder against the company itself, other shareholders, and some directors. The plaintiff had acquired its shares from one of the defendant shareholders, Lionsgate. There were four key allegations said to amount to the relevant prejudice. The share sale agreement pursuant to which Lionsgate sold the shares to the plaintiff contained an arbitration clause which covered “*any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination*”. Lionsgate applied to stay the entire proceedings against it pursuant to the Singaporean equivalent of section 9. By the time of the appeal, it was common ground that two of the four allegations were outwith the clause. As to the balance, one was that a subsequent issue of shares was an improper dilution of the plaintiff’s shares (“the Share Issuance Allegation”) and the other was that the plaintiff’s legitimate expectation of participation in management had been denied (“the Management Participation Allegation”).

86. At paragraph 108 of the lead judgment of Sundaresh Menon CJ, the Court said that there was a two-stage process. The first was to identify what the matter or matters in the proceedings were and the second was to see whether the matter(s) fell within the clause. The Court went on to say as follows:

“113 In our judgment, the starting point of the analysis is the language of s 6 of the IAA, which clearly recognises that the court, when faced with a stay application, is not presented with a binary choice which confines it to either staying the proceedings entirely and so forcing the parties to arbitrate, or refusing the stay and allowing the court proceedings in their entirety to continue. Instead, s 6(2) contemplates that the court is to stay the proceedings “*so far as [they] relate to [the] matter*” [emphasis added]. This seems to us to militate against taking an excessively broad view of what constitutes a “matter” or treating it as a synonym for the court proceedings as a whole. In our judgment, when the court considers whether any “matter” is covered by an arbitration clause, it should undertake a practical and common-sense inquiry 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.....

121 Our third and final reason for rejecting the broad approach canvassed by Silica Investors is that it is ill-suited to the reality that disputes may be complex and engage disparate factual and legal issues. Characterising a “matter” at an unduly high degree of abstraction may carry with it the elegance of simplicity and convenience. But, any attempt to boil down a complex dispute to a singular aspect of its essence would be contrived. This case presents a perfect example. There are four distinct allegations made

in support of the main complaint that the affairs of AMRG have been conducted in an oppressive or unfairly prejudicial manner towards Silica Investors as a minority shareholder. At least the second of the four allegations (*ie*, the Management Participation Allegation) has an immediately apparent and undeniable nexus to the Share Sale Agreement. On the other hand, it is not disputed that the latter two allegations...have no relation whatsoever to the Share Sale Agreement. To say that each of these allegations, although quite different from one another, all form part of the same matter, and that the court must then decide whether the matter as a whole falls within the scope of the arbitration clause in the Share Sale Agreement seems unprincipled and, indeed, artificial. Another example of the strain which an overly broad approach entails would be where a party to a contract containing an arbitration clause brings a claim for unlawful means conspiracy against the other contracting party and a third party, with the alleged breach of the contract relied on as the unlawful means in question. While the court may conceivably consider that the conspiracy claim against both defendants falls outside the scope of the arbitration clause, that would be to ignore a substantial issue - the question of breach of contract - which plainly arises out of the contractual relationship between the two contracting parties.”

87. The Court went on to conclude that the Share Issuance Allegation was outwith the clause whereas the Management Participation Allegation was within it. That was because the sole source for the claimed legitimate expectation was a provision within the share sale agreement which obliged Lionsgate to support a board resolution of the company that a representative of the plaintiff be appointed a director. The Court added that in reality this was a short point of construction which could be decided swiftly by arbitration.
88. What is important to note is that the overall unfair prejudice claim was not referred to arbitration (even though the Court found that it would have been arbitrable) but only one element of it.
89. The second case is that of *Sodzawiczny v Ruhan* [2018] 2 Lloyds Rep 280, a decision of Poplewell J (as he then was). He essentially followed *Tomulugen* and observed as follows:

“42 Commercial disputes often involve more than one cause of action and a number of alternative or cumulative defences in relation to each. It is trite to observe that the problem being considered arises in the context of what will often be a dispute involving multiple issues. Even a single cause of action may involve some issues which are arbitral and others which are not, depending on the scope of any potentially applicable arbitration agreement. This would be so, for example, in the case of a claim in the tort of conspiracy to injure by unlawful means, where the unlawful means are breaches of a contract between the parties, where the arbitration clause on its true construction applies to contractual but not tortious disputes. Moreover the grounds for disputing a claim may involve a claim of compromise, discharge, estoppel, and limitation provide obvious examples. So too does a transactional set-off arising out of a different contract or tortious liability.

43 The approach to what constitutes a matter in section 9 in respect of which the proceedings are brought should be capable of application in all these different circumstances and many in between, all of which are contemplated by the section. 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..
- (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...
- (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...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...

90. I would respectfully endorse those observations but would add the following. The purpose of the search for the issue in the manner suggested is to find “candidates” for the application of the arbitration clause. It is important that, as the Court in *Tomulugen* said, the search is neither too broad nor too narrow. And while I agree that the search is not limited to the “main” or “most substantial” issue in the proceedings in question, it must at least be “reasonably substantial” as, again, the Court in *Tomulugen* stated. That particular point was cited with approval by Blair J in *Autoridad del Canal v Sacyr* [2017] 2 Lloyds Report 351 at paragraph 129, and then in turn by Sir Richard Field in *China Export v Emerald* [2018] EWHC 1503 at paragraph 58.
91. In the actual case before Poplewell J, the exercise of identifying the issues and then determining their coverage by the clause was relatively straightforward. The parties had entered into a comprehensive settlement agreement dealing with their various disputes and which then prevented them from making any further claims against each other. The claimant subsequently made primary substantive claims against the defendant for breach of trust and fiduciary duty and the like, which the defendant said were compromised by the settlement agreement which contained an arbitration clause. The claimant made a secondary claim which was that insofar as the primary claims were compromised by the settlement agreement the latter itself had been obtained by fraud and was therefore void and ineffective as a compromise. The defendant said that both primary and secondary claims were caught by the clause which referred to “any dispute arising out of or in connection with the performance or non-performance of this Agreement.” Poplewell J held that both sets of claims fell within the clause. In that context he said this:

“51 The presumption in favour of one-stop adjudication has particular potency where there is an agreement which is entered into for the purpose of settling disputes. Where parties to a dispute enter into a settlement agreement, the disputes which it can be envisaged may subsequently arise will often give rise to issues which relate both to the settlement agreement itself and to the previous circumstances which gave rise to the dispute. It is not uncommon for one party to wish to impeach the settlement agreement or challenge its scope and to advance a claim based on his alleged pre-existing rights. In such circumstances rational businessmen would intend that all aspects of such a dispute should be resolved in a single forum. This is especially so because in considering any dispute about the scope or efficacy of a settlement agreement, the tribunal is likely to have to consider the background, of which an important element will often be the circumstances in which the pre-existing dispute arose and the alleged rights of the parties which preceded the settlement agreement. There will therefore often arise a risk of inconsistent findings if the tribunal addressing the validity or efficacy of the settlement is not seized of jurisdiction to address the pre-existing disputes and the latter fall to be determined by a different tribunal. This is no less true when a settlement agreement is in terms alleged to be wide enough to cover unknown or unidentified disputes: it will be envisaged that the settlement agreement will be invoked in the context of claims allegedly within its scope, which will often require adjudication on the validity of the claims as well as the effect of the settlement agreement.”

92. I refer to this not simply because the case before me is not a “settlement” case. I do so because it shows that under English law the “potency” of the “one-stop shop” principle can clearly vary from case to case. I think that the same can be said of the “*in favorem arbitri*” principle of Swiss law discussed above.

ANALYSIS

Overview

93. It is correct to say that however one expresses it, the overall misconduct alleged arises out of the alleged corrupt procuring by the Defendants of a number of transactions with the SPVs or the Republic which consist of the Supply Contracts, the financing therefor, and the Guarantees. The corrupt scheme could not exist without all three elements. That is because the Prinvest Defendants would only be able to make money from the Supply Contracts if they were financed and they would only be financed if the loans were guaranteed. Moreover, the fees received by D1 and D2 (as distinct from the bribes paid to the CS Teams Defendants) could only arise if there were loan agreements to generate them.
94. However, the emphasis in the Main Action on the provision of the Guarantees and the description of that as “a key aim of the conspiracy” was not, in my view, some artificial characterisation of the claims in order to distance them from the arbitration clauses, as the Prinvest Defendants contend. From the Republic’s point of view this was the key element because this is how its liability and potential for loss arises. It makes no claim under the Supply Contracts, not because it has chosen not to do so but because it cannot do so.
95. The fact of multiple arbitration clauses does in my view suggest that in general terms, a narrower approach to the sufficiency of the connection is required. The fact that one has three separate arbitration clauses suggests, objectively, that all those parties must have intended that each provision is a dispute resolution procedure principally intended for that particular contract. In general, that militates against, rather than for, the inclusion under each clause of the claims made generically against parties who are not restricted to the Suppliers and which in theory would have to be arbitrated three times over. As noted above, it cannot be assumed at the outset that they would be consolidated or jointly managed.
96. A further contextual point is that the EMATUM and MAM sub-contracts (which state that they are “back-to-back” with the relevant Supply Contracts) made between the Suppliers and Logistics prescribe English governing law and the exclusive jurisdiction of the English courts (as did the loan agreements and the Guarantees). A point was made about their timing in relation to the sub-contracts because they were in each case made several days after the Supply Contract to which they related. I do not think anything turns on this from the point of view of their constituting part of the interpretive context for essentially the same reasons I gave in respect of the timing points on the Supply Contracts (see paragraph 78 above). Those sub-contracts also import from the Supply Contracts the rights and duties as between the relevant SPV and Supplier. This is in circumstances where Logistics contend that they themselves must also be considered parties to all three Supply Contracts. So, in a putative dispute involving the Supply Contracts and the sub-contracts and which includes one or more Suppliers and Logistics, there may be a potential clash between the arbitration clause in one contract and an English jurisdiction clause in the other, not to mention the difference in governing law. But in any event, the sub-contracts clearly form part of the context to the Supply Contracts.
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.
98. In my detailed description of the Main Action in paragraphs 48 - 67 above, I have sought to identify the issues or, to use the language of the arbitration clauses, the “disputes” between the Republic and the Suppliers, with the appropriate degree of granularity. This exercise has also been responsive to the way in which the parties have put their cases. The focus has been on each separate claim and its elements, but also upon the IFA Allegation, standing on its own, in the light of each side’s alternative case. I consider the individual claims first.

The Bribery Claim

99. It is obviously correct that part of the Republic's case on bribery is that the reasons for paying the bribes included the procuring of the Supply Contracts along with their financing and the Guarantees. To that extent, the IFA is relevant. On the other hand, this tort is not dependent on the making of a particular contract (see Clerk & Lindsell on Torts, 22nd Edition paras. 18-55-18-56). So the IFA is not actually an essential element of the claim.
100. So far as relief is concerned, the remedies claimed in terms of the amount of the bribes, the profits therefrom or their traceable proceeds are not concerned with the proceeds of the Supply Contracts. As to damages, they relate back to the losses claimed at paragraphs 152-154 of the Particulars of Claim which I have dealt with at paragraph 67 above. None of those encompass the proceeds of sale from the Supply Contracts. There is, however, a claim for an account of profits which necessarily is an alternative to the claim for damages. In theory, that could include, for the Prinvest Defendants, some of the proceeds of the Supply Contracts. However, whether an account of profits will be ordered will only be decided at the end of the trial since the Republic will have to elect then between it and damages if it succeeds on liability. So this remedy simply does not arise now.
101. In my view, the fact that the IFA forms a background, even an important one to this claim does not bring the claim within the arbitration clause. The claim is not sufficiently connected.²

The Dishonest Assistance Claim

102. Again, the IFA is an important background matter because this claim starts with the Breach of Duty. It is true that paragraph 136 of the Particulars of Claim then goes on to say that the transactions failed to comply with the Constitution and the law, which would appear to relate only to the Guarantees. However, as I have already said one cannot ignore the relevance of the procuring of the Supply Contracts to the bribes.
103. As to the dishonest assistance of the Breach of Duty, paragraph 137.3 pleads that one aspect of this is the entry of the Suppliers into the Supply Contracts. It is a less direct form of assistance than actually facilitating the bribes. While I can see how, logically, it can be said that the Breach of Duty is assisted (or perhaps more accurately completed) by the actual entry into the Supply Contracts, it is a somewhat artificial point and does not itself depend on anything other than the entry into the contract. As such, I do not think that it really adds much to the claim. As for remedies, the position is the same as for the Bribery Claim.
104. In my view, the position with the Dishonest Assistance claim is essentially the same as for the Bribery Claim and it falls outside the arbitration clause.

The Knowing Receipt and Proprietary Claims

105. These can conveniently be taken together. They depend on knowledge and/or recklessness as to the Breaches of Duty as to which the IFA is a background matter. As for remedy, this is limited (as it must be) to monies actually received by the Prinvest Defendants. However, lest it be thought otherwise, the Republic does not suggest that any proceeds of sale of the Supply Contracts constitute such sums in the hands of those Defendants. That is unsurprising since no such monies were paid by the Republic to those Defendants. The fact that the Republic is or may be liable under the Guarantees does not alter the position. The same goes for the Proprietary claims.

² A point was made in paragraph 47 of the Prinvest Defendants' Skeleton Argument that bribery in Swiss Law amounts to *culpa in contrahendo* and that the Swiss Law of "absorption" makes it a contractual claim. In fact, there was an issue as to how far the absorption point was really before the experts (it had not been pleaded) and what they actually thought about it – see Day 1, pp99-100, Day 2, pp21-23 and 27. In any event, even if it could lead to a contractual claim, there is no such claim made here (and could not be, by the Republic), only in tort, and I do not consider that however characterised, it make the claim sufficiently connected here. See also the disagreements between the experts set out at items 22 and 23 of the Joint Statement. The overarching point remains whether the claim (or dispute, if different) is "sufficiently connected".

106. In those circumstances, the Republic frankly concedes that on the face of it, these are claims which are likely to end up going nowhere. The Prinvest Defendants argue that this is why they must relate to the proceeds of the Supply Contract even though the Republic says otherwise. However, I think the Republic is entitled to make clear what its case is or is not about, if there were any doubt. The various claims have been comprehensively pleaded in many different ways, which is not surprising in a substantial fraud case of this kind. It is equally unsurprising that it may turn out (as it often does) that some claims or remedies prove to be of no utility. But that is no reason not to characterise them as something else.
107. In those circumstances, in my view, these claims are plainly outwith the arbitration clauses. They fall into the same category as the Bribery and Dishonest Assistance claims in my view.

The Conspiracy Claim

108. Of the five separate unlawful means relied upon, pleaded in paragraph 133.3 is the “entry by the Suppliers into the Supply Contracts which were, as alleged,... instruments of fraud, alternatively shams.” ie the IFA.
109. The Prinvest Defendants’ principal contention is that the inclusion of the IFA here is sufficient to “infect” as it were, the entire conspiracy claim, so that the whole of it is subject to the arbitration clauses. I cannot see that, on an objective basis, this can possibly be right. It would mean that each set of parties to the three different arbitration clauses would have reasonably contemplated in good faith that a wide-ranging conspiracy claim brought against them and others, where the IFA is only one out of five unlawful means and which itself seeks no relief should be litigated in three arbitrations. Although, there is, through the IFA, a connection to the Supply Contracts, the Conspiracy Claim as a whole is a completely different “ball-game” involving allegations and consequences going far beyond the confines of each individual Supply Contract. Moreover, it is worth noting that the Court in *Tomulugen* did not countenance the notion that the entire unfair prejudice claim should be remitted to arbitration but only one element of it. As to the latter, I deal with this separately in paragraphs 111 to 118 below. However, the claim as a whole is plainly insufficiently connected to the Supply Contracts here and is thus outwith the arbitration clauses.

The Claims taken together

110. The Prinvest Defendants also make an overarching point that the entire collection of claims against them fall within the arbitration clause because the case is “all about” the Supply Contracts. Since I have rejected the contention that any individual claim falls within it, this overarching point does not arise. In any event, if one was prepared to look at the matter so broadly, since it is a collection of tortious and equitable claims which involve very much more than simply the Supply Contracts, and where there is no claim on those contracts themselves, one would be bound to reach the conclusion that this collection is obviously outwith the clauses. Indeed, the Court in *Tomulugen* made the point that an over-broad approach to the identification of the relevant “matters” should be avoided precisely because it might otherwise rule out the applicability of the arbitration clause without more.

The IFA Allegation

111. I then turn to IFA taken by itself. It is not a “claim” because no relief is sought pursuant to it. I accept that this does not mean that it cannot be covered by the clause. And an arbitration could decide the IFA Allegation, just as the Court in *Tomulugen* held that an arbitration could determine the discrete question of the Management Participation Allegation. I also accept that the IFA cannot be dismissed as merely peripheral so that it is incapable of counting as a “matter”. Equally (and again as with *Tomulugen*) the fact that it relates to claims made against other Defendants as well as the Prinvest Defendants is not *per se* a bar to coverage by the clause.
112. There can be no doubt that the IFA will be (in any Defence) hotly contested. To that extent, there is a dispute between the parties and it is “connected” with those contracts.

113. The real question however, in my view, is whether it is “sufficiently” connected. In my judgment it is not.
114. First, the context here requires that a narrow approach to sufficiency is taken. See paragraphs 95 to 97 above. This applies just as much to the analysis of the IFA as it does to the individual claims. As a matter of objective intent, and on the facts of this case, it seems very unlikely that where (on this hypothesis) the substantive claims themselves are outwith the arbitration clauses, nonetheless, one particular allegation should be stripped out of the proceedings as a whole to be arbitrated while the Court deals with everything else. That would lead here to serious fragmentation with the prospect of the Republic and the Privinvest Defendants fighting on (at least) two fronts at the same time. Nor should it be putatively assumed that there would be a case management stay of the proceedings here as an antidote. In my judgment, the grant of such a stay here would be seriously open to doubt. I accept of course that the prospect of fragmentation may simply be the cost of respecting the parties’ agreements to arbitrate, a point made by Popplewell J in *Sodzawiczny*, in the context of explaining why an issue-based application of section 9 is appropriate. However, I am not here dealing with that matter. I am dealing with the separate issue of what can be said to have been objectively intended (or not intended) in respect of the scope of the clause.
115. Second, it should be noted that the IFA does not in fact involve any legal analysis of any particular contractual term (cf *Tomulugen*) as opposed to whether certain terms make the contract “one-sided” and if so, whether an honest and reasonable official could have countenanced them or whether the initial price or the price for changes were excessive (elements (iii), (iv) and (v) using paragraph 64 as the exemplar). Other elements are yet more remote from the contract, namely the bribery (already rejected as a separate claim), the payment of fees to D1 and D2, and further payments to the SPVs by the Privinvest Defendants to “prop them up” (elements (i), (ii) and (vi)). In my judgment, there is no sufficient connection constituted by these elements.
116. Third, in the circumstances of this case, I consider that the fact that no relief is actually claimed pursuant to the IFA is relevant and further deprives this matter of the necessary immediacy to the underlying contract.
117. Finally, in my judgment, the IFA here clearly falls on the other side of the line drawn by the Court in *Tomulugen* in relation to the Management Participation Allegation. It also falls on the other side of the line to the example given by the Court in *Tomulugen* at paragraph 121 of an allegation of breach of contract which forms the unlawful means for a conspiracy claim brought against a third party as well as the party in breach of contract (see paragraph 86 above). That example is also referred to by Popplewell J in *Sodzawiczny* at paragraph 42 (see paragraph 89 above). That example plainly presupposes that there is a claim for breach of contract made against the other contracting party and that there is then the separate conspiracy claim so as to bring in the third party. The unlawful means element is thus reproducing a direct contractual claim already made which presumably seeks relief against the other contracting party. That is quite different from the case before me. Of course, these differences on the facts are not determinative but in my view they provide a useful pointer.
118. Accordingly, I conclude that the IFA is also outwith the arbitration clauses.

CONCLUSION

119. It follows that the Scope Issue has been decided in favour of the Republic, and against the Privinvest Defendants in its entirety. The result is that there is now no need for a trial of the balance of the issues arising under the Application because in any event there are no “matters” in respect of which these proceedings have been brought which are subject to the arbitration clauses. On that basis, the Application should be dismissed.
120. I am most grateful to Counsel for their excellent written and oral submissions and I will hear them on all consequential matters following the handing-down of this judgment.