Negative Effect of Competence-Competence in Mozambique Fishing Project Dispute: Case Headed to Arbitration

By:

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The Privinvest Group, ("Prinvinvest"), an Abu Dhabi, United Arab Emirates based holding company operating in the shipbuilding industry, has obtained a decision in the proceedings against it introduced by Mozambique to be stayed in favor of arbitration. (See, *Republic of Mozambique v Credit Suisse International and others [2021] EWCA Civ 329, 1 March 2021, Justices Carr, Singh and Henderson*) The decision rendered on March 11, 2021 pertains to a jurisdictional dispute brought under Section 9 of Mozambique's 1996 Arbitration Act relating to the competence of the arbitral tribunal.

The dispute arose from 2013 loan arrangements from Credit Suisse International, ("CSI"), to Mozambique's Ministry of Finance to establish an Exclusive Economic Zone to combat illegal fishing ("ProIndicus Project") and to establish a tuna fishing fleet ("Ematum Project"). The loan agreements totaled 1.5 billion USD. Privinvest was to execute the two projects via three supply contracts with State Owned Entities. CSI syndicated and sold via loan notes the loan. Mozambique restructured the debt in 2016.

Two of the Privinvest supply contracts contained an arbitration clause providing that Swiss law would govern the contracts and the choice of forum was ICC arbitration according to the ICC Rules, with a seat in Geneva. The third contract provided for the Swiss Chambers Arbitration Institution, ("SCAI"), in accordance with the rules of the SCAI. It is worth noting that the Republic did not sign the sub-contracts, as the supply sub-contracts were entered by Special Purpose Vehicles (SPVs). (See, *Proindicus SA ("Proindicus"), Empresa Moçambicana de Atum SA ("EMATUM") and Mozambique Asset Management ("MAM"). Each is a Mozambique company wholly owned by the Republic and set up for the purpose of entering the Supply Contracts*) However, Privinvest later subcontracted the projects with a dispute resolution clause indicating the courts of England and Wales.

Mozambique then sought to dispute the arrangement by claiming that the Minister of Finance had no authority to enter in the 2013 loan for the two projects, due to bribery, conspiracy and fraud allegations. The case started in the United States where a Bill of Indictment was filed on 19 December 2018 in the United States District Court for the Eastern District of New York. (See, *Case Cr No 18-681 (S-1) (WFK)*) The case continued in the UK against ten defendants, among which CSI and Privinvest. (See, *Mozambique v Credit Suisse International, 2020 WL 03577734 (8 April 2020) (Justice Waksman)*)

Privinvest applied for a stay of the proceedings under the Arbitration Act 1996 section 9, asserting that while some of the contracts were subject to English law and the jurisdiction of the Courts of England and Wales, the supply contracts were subject to Swiss law and arbitration. In the judgment dated 30 July 2020, Justice Waksman provided guidance on how to determine whether a "matter" fell within the scope of the arbitration agreement given the complexity of the dispute. Justice Waksman dismissed the application

concluding that the claims brought by Mozambique fell outside the scope of the arbitration agreements enshrined in the supply contracts.

Privinvest appealed the judgment. While the English Court of Appeal (the "Court") decided that the findings regarding the question of the interpretation of the arbitration agreement as a matter of Swiss law were correct, the appeal was still upheld. Indeed, the Court stated that the heart of the appeal rested on whether or not the Judge's application of the law to the facts of the case was correct. The Court then found that the lower court had erred in finding that the fraud allegation was not sufficiently connected to the supply contracts to fall within the scope of the arbitration agreements.

Additionally, the appeal decision opted for a pragmatic approach in stating that in so far as "[t]he application of s. 9 can give rise to particular difficulties both as a matter of analysis and procedure, (…) the sanctity of the parties' agreement takes priority" (*Republic of Mozambique v Credit Suisse International and others [2021] EWCA Civ 329 (1 March 2021) (Justices Carr, Singh and Henderson), para 70*).

Privinvest is represented by Duncan Matthews QC of Twenty Essex, Ben Woolgar and Frederick Wilmot-Smith of Brick Court Chambers, and Signature Litigation. Mozambique is represented by its Attorney General, Nathan Pillow QC of Essex Court Chambers, Richard Blakeley of Brick Court Chambers, 3VB, and Peters & Peters Solicitors.

The decision is a win for Prinvinvest from a jurisdictional standpoint, however as cautiously indicated by the court "[w]hether or not the Republic is in fact a party to the Arbitration Agreements and whether or not Logistics Offshore and Logistics Investments can invoke the Arbitration Agreements remains to be seen". (*Republic of Mozambique v Credit Suisse International and others [2021] EWCA Civ 329 (1 March 2021) (Justices Carr, Singh and Henderson), para 124*).

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