Wednesday, 17 February 2021

(10.30 am)

LORD JUSTICE HENDERSON: I think, Mr Matthews, it's over to you when you're ready.

MR MATTHEWS: May it please the court, I appear together with Mr Ben Woolgar and Mr Frederick Wilmot-Smith on behalf of the appellants. My learned friends Mr Nathan Pillow Queen's Counsel, Richard Blakeley and Ryan Ferro appear on behalf of the respondent.

We have, for the information of the court, roughly managed to agree between the parties a division of time, which I might indicate to the court. Obviously we recognise that it is not an exact science, but recognising a maximum of 7.5 hours in 1.5 days, less, we had calculated, three 10-minutes breaks, one in each half day, leaving 7 hours, we had agreed to divide roughly 3 hours 45 minutes to the appellants, namely to me, and 3 hours 15 minutes to my opponent, and I will aim to split my time between opening the appeal and replying.

Subject to how things develop and the views of the court, that is what the parties had in mind.

LORD JUSTICE HENDERSON: Thank you. That all sounds very sensible. Obviously much will depend on how much we interrupt. I'm afraid that's always an unknown.

Subject to that, let's get cracking, thank you.

Submissions by MR MATTHEWS

MR MATTHEWS: The appellants' appeal, with the permission of Lord Justice Males, against the judgment of Mr Justice Waksman refusing a mandatory stay under the Arbitration Act 1996 of the respondent's claims against the appellants. It has become complicated but at its heart lies a simple point which we suggest, with respect, Lord Justice males spotted in giving permission to appeal and Mr Justice Waksman, with respect, missed, albeit ably steered by the respondent.

The short point is that however the respondent seeks to dress up its claims and alter the cast of its claims against the appellants, they arise in connection with or out of or in relation to the supply contracts and are therefore caught by the arbitration agreements in them.

The respondent has made two attempts to evade compliance with the arbitration agreements and the stay of their claims against the appellants that would follow. Firstly, it has amended its pleadings since the judgment to try to avoid or minimise reliance on matters or raising issues which more obviously engage the arbitration agreements, although this renders its case even more artificial.

Secondly, it has conceded important elements of this

appeal, albeit elements that in large measure constituted the weakest elements of its resistance to this appeal and in fact have the opposite effect to that which they intended.

The appellants' case is those efforts have been unsuccessful. The first conflicts with the principle enunciated by Mr Justice Popplewell, as he was, in what I shall refer to as "the Ruhan case" rather than keep trying to murder the pronunciation of Sodawiczny.

It is cited by Mr Justice Waksman in his judgment at paragraph 89 and in particular in this context paragraph 43.4 of Mr Justice Popplewell's judgment is cited there:

"The court looks to the substance, not to the claimant's artful and artificial attempts to frame their claim in such a way as to try to avoid the impact of the arbitration agreement."

So the respondent is not assisted by the fact that whereas originally the claim was said to arise out of the supply contracts as the relevant transactions, that has now been amended since the scope judgment to a somewhat ambiguous reference to the transactions being the guarantees guaranteeing the financing along with the supply contracts. For your reference, but I don't invite you to turn it up at the moment, that is in the

re-amended particulars, paragraph 26 at C1, tab 8, page 134. Although it is clear that the three transactions, as referred to now in the re-amended claim particulars, do at least still encompass the three supply contracts, that is apparent from paragraph 27 of the pleading, page 135 of the first core bundle.

The appellants have addressed the claims in their first skeleton by reference to the consolidated particulars of claim at bundle C1, tab 7, and the equivalent paragraphs to those I have identified for the court are at C1, tab 7, pages 82 to 83 on the basis --

LADY JUSTICE CARR: They were the amended particulars of claim?

MR MATTHEWS: Indeed, my Lady, yes, I'm grateful.

The reason for doing that is twofold. First, that that was what the judge was considering and, secondly, that it actually represents the less artificial presentation of the respondent's claims before they were further amended to seek to render them less arbitration-friendly.

The appellants have dealt with this in detail in our second skeleton argument at paragraphs 5 to 7, but I don't propose to go back over that orally unless necessary.

The second of the points that we identify is of

perhaps greater significance. Once the concession the respondent has rightly made is acknowledged, the rest of the dominoes on the appeal fall in favour of the appellants, and I refer here to the concession about the instrument of fraud allegation and the unlawful means instrument of fraud allegation, which I'll come back to develop in a little more detail.

In other words, we say that if Mr Justice Waksman had started from the position that the respondent now concedes instead of, with respect, starting at the other end and then wrongly deciding the point which the respondent has now conceded against the appellants, he would or should have clearly resolved in favour of the appellants the balance of the issues in his judgment and now arising on this appeal.

It is notable that despite the concessions and the alleged fundamental impact in favour of the respondent on this appeal which they claim it to have had, when it came to reconfirming the time estimate, the respondent reconfirmed that despite the supposed far-reaching nature of the concessions for this appeal, the time limit remained the same. The appellants say it was right in this but only because the concessions do not in fact undermine the appeal at all.

Moving on, we stress at the outset two elements.

The first is that, of course, the section 9 stay is mandatory, as Lord Justice Males pointed out in the Bridgehouse case, which you have in your bundle of authorities, and which I am not going to take you to at the moment unless necessary, at tab 18 at paragraph 73. In that judgment, in comments with which Lord Justice Phillips agreed, the fact that it is mandatory is a reflection of the fact that the parties have not only agreed that the disputes in connection with, in our case the supply contracts, should be arbitrated, but also that they should not be decided by the court.

Secondly, the stay operates insofar as the court proceedings involve any issue which falls within the scope of the arbitration agreement. Accordingly, this is, of course, as I am sure the court will all appreciate, not a matter of case management. This is a mandatory stay. Once the scope of that stay has been ascertained, it is a matter for the parties, and ultimately the court hereafter, to work through the practical consequences as a matter of case management. There may be all sorts of different ways of sensibly case managing such issues and claims as are not subject to the mandatory stay, but that is for another day.

Put another way, this is not about discretion or

about forum conveniens or any such discretionary or case management issues, but about the mandatory stay in favour of arbitration of so much of court proceedings as the parties have agreed shall be arbitrated and shall not be determined by the court.

It is also not about practical purpose, which is irrelevant. Again, we have dealt with the attempts of the respondent to make something of this in our second skeleton at paragraphs 14 to 16, but again, unless necessary, I do not propose to spend time orally developing further any of that. The points raised by the respondent are irrelevant even if they were right, and therefore it's not worth the time either of the appellants or of the court taking time addressing them as to whether they are right or not. We, of course, dispute them but the fact remains that they are irrelevant.

Finally, in relation to the second point, the court stays its proceedings to the extent of any dispute with which it is or will foreseeably be concerned, which is the subject of the parties' arbitration agreement. Again, citing the Ruhan case, paragraph 43.3, as referred to by the learned judge at paragraph 89. This can, of course, lead to multiple sets of proceedings.

A classic and relatively common example is unfair

prejudice claims by minority shareholders where the shareholders' agreement itself is subject to an arbitration agreement. Much, if not all, of proceedings before the court in relation to unfair prejudice may have to be stayed in favour of arbitration.

LADY JUSTICE CARR: That was the case in Tomolugen, if I have pronounced it correctly.

MR MATTHEWS: Yes, also the Fulham Football Club. There are quite a number of such cases, absolutely right, my Lady, and the point that arises from that is that much of the proceedings before the court in relation to unfair prejudice may have to be stayed in favour of arbitration but not necessarily all.

Classically again, if a remedy sought is winding-up, that may need to come back to the court on conclusion of the arbitration for the court to address a winding-up application in light of the relevant findings of the tribunal and there may therefore be a case management stay of the balance of the action in the meantime.

At one extreme, the only relief sought might be a winding-up and therefore the minority shareholders might argue, "I do not want any relief from the arbitrators", but in truth he does. He needs their determination of his factual allegations and whether they amount to unfair prejudice in the same way as here

the respondent needs and has now conceded it falls to the arbitrators to determine the factual allegations as to whether the supply contracts are in fact fraudulent, shams and corruptly bought.

So as your Ladyship has pointed out, in the example posited by Mr Justice Popplewell in the Ruhan case of a breach of contract founding a conspiracy claim where the arbitration agreement does not cover tort claims, the breach of contract foundation of that conspiracy claim falls to be determined in the arbitration albeit the implications of any such findings as are made in the arbitration may then be relevant and only relevant for the resultant tort claim. There may be no interest on the part of the claimant in a pure finding of breach, but he may need it for his conspiracy claim and he has to go to the arbitrators at least to get that.

This accords with the approach also of Chief Justice Menon in what I shall refer to as "the silica case" rather than keep torturing Tomolugen or however that is meant to be pronounced, which the learned judge cites at paragraph 86 at the end of the passage which he cites in his judgment, where:

"The fact that it is a tortious claim in conspiracy does not justify ignoring the breach of contract element that is caught by the arbitration agreement."

But as Mr Justice Popplewell also pointed out at paragraph 44 in the Ruhan case, cited in the judgment at paragraph 89 at the end, that in itself is not a sufficient reason to depart from these principles. As he expresses it:

"The desideratum of unification of process must give way to the sanctity of contract, ie the arbitration agreement. The case management power of the court in respect of the issues that remain in the proceedings is the proper way to deal with the resulting situation, not manipulation of the arbitration agreement or of the nature of the claim being brought to somehow favour the court proceedings on the basis that that would be unitary."

The other point we wish to stress at the outset is that there is a point taken against the appellants that two of the arbitrations have been stayed pending provision of security thus, it is said, indicating some lack of real enthusiasm for arbitration on the part of the appellants. That again, with respect, does not assist the court. We have dealt with it in the note to the court, which I hope the court has at bundle C2, tab 17, page 518 at paragraphs 3 to 4.

Not only, of course, are such matters confidential to the arbitrations and should not have been publicly

revealed by the respondent, but in any event it impacts only two of the arbitrations that have been commenced by the appellants against, among others, the respondent. It relates to security for the costs of the arbitrations and the appellants have not been ordered to provide, let alone failed to provide, any security for any claims contrary to paragraph 7 of the respondent's note. And in any event, delay in posting security is due entirely to the financial challenges of getting money out of Lebanon in all the circumstances coupled with the difficulties which the allegations in this case have created from a banking point of view for Mr Safa, which are all dealt with in that note.

Nevertheless, it is also to be pointed out that the appellants have paid the respondent's share of the contribution to the expenses of those arbitrations, the deposits in relation to those arbitrations, and absent all of the above we say it would be legally irrelevant in any event and the stay of the respondent's claims in favour of the arbitration agreements is mandatory and not discretionary.

If we turn to the substantive issues on the appeal, stripped of their artifice, the underlying claims of the respondent relate to three supply contracts negotiated between the appellants and the respondent. The

appellants' case is that those supply contracts were real and substantial, they were a valuable benefit to the respondent, and I'm going to spend, if I may, a little time on this because it lies at the heart of the respondent's claims that these contracts were instruments of fraud, alternatively shams, procured by corrupt practices, and that in turn is the only and necessary foundation of their claims against the appellants.

If I can touch, first of all, by reference to paragraph 51 of the judgment, where Mr Justice Waksman set out the key paragraphs that may be just worth bearing in mind. This is in relation to one of the three contracts, and I will come back to look at each of them a little bit in turn if I may, the Proindicus supply contract which for current purposes is as good as any other.

You will see from the passage cited at paragraph 51 of the judgment, at paragraph 64 from the pleading:

"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 reply on the following facts and matters in support of that allegation. Firstly, the alleged bribery. Secondly, the alleged payment of contractor fees as relevant. Thirdly, that no honest and reasonable government official could countenance a contract [that is of course a supply contract] on such one-sided terms. Fourthly, the price paid to the supplier bore no resemblance to the market value of the goods and services supplied. Fifthly, 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 sixth, as pleaded, the payment of money from Privinvest to Proindicus."

I'll come back to the significance of this in a moment if I may, but the factual allegations underlying this are, we say, key to an understanding of how this matter has to be addressed.

Then at paragraph 123, as a review --

LADY JUSTICE CARR: Sorry, just so I understand, Mr Matthews, are you heading in the direction of saying that the bribery aspects, for example, are subsets or particulars of the overarching allegation which is all about the supply contracts? Is that what you're -- I'm not putting it very well, but is that what you're driving at?

MR MATTHEWS: The allegations in relation to the supply contracts are a fundamental and necessary part which has to be made good for any of the rest of it to have any legs at all. Outside -- if these issues are not ventilated, the respondent cannot succeed. If these issues are ventilated and the respondent fails, the respondent fails entirely. There is no, for example, formulated case, and I'll come back to develop this, no formulated case that somehow, even if the supply contracts were not fraudulent, one-sided, the subject of all these criticisms, nevertheless there was something wrong with the guarantees.

LADY JUSTICE CARR: I see. So your point here is that the IFA is key? That's your point?

MR MATTHEWS: Indeed, my Lady.

LADY JUSTICE CARR: Thank you.

MR MATTHEWS: The factual aspects underlying the IFA. The disputes that are engaged by the IFA are key to the whole of the case.

LORD JUSTICE HENDERSON: Would that be so even if there were, as it may eventually turn out, merit in the allegation that the contracts were procured by bribery? But other than that they were not objectionable in commercial terms.

MR MATTHEWS: I identify all of these, including the (i)

in that, so yes, all of those are relevant. If there was bribery involved in the process of securing the supply contracts then that is another of the features which would justify potentially the other claims. But without it and without the imputation of any problem to the supply contracts, there is no other claim based upon some extraneous facts that are particular to the guarantees.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: At paragraph 123 cited there:

"As a review of the contracts would have disclosed, no honest and reasonable government official could countenance the one-sided terms of these two of the three supply contracts without prejudice to the generality of that allegation. The following matters will be relied on in support of it. Firstly, the entire price was to be paid to the suppliers upfront. Secondly, the suppliers were entitled to subcontract all or any part of the works to third parties of the supplier's choice. Thirdly, the prices stated could be increased by the supplier to include any other increased costs or expenses as a result of the operation of the provisions of this contract. And fourthly, the delivery timetable under the EMATUM supply contract was indicative only."

Those are all allegations which form the main framework of the basis by which the respondent seeks to argue ergo these transactions were tainted and therefore they are entitled to relief reasons of the very claims that they advance.

Since of course the judgment has come in, a defence has been served on behalf of the appellants, and that is in the bundle. I wasn't going to take you to it in detail, but I'm going to invite you to read one bit of it, if I may cheekily do that. That is that -- the defence itself is at bundle 2, core bundle number 2, tab 15, and the bit that I invite you to read is the summary of the defence, which is at paragraphs 11 to 22, which is pages 354 to 360. But I will, if I may, move on and take that as read because it's not, I think, a matter that I need you to read precisely at this point.

I was going to move on, if I may, to refer next and take you to the three supply contracts because there are very important aspects of that that it's necessary to get into one's mind before looking at the substance of the claims.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: If I take first the Proindicus claim. The supply contract, the court has that in the bundle, core

bundle 1, tab 9 at page 230. It begins at 228, apologies. But turning on to page 230, we see first the preamble:

"The purpose of this contract is for the purpose of enhancing the capabilities of the Government of Mozambique to monitor and protect the exclusive economic zone as prescribed by the UN Convention on the Law of the Sea. The Republic of Mozambique, that is of course the respondent, decided to enter through Proindicus, a state-owned company incorporated by various public entities of the Republic of Mozambique [the respondent] and established for the purpose of the acquisition and operation of the project into this contract with Privinvest Shipbuilding [essentially part of the appellants] where customer will acquire the system detailed in the attached project description."

So as you see from the outset, it is not a situation in which there may be some third party providing some sort of guarantee, the nature of the supply contract and the party with whom it was negotiated and indeed ultimately, we say, and I'll come back to that, concluded, other than Proindicus is of course the respondent itself, and it is entirely for the benefit of the respondent so far as it is on the receiving end of the equipment and matters.

If you'll just turn on to page 231, you see under the heading "Subject of contract "--

LADY JUSTICE CARR: Sorry, what's your point about there's no reference in the preamble to a guarantee?

MR MATTHEWS: There is certainly no reference in the preamble to a guarantee. My point was a slightly different one, which is that it is not a situation in which the guarantor is some third party.

LADY JUSTICE CARR: I see. Thank you. I have it, thank you.

MR MATTHEWS: So turning to clause (ii) at page 231, under "Subject of contract", you see the assets identified and there were various ships, aircraft, and local infrastructure to enable the respondent to police its very extensive coastline and exclusive territorial waters, particularly for the protection of its extensive fishing, especially tuna reserves, and for gas exploration. So this is all central to the government's interests and it was negotiated, of course, with the respondent itself.

Then if you turn on to page 234, one has all the sort of usual post-delivery warranty clauses that would have and indeed did operate in the sense that, as you'll appreciate, it is the appellants' case that these contracts have been performed save to the extent

obstructed in performance by the Republic itself.

The second contract, if I can again briefly take you to the relevant aspects there, begins at the same tab, page 240. If you'll kindly turn on to page 241, the preamble again:

"The Republic of Mozambique [ie the respondent] has identified the need to develop a modern and efficient fishing industry as a critical step in the social and economic development of the country. EMATUM, wholly owned by relevant ministries within the Republic of Mozambique [the respondent], has been granted authority to acquire and operate [the various things there] for the benefit of the respondent."

And the role of the appellants' entity is to supply the required vessels and defined equipment for the coordination centre and to provide basic operators' training and support to EMATUM to help further develop the fishing industry in the respondent's territory.

Again, over the page at 242, you see the supply of the fishing fleet identified under (ii), the assets and services to be provided, and again at page 244, post-delivery warranty.

Turning on then to the third contract, which begins at page 251. The preamble is at 252 and it's in slightly different form. In summary, the purpose was

the creation of a shipyard and related services and provision of further vessels in and for the respondent and to support the respondent's vessels and the respondent's offshore gas industry and fishing industry. You see that from the various clauses, but hopefully that's adequately summarised the seven preamble clauses.

At 255, in paragraph 9, in the middle of the page you have the summary of the assets and services to be provided. Again, a substantial number of fishing vessels, a shipyard, and certain services. And then again at page 260, the post-delivery warranty.

Of course, those supply contracts for the purpose and in the context of the preamble that you have seen, because they were entered into by the respondent's Mozambican SPV entities, payment was financed by loans to those SPVs by international banks, including Credit Suisse, and the obligations under the financing loans were in turn guaranteed by the respondent. But the financing and guarantee agreements of the respondent were and are, of course, entirely parasitic on the supply contracts.

There is no suggestion, nor could there be, that there is some sort of relevant distinction between the conclusion of the supply contracts and related financing agreements with the respondent's commercial, local or

SPV creatures, and the conclusion of the related guarantee agreements with the respondent itself to pay for the supply contracts. Without the former there would not have been and not have needed to be the latter.

In the context, that context, whether causal or purely chronological, of the conclusion of the supply and related contracts a range of other agreements were made and payments made which the respondent now wishes to challenge to escape from paying for what has been supplied under the supply contracts.

I use a loose expression to describe what has taken place, not because the appellants consider there to have been anything wrong with any of the agreements entered into or payments made, but because there was a range of different types of agreements and payments, all of which, to the best of the knowledge of the appellants, were legitimate agreements and payments. Amongst those to whom or on whose behalf payments were made, and this is detailed, summarised in the section of the defence to which I have referred you and detailed in the defence, amongst persons to whom or on whose behalf payments were made is the now president of the respondent, at the time the minister of defence of the respondent, and on the appellants' case was aware of the agreements and

payments made.

Some of them were consultancy agreements, others were payments to political campaigning funds of the ruling governing party, including the now president, then minister of defence, and yet others were the financing of other investment activities by or on behalf of the appellants as part of wider financial investment in the respondent, ie in the Republic, than merely the three supply contracts and how they would be paid for, which are at issue in this case. There is, accordingly, in the appellants' submission nothing in the complaints of financial wrongdoing in connection with the supply contracts and their associated financing.

In the US criminal proceedings to which the respondent makes reference, the representative of the appellants was acquitted. The Credit Suisse employees, for whatever reasons -- my Lady?

LADY JUSTICE CARR: I'm just wondering, the substantive merits are not before us, are they?

MR MATTHEWS: No, indeed, my Lady. The matter has been developed at considerable length by the respondent in their skeleton in a very prejudicial manner. What I'm seeking --

LADY JUSTICE CARR: I understand that. Speaking for myself, I think the message is clearly understood that this is

not about forensics or indeed case management, as you've submitted, it is just about the scope of the arbitration agreement as it applies to the matters raised in the pleadings.

MR MATTHEWS: Indeed, my Lady, and it's part of that context that one has to appreciate the nature of the supply contracts and how they lie at the heart of the respondent's claim.

As we have indicated, the respondent does not say that aside from and separate from the circumstances in which they say the supply contracts were entered into with the SPVs and with which it is somehow now said to be not concerned, there were some special or different circumstances surrounding the conclusion of the financing and guarantee arrangements with the respondent, which relate solely to those agreements and to the exclusion of the supply contracts. It does not point to any feature of the guarantee arrangements which are said to have been commercial or extraordinary or such as no reasonable government official could countenance. On the contrary, the complaints are all directed towards the terms and circumstances of the supply contracts as allegedly suggesting that they are such that no honest and reasonable government official would have concluded them.

The allegation of wrongdoing in procuring these suites of contracts -- supply, finance and guarantee -- lies at the heart of the respondent's claims, but this remains so, including and fundamentally essentially the supply contract, despite the best efforts of the respondent now to try to distance itself and its claims from the valuable supply contracts themselves and suggest their only interest in avoiding in this litigation only involves the guarantee elements damages claims in respect of them rather than the supply contracts and their associated arbitration agreements.

The short point on damages is that there will be no damages, and indeed no claim, if the appellants are right in saying that the supply contracts were substantial and genuine commercial contracts, properly procured, from which the respondent has derived the full benefit save to the extent that its own acts prevented that occurring. That is the appellants' case, that is the appellants' defence to the allegations made against it in these proceedings, and in our submission that falls squarely within the relevant arbitration agreements of the supply contracts.

If we turn next to them, if we can go in tab 9 again of the first bundle, first of all in the Proindicus contract at page 236 of the bundle, clause L. The

Proindicus contract, clause L, Swiss law and ICC arbitration. In the third paragraph:

"All disputes arising in connection with this project to go to ICC arbitration Geneva (ICC Rules)."

I'll come back to look at that in more detail, but just turning next to the EMATUM clauses in exactly the same terms, so just for your note, at clause J, page 247.

The MAM clause is in slightly different terms. It's at page 264, clause K. It does again provide for Swiss law, it provides for Swiss Rules arbitration rather than ICC arbitration, Swiss Rules at the Swiss Chambers Arbitration Institution, and the scope of the clause or the matters caught by it in the second paragraph are:

"Any dispute, controversy or claim arising out of or in relation to this contract."

If I may just make clear and remind your Ladyship and the court of paragraph 45 of the judgment, for present purposes we proceed on the basis, and the scope issue is to be decided on the basis, that the Republic, the respondent, is bound by the relevant arbitration clauses. So we are looking at the arbitration agreements on the basis that the respondent is a party to or otherwise bound by them as a matter of Swiss law, albeit that matter obviously remains to be determined.

For the purposes of this appeal, the court would assume that the respondent is bound by the relevant arbitration agreements and the question is whether the claims they are bringing arise in connection with or arise out of or in relation to the relevant supply contracts. The appellants' case obviously also is that, for the avoidance of doubt, the respondent is not just party to the arbitration agreements, but party also to the supply agreements and that is the basis on which we are proceeding before this court.

So turning first, if I may, to the relevant law. Obviously, all the contracts, arbitration agreements, as you have seen, including the arbitration agreements, are subject to Swiss law. The judgment deals with Swiss law in some detail at paragraphs 71 to 81 of the judgment. The judge concluded in the final sentence of paragraph 73, with which we respectfully agree, he doubted whether there was much difference between Swiss law and English law on the question of interpretation.

The respondent has raised a range of rather abstruse points seeking to make something out of the fact that this court is being asked to consider questions of Swiss law. We have dealt with that in our second skeleton at paragraphs 8 to 13, but I don't intend to take up valuable time orally debating those points unless the

court would be assisted. It is relatively straightforward in our submission and doesn't take the matter much further.

We point out in our own first skeleton argument at paragraph 4 that not only did the judge form the view that there was not much difference between Swiss law and English law, but that the direction of travel in Switzerland in this regard and other leading arbitration-friendly jurisdictions in this area is much the same as English law, or as reflected in the well-known Fiona Trust case.

So as was accepted, there is nothing as a matter of -- significant as a matter of construction of the clauses that two of the supply contracts refer to "in connection with this project" and the other refers to "arising out or in relation to this contract". The court will have seen that from the judgment at paragraph 71.

The respondent's notice seeks to create some significance out of the different wording. We have dealt with that in our skeleton, second skeleton, at paragraphs 23 to 29. I don't propose to say more about it at this stage. With respect, it's a thoroughly bad point semantically. It goes contrary to the direction of travel of the English courts and the Swiss courts and

in any event it doesn't work on the facts.

LADY JUSTICE CARR: Sorry, which point are you referring to that the Republic is taking?

MR MATTHEWS: They are saying that there is significance to be made out of the different wording of the contracts. We have dealt with it in our supplementary skeleton argument at paragraphs 23 to 29. It's the points that the respondent has raised in its skeleton argument at paragraphs 42 and following.

LADY JUSTICE CARR: You say the judge dismissed these arguments at paragraph 71?

MR MATTHEWS: Yes.

LADY JUSTICE CARR: Going back to your earlier submissions, whatever he may or may not have meant by the last sentence at paragraph 73, do you accept that it's Swiss law that falls to be applied?

MR MATTHEWS: It is Swiss law that falls to be applied.

LADY JUSTICE CARR: Secondly, where in this section do we find a finding by the judge that Swiss law was also following the same direction of travel as the English courts in Fiona Trust?

MR MATTHEWS: That you derive from paragraph 4 of our skeleton argument and it builds on, as it were, paragraph 71 of the judgment in the sense that the judge concludes that there is not much difference between

Swiss law and English law on the question of construction. In paragraph 4 --

LADY JUSTICE CARR: Forgive me, there's no direct express finding you can take us to on that particular point? I'm just asking to make sure I've got everything complete. Thank you.

MR MATTHEWS: No, my Lady, not from the judgment itself. We develop the point in paragraph 4 of the skeleton argument.

LADY JUSTICE CARR: Thank you very much.

LORD JUSTICE SINGH: Can I ask you about the judge's summary of Swiss law at paragraph 81 of his judgment. Do you have any quarrel with his summary of the relevant Swiss law principles at paragraph 81?

MR MATTHEWS: The one that I propose to develop in more detail, where we say that he fell into error, certainly in his application of it, is sub-paragraph 4 principally, although depending upon quite how he develops sub-paragraph 3, potentially the impact of multiple arbitration clauses as well. But primarily, our issue would be, and I will develop this if I may in due course, insofar as he turns the sufficient connection test into a narrow test for the construction or interpretation of the agreement, then he's gone wrong in relation to Swiss law. But it's not wholly clear in

81.4 that he goes that far. It's only when you see his Lordship's application of it that he seems to go further than making what we say is the correct position, both under Swiss law and indeed under English law, that you need to establish the relevant connection between, for example, a tort claim and the contract in question into saying that as an aid to construction the Swiss law requires him to adopt a narrow interpretation of the clause. We say that he's wrong in that regard.

LADY JUSTICE CARR: Speaking for myself, speaking up on my Lord, Lord Justice Singh's point, as you say in your skeleton, this is all quite shaded, the overlap of ground 1 and ground 2. At face value you don't have any issue with paragraph 81. What you really have an issue with, in one sense, is its application. It's the application of the fourth test in particular which may raise questions of Swiss law.

But can I ask you this: let's say that there's nothing wrong with his approach or indeed the judge's conclusion that one should adopt a narrower approach to what is a sufficient connection; do you stand or fall by that or are you in a position and do you contend that even on either construction the judge's application is unsustainable?

MR MATTHEWS: We do. We say even if you adopt a narrow

construction of the requirement of connection and compounded by the concession that has now been made in relation to the IFA and the UMIFA, the narrow test is satisfied anyway.

LADY JUSTICE CARR: Thank you.

LORD JUSTICE HENDERSON: Just before you go on, Mr Matthews, a point I wanted to raise at some point, perhaps now is as good as any, relates to the concession. Obviously, you don't quarrel with it, but equally we need to be satisfied, I think, that it was indeed a correct concession to be made because the court does not make declarations by consent. So at some point I think we will need, perhaps not at great length, to be taken through what it is that you say was indeed wrong with the judge's conclusion in relation to the IFA aspect of the case.

MR MATTHEWS: I'm very happy, my Lord, I certainly will do that. The way that I will approach it is twofold. First of all I will say that the IFA should have come first in the judge's analysis and his analysis in relation to the IFA then was wrong.

Secondly, I say that with the benefit of the concession, this court then has to look at the other issues against the background of the concession, which again merits looking first in the context of the IFA and

seeing what follows from that.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: I had just briefly dealt in summary by reference, really, to what we say in our second skeleton argument about the attempt by the respondent to spell out some nice meaning, as it were, from the difference between the wording of the two types of clauses, and we say that that's a thoroughly bad point, both semantically and doesn't work on the facts for the reasons set out there, and I don't -- I hope it isn't necessary for me to take that further, but if necessary I certainly will of course.

LADY JUSTICE CARR: But is it right that that's a new point, because paragraph 71 of the judgment suggests it is --

MR MATTHEWS: Yes.

LADY JUSTICE CARR: -- on the part of the Republic? Because the judgment records that nobody contended anything material turned on the difference in wording.

MR MATTHEWS: Yes, it is a new point, my Lady.

LADY JUSTICE CARR: Mr Pillow is shaking his head.

MR MATTHEWS: I shall be corrected in due course if I'm wrong, but in our submission the learned judge correctly recorded the position of the parties at paragraph 71 and I'll deal further, but we have dealt with the merits of the point, as it were, in any event in our second

skeleton argument. Insofar as it is sought to be pressed further, we say it runs contrary to the way in which the law has developed. It reintroduces -- and because the Swiss legal system has the same fundamental principle of favouring arbitration, in favorem arbitri as it's rendered, as one of the principles applicable, as cited in paragraph 81.2 of the learned judge's judgment.

The position is that the approach which the respondent invites the court to take as a matter of construction runs contrary to that principle by reintroducing the sort of nice distinctions which, whether in Fiona Trust, evidencing that approach in English law, or in Swiss law, demonstrates it is inappropriate and unhelpful. Ultimately, it is a matter for the objective test of the parties, of course, but against that background, as Fiona Trust says, it is improbable that the parties intend to strip out elements of disputes that may arise between them in relation to or in connection with or arising under, whichever wording one uses, when agreeing their jurisdiction clauses. That's an assumption that one starts with, but I'll come back to that in a little bit more detail.

The principle of construction of the arbitration agreement, we say in Swiss law, as much as in English

law, is essentially one starts from, as I say, the assumption that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal and the clause should be construed accordingly unless the language makes it clear that certain questions were intended to be excluded from the arbitrators' jurisdiction. That again is taken from Lord Hoffmann in Fiona Trust, paragraph 13, but in our submission that again reflects the similar approach taken in relation to Swiss law. You have the presumption in favour of arbitration, you have the objective test, and that statement from Lord Hoffmann in Fiona Trust frankly tells you what happens if you apply the objective test with the benefit of that presumption.

We say that unfortunately the judge does not seem to have been guided by that principle. Ultimately, in applying the test, by a rather torturous different approach, although it may be that -- I say applying the test, it may even be applying a different test, he became very much focused on an assumption that the test of some close connection or narrow construction of connection was required to be adopted and he then took the view that the disputes in question were not sufficiently closely connected to satisfy that narrow

construction. But of course that simply begs the question of whether a narrow construction is right in seeking to identify a connection, and in our submission there is no basis for it.

I can give the court some references to the underlying material if that is helpful. I wasn't going to take the court in detail to it. There was an expert called on behalf of the appellants, Professor Besson, who explained that the extra contractual claims have to be related in some way to the parties' contractual relationship and not to some other entirely unrelated matter or relationship. You have his report in the supplementary bundle number 1 at tab 6 and he comments particularly in this regard at paragraphs 59 on page 56 and paragraph 63 at page 57.

There was no indication that the reference to "sufficiency of the connection" was to cut down in any meaningful way the necessary link rather than simply having to establish a link between the tort claim, for example, and the contract. Indeed, Professor Besson, at paragraph 28 of his report, said that Swiss law was the same as Fiona Trust for those purposes and that indeed he used Fiona Trust in order to teach his students.

One sees also from the respondent's expert, which the court has, supplementary bundle 1, tab 7,

paragraphs 76 to 89, pages 82 to 86, she again touches on this sufficiency point, refers to two cases and cites from them, and in both of them they refer to the need for a connection between the tort in question and the contract without suggesting that that creates the requirement of some narrow test requiring some close connection.

To be fair to the learned judge, as he pointed out in his judgment at paragraph 77 towards the end, neither expert was able to assist him with any real learning as to what the precise nature of the sufficiency was. In our submission, the judge took too narrow an approach with his requirement of a close connection based on the need for a sufficient connection and therefore applied too stringent a test.

LADY JUSTICE CARR: Did he use the words "close connection"? Have I missed that?

MR MATTHEWS: No, we say that in seeking for a sufficient connection, he was implying into that the requirement of some closeness or strength of sufficiency rather than simply a sufficient connection rather than the absence of a sufficient connection.

LADY JUSTICE CARR: The judge (inaudible: distorted) not blaming the judge, but we don't get beyond sufficiency and context applied to the facts?

MR MATTHEWS: Correct, my Lady.
LADY JUSTICE CARR: That's the process he went through. We don't know any more about the breadth of his approach. He doesn't say narrow, does he? He says narrower which I think Mr Pillow says is important. But that's it anyway. For our purposes it's sufficient to application.
MR MATTHEWS: Yes. I will come back in a little more detail -- I'm sorry, my Lord.
LORD JUSTICE SINGH: Mr Matthews, is it your submission that any connection will suffice?
MR MATTHEWS: The learned judge says, in citing the matter dealing with a slightly different point, that any connection wouldn't be sufficient, there has to be a connection between the contract and the tort complained of.
LORD JUSTICE SINGH: I know that's what he says, I want to know what your submission is: will any connection with the contract suffice?
MR MATTHEWS: Yes, once you've got past that threshold --
LORD JUSTICE SINGH: So if, for example, not dealing with the facts of this case, but just to test the point of principle, if you have a contract and one of the parties wishes to bring a tortious claim that the contract was procured by bribing one of its officers, your submission

is, is it, that the parties in agreeing to the mandatory arbitration clause have agreed that even the claim for bribery must be brought in the arbitration?

MR MATTHEWS: That would definitely be our primary case, yes. A claim for bribery procuring a contract would certainly be something that would in the ordinary course be caught by an arbitration clause which says, "Any claim in connection with this contract or this project", yes, because it's a claim between the two parties to the contract arising squarely in the context of the conclusion of the contract. So as with an attempt to set it aside for grounds of bribery, secret profit, misrepresentation, whether fraudulent, negligent, all of these are different species of the basis upon which parties to a contract may challenge their obligation to be bound by it and the consequences that may arise out of the circumstances in which it came into existence, and those are matters which the parties would be taken to have agreed to arbitrate --

LORD JUSTICE SINGH: Well, can I just press you on that? I can see if there was an argument about fraudulent or negligent misrepresentation, I can see that might go to whether the contract is vitiated. But suppose the party isn't making any claim that a contract is not a proper valid contract, it's just saying it was procured by

bribing one of our officers and that's the claim we want to make in the ordinary courts. Is it your submission that the parties are precluded from ventilating that in the ordinary courts?

MR MATTHEWS: In the ordinary course, it would be. I don't know whether one could contemplate circumstances in which they might not be, but certainly it seems that the circumstances in which the contract is entered into is prima facie something which is something in connection with the contract, yes.

LORD JUSTICE SINGH: I see, thank you.

MR MATTHEWS: We do say that it extends that far in the same way that a fraud in relation to it, in which the party doesn't seek to rescind the contract but perhaps claims damages for fraud or deceit. One of the reasons for that is if you start to unravel the bits that might go to prove different elements of the complaints and the allegations, very quickly you are into a situation in which aspects of the relationship between the parties, as defined by the contract, are likely to come into prominence.

For example, in this case itself, if one looks back to the sort of facts which are alleged against the appellants to justify an inference that agreements that have been entered into were not, for example,

consultancy agreements or otherwise proper agreements but were bribery, in order to make that good they are making allegations about the very nature of the terms of the contract and immediately one is into that world. They are saying, these are contracts whose terms are such that they are obviously uncommercial. Whether a term is uncommercial or not is precisely the sort of thing, where parties have chosen arbitration, one would expect them to anticipate arbitrators dealing with rather than the court. I'll come back to that in a little more detail if I may.

May I also stress, of course, that if you're against me on that, we also say that we satisfy any narrower test, so if some greater degree of sufficiency requires to be shown, it clearly is shown on the facts of this case, and that if the relevant test is something more than any connection between the contract and the relevant tort but is to be drawn -- a line is to be drawn in the sand at some point beyond that, it is not to be drawn as far as the judge did, as we can see when he came on to look at the matter on the facts.

So we do say that the judge took too narrow an approach as a matter of the test and in any event there was a significant connection. But in any event, furthermore, we do say that the effect of the concession

is that it's now recognised by the respondent that the IFA and the UMIFA are indeed in connection with or arising out of or in relation to the contracts, the supply contracts, and we say that that necessarily informs one's approach when looking at the matter when it arises in the other claims.

Finally in relation to law, obviously this court is applying section 9. We have dealt with that in our skeleton argument at paragraphs 18 to 24 and there's nothing that I was proposing to add to what we have put there.

LADY JUSTICE CARR: No substantive criticism of the judge's summary of the law either on section 9?

MR MATTHEWS: No, my Lady.

LADY JUSTICE CARR: It's largely common ground. Do you have any truck with Mr Pillow's, I think it's section B2 of his skeleton? Do you accept his exposition of the law there?

MR MATTHEWS: The poisoned chalice. May I come back to my Lady on that and confirm the position?

LADY JUSTICE CARR: Of course. I may have given you a false reference, in which case I apologise. Yes, it's B3.

MR MATTHEWS: B3. I'm very grateful, my Lady.

So what we do say in relation to the judge's application is that he does seem to have been very taken

in his analysis when in effect applying the interpretation. I'll come back to this in more detail at the relevant time. He seems to approach it on the basis of: well, it's not a very important element. That sort of application, and it's partly why I stressed at the outset that it's mandatory and it's not a matter of case management, that sort of approach is not a correct application of section 9; the relevant issue either is or is not caught and, if it is caught, it goes to arbitration, and if it isn't, it doesn't. As I say, it's then a case management matter if certain matters do go as to what one does with the things that don't go.

I was going to turn then to deal with the effect of the concession. We have dealt with this in detail in our note to the court, which the court has at C2, tab 17, beginning at page 519 at paragraphs 5 to 10. Crucially, as we say there, the concession means that the dominoes do not fall as the judge had them fall, whereby he looked at all the other claims first, and then turning to the IFA and the conspiracy last and, with respect, wrongly concluding that, building on his decision on the earlier aspects, claims, issues, matters arising, the latter two also fall outside the scope of the arbitration agreement.

Instead, in our submission, consistent with our

position throughout that the IFA and the UMIFA to that extent, although we also say there are other aspects of the conspiracy that are caught, are central to the respondent's claims. You start with the recognition that those two are indeed within the scope of the arbitration agreement and therefore not properly the subject of the court hearing. Once you start from that correct perspective you recognise that none of the other claims can get off the ground because they are undermined by the stay in favour of arbitration of the essential elements encompassed within the IFA and the UMIFA.

We say the correct starting point is therefore the supply contracts and their arbitration agreements, although that is the reverse of the way the respondent and the judge approached it. The (inaudible: distorted) then looked to the claims being advanced and ask yourself whether those claims arise in connection with the supply contracts, the answer is obviously yes, despite the best efforts of the respondent to make the tail wag the dog by suggesting their claims are nothing to do with the supply contracts or, so far as they are, must, as they now accept, be stayed but are all about the financing and guarantee arrangements. The problem for the respondent is that once the concession rightly

made is banked, you do not get to their second stage analysis: do the claims arise in connection with the supply contracts against the background that the IFA and the UMIFA do? Answer: clearly yes.

The respondent cannot and does not point to any particular payment and say, "That was not made improperly to induce the supply contract and therefore my complaint in connection with it does not arise in connection with the supply contract", rather, "That payment was made to induce the financing and guarantee payments and nothing to do with the supply contracts". They don't say, as I have indicated that, there's anything in relation to the terms of the guarantee which is in any way objectionable, uncommercial, odd, strange, such as no honest and conscientious government employee would have entered into.

So against that background, do these claims arise in connection with the supply contracts? Answer: yes, ergo they are caught by the scope of the arbitration agreements.

Turning to the judgment --

LORD JUSTICE SINGH: Mr Matthews, sorry, before you leave your note, can I just ask you a question about page 520 at paragraph 7 of your note. Forgive me, it's my fault, I've probably not followed exactly what is being

conceded and what your understanding is about what is being conceded. I was slightly surprised to read your paragraph 7 because it appeared to be looking a gift horse in the mouth. On your understanding, have they conceded that even the bribery claim has to be stayed?

MR MATTHEWS: I had not understood them to say that.

LORD JUSTICE SINGH: In the first sentence of paragraph 7, what's the point you're making?

MR MATTHEWS: They seek to argue that, as I understand it, because of the points that they have conceded, which are the IFA and the IFA insofar as it's an unlawful means in the conspiracy claim, that those claims may be extracted because they are stayed, but nevertheless they say their bribery claim continues. I'll come on to develop this in a little more detail if I may, but essentially what they say is, based on some authorities that we say are not relevant, you don't have to show a contract that was procured by the bribe rather than another one, therefore they can ignore altogether their allegations in relation to the supply contracts and simply set up (a) a fact of bribery and (b) the fact of their entering into a guarantee contract, which they wish to get out of, and therefore they say the result is that the bribery claim continues without any element being stayed because they don't have to demonstrate that

a bribe induced a particular contract, therefore even if you leave the supply contracts out, if they can demonstrate that we bribed their official, then they can escape the guarantee contract.

We say, for all sorts of reasons, that approach doesn't work because on the facts you can't strip out the investigation as to whether there was corruption or not because of the way in which they advance their case without the sort of detailed analysis of the supply contracts, which is properly a matter for the arbitrators and which is conceded as a result of the IFA.

LORD JUSTICE SINGH: Yes.

LADY JUSTICE CARR: The judge correctly identified, or he certainly thought, that the pleaded case in relation to the Proindicus contract was important because he set out those bits. But then you say he overlooked that bit of the pleading, as it were, in his later analysis?

MR MATTHEWS: Yes, overlooked or minimised, and we say wrongly so in relation to that, but then you take the further step that once you've got the concession on the IFA, it makes the respondent's position completely untenable, and had the judge been armed with that concession so that he had started the matter from, as it were, the other end, which is where we say he should

have started and said, "The IFA, it is acknowledged, is sufficiently connected to the supply contracts for that matter to be stayed, now let's look at the other claims, can those claims be investigated without addressing or dealing with any of the matters that are the subject of what is now accepted is sufficiently close", answer, no, because they too are sufficiently close because the IFA is.

LADY JUSTICE CARR: One last question on your understanding of the scope of the concession. As you say, it's been advanced as a concession and Mr Pillow has stated in terms that it follows that your clients are entitled at least to a declaration in regard to those two matters and a stay in regard to those two matters. However, the first letter from the Republic's solicitors indicated that they did not accept the validity of your challenge but nevertheless were happy to park it. Is your understanding that that can't work? We can't be being asked to make a declaration unless it is conceded that the judge was wrong.

MR MATTHEWS: Yes. From this court's perspective, as I have indicated, we think the concession is rightly made, but the concession can't be made on the basis that it's wrongly made and the consequences of the concession are what we say follows in relation to the other

allegations.

LORD JUSTICE HENDERSON: Ultimately, as I was saying, we do have to make up our own minds on this point. I think the mere fact it is conceded is not enough for us to -- obviously, it's a very good start, so to speak, but it's not conclusive.

MR MATTHEWS: Indeed, my Lord, it would of course be open to the court to reject this, as indeed any other proffered concession, especially in circumstances where it was stated to be proffered on the basis that it undermined the appeal entirely, but I'm afraid your Lordships and your Ladyship have nevertheless got stuck with 1.5 days of this appeal.

LORD JUSTICE HENDERSON: Yes. Would that be a good moment to have our mid-morning break, Mr Matthews? It's already slightly overdue, I think.

MR MATTHEWS: Absolutely, my Lord.

LORD JUSTICE HENDERSON: Good. In that case we'll resume at about 11.55. That will give us about 7 minutes, I think.

(11.48 am)

(A short break)

(11.55 am)

LORD JUSTICE HENDERSON: I think it's about time to proceed. The members of the court are all here and leading

counsel are here, so Mr Matthews, we're ready when you are.

MR MATTHEWS: I'm grateful, my Lord.

We start, as the judge in our respectful submission initially rightly did in his judgment, at paragraphs 51 and 52 with the instrument of fraud allegation, but then, as we say, he failed to do that when he came on to his later analysis in his judgment.

At paragraphs 51 and 52, he sets out the claims of the Republic, the respondent, makes in relation to that plea and makes the point in paragraph 52:

"The same plea or submissions are made in relation to the EMATUM and MAM supply contracts as the Proindicus."

We say that that should have been his starting point when he comes on to the analysis.

There's one point that we need to pick up slightly before that, which is in the way the learned judge dealt with the assumption that the respondent is a party; that is in his paragraphs 46 and 47 of the judgment. Having correctly recorded the agreement of the parties in paragraph 45 to the fact that the issue was to be decided on the assumption that, although not an express party to the supply contracts, it is nevertheless bound by the arbitration agreements, our case is of course

that the Republic, the respondent, is a party to the supply contracts, though of course we recognise they dispute that.

He goes on to say at paragraph 46:

"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 or to avoid or rescind them."

That is to create an inconsistency. The correct analysis for the purposes of the court, both at first instance and now in the Court of Appeal, is that contrary to the respondent's case, it is in fact a party to the supply contracts, and although it might suit it to identify itself as not being a party to it and it might suit it to seek to avoid the implications of its being a party, it is the subject of the arbitrations as to whether or not the respondent is a party, and if it is determined in the arbitrations that it is a party then of course it has available to it any claims that it can, may or should advance in relation to the supply contracts, including all of the matters that it complains of in relation to these matters in these proceedings.

Of course, if that is not the case and the Republic, the respondent, is not a party to the supply agreements and the arbitration agreements in them, all of this falls away anyway because by definition all of this only arises if we are right in saying that the respondent is indeed a party.

LADY JUSTICE CARR: So he had to assume for all purposes that the Republic was a party?

MR MATTHEWS: Yes, and what he cannot do, as he seeks to do later, is to approach later aspects of the case on -- I was going to say almost on the basis, it is really on the basis that the respondent doesn't have claims that it can bring under the supply contracts because it's not a party. That is completely begging the question --

LADY JUSTICE CARR: Would you remind me where in the judgment that comes in? I have just lost the cross-reference. This analysis comes in later? Don't worry, I'm sure we'll get there.

MR MATTHEWS: It's where he deals with the individual claims.

LADY JUSTICE CARR: Don't worry, we'll get there, thank you.

MR MATTHEWS: I'm sorry about that.

It is the foundation of the respondent's claims that its guarantees were induced in a manner incapable of differentiation or separation from the inducement of the

supply contracts and related financing. It is not being said there's nothing wrong with the supply and related financing contracts entered into by our SPVs and also in contracts to which by definition on this analysis we are party, but we, the respondent, were induced to enter into the guarantee agreements by reason of this, that or the other bribe. On the contrary, it's all part of the same factual analysis as to the circumstances in which the entire suite of agreements was entered into in negotiation between the respondent and the appellants, ultimately leading to the supply contracts and the related financing.

If we are right, as we assumed to be for present purposes, that the respondent is party to those agreements, supply contracts and its arbitration agreements, then the question is whether its complaints or claims arise in connection with those supply contracts, and in our submission they clearly do.

If one puts oneself into the position of two parties to those contracts at the time they were concluded, which is the point of analysis, the answer is, in our submission, that any such party looking at, well, what do I mean by "disputes connected to these contracts", would include, as I say, suggestions that they had been fraudulently induced to enter into them, suggestions

that they'd been entered into by way of bribes, suggestions that they were frauds, shams, and so on and so forth, all of which underlie the analysis of the respondent in this case.

LADY JUSTICE CARR: I'm sorry to press you on this, but if you look at paragraph 46, isn't the judge right?

"The agreed assumption for the purpose of the preliminary issue cannot alter the fact that the claims that are made are on the basis that the Republic wasn't a party."

So the claims are not made on the basis that the Republic -- it may be your position and it may be the assumption for the purpose of the preliminary issue.

MR MATTHEWS: That's what I'm saying.

LADY JUSTICE CARR: Analysing what the matters are, you look at the claims made, and the claims are not made on the basis that the Republic is a party. That's the point. What's wrong with that?

MR MATTHEWS: I'm going to develop it, if I may, in relation to the analysis that the judge pursued in relation to the individual claims because the point is that construing the clause, he comes on to look at the claims on the basis that these are not claims that the respondent could make because it's not a party. That is inconsistent with the assumption that has to be made

in the context of this hearing.

LORD JUSTICE HENDERSON: Can we just pin down what the assumption was? If we go back to paragraph 45, it says:

"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."

That is only a reference expressly to the arbitration clauses. One of the things we learn, unless I'm mistaken, from Fiona Trust is that one has to distinguish between the arbitration agreement and the contract within which it is contained. So from one point of view this is only quite a narrow assumption going to the question of whether Mozambique is bound by the arbitration clause and not by the rest of the contract generally. Have I misunderstood that?

MR MATTHEWS: Yes and no. It is entirely correct as a matter of analysis of the law, my Lord, of course, the separation of the agreements and so on. But one has to have the context in which such assumption comes to be made, which is what is referred to as the interference or the beneficiary routes by which it is said that the respondent is a party to the arbitration agreements. It is not because it's interfered in or is a beneficiary of the arbitrations, it's because it's interfered in or

is a beneficiary of the supply contracts.

So the route by which, if the respondent is a party to the arbitration agreements, it becomes such is via the supply contracts. There is no jurisprudential route posited in this case by which the respondent becomes party to the arbitration agreement without the route through the supply contracts. It is entirely possible, of course, as you say, my Lord, that one could be party to an arbitration agreement without being party to a contract, but that is not what's being suggested in this case.

LADY JUSTICE CARR: Speaking entirely for myself, you're going to have to help me with this aspect of your argument by reference to the individual application to the individual causes of action, because at the moment I'm struggling to see how an error on the part of the judge here infects what comes later.

MR MATTHEWS: I'm going to come on to that, if I may. I wanted to put it in the background because I then want a clear run on, if I may, first of all, at the IFA -- and when I say clean, I don't mean without the intervention of the court --

LADY JUSTICE CARR: I think you do, Mr Matthews. Hint taken!

MR MATTHEWS: -- of the IFA and each of the claims following

after that, and I'm afraid inevitably it involves taking the judgment in a slightly different order than the judge himself took it in for the reasons I have already indicated. I did want to get 46 to 47 out of the way first because when we come back to the analysis of the clauses that is one of the things that will arise in that context.

If we turn to the instrument of fraud allegations, that is 49 to 52 or is developed in 49 to 52 of the judgment. These are important paragraphs, of course, and they help, I hope, also the court in relation to what I have been asked to do, which is to demonstrate that the concession is rightly made that if one starts with paragraph 49 the claims are said to arise out of three transactions, each transaction is said to encompass various contracts, and having referred to the allegation as to payment of bribes, the learned judge then sets out at paragraphs 51 to 52 what we say are the core allegations in this action which underpin the respondent's case and which we say, now by concession but rightly made, are matters for the arbitrators.

So in dealing with the matter in more detail, as I've indicated, he only comes back to this at the end of his judgment, or relatively near the end of his judgment, at paragraphs 111 to 114, after having dealt

with the other claims. As I have indicated, I am going to invite the court to take them in the other order.

We deal with it in our first skeleton argument at paragraphs 31 to 34, but just picking up the points going through, as I say, the learned judge deals with it last instead of first, and it is made more stark by the concession that he should, with respect, have started at this point.

Paragraphs 111 and 112. It is, of course, right that the IFA is not a claim strictly so-called because no relief is sought pursuant to it, but as the learned judge also rightly says, that doesn't mean it's not also covered by the clause, and an arbitration could decide the IFA allegation just as the court held that an arbitration could determine the discrete question of the management participation allegation and Chief Justice Menon's case and the IFA, he accepts, can't be discussed as merely peripheral. We would go rather further than that, of course, so that it is incapable of counting as a matter.

Equally, the fact that it relates to claims made against other defendants as well as the Privinvest defendants is not per se a bar to coverage by the clause. So we would in principle agree with all of that:

"There can be no doubt [112] 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."

And of course, it is now conceded, sufficiently connected with those contracts. But instead, in our submission this is where the learned judge goes wrong. Instead of having the benefit of that concession, which would have enabled him to go right, he goes on to paragraph 113 where he says:

"The real question is whether it is sufficiently connected and in my judgment it is not."

He says here at paragraph 114:

"The context here first requires that a narrow approach to sufficiency" --

LADY JUSTICE CARR: You're quite right, I was wrong. He refers to "narrower" in paragraph 95 but then he refines that here. So that clarifies that, yes.

MR MATTHEWS: This is the problem, we say, my Lady, that infects the judgment and infects his approach to it, that he's looking for some narrow test of sufficiency when there's no justice or jurisprudential basis for his doing so. He says you must take a narrow approach, see paragraphs 95 to 97 -- I'm going to come back to those, if I may -- but he says -- we say he's wrong about this,

you don't take a narrow approach to sufficiency:

"This applies just as much to the analysis of the IFA as it does to the individual claims."

So the matter infects his analysis of the claims, which I am coming on to hereafter, as much as it infects the IFA.

He says:

"As a matter of objective intent and on the facts of this case, it seems very likely that where the substantive claims themselves are outside the arbitration clauses..."

So he's leaning on his decision in relation to the other claims to infect his position in relation to the IFA:

"... 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."

These are, with respect, impermissible analyses because it is not appropriate for him, in analysing the position under section 9, to decide whether it gives rise to inconvenience. Indeed it may well be the case, as it often is, as I have indicated, that the effect of an arbitration agreement is that some aspects of a claim get stripped out. Another very common one is where

you have a breach of contract case and a tort case and it's well recognised, and always has been, that if the arbitration clause is not wide enough to cover the tort case, then the breach case has to go off to arbitrators and the tort case doesn't. But that is something which nobody has ever suggested that the parties cannot have intended, although Fiona Trust rather indicates that one leans to the assumption that they would have intended, given that some of their matters are going to arbitration, that it be wider rather narrower.

What the judge here is doing is doing completely the opposite. He's saying: I must approach it narrowly, if I come to the conclusion adopting a narrower approach that there would be fragmentation and some things would be dealt with by arbitration and other things dealt with by court, I must assume that these aspects must all go off to court. But that's completely, with respect, the reverse approach. If you start with the IFA, you recognise that the IFA is clearly in connection with the supply contracts and you then ask yourself, if you accept that, what would the objective intention of the parties be in relation to the other claims? You approach the matter from the other end of the spectrum. That is why we say the judge goes wrong in leaving this to the end, although he addresses it first at

paragraphs 51, 52 and when analysing the claims. He should have then come on to analyse the claims in the context of the scope of the arbitration clause starting with this.

He says:

"Nor should it be putatively assumed that there would be a case management stay of the proceedings here as an antidote."

But again that is, with respect, putting rather too much analysis in the minds of the objective observer who late at night is agreeing this arbitration or other clause, with respect.

So it is on any view, because of the concession, recognised that the judge went wrong at this point with his sufficient connection test and finding the IFA on the wrong side of it. When he then identifies the test, with respect, it's the wrong test because it's a narrow test. And when he applies the test, he does so with regard to these, with respect, irrelevant matters, such as fragmentation, which it is not appropriate for him to take into consideration. If it is appropriate to take into consideration, it operates the other way, that when one is looking at what the parties will have intended when one comes to look at the other claims, the presumption against fragmentation drags the other claims

to arbitration, it doesn't drag the IFA away from arbitration to court.

So we say, with respect, that he has simply overcomplicated the process by adding these additional elements. If you ask yourself whether the respondent's claims arise in the IFA in connection with the supply contract, the answer can only possibly be: yes, the subject matter of that dispute must be connected to the supply contract and the respondent's case on that is that the supply contracts were fraudulent and a sham, designed as a corrupt vehicle to procure financial reward and achieved by bribery.

It is very difficult to posit a test which is so narrow that those allegations don't fall within an arbitration clause which is supposed to consider all matters in connection with the contracts. If the respondent doesn't succeed in showing that, that the supply contracts were fraudulent and a sham designed as a corrupt vehicle to procure financial reward and achieved by bribery, they will fail in their other claims. They have no independent case --

LADY JUSTICE CARR: (Overspeaking) are posed by my Lord, Lord Justice Henderson, is that right? Is there no pleaded claim for bribery or conspiracy that could survive a finding that the supply contracts were

genuine?

MR MATTHEWS: If the supply contracts were genuine and not induced by fraud, all of which are matters going to the supply contracts, as I say it is not at all suggested that the supply contracts were always going to happen; the tricky bit was getting the government to agree to guarantee. That's not the kind of case. It's not a third party guarantor who was persuaded to come in and join this.

If the respondent cannot show that the circumstances surrounding the conclusion of the supply contracts are objectionable for the basis that they say they were, namely fraudulent, a sham, designed as a corrupt vehicle to procure financial reward and achieved by bribery, if all of that goes in relation to the supply contracts they will have no case left. Because it is not suggested that somehow, as I say, all of the -- if all of the circumstances surrounding the conclusion of the supply contracts separately were genuine and proper, nevertheless they were somehow induced to enter into a guarantee in some way that was fraudulent.

Therefore it is simply at the heart of their entire allegations by which they seek to undermine the guarantee that they can in practice and in effect impeach the supply contracts. That we say is fatal to

the judge's analysis and it's fatal to the respondent on this appeal. Therefore, as we have indicated, paragraph 114 is flawed in the respects that we identify.

What you have to do is give effect to the words used in the clause and just because it is one allegation, especially though not only a pretty fundamental one, doesn't mean you can decide that in such case it's not in connection with because there are also other allegations made which arguably may not be.

I have dealt with fragmentation. He then gets on, in the second half of 114, to say:

"Nor should it be putatively assumed there would be a case management stay. I accept the prospect of fragmentation may simply be the cost of respecting the parties' agreement to arbitrate, a point made by Popplewell J in Ruhan 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."

And with respect, that is to create a distinction without a difference. What he needs to do is to start off by considering what would be encompassed and then to

consider whether the other matters are similarly connected.

So turning then to paragraph 115, we say at this point that the learned judge, with respect, strays even further from the permissible territory. We deal with it in our written skeleton at 33, paragraph 2. But what we say is that -- he says:

"The fact it does not involve any legal analysis of any particular contractual term as opposed to whether certain terms make the contract one-sided..."

With respect, it's very difficult to see that distinction. The point is that the learned judge is saying that the terms of -- whether the terms are proper commercial terms or not shouldn't fall to be decided by the arbitrators because they don't involve a legal analysis of a particular contractual term. That, in our submission, is a difficult one.

First of all, of course, this is ICC and Swiss Rules, so arbitrators' decisions on law as well as fact wouldn't be subject to judicial intervention. But at the very least, it is of course a well-established principle of arbitration that factual issues are totally matters for the arbitral tribunal and the sort of issues the judge is identifying are typically that kind of matter which parties in choosing arbitration agree to

leave to the arbitrators to address and resolve.

Going back to what he cites at paragraph 51:

"The sort of issues that arise for determination on the respondent's case are archetypally key factual issues which are the sort of things that commercial parties would want dealt with by arbitrators."

It is difficult, with respect, to see why the bribery is somehow said to be remote from the contract, as the learned judge suggests in 115, where the circumstances in which a contract is being entered into are again archetypally matters that are commonly dealt with by arbitrators and are not in any sense remote from the contract. It is whether or not as a matter of law in English law, if and insofar as relevant, the respondent would have to show that the bribery procured this specific contract, it is fundamental to their own case on bribery that the nature of this contract, the facts of this contract, are such that no honest and competent government official would have entered into the agreements. That, in our submission, is a classic factual matter which tribunals are ordinarily called upon to determine.

Paragraph 116. The learned judge says:

"In the circumstances of this case I consider 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."

LADY JUSTICE CARR: Speaking for myself, I just don't understand that. I don't understand the logic. Why does the fact that no relief is claimed...

MR MATTHEWS: With respect, we agree, my Lady.

LADY JUSTICE CARR: There must be some clever explanation, Mr Matthews. What was he trying to say here that I'm missing?

MR MATTHEWS: With respect we do think this is one of the areas in which the learned judge has strayed because of what he says in paragraphs 46 and 47. He is approaching the matter very much on the basis that -- effectively he says since the respondent can't get relief in relation to the supply contracts and can't do anything about the supply contracts because it says it's not a party to them, therefore it follows that...

LADY JUSTICE CARR: I see. That's the link?

MR MATTHEWS: It may be, my Lady.

LADY JUSTICE CARR: Why does it go to the immediacy? "Deprives this matter of the necessary immediacy" -- the underlying contract is the supply contract?

MR MATTHEWS: The supply contracts, my Lady. As I read it, my Lady, I understand this to be a reference to his narrow sufficiency test being applied and when he says

"necessary immediacy" here, it's another formulation of the narrow sufficient connection, and because there's no relief claimed, he says that is another indication of the absence of a sufficiently close connection.

LORD JUSTICE HENDERSON: This again ties in with the assumption that has to be made about the status of the Republic. If it is deemed to be a party then presumably it would have the right to claim, would it not --

MR MATTHEWS: Precisely, my Lord.

LORD JUSTICE HENDERSON: -- in the supply contracts? That would be a matter of Swiss law, but on the face of it, if you're right in your submissions about the breadth of the assumption, the judge has simply just lost sight of that fact here.

MR MATTHEWS: Precisely, my Lord. It goes to the fact that the respondent is saying, "We are not a party to any agreements in the supply contract, whether the supply contract itself or the arbitration agreement", because that suits its tactical purpose to do so.

LADY JUSTICE CARR: I am sorry to interrupt you, but if this goes forward and then we have the next preliminary issue, which is "Was the Republic a party?", if there is a finding that the Republic was a party, then the Republic can amend with permission and seek damages for breach.

MR MATTHEWS: And also it will raise a question, obviously, because these issues are also live in the arbitration.

LADY JUSTICE CARR: Yes.

MR MATTHEWS: And it'll raise the issue, potentially, as it were, of who gets there first and what is the effect of any determination by a court or an arbitrator in relation to that. But my Lady is absolutely right.

And of course at any point the respondent could, as is done time over time, plead a contingent claim in the arbitration, saying, "We don't accept that this arbitration to which you have impleaded us is properly to be brought against us because there is no jurisdiction, but insofar as we are wrong about that and insofar as there is jurisdiction against us because we are a party, we've got these whopping responses to your claim".

So there's nothing to stop the respondent, other than tactics, from raising claims in relation to the supply contract, which is the real point that it makes, namely that these supply contracts were got out of the Republic, out of the respondent, on a corrupt basis. And one might have thought that the starting point is "I'll have the money back for my contracts, please". Of course, they would also have to address potentially a number of significant issues, such as the fact that

they've had hundreds of millions, if not billions, of dollars of supplies and services pursuant to these contracts, albeit that the financing agreements and guarantees are in default.

So yes, there are all sorts of ways in which the respondent can properly address these, it's just that for tactical reasons at the moment they are trying not to.

So that is the position in relation to 116.

LORD JUSTICE SINGH: Before we leave 116, can I just ask you about that. On its face, what the judge actually says there is quite a narrow point, not that they could not but that they have not actually claimed relief pursuant to the IFA. So that's the simple, factual point that he's focusing on there. That may or may not have been a good point on its merits, but I just wanted to observe that that's the only point the judge appears to be making there.

I suppose what he might have been thinking, I don't know, is that what this is all about ultimately is the effect of section 9 and whether a matter must be stayed. So he may simply have been asking himself, "What is the matter here in relation to the IFA? There is no relief being claimed", and so he says, rightly or wrongly, that, amongst other reasons, that's a factor why the

matter does not have the necessary immediacy to the underlying contract. In other words, what did the parties intend should fall within the scope of the arbitration clause, the mandatory arbitration clause? He is saying: they're not claiming any relief in relation to this, so this is a factor which leads me to think it's not something the parties intended has to be in the arbitration.

MR MATTHEWS: I follow that, my Lord. If that is the approach, then it is simply wrong in law because -- I take again the example of Mr Justice Popplewell, as he was, in the Ruhan case. The fact that you claim a tort which requires as an element of it a breach of contract allegation, but you claim no relief arising out of the breach of contract, doesn't mean that that breach of contract element doesn't have to be stayed. It does.

LORD JUSTICE SINGH: Yes. I understand why you criticise the legal merits of this analysis. I was just trying to understand what the judge was saying to himself.

MR MATTHEWS: My Lord, yes, and obviously also in taking this approach we say he's also fallen into error because the necessary immediacy test is an overstatement test, it's stating it too narrowly.

LORD JUSTICE SINGH: Yes, I understand that.

MR MATTHEWS: Then in relation (inaudible: distorted).

LORD JUSTICE HENDERSON: I think we lost the connection just then, Mr Matthews, or at least if you were speaking we couldn't hear you, or I couldn't.

MR MATTHEWS: Have I returned?

LORD JUSTICE HENDERSON: You have returned, yes, but your photograph was frozen for about 10 seconds and we heard nothing. So if you were saying something rather than just pondering your next line of attack, I'm afraid you'll need to repeat it.

MR MATTHEWS: I was going on to paragraph 117 of the judgment.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: And I was referring to the fact that there, the judge says:

"The IFA clearly falls on the other side of the line drawn court in relation to the management participation allegation on the other side of the line given by the court, an allegation of breach of contract which forms the unlawful means of conspiracy."

He says that but he doesn't identify why. But he says:

"That example plainly presupposes that there is a claim for breach of contract made against the other contracting party and 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. These differences are not determinative but provide a useful pointer."

So I'd better not spend too long on them. But in our submission they don't, it's a bad distinction. The question is: are two parties to the contract -- on this hypothesis they are two parties to the contract -- raising matters which under the terms of the contract they have agreed will be determined by arbitration?

It is no answer to say, as indicated in the first half of his paragraph 117: well, I choose not in this case to raise a claim of breach of contract against the other party to my contract, I am, however, going to say that this contract is an instrument of fraud, it is a sham, all of which is to be determined as a matter of res judicata, or issue estoppel at the very least, between the two parties to the contract, which has a fundamental impact upon the existence and terms of the contract between the parties and yet is somehow not to be the subject of an arbitration agreement because the person in a position of respondent has chosen to bring the claim in a different forum. In our submission, that

can't take you outside the scope of the arbitration agreement by raising the claim in this way where the very matters that you are raising are matters that are four square within the contract.

It may be that he's approaching it simply on the basis that in practice they don't say, "We also have a claim in breach of contract against you", but what is the distinction? It is said in those cases where the breach of contract is part of the unlawful means conspiracy that no relief is sought specifically in relation to the breach of contract, it simply forms part of a wider tort against the various people. Well, so that may be, but the fact remains that whether relief is sought in relation to the breach of contract or not, that matter has to go off to arbitration. So also we say in this case, whether or not relief is sought on the basis of the allegations that are made about the supply contract and the allegation by one contracting party to the supply contract against another that it is a fraud and a sham and that it has been induced by the unlawful payments, that is a matter that is between those parties and which is clearly a matter in connection with those supply contracts.

There's a new point raised in the respondent's note, which we deal with in our second skeleton argument at

paragraphs 31 to 34. This is that the respondent's attack on the supply contracts arises as a matter of English public policy and therefore must be assumed to be outside the parties' contemplation of (inaudible: distorted) in the arbitration agreement. In our submission, it is only to be stated to be rejected. If anything, it proves the reverse, as we have tersely encapsulated it at paragraph 34 of our second skeleton argument, if indeed it is to be said that in various jurisdictions around the world this contract is capable of being impugned in circumstances where it is not capable of being impugned in the forum and subject to the law the parties have chosen, how much the more probable is it that the parties intended that that forum and that system of law should deal with the issue? One might say that may be precisely why they chose that system of law and that forum. Therefore, in our submission, that is a bad point.

That is what I propose to say about the IFA claim, both to establish, first of all, that the concession was rightly made but in any event to say that premised upon the concession or given that it is rightly made, that is the starting point for one's analysis of the claims that are made by the respondent in this case. One goes on naturally, in our submission, to the next one, which is

the conspiracy claim. There again, the respondent has belatedly made, in our submission, an important concession. It has rightly recognised that the IFA allegations, insofar as it is also a component, which of course it is, and a fundamental one of the conspiracy claim, is also subject to the arbitration agreement.

We say, both rightly conceded and in consequence of the concession, that demonstrates again that that aspect is, whatever the relevant test of sufficiency of connection, sufficiently closely connected. We deal with this in our first skeleton argument at paragraphs 43 to 44, where we say that the IFA is a key component of the conspiracy claim and not just of one element of it, we identify the other elements which we say are also caught within it, and you can't simply strip out the one aspect because it infects the others which we there identify. You test it, we say, by extracting the issue or matter embraced by the IFA and you say, assuming the respondent fails on all of that, in those circumstances in our submission there is little, if anything, of the alleged combination left.

The learned judge deals with this at paragraphs 64 to 66 of the judgment and it is said:

"It's alleged that the various defendants [and of course the appellants amongst them] 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."

Well, in our submission, that's a somewhat specious and artificial way of putting it. The appellants of course are only parties to the supply contracts (inaudible: distorted) their only interest is actually the supply contracts and payment under them and there was obviously, and is not said to be, not any special or separate conspiracy in relation to the guarantees and none is alleged independent of the supply contracts. So again, if one recognises that the IFA and those elements of the IFA that infect the conspiracy claim are properly matters to go off to arbitration, which we say they are and in any event it has been conceded that they are, in those circumstances there is no separate conspiracy claim left against the appellants.

LORD JUSTICE HENDERSON: Sorry, there's some feedback. Can you hear me?

MR MATTHEWS: I can hear you, my Lord.

LORD JUSTICE HENDERSON: I don't know what the problem is. I seem to be -- everything seems to be repeating itself. Let me just...

(Pause)

Is that any better? I think it may be, thank you.

I was just going to put a point which perhaps occurs across the board in some respects, which is: how far it is realistic to try and look at the supply contracts in isolation from the financing parts of the overall transaction given that one would think from a commonsense commercial perspective they were all interdependent, as indeed the judge recognised, I think, at one point in his judgment.

A notable feature of the supply contracts is that payment in full has to be made upfront right at the beginning before any services or goods have been supplied. That is, I would guess, pretty unusual and does imply that the financing provisions therefore need to be in place right from the beginning in order to enable that to happen. It doesn't seem realistic to suppose that the SPVs and your clients entered into the supply agreements without knowing perfectly well that on day 1 the loans are going to be called down in full and used to pay your clients, and of course they would have to be backed by the guarantees. So it all hangs together, surely, as a simple composite transaction, or is that too simplistic an approach?

MR MATTHEWS: Not too simplistic, of course, my Lord. One of the reasons I took you to the preamble was to show you the reality of this, which is of course contracts in

effect, whether actually or not has to be determined, between the appellants and the respondent for the supply of equipment in the respondent's national interest, which we say was substantially performed. Obviously, the whole matter was negotiated by a range of people, government officials including, as we have now said, the now president who was then minister of defence. Of course these matters are all associated. The question is: what do you then do with that? Our submission is what you do with it is, having started with, in our submission, the right recognition of the fact that the IFA and the UMIFA go off to arbitration to be addressed there, the proper analysis is that the forum in which the parties must be taken to be addressing those issues and if the respondent is successful on those issues, then that will inform any claims it might have. If the respondent fails on those issues it will completely undermine any other claims that the respondent might have.

But at the heart of it is in reality the supply contracts and the matters complained of by the respondent in relation to the supply contracts is, in our submission, absolutely fundamental. The financing is the mechanism by which the supply contracts in effect came to be performed, but nobody is suggesting for one

minute that there would be a number of financing or other arrangements in place if it hadn't been that the Republic wanted these supply contracts. That is the issue between the parties which is at the heart of this. We say they wanted the supply contracts, they got the supply contracts and the materials under them and they now say they don't like it and their mechanism for trying to get out of the consequences of the contracts is to try to avoid the financing elements of that.

But the fact is that that is only even remotely potentially a viable position for them if they can impugn the supply contracts. If you can't impugn the supply contracts, what is their complaint? There's nothing else that's wrong. As I say, it's not a suggestion that if they'd known this, that or the other they would never have guaranteed these contracts entered into by some other party, they are the party, and they entered into all of these contracts in order to procure the materials that they need. And they say that they were shams, fraudulent and so on. That is at the heart of it, in our submission.

It's equally at the heart of the conspiracy claim because, again, if they can't demonstrate that there was fundamentally something wrong with the supply contracts, they're never going to get anywhere on the guarantee

contracts because again there's no conspiracy to get them to enter into the guarantees but not the supply contracts. One can't begin to separate them out. As I say, if in the context of the conspiracy it were being said that they had been the subject of some conspiracy aimed at the guarantees, some third party had been induced to enter into them by some conspiracy, then that's a different matter. But that's not what's being said. It's all part and parcel of what is being said, which is that the supply contracts themselves are objectionable and because the supply contracts are objectionable the guarantee is objectionable.

LORD JUSTICE HENDERSON: Yes, thank you.

LORD JUSTICE SINGH: Mr Matthews, in that context, can I ask you about paragraph 65 of the judgment. The unlawful means are there summarised as being fivefold.

I understand your submission in relation to number 3., but is it your submission that the whole of the unlawful means conspiracy allegation made must be stayed because of section 9?

MR MATTHEWS: The position is that all of the elements that are infected by the IFA must be stayed and the consequence of that is that there is no conspiracy claim left.

LORD JUSTICE SINGH: Well, that may be right, but on its

face what you have submitted so far appears only to go to element number 3.

MR MATTHEWS: May I take you -- sorry, I skipped over this wrongly, my Lord, I do apologise. If I can take your Lordship to paragraph 43 of our first skeleton argument.

LORD JUSTICE SINGH: Yes, I have that.

MR MATTHEWS: It's my fault, I referred to it too briefly before coming on to focusing on this aspect of it.

At paragraphs 43 and 44, it deals with the five elements, although the respondent seems to suggest there are seven, but we found five and the judge seemed to find five, and we make the point that of those, only the IFA is expressly addressed but that 1, 3, 4 and 5 all involve the IFA and issues arising out of the IFA. But I will come back to deal with each of these individually to show our position on them.

The only one that we say isn't infected is 2, which is the entry by Credit Suisse into two of the sovereign guarantees and that's actually nothing to do with us at all.

LORD JUSTICE SINGH: Yes, quite.

MR MATTHEWS: That's the only reason we say -- and obviously we'd have to accept that insofar as there was a claim being run by the respondent against Credit Suisse,

that's not a matter for us at all. But I'm sorry, yes, 1, 3, 4 and 5, because of what we say about the specific claims, we say they are all infected by the IFA and therefore they're all subject to the stay. Although it is not conceded that that's the effect of the IFA, we do say the effect of the concession on the IFA has that effect.

The learned judge having picked up on the nature of the claim at paragraphs 64 to 66 then comes back to analyse it in this context at paragraphs 108 to 109. What he says there is, first of all, he recognises that at least the entry by the suppliers into the supply contracts is one of the methods and ie is the IFA and the rather vital aspect which is properly to be dealt with by arbitration. What he then says in 109 is:

"The Privinvest principal contention is that the inclusion of the IFA is sufficient to infect the entire conspiracy claim. I cannot see that on any objective basis this can possibly be right."

And as I said in answer a moment ago to my Lord, Lord Justice Singh, it's partly because if one only focuses on one aspect, having already decided the other ones against us because of the way in which he took things, he arrives at position A whereas if he had taken the course we say he should have taken, of dealing with

the IFA first and the consequences of that, he would have reached a different decision in relation to the claims and therefore the impact of the IFA is more wide reaching.

But he says about halfway down:

"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."

The short point in relation to that is that we do say that obviously you have to hive off any aspect of it which does infringe the arbitration agreement and we do say that all the elements that affect the appellants are so affected or infected. And the learned judge is therefore wrong to have looked at it the other way round and ended up with only one potential problem, namely the IFA.

LADY JUSTICE CARR: So each of the other three elements that do involve your clients, they are independently infected, you say?

MR MATTHEWS: Yes.

LADY JUSTICE CARR: They are not just infected by the third allegation, the third means alleged, they are independently infected, you say; is that it?

MR MATTHEWS: They are both, my Lady, and I'll come on to explain why as I go through each of them in turn.

LADY JUSTICE CARR: I see.

MR MATTHEWS: The net effect of both of those facts is that on either basis one has to take into account the fact that 1, 3, 4 and 5, insofar as they involve my clients, are properly the subject of the arbitration, not of these court proceedings, and therefore there is left no conspiracy claim against my clients. As I say, if and insofar as there is a different conspiracy claim against Credit Suisse, that is not a matter which affects us.

LADY JUSTICE CARR: I'm not sure that's right, is it? Because if it's a conspiracy claim there's an agreement between all of you and the fact that one individual act only involved Credit Suisse doesn't mean you're all joint tortfeasors, so I'm not sure you can just ignore the Credit Suisse transaction like that.

MR MATTHEWS: We struggle at the moment to see how our involvement is said to arise out of the Credit Suisse involvement if the other four elements are all being addressed by the arbitration. Because if, and fundamentally, the IFA is being addressed by the arbitration, then how can it be said that the appellants have participated in an unlawful conspiracy to procure the guarantee --

LADY JUSTICE CARR: The essence of the unlawful conspiracy is the agreement. Is it -- in unlawful means conspiracy, is it the agreement or the means? It's both, the agreement and the means.

MR MATTHEWS: It's both, my Lady.

LADY JUSTICE CARR: You will have known that somebody is going to have to come up with the facilities under the facilities agreement. So I think you are in on the Credit Suisse agreement to that extent.

MR MATTHEWS: Only insofar as they can demonstrate that there is an unlawful means, and there is no unlawful means unless and until they can establish in the context of the arbitration and by the route of the supply contracts that there is something in relation to the supply contracts in their case against us on those. Because there is nothing that we are said to have done specifically in the context of the guarantee rather than the supply contracts, which means that if the supply contracts are perfectly good and proper contracts, not in any way induced by corruption, somehow the guarantee is. So what is the unlawful conspiracy when you strip out all of the elements that are to go off to arbitration? There's no unlawful means unless they establish the elements that are properly to go off to arbitration.

If one asks oneself... An unlawful means conspiracy must first of all mean we did something unlawful. Question, what? And secondly, that we must have done something to, in some case, cause them harm or loss, and as I have already indicated, if we are right that the supply contracts are perfectly proper commercial contracts and that is a matter for the arbitrators, where is their loss? If these supply contracts were perfectly properly and lawfully entered into, as will have to be addressed by the arbitrators, where is their loss? What is the tort?

That is in some measure dealt with at paragraphs 54 and 55 of the judgment. In relation to that, the case is made against, obviously, the only parties, namely Credit Suisse, not us, and it's objection to all of those various matters.

And A is an ultra vires matter. B, they were entered into in the knowledge that bribes had been or would be made, that they were ultra vires, that Mr Chang was acting without authority or in breach of his fiduciary duty, and that the Proindicus and EMATUM supply contracts were instruments of fraud and/or shams. So the short point is that they're not claims made against the parties to the arbitration agreement, yes, but insofar as they are then dragged into the conspiracy

claim, they can't be made good without aspects that involve us that are subject to the arbitration.

If this is coming to a convenient moment, just before, I should have picked up one further point in relation to the conspiracy claim that a further point has been raised by respondent's notice, which we deal with in the second skeleton argument at paragraphs 44 and 45. But I don't need to develop that any further orally than I have already said. I give you that as the cross-reference to where we deal with it in writing.

LORD JUSTICE HENDERSON: Thank you, Mr Matthews.

MR MATTHEWS: There's one small point that I should make just to clarify the position in relation to the arbitrations by reference to paragraph 32.3 of our first skeleton argument and the judgment at paragraphs 26 and 31, which is to make the point that currently there is a counterclaim in the arbitrations for a declaration that the contracts were shams. I understand the point that's being taken by the respondent is that that is only for the purposes of, as it were, undermining the arbitration agreement element of that and avoiding jurisdiction in relation to it. But we say that that demonstrates the artificiality of the whole exercise when they are in this way picking and choosing when the consequence of the allegations that they make are not

just or indeed barely to affect the arbitration agreement, what they would far more fundamentally affect would be the supply contracts.

If that's a convenient moment, my Lord.

LORD JUSTICE HENDERSON: Yes, it is. Can you perhaps just help us as to how you're doing in terms of when you're likely to finish your submissions this afternoon? Bearing in mind you said you were going to divide them up more or less equally between opening and reply, so on that basis there can't be very much more to come.

MR MATTHEWS: Not equally between opening and reply, my Lord, I am sorry if I gave that that impression. I aim to finish at about 2.45.

LORD JUSTICE HENDERSON: Thank you very much. We will break off in that case and resume at 2 o'clock. Thank you all very much.

(1.00 pm)

(The Short Adjournment)

(2.00 pm)

LORD JUSTICE HENDERSON: Good afternoon, everybody. I think it's 2 o'clock. If we're ready, I think Mr Matthews, on we go. Thank you.

MR MATTHEWS: Thank you, my Lord.

May I just briefly pick up one point that my Lord, Lord Justice Henderson, said before the break, which was

a reference to the suggestion that these contracts were unusual because of the provision for payment in advance of performance of the contracts. All I want to do on that, if I may, is pick up the fact that we deal with that in our defence, but obviously subject to the fact that we say this is archetypally a matter which should be dealt with by the arbitrators. It's the defence, paragraph 210.3, bundle C2, tab 15, page 416.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: Which is part of why we say this is (a) not unusual and therefore one of the many features of the IFA which is to go off to arbitration is not satisfied or the respondent fails on it.

I was going to deal then with the bribery claim. We deal with that in our first skeleton argument at paragraphs 35 to 37, and the judgment turns to it first at paragraphs 56 to 60. It doesn't in terms say so, but in our submission it is clear that there is nothing in the claims brought by the respondent to suggest that the payments of bribes insofar as they impacted the guarantees were in some, and if so what, manner different to the bribes said to have induced the supply contracts and absent the supply contracts clearly there would have been no guarantees. There is some attempt now made in the respondent's notice to address this, but

in our submission it fails for the reasons which we have developed in our second skeleton at paragraphs 35 to 36, and I don't propose to say any more about it orally at this stage. It is, in our submission, facile to suggest that the respondent has some sort of case that even if the supply contracts were not induced by bribery the guarantees were, when there is no complaint about the guarantees, even if there is no valid complaint about the supply contracts.

The short point is the appellants are entitled to have it resolved in arbitration, and it is now so conceded by the respondent, the issue of whether or not the supply contracts were sham, instrument of fraud, procured by bribes, and accordingly the appellants are not bound to argue in court but are entitled to have determined in arbitration what might be the consequence of that issue.

The judge returns to it at paragraph 99 of the judgment. He acknowledges, of course, that 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 is IFA is relevant and we say again that ties into the fact that if you start with the IFA being sufficiently

connected then the other dominoes fall into place in the right way.

On the other hand, he says:

"This tort is not dependent on the making of a particular contract."

Well, yes, up to a point, but the fact if it be so that you can have a claim in the tort of bribery without the making of a particular contract does not mean you have to establish a loss to complete the tort, and the loss here is entering into the supply contracts.

That is what drains the substantial sums of money --

LADY JUSTICE CARR: Sorry, Mr Matthews, you have gone too quickly for me there. The fact that the tort of bribery is not dependent on contract does not mean you don't still have to have loss?

MR MATTHEWS: Yes.

LADY JUSTICE CARR: I misheard you. Does not mean you don't still have to have loss. And?

MR MATTHEWS: The loss here is entering into the supply contract.

LADY JUSTICE CARR: Why is the loss not the bribes?

MR MATTHEWS: Because if you don't have any contracts, nothing has been achieved by any bribes. If you cannot impugn --

LADY JUSTICE CARR: I see that.

MR MATTHEWS: I won't go over it again.

Of course, there is no bribe that's said to have induced the guarantee rather than the supply contract. Obviously, the fact that you can rescind any contract concluded by your bribed agent without proof that the bribery caused that contract is a different matter, which doesn't take matters any further. The IFA is an essential element of the respondent's claims in bribery. There's not alleged to have been an isolated act of bribery directed purely to procuring the guarantees and there is no factual scenario in which that is said to have arisen in circumstances where, as I have shown, and we seek to do so, that the supply contracts themselves were for the benefit of the respondent, albeit through their SPVs, and lie at the heart of the respondent's whole case.

In the context of the bribery claim, one has to look at the reality of what is being asserted. It's not that the guarantee contracts were and the supply contracts were not procured by bribery; it is the supply contracts were procured by bribery inevitably together with the means of funding. But it's the procuring of the supply contracts which is absolutely fundamental to this.

The judge then goes on in paragraph 100 to deal with the question of relief and he says:

"So far as relief is concerned, the remedies claimed in terms of the amount of the bribes, the profits and the traceable proceeds are not concerned with the proceeds of the supply contracts."

That is true insofar as the judge is focusing on an element which has nothing to do with the appellants and it's therefore perhaps unsurprising it would not lead him to the arbitration agreement; one wouldn't expect it to. But insofar as he is dealing with damages and account of profits, damages do not, it is said, encompass the proceeds of the supply contracts, but they arise simply because payment under the supply contracts was financed through loans and the guarantees and it is alleged that the supply contracts were shams. If, as the appellants contend, the supply contracts were not shams, not the vehicle for fraud that is contended, then inevitably that will impact damages, and that is self-evidently a matter in connection with the supply contracts and therefore subject to the arbitration clause.

In relation to the account of profits, the learned judge effectively says, well, the remedy doesn't arise now, and in our submission that can't be the right analysis that because the election and remedy may arise once liability is established, it doesn't arise now.

Just from a practical point of view, can it be suggested that there wouldn't be pleading, disclosure, witness, expert evidence on the subject of what, if any, profits the appellants derived from the supply contracts? So in our submission it's not correct to say that it doesn't arise now even if the election hasn't taken place yet and in any event election doesn't have to take place at the end, it can take place any time, and we've made that point with the relevant authority in the first skeleton, paragraph 36, sub-paragraph 2.

Account of profits is pleaded and it is, we say, caught by the arbitration agreements, whether or not the election has yet arisen. The respondent now raises a further point by its respondent's notice on the account of profits, which we haven't entirely been able to make sense of. We've dealt with it so far as we can in our second skeleton at paragraph 37 and I will come back to that if I need to.

Turning to 101 of the judgment, it is said the IFA forms a background, even an important one, to this claim but it doesn't bring the claim within the arbitration clause, it's not sufficiently connected. That, with respect, is simply the assertion and the detail is dealt with elsewhere. It is a necessary element of the guarantee claim that it guarantees the financing of

a corruptly obtained, fraudulent or sham supply contract. If it doesn't, the guarantee claim must fail. It's difficult how there can be said not to be sufficient connection in the circumstances.

We also rely in this context, in relation to bribery, on the matters which we develop in our first skeleton at paragraph 37 to do with the culpa in contrahendo under Swiss law that bribery is a culpa in contrahendo wrong and therefore, we say, clearly within the scope of the arbitration agreements.

LADY JUSTICE CARR: You're going to have to help me on that. This is footnote 2?

MR MATTHEWS: Yes. We develop it fully in our first skeleton argument at paragraph 37, page 300, where we explain the circumstances in which the footnote came about, but really focus on the fact that the case is that as a matter of Swiss law the breach of duty or care or loyalty may be committed, as we say at the top of page --

LADY JUSTICE CARR: Sorry, my first (inaudible: distorted) was you said your second skeleton, paragraph 37. Is it your first skeleton?

MR MATTHEWS: I do apologise, I meant to say my first skeleton, I'm sorry, my Lady.

LADY JUSTICE CARR: So it's your first skeleton?

MR MATTHEWS: Paragraph 37 and I don't know whether the internal pagination or bundle pagination is more helpful. It's internal page 20, bundle pagination, page 300. It's simply dealing with the fact that in Swiss law, the bribery would be a culpa in contrahendo, a pre-contractual duty (inaudible: distorted) with the ultimate contract procured and therefore, we say, sufficiently closely connected.

LADY JUSTICE CARR: The judge says this wasn't pleaded, not clear how far it was before the experts, in any event if it could lead to a contractual claim, that such a claim wasn't made...

MR MATTHEWS: It somewhat begs the question of the nature of the claim, but our position would be that bribery is a culpa in contrahendo claim and therefore it's not a matter for the court, it's a matter for the arbitrators because it's closely connected with the contract.

LORD JUSTICE SINGH: In that context, do you make the submission that what section 9 focuses on is a relevant matter, not whether it's a pleaded claim?

MR MATTHEWS: Yes, indeed so, and it's whether it does or reasonably foreseeably will give rise to a consideration of a matter that is within the arbitration clause.

LORD JUSTICE SINGH: Yes, thank you.

LADY JUSTICE CARR: Is there any authority for the proposition that you have just discussed, that it's -- I mean, the "does or will reasonably foreseeably crop up" point.

MR MATTHEWS: That's the fourth --

LADY JUSTICE CARR: That's the fourth one in Ruhan, is it?

MR MATTHEWS: Yes.

LADY JUSTICE CARR: Got it, thank you very much.

MR MATTHEWS: I'm so sorry, it's the end of the third one, not the fourth one.

I was going to pass then to the dishonest assistance claim. The judge deals with that at paragraph 61 in his first run through. That is purely parasitic on the bribes. There is nothing, again, to suggest anything relating to the guarantees involves different factual elements from entry into the supply contracts. If the supply contracts are impugned there's no basis of complaint about the guarantees, so it's the same point again.

That's his analysis of the claim and then at 102 is his application of the test to the claim. He suggests at 102 that paragraph 136 appears to relate only to the guarantees. Well, with respect, we suggest it's not clear that it does, but even if it does, it's wholly artificial for the reasons we have already gone over.

In any event, the judge accepts that the bribes are also relevant to the supply contracts and we say in fact rather more, in the last sentence of 102, as I have already said, one cannot ignore the relevance of the procuring of the supply contracts to the bribes. We say it's rather more fundamental than that and if you start with the IFA, this element again goes the same direction as the IFA.

At paragraph 103, as the dishonest breach of the duty, one element is the entry of the suppliers into the supply contracts. It's a less direct form of assistance than actually facilitating the bribes. I can see logically how it is said that that is assisted by the actual entry into end the supply, but he says:

"It's a somewhat artificial point and does not depend on anything other than the entry into the contract."

I don't think it adds much, with respect. We say it's an artificial exercise trying to rank the comparative importance of particular allegations. It's not about whether it adds much to the claim but whether it falls within the arbitration clause.

LADY JUSTICE CARR: Speaking entirely for myself, isn't the dishonest claim based on entry into the supply contracts? If it's not identical to the IFA, it's

exactly the same facts. It's the --

MR MATTHEWS: I accept --

LADY JUSTICE CARR: It's a point in your favour, if anything, Mr Matthews. If we are looking at the effect of the concession, as you put it, how can it be said if the entry into the supply contracts as a sham is within, how can dishonest assistance by on entry into the supply contracts not also be within? I'm asking it as an open question.

MR MATTHEWS: We entirely agree with you, my Lady. The reason I pause, even though I accept it's the proverbial gift horse, is because there is a suggestion here that it's also being suggested that there's dishonest assistance into the entry into the guarantees in some form, so it's not just the entry into the supply contracts and it is also entry into the --

LADY JUSTICE CARR: Dishonest assistance by entering into the supply contracts which led to the guarantees?

MR MATTHEWS: Yes. We struggle for our part to see how, once you recognise, as you rightly should, that the IFA goes to arbitration that these are not all simply incidents or consequences of that. We would entirely agree with you. I'm trying to anticipate what might be said against me but struggling.

LADY JUSTICE CARR: What Mr Pillow says -- I'm now getting

feedback. (Pause). Is that better?

LORD JUSTICE HENDERSON: Yes.

LADY JUSTICE CARR: What Mr Pillow says is that this allegation of assistance, the only thing that's in dispute -- well, there is no dispute. The only thing that's in dispute is the fact of assistance, which is a causal matter. Impropriety is not an issue to which you say, as I understand it, no, propriety is absolutely an issue and has to be an issue.

MR MATTHEWS: Exactly. It cannot be said that there's dishonest assistance if there's no impropriety.

LORD JUSTICE HENDERSON: Can I just get clear who it is who's doing the assisting and whose dishonesty is being assisted? Is this dishonesty by your clients this is said to be, is that correct, in furthering the breach of duty by the fiduciaries who should not have entered into the contract because it was a breach of their duties owed to the Republic to do so?

MR MATTHEWS: That is correct. It is explored, helpfully to a degree, in paragraph 61 of the judgment. It's said that the various different defendants, including my clients, the appellants, dishonestly assisted the Mozambican officials --

LORD JUSTICE HENDERSON: That's right, yes, thank you.

MR MATTHEWS: And the point that's made against me is that

it wasn't just the suppliers entering into the supply contracts, it's also Credit Suisse entering into the guarantee agreements and facility agreements. But as we say --

LORD JUSTICE HENDERSON: That aspect of it doesn't concern you. So as against your group of defendants, you say it is simply the entry into the contracts which is the conduct complained of as constituting the dishonest assistance?

MR MATTHEWS: Yes.

LORD JUSTICE HENDERSON: Thank you.

MR MATTHEWS: It's a necessary feature of that that there be dishonesty.

LORD JUSTICE HENDERSON: Indeed, otherwise it wouldn't be dishonest assistance, yes.

MR MATTHEWS: At 104 of the judgment, remedies at 103, the second part, the learned judge again -- there's nothing to add and similarly 104. If we're right on where we've got to so far, we're right and no additional point is made.

There is a further point made in the respondent's notice, which is essentially they want to add that the only relevant question raised is whether there was entry into the supply contracts having a causative effect of some description on the Mozambican officials' breaches

of duty. I'm not quite sure what that point actually is, but anyway, we've tried to answer it as best we can in our second skeleton at paragraphs 39 to 42. What the respondent is, we say, artificially seeking to do is excise the core feature of their case that the supply contracts were instruments of fraud and it is only if they can get home on that that they can hope to mount any case against the appellants on any of these other grounds such as dishonest assistance.

If one looks at it by way of testing, assume you have to replead all of this, accepting that there was nothing objectionable about the supply contracts or the appellants' conduct in relation to them, do you have any basis for a claim against the appellants? No. Ergo the issue or matter as to whether the supply contracts were or were not instruments of fraud or shams and concluded corruptly is the starting point and obviously because the IFA to be arbitrated.

LADY JUSTICE CARR: You can have a claim in bribery without a sham contract, so you could have a totally bona fide contract but a contractor wants to get a leg up over his or her competitors and so places a bung. So have you overstated your case earlier this morning on that? You could have a bona fide supply contract and alongside it a sustainable bribery claim.

MR MATTHEWS: You would struggle to have, I suggest, a bona fide in the sense of a contract that can't be impugned if you have bribed --

LADY JUSTICE CARR: I mean, you may say on the facts, you say technically possible, that is all I am exploring. You say on the facts here it's clearly not the case that's advanced, it's not the matter. But you could, couldn't you, in theory?

MR MATTHEWS: Well, if your question is can you have a proper contract where there is also a bribe, then the answer must be no, because the contract is by definition improper if it is tainted with the bribe. There is -- of course, the person whose agent has been bribed may nevertheless choose to adopt and maintain the contract, but they would have claims in respect of the contract. First of all, they'd have a claim in respect of the bribe paid, and that would be a claim in relation to the contract. Secondly, they'd be entitled to rescind the contract.

LADY JUSTICE CARR: Thank you.

MR MATTHEWS: Turning then to knowing receipt, I'm going to take knowing receipt and proprietary claim quite quickly as everybody else does and lumps them together to a significant because the points essentially arise the same.

The position is somewhat confused by the respondent having tried to amend by skeleton argument in advance of the hearing before the judge to try to diminish the obvious central role of the supply contracts in the respondent's claim. We've dealt with this in our first skeleton at paragraphs 41 to 42 and in our second skeleton at paragraph 7. The learned judge deals with it, first of all, at paragraph 62, where he refers to:

"The fees or other payments directly or indirectly received from the Republic in respect of the three transactions."

At that stage on the pleadings, the three transactions were the supply contracts and they are now said to be the supply contracts and the parasitic financing or guarantee contracts. The appellants are not alleged to have received any relevant money, so it's difficult to see how this claim applies to them. Although it's -- in the judgment at paragraph 100, the point is made in relation to an account of profits. If and insofar as an account of profits was said to include some of the proceeds of the supply contracts, that would trigger some responsibility or liability under the supply contracts, but of course that would be properly a matter for an arbitral tribunal in relation to the supply contracts.

The judge then turns back to it at paragraphs 105 and 106. He deals with them compendiously, this and the proprietary claims. He says:

"They depend on knowledge and/or recklessness as to the breaches of duties as to which the IFA is a background matter."

But again, with respect, the IFA is essential because if the IFA is not made out, there can't be any breaches of duty.

As for remedy, it's said:

"This is limited to monies actually received by the Privinvest defendants but the Republic does not suggest that any proceeds of sale constitute such sums in the hands of those defendants."

It says that's 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. This all somewhat begs the question also of whether the respondent is in fact a party to the contract, and that gets us back into that debate, because if it is in fact a party to the contract, and as we say only in those circumstances does its being a party to the arbitration agreement arise, then of course it has claims under the contract to

recover sums in relation to knowing receipt and proprietary claims.

So essentially in relation to this, it either appears that these claims be not pursued against us, or if they are pursued against us, it must be in relation to sums received under the supply contracts and therefore properly a matter to go to arbitration.

Paragraph 107. Again, we say it's the dominoes falling the wrong way because of starting at the wrong point.

Finally, there's an additional point raised in the respondent's notice. We've addressed that in our second skeleton at paragraph 43 and I don't propose to say anything more about that.

The proprietary claim. There's nothing further to say. All the same points arise as have been dealt with under knowing receipt.

The judge then deals with the losses claimed at paragraph 67 of the judgment. Essentially what we say in relation to that is that they are -- first of all, they are essentially or basically the payments that have been made under the supply contracts. It is said, of course, it's the liabilities under the guarantees, but what do the financing agreements and the guarantees cover? Namely the payments that have been made under

the supply contracts. So if and insofar as there is a right in the guarantors, the respondent, as parties to the supply contract and also parties to the arbitration agreement, then there is the claim which they have, even though, as I say, for tactical reasons they're choosing not to deploy it. But ultimately what is basically at issue here is the sums that have been paid out under the supply contracts.

I was going to turn then to deal with the Swiss law of interpretation of arbitration clauses, which I can take fairly quickly, I hope, because there are just a couple of points to pick up on the basis indicated earlier that essentially Swiss law and English law travel the same path.

If we can turn in the judgment to paragraph 81, the multiple arbitration clauses point, we deal with in our skeleton at paragraph 27. The fact that there are multiple arbitration clauses does not, in our submission, detract from the one-stop-shop point. It is simply that all disputes should be resolved in the same place.

LADY JUSTICE CARR: Are you in the judgment at paragraph 95?

MR MATTHEWS: I was just touching first on 81 and then coming to 95. 81.3 is where it's identified.

LADY JUSTICE CARR: I'm sorry, yes.

MR MATTHEWS: So relevant consideration. It's linked into 81.2 because that is the in favorem arbitri point, and there is an element or an extent to which the judge diminishes the significance of the in favorem arbitri point, relying upon the multiple arbitration clauses point. We say that's not a proper approach.

There are a number of points that come together in relation to this, which are dealt with, I'm afraid, in various different places. Paragraph 78 of the judgment addresses the prospect of consolidation. He says, well, when you have three arbitration clauses, the utility of the one-stop-shop principle appears to me to be somewhat limited. This scenario was posited to the experts. Mr Besson's response was to say they simply show the different parties reached (inaudible: distorted) insufficiently organised or properly advised. I don't see how that is an answer, although, with respect, it is quite commonly the explanation.

Secondly, he says that one can take into account the fact the three separate arbitrations are likely to be consolidated or managed together. We can see this might happen and indeed it has largely happened here, but one surely cannot assume this at the outset. The difficulty with that is that the parties have chosen rules and curial law which contemplate consolidation and common

case management which is precisely why they have happened here. So in those circumstances the fact of multiple arbitration clauses is rather less significant and we've dealt with that in our first skeleton argument at paragraph 27.4.

But even if there are different arbitrations, the one thing that it can be said the parties did intend is their disputes would be arbitrated under whichever agreement rather than be resolved in court. That takes us back to Lord Justice Males in Bridgehouse: the parties not only agreed their disputes would be arbitrated but also that they would not be resolved in court. So in our submission, the multiple arbitration clauses is not or not a significantly relevant consideration or at least not negative to the appellants.

We would point out that in Fiona Trust there were multiple arbitration agreements between eight companies within a Russian group and Lord Hoffmann didn't at any point indicate that this required a narrow approach to construction and we would respectfully suggest that therefore the learned judge was wrong to reject Professor Besson's approach on this.

It is said in paragraph 78, thirdly, by Mr Besson that if multiplicity of clauses creates a tension, then

so be it. He says that's not really an answer either since, if possible, the process of interpretation should involve removing such tension. The difficulty is that the answer to that by the parties who have agreed to arbitration is that a tension should not be resolved by sending more rather than less to court when they've agreed arbitration. So at the end of the day one still comes down to the principle that the clauses must be interpreted on the assumption that the parties intended all their disputes to go to arbitration rather than court, even if not necessarily all to the same arbitration or at least not until consolidated or the subject of a common case management regime, as has happened here.

So that does, as your Ladyship says, tie one in then to paragraph 95 of the judgment. As to that, we say that it does not justify adopting a narrow approach or, as your Ladyship has rightly pointed out, narrower approach in this paragraph to the sufficiency of the connection.

First, two of the contracts contain the same arbitration clauses in any event and what he seems to be saying is the fact that there were three contracts militates in favour of a narrow sufficiency test. But there, with respect, just isn't any warrant for that

approach either in English or Swiss law. The fact remains if an issue arises in the proceedings which is caught by the plain words of the arbitration agreements, then the parties contemplated that that issue would be resolved by arbitration. And it's not for the court to rewrite that for them by saying, for example as it was said, I think, by Lord Justice Popplewell, that the parties could have easily excluded certain types of claim expressly if they had wanted to and therefore one shouldn't lean in favour of construing parties' arbitration agreements narrowly.

Obviously, ultimately, the fact that there were three contracts may be the product of the desire of the respondent to use a different SPV for each contract. It doesn't tell you anything about how narrow or wide is to be the sufficiency of the connection.

LADY JUSTICE CARR: If you're right that the judge found in some way that there was no difference between English and Swiss law, why did he take the narrow approach that he did in the light of Fiona Trust? I'm just wondering whether it's as clear as you say that he adopted English law because his approach is contrary to Fiona Trust and the approach to be taken to arbitration clauses, whereas Lord Hoffmann says in terms you take a wide and broad approach. So he can't really have found that

effectively English law principles applied by analogy.

MR MATTHEWS: We agree, my Lady. He seems to have started off with that position earlier in his judgment, but then shifted from it when he comes on later to analyse the sufficiency element. In our submission, that wasn't a warranted approach, it wasn't warranted on the basis of the Swiss law evidence, and I have given your Ladyship the references to that in the underlying evidence. It wasn't warranted, in our submission, on the basis of what the learned judge has expressed in his judgment and there's no basis for it.

What he seems to indicate very fairly in his judgment at the end of paragraph 77 was that there is no legal definition of sufficiency. But what he doesn't do is identify how or why he got to a conclusion that it has to be narrow or narrower in its analysis.

So in paragraph 95, the judge asks himself the question whether the structure of the three contracts militates against inclusion of claims made generically against parties who are not restricted to the suppliers and in theory would have to be arbitrated three times over. That was one of the areas where it wasn't clear to us whether that was in some way indicating the position of the respondent as not being a party, although it's not wholly clear to us what that meant.

But it may indeed be necessary, if you choose to enter into three different contracts, to have three different arbitrations, but that may be a reason why you choose Swiss law and Swiss arbitration, which is particularly sympathetic to consolidation and joint case management, which has resulted in this case and the appointment of the same tribunals and joint case management.

Certainly we do not suggest that the clauses catch claims against non-parties, of course they never would, but that's not the point. The question is whether they catch claims insofar as they are against suppliers, namely the appellants, and that doesn't help answer the question of analysis as to whether it was intended to bring these claims within the ambit -- or these matters within the ambit of the clause or not.

If one looks at it this way: if the Republic had brought the same underlying claims in arbitration under the supply contracts, ie to set aside the supply contracts as having been procured by bribery and for recovery to its SPVs or itself of the money paid out, then it would have to have brought the three different claims under three different arbitrations but there's no suggestion that those claims would not have been arbitrable as a result, clearly they would have been and

they would have raised exactly the same matters as are raised by the IFA.

There's also a timing flaw in the sense that the learned judge is relying upon later contracts as an aid to construction of earlier contracts, and although the point is made that the fact of later contracts would have been in the contemplation of the parties, so it might be, but there is no evidence that the form of a dispute resolution clause was in the contemplation of the parties at the time when the earlier contracts were resolved.

In paragraph 93 it is said again:

"It's correct that 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 those various contracts. The corrupt scheme could not exist without all three elements."

Well, that's only true up to a point. The reality is that if you don't have the supply contracts, you have nothing. So it's the supply contracts which are at the heart of this on any view.

LADY JUSTICE CARR: But that still supports your -- whether that's right or not, that supports your primary -- whether the supply contracts will be enough by

1 themselves, this certainly supports your submission that
2 nothing could work without them.
3 MR MATTHEWS: Exactly, my Lady.
4 LADY JUSTICE CARR: If you see what I mean.
5 MR MATTHEWS: Absolutely. That was the point I was trying
6 to make, precisely.
7 LORD JUSTICE HENDERSON: In relation to the timing point,
8 was it not open to the judge simply to infer from the
9 facts before him and just the obviously interconnected
10 nature of all these contracts that really all their
11 significant elements were in contemplation from the
12 beginning?
13 MR MATTHEWS: Well, he touches on it at paragraph 78. He
14 refers back to 78 and deals with it there, yes. Sorry,
15 it's in the second half where he says:
16 "In my view, at the very least the fact that the
17 context here includes the making of three different
18 arbitration agreements is relevant. I accept they are
19 not made all at the same time, but at the time of the
20 making of the supply contract they must have been in
21 contemplation, at least the second and third such
22 contracts."
23 LORD JUSTICE HENDERSON: Yes.
24 MR MATTHEWS: Yes, but there's no evidence and there's no
25 suggestion that he did indeed conclude that the

arbitration agreements or the forum elements to that would already have been resolved or addressed, and indeed one might say that the inference would, if anything, be that -- the expectation might have been that they would all have been the same rather than being different.

LORD JUSTICE HENDERSON: (Overspeaking).

MR MATTHEWS: That same point, while I'm on it, because I'm very nearly finished, is the -- reliance is also placed by the learned judge on the subcontracts as a relevant matter. But of course the subcontracts were not concluded until after the conclusion of the contracts. There is a point raised, a new point raised by the respondent in their respondent's notice that because the supply contracts were conditional upon later events they didn't become executed until a later event, by which time the subcontracts were in place.

We have dealt with that point, we say it's a thoroughly bad point, in our second skeleton at paragraphs 18 to 22. In short, the contract has been concluded even though it is conditional upon subsequent events and it must have a meaning at the time when it is concluded rather than only having a meaning when it comes to be executed at a later date because the condition, whether it be precedent or subsequent, is

fulfilled --

LORD JUSTICE HENDERSON: Again, I follow that, but I just wonder whether it was not open -- bearing in mind these are ultimately issues of fact, whether it was open to the judge to infer that these subcontracts must have been in contemplation from the beginning. One of them was entered into a matter of days after the relevant contract, if I remember rightly, and if that subcontracted the entire performance of this colossal contract, it seems stretching credulity to suggest that that wasn't part of the plan from the beginning. Nothing may turn on it, but it seems to me as a matter of fact that was a perfectly reasonable inference for the judge to draw.

MR MATTHEWS: It may be, my Lord, but it's not one he expresses as having drawn. He rather deals with it by saying, "Oh well" -- he doesn't make that point, he rather just simply says the contracts must have been in contemplation of the parties.

LORD JUSTICE HENDERSON: I rather read that as an implicit finding to that effect, but maybe I'm being...

MR MATTHEWS: It's not a sufficiently important point for me to take up more of the court's time on.

LORD JUSTICE HENDERSON: Very well, thank you.

MR MATTHEWS: If I may just check to see whether there's

anything else I want to touch on.

(Pause)

We make the same points in relation to 94 as we have made in relation to the 93. It's the artificiality of suggesting that somehow this was all about entering into the guarantees rather than entering into the supply contracts to which the guarantees are ancillary, as it were.

So for example, for the judge to say that the financing and guarantees were necessary for the appellants to make money from the supply contracts may or may not be true, but the starting point for the analysis has to be whether there was anything wrong with the supply contracts because if there's nothing wrong with the supply contracts the appellants can't have done anything wrong.

It's the last sentence of paragraph 94 which I particularly wanted to draw to the court's attention. This is where the judge does seem to proceed on the basis that the respondent wasn't party to the supply contracts. He says from halfway through:

"From the Republic's point of view this was they key element because this was 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."

In our submission, that has infected the judge's thinking, it's simply not consistent with the assumption underlying this scope hearing.

LORD JUSTICE HENDERSON: That reminds me: do we find any independent record of what the assumption was? Was it reported in writing or are we simply dependent on what the judge says in his judgment about it?

MR MATTHEWS: I will come back to you on that, if I may, my Lord.

LORD JUSTICE HENDERSON: Yes. Before the hearing ends, I would like to know whether there is a record somewhere to which the parties committed themselves as to what the precise assumption was that the court was being asked to make. I'm sure your army of juniors will have an answer to that very shortly.

MR MATTHEWS: Indeed. Therefore, just to make good that point, with respect, it prejudges therefore the parties' point, which is that the respondent's liability and potential for loss arises because they arranged for their SPVs to enter into what are alleged to be fraudulent or sham supply contracts and the respondent only cannot pursue claims under those supply contracts if it is not party to them but that begs the question. And if, as we say, they are party to the contracts and

thereby to the arbitration agreements, then all of this arises but they do have a basis and if not then the arbitration agreement point falls away anyway.

LORD JUSTICE SINGH: Mr Matthews, this seems to be a pretty fundamental argument. I may have missed it, but does this feature in the grounds of appeal?

MR MATTHEWS: I'm sorry, which argument is that?

LORD JUSTICE SINGH: Well, the argument that the judge has fundamentally misunderstood -- as you say, in the last sentence of paragraph 94, he has proceeded on the basis that the Republic was not a party to the supply contracts and therefore could not make a claim under those contracts. That seems to be a pretty fundamental submission that you're making, is an error of law in the judge's judgment, but I don't recall seeing it in the grounds.

MR MATTHEWS: We've certainly made it in the skeleton.

LORD JUSTICE SINGH: I know, but forgive me. What you're permitted to argue on an appeal is the grounds, not what's said in a skeleton argument.

MR MATTHEWS: My Lord, yes. It's sometimes necessary to develop points that support the grounds.

LORD JUSTICE SINGH: That I understand, of course.

MR MATTHEWS: That's what I'm seeking to do. May I come back to you on that?

LORD JUSTICE SINGH: Yes, of course.

MR MATTHEWS: I appreciate that I'm stocking up homework.

I was simply going to touch in paragraph 97 -- it again seems to be the same decision on his part to take the narrow approach that the arbitration clauses should be confined to their immediate contractual context, and that we say seems to create some sort of a binary dichotomy between the parties agreeing contractual framework in which all the claims would come under one dispute resolution clause even though, of course, by definition the respondent had chosen to enter into it through three different SPVs, and a contractual framework in which the disputes would be confined to their immediate contractual context. Our submission would be there isn't such a false dichotomy and you read from the wording to the breadth of the effect of the clause, and if they had wanted it to be narrower, they could have used words to achieve that.

Finally, paragraph 110. The judge approaches the matter on the basis that the claims are taken together and in our respectful submission it is again missing the point to take the claims together in the way that he does. What we say, and intended to say, in that context was that the various claims that we have looked at are all infected by the IFA, which lies at the heart of them

all, and therefore the reality or the expectation is that if the issues encompassed within the IFA fall to be dealt with by the arbitrators, as we say they rightly do, then there's no basis for construing the clause in such a way as to exclude the other individual claims which we have now gone through, and that brings together the collectivity of the claims, as it were, going to arbitration rather than either fragmentation or dragging the arbitrable claims into the court proceedings.

Unless I can unless your Lordships and your Ladyship further at this stage.

LORD JUSTICE HENDERSON: No, I think we have no further questions at this point. Thank you very much, Mr Matthews.

Mr Pillow, when you're ready.

Submissions by MR PILLOW

MR PILLOW: Thank you, my Lords, my Lady.

What I would like to do this afternoon, if it's convenient to the court, is to try to deal with and put paid to some of the fallacies, the logical and analytical fallacies, that have pervaded the appellants' case on this appeal. They're all quite fundamental and this is one of those strange -- well, strange may not be the word, but it's one of those areas of law where the analytical rigour involved in assessing the various

stages of section 9 -- one needs a lot of analytical rigour and one needs to look at what is the matter in respect of which the proceedings are brought, if it is a matter, and then ask secondly whether it's a matter that the parties have agreed can only be arbitrated.

I'm afraid when one teases apart some of Mr Matthews' submissions from today, you will see that there are some fundamental logical fallacies in his approach and legal fallacies.

The first one I want to deal with is what was actually the principal plank of Mr Matthews' case before you today, if I may put it that high. That is none of the claims against Privinvest by the Republic of Mozambique can work without the supply contracts being shown either to have been procured by bribery or to be instruments of fraud or shams or unlawful or uncommercial and improper in some way.

You'll remember from just a few moments ago that Mr Matthews went so far as to say, and I quote I think:

"If there's nothing wrong with the supply contracts then the appellants cannot have done anything wrong."

That premise is fundamentally erroneous in English law and in analysis of the claims the Republic brings.

All of our causes of action as pleaded are available to us against Privinvest, and I mean all of D6 to D10

inclusive, even if the supply agreements -- well, firstly didn't exist, but secondly, given that they do exist, even if they were entirely untainted by bribery, even if they were perfectly valid, lawful, commercial even, our claims will still work and will still be made and are still made on that basis.

You can test that proposition by taking a part of our claim, a sample of our claim, but an important exemplar of our claim and analysing it properly as a matter of law. Imagine that our pleading said this, and cut down to its bare essentials this is essentially what our case is: Mr Chang, the Minister of Finance of the Republic of Mozambique at the time, was a fiduciary of the Republic. That I don't think is in principle going to be difficult to show.

We say Privinvest and Mr Safa paid Mr Chang a secret commission of $5 million. In fact it's now admitted that he was paid $7 million by Privinvest entities. We say that's a bribe, but in civil law essentially what matters is whether it was a commission and whether it was secret from the honest people in the Republic.

Mr Chang signed the guarantees. He signed each of them personally. If those guarantees are valid then the loss or the loss to which the Republic has thereby been exposed is its liability, if any, under the guarantees.

That is only one way, of course, of putting a remedy for bribery. The others are that Mr Chang and Privinvest individually, if they're jointly and severally liable, as we say they are, are liable in restitution for the bribe, both of them, the money they hadn't received, as it were, in old language.

Let's assume that is all our claim said. None of that has anything to do with the supply contracts. It comes back to the point my Lady, Lady Justice Carr, made to Mr Matthews, which is that of course bribery is what is -- bribery is bribery whether or not any contract is induced at all. It's actionable in law, it's corrupt, it's wrong, it's morally reprehensible. It's equally so if a commercial contract is produced from it. It's no necessary part of any case that we have in relation to the things I have just described whether the supply contract resulted from the bribes or whether it, having resulted from the bribes, was a good, bad or indifferent, a lawful, unlawful or other contract.

The claims we make in this case against Privinvest therefore have nothing to do with the supply contracts. And one has to be careful with what Mr Matthews has suggested this morning is in fact the claim we are making, and this is why one has to analyse it very carefully because Mr Matthews was suggesting that the

only possible loss we could claim in this case is loss in relation to the supply contract, the price that was paid. We of course didn't pay that price, no one paid it apart from Credit Suisse originally. It was advanced in full upfront to Privinvest directly by the bank, and the Republic was never going to pay it and didn't.

But you will see that if one looks at what Privinvest say in their defence is the nature of our claim in loss against them you'll see they accept in fact that it's nothing to do with the supply contracts. So if I could briefly ask you to look at the defence that's now been filed, paragraph 348, which you'll find in C2, tab 15, page 461.

You will see there that Privinvest have in fact done our job for us and characterised the nature of the loss that we claim in 348.1 as, (1), liabilities which the Republic is or may become subject to under the guarantees or euro bonds which have replaced some of the lending, and macroeconomic losses.

There is no suggestion on the part of Privinvest that the losses we're claiming arise under or in relation to or are connected to the supply contracts and if they were of course, they would no doubt say that was a matter of Swiss law.

So they know what this claim is about, actually,

when they come to pleading it with a statement of truth. But in order to evade the fundamental question on this application, which is what is the matter in respect of which this claim is brought, there has to be this slip from what is the real claim made into, oh, it must all have something to do with the supply contracts. And that is a fundamentally erroneous and wrong slip. I will come on in a moment in more detail as to why that is in relation to conspiracy, bribery, dishonest assistance and so on.

What follows from that, my Lords and my Lady, is that on no analysis of the outcome of this appeal should we be unable to bring any claim or group of claims against the Privinvest defendants as pleaded, even given that we have now made the concession in relation to the IFA.

LADY JUSTICE CARR: Mr Pillow, on that, can we take it that the concession is that the judge was wrong? You can't have a declaration that you say the Privinvest appellants are entitled to unless it's a correct declaration.

MR PILLOW: My Lady, what I'm doing is not opposing the appeal to that extent. I don't think I can go further than that given what I have said. Equally, as Lord Justice Henderson says, the court has to decide.

I'm not suggesting the judge got this right. You may think there's not much difference in that, but I have to be careful about what my instructions are and what the terms of the concession were. What it means is, I accept and we have said all along, Privinvest are entitled to the declaration to that extent if the Court of Appeal, you, consider that is a proper course in law.

As I say, it probably doesn't make any difference, but there we are.

The reason we did that, my Lady, is we say it has never been and is no part of our case on any of the causes of action that are relevant that the supply contracts matter, that anything to do with them -- we do not wish to advance a case that they were induced by bribery or procured by bribery or tainted by bribery, nor that they were frauds or shams, because we don't need to. That's why what we have conceded is effectively that they should be stayed because it doesn't matter to us whether they are in this case or not.

It is important to pause there and note what is the effect of a stay. It doesn't mean these are issues that will be arbitrated necessarily, it just means they are issues that are taken out of this court case as against Privinvest and only as against Privinvest. That's what

drove the concession. So the question is -- and this is really, really important in terms of my analysis -- not what Mr Matthews would like it to be, which is having conceded the IFA, will we make it home on the merits or are our claims sustainable on the merits for bribery connected with the guarantee or connected with no contract at all or a conspiracy to bribe in relation to the guarantee or to bribe with no connection to a contract at all?

The question is not whether those are sustainable on the merits, which they plainly are, but that's not the question for today. The question is: does what remains, now that stays in place by concession, fall within section 9? So we have cleared the board, we hoped, of the IFA and we make it clear we do not advance a case in this action against Privinvest to the effect that the bribes procured the supply contracts, nor that they were frauds, shams or inherently unlawful. It is no part of our case against Privinvest and we have agreed that comes out.

LADY JUSTICE CARR: This is -- well, I don't want to stop you now, but this is part of the problem, speaking entirely for myself, about all of this, that everybody is ducking and weaving on the pleadings and you're now resting your case, not resting your case, but now

advancing a case which is completely different to the one that was before the judge because the IFA was before the judge. It was a part, a central part, front and centre of the case. How are we to proceed here? We've got your revised pleading. Now there's a concession as to a stay of large chunks of the claim. Should we just be remitting it all and start again in the light of the re-amended pleadings and the concession that's now been made as to the way you put your case?

MR PILLOW: No, my Lady, with respect, we shouldn't. Because nothing I have said so far today is anything that I did not say in almost the same terms to the judge.

LADY JUSTICE CARR: Except for the IFA.

MR PILLOW: No, my Lady, because as far as all the other claims were concerned I made it clear to the judge and the judge accepted that the IFA didn't impinge on those claims. That's my point today. That is why we can say that we are happy for the IFA to be stayed and to be removed from the case as against Privinvest, but everything I've said to the judge and everything I'm going to say to you is effectively the same submission, which is that whether or not the IFA remains in or out, and we accept that it's out because we thought that might simplify matters, all of the other cases remain

in, all the claims remain in. That comes back, in my respectful submission, to the point that I was trying to make, which is that -- and I do object or dissent from your Ladyship's description of the IFA as a large chunk of the case.

We have always said it was peripheral, and I have used those words throughout, including to the judge from the outset, but it doesn't matter whether it was peripheral or not. What matters for your present purposes is, having got rid of the IFA, which was one of the five bones of contention that were between the parties, having got rid of it, is our bribery case now without it, if it ever had it, but necessarily without it, is our bribery case a matter in respect of which these proceedings are brought that must be referred to arbitration bearing in mind there is no IFA element to it ex hypothesi?

What I have just described at the beginning of my submissions to the court demonstrates that it's not a matter that could have been referred to -- required to be referred to arbitration under the arbitration agreements in the supply contracts because our claim in bribery has no connection to the supply contracts and certainly no necessary connection to the supply contracts. And it's on that basis your Ladyship and the

court will have to grapple with whether what remains in this case, namely an allegation, a claim for bribery, an allegation that bribes were paid to Mr Chang and various other officials, there was some $140 million paid to Mozambican officials -- what you have to grapple with and Mr Matthews hasn't yet grappled with is when we say that those bribes are actionable per se, in English law, we don't need to say they were linked to a contract, intended to be linked to a contract, procured a contract, all we have to show is that they were paid to an agent who had a responsibility to the Republic to give disinterested advice in relation to the relevant contracts. No one can possibly suggest Mr Chang, who signed the contracts, didn't have to give disinterested advice.

So what your Ladyship and the court have to do, in my respectful submission, is to consider now that the IFA has been taken out of the equation whether a claim in bribery that is not linked to any contract, or at most is linked to the guarantee contract on our case, whether that is a matter that falls to be arbitrated under another contract to which the parties, one side of the guarantee parties -- where the parties aren't the same. Privinvest wasn't a party to the guarantee that it procured through bribery. There's no arbitration

clause in the guarantee; there's an exclusive English Court jurisdiction clause.

So the question is whether it is any part of our case that is necessarily and sufficiently connected to the supply contracts that requires that to be stayed under section 9 or whether it's any part of the foreseeable issues arising from the defence that require that bribery claim to be stayed under section 9. And in our submission it's obvious once you take the IFA out and avoid anyone suggesting that it is our case against Privinvest that these were shams, frauds or whatever, it's obvious in our submission that this claim for bribery and loss flowing from the guarantees cannot be sufficiently connected to a totally different contract or series of contracts, namely the supply contract.

LORD JUSTICE HENDERSON: May it not be said there's an element of artificiality in trying to strip out the IFA elements from contracts which all form part of a single commercial whole? There can't be any realistic suggestion that Mr Chang would have been asked to sign guarantees if it hadn't been necessary for the purpose of financing the very supply contracts that you're now trying to sideline.

MR PILLOW: Well, whether it's artificial or not, my Lord, is not really, with respect, the question. I accept

there's a linkage between these contracts, of course. They were parts of a triangular relationship that ended up being created in relation to this bribery, as we allege.

LORD JUSTICE HENDERSON: Absolutely. So why is that artificial given that the test is such a broad one of "anything in connection with or arising out of"? I forget the exact words, but they're very broad.

MR PILLOW: With respect, my Lord is eliding the second part of the analysis with the first. What I'm on at the moment is the first, stripped of the IFA, but it doesn't matter.

Look at the first part of the test: what matters are these proceedings brought in respect of? The only submission I'm trying to make to the court at the moment is that the whole nature of our claim is in respect of our putative liability under the guarantee. We do not put in issue the supply contracts for that purpose.

LORD JUSTICE HENDERSON: It looks to me as if you're just trying to redefine the pleaded issues in a way that would get round the arbitration clause.

MR PILLOW: That we are not doing and the proof of the pudding, if you like, is the judge specifically found that we're not trying to artificially characterise our claims and there's been no challenge to that

finding.

LORD JUSTICE HENDERSON: But he didn't have before him the concession. It now makes all the difference.

MR PILLOW: My Lord, it doesn't, in my respectful submission.

LORD JUSTICE HENDERSON: It arguably makes all the difference. I'm not expressing a conclusion I hasten to add.

MR PILLOW: The point about the concession is it goes completely the opposite way because the concession takes away the possibility that Privinvest can argue that we are bringing a claim in respect of -- against them in respect of the validity or lawfulness of the supply contracts. What we are trying to do by that is to say we accept we are not going to bring that case in the --

LADY JUSTICE CARR: No, no, you are bringing that case; it's being stayed. You have brought the case, it's on the pleadings and it's in place, so the matter has been brought. The fact that it has been stayed doesn't alter that analysis. But your submission is, step 1 -- I'm going to get it wrong, you know I am -- Tomolugen, we have to identify the matter. And you say the matter is the guarantee and the matter should not be defined as extending to cover the IFA (overspeaking).

MR PILLOW: Not quite that. The matter has to be defined

with not too much particularly but not too much width. The matter if you want to describe it as our claim in bribery -- in fact this is how Mr Matthews approaches it. His client has defined the matters in question before the court, they are the bribery claim, the conspiracy claim, the dishonest assistance claim, the knowing receipt and proprietary claims and the IFA. Those were agreed to be the matters that the judge had to grapple with.

We say -- and those are clearly far too widely formulated to fall within the Tomolugen/Ruhan style test because what is clear from those cases is that you -- a cause of action can be a matter but you may well have to approach it with more granularity. And the unlawful means conspiracy is a good example because the appellants accept that for the conspiracy claim there are at least one or two unlawful means that can't have anything to do with the supply contracts. That is therefore very much like Tomolugen where you've got a shareholder disagreement, an unfair prejudice petition, only some the court holds grounds of which would go off to be arbitrated while the others remain in court. There's a close parallel there.

The question is: have they got right that the matter is the bribery claim or the conspiracy claim? We say --

let's take the bribery claim -- no. What we have shown by the concession is that we don't need to make any allegation in relation to the supply contracts to sustain a bribery claim because for all the reasons I have just explained it is no part of our case against Privinvest any more, if it ever was, for bribery purposes that we need to show a --

LADY JUSTICE CARR: I'm so sorry, I don't want to be difficult. Before the judge it was part of your claim. You may not have needed it, but it was part of your claim because it was pleaded.

MR PILLOW: I think therefore, my Lady, I'm disagreeing with you because we have always said that the IFA formed no part of our bribery claim or our conspiracy claim and it was a separate issue that goes to separate matters.

What's slightly ironic is that until today the appellants' case was that the judge had erred in eliding the bribery claim with the IFA and it was wrong to do that, whereas now he's saying that that's entirely what you have to do because the IFA is dispositive of the bribery claim. But the opposite was the case below and you'll see that, if you'd like -- let me just find the reference for you.

(Pause)

I'll come back to that. I wrote it down but I can't

immediately find it.

So there's the fact that it's not open -- my learned friend has turned a volte face on this because his case below was that the IFA didn't have anything to do with bribery and the judge was wrong to elide the two. His case now is the opposite -- I have found the reference. It's his skeleton argument for permission, paragraph 31.1, bundle C, tab 2, page 35, which is repeated in their main skeleton for this appeal at paragraph 36, sub-paragraph 1, C1, tab 12, page 300.

But my Lady, going back to what my case is, we were always very careful -- and this is why the analysis is slightly complicated, but we were always very careful to say below that it was no part of our case that the IFA had anything to do with the bribery case. The bribery occurred on our case in relation to the guarantees. Whether a tribunal finds or is ever asked and then ever finds that the supply contracts were good, bad or ugly is totally irrelevant to that question.

LADY JUSTICE CARR: Forgive me, I will stop, I promise, now. But where in the pleading is the bribery linked to the guarantees and not the supply contracts, please?

MR PILLOW: My Lady, it's time for a break. May I come back to you?

LADY JUSTICE CARR: Sorry, I have been asking too many

questions.

LORD JUSTICE HENDERSON: It gives you a good opportunity to gather your ammunition to answer my Lady's question. We'll resume at 25 minutes past.

(3.19 pm)

(A short break)

(3.25 pm)

LORD JUSTICE HENDERSON: I think we are now resembled in which case, Mr Pillow, we're ready for you.

MR PILLOW: Thank you, my Lord.

I think perhaps the easiest way to answer her Ladyship's question and to avoid more noting down is paragraph 55.1 of our skeleton, which is tab 13 of the first core bundle at page 325, which has the pleading references and the footnotes to the other pleading references. 55.1 of our skeleton, tab 13, page 325, footnote 41.

In a sense, what that does is do exactly what I said to the judge our claim for bribery was at the hearing below which is to say we allege the bribery. We then say at paragraph 131.1 of the pleading, which is in the bribery section, that the loss claimed is as set out below. That loss is only referable to the guarantees. There is no reference in the loss that flows from the bribery claim to the supply contracts ex hypothesi

because we say we are not a party to them and therefore would never initiate a claim in respect of the supply contracts.

I showed you a moment ago that that is exactly how Privinvest have understood the pleaded claim in bribery. But can I, while I'm there, if your Ladyship and the court still has 55.1 of my skeleton open, you will see in the footnote -- sorry, if you see 55.2 makes the point I have been making to you that there is no part of our case that they were promised or paid to procure the supply contracts.

What we then point out is that in their skeleton, Privinvest actually use the IFA and the particular of the IFA to try to attack the bribery case, where we say it was only ever a particular of the IFA. It's the final sentence -- we'd actually assumed, before today's change on the part of Mr Matthews, from paragraph 36.1 of their skeleton that they rather took the same view, that the IFA had nothing to do with the bribery case. That's certainly what they were saying below to the judge. If you look at paragraph 36.1 of their skeleton at page 300, tab 12, then you will see that is exactly what they say.

They say:

"The IFA is irrelevant to the issue at hand [which

is the bribery case] and where" --

LADY JUSTICE CARR: Isn't that in a different context though? This is attacking the judge's reasoning that because the tort of bribery is independent on the part of making a particular contract, the IFA isn't an essential element. He's saying, no -- it's not saying that the bribery doesn't involve the IFA, it's saying the reasoning of the judge doesn't stand up.

MR PILLOW: Well, with respect, that's not how I had understood it, my Lady. What they are saying in 35 is that the judge was wrong to find the bribery case, the allegation of bribery, outside the scope of the agreements and his reasons are unsustainable because he says the IFA is not actually an essential element of the claim. But they say the IFA is irrelevant to the issue, which is whether the bribery claim falls within scope and that's because they define the IFA as a totally different matter and they accepted until today, as I had understood it, that the IFA was not an essential part of our case on bribery and that's what the judge also understood.

But the idea of the concession was designed to show that when you take away the IFA, any argument that the IFA requires to be ventilated in court for us to advance our bribery and conspiracy claims is wrong. That was

the entire object of it and one always tries to do these things to simplify things and it may turn out to complicate matters. What I come back to and what I do urge on the court, what you're asking yourself on the bribery allegation, which is a bribery case that can be made good without reference to any contract and certainly only requires us to refer to the guarantee contracts, that bribery allegation is not a matter that has to be referred to arbitration under the supply contracts to which the allegations have no necessary connection.

To put it another way, we do not advance that case as part of our case of bribery, I eschew it as against Privinvest, and I have made the concession in order to make that abundantly clear and possibly irrevocable. If we don't pursue it, if we don't allege that the supply contracts were procured by bribery, Mr Matthews certainly won't allege in the court proceedings they were procured by bribery. In fact his case is (a) that the payments were not bribes and (b) they had nothing whatever to do with the entry into the supply contracts at all.

LORD JUSTICE SINGH: Mr Pillow, can I ask you, because I think it may be relevant to this point you were just making -- can I ask you to go to your note following the

review, which is in C2.

MR PILLOW: Tab 16, my Lord, I think.

LORD JUSTICE SINGH: Particularly at page 511. In explaining the concession that you've now made to the court, you seemed to be going further than the IFA point because it also relates to one of the alleged unlawful means in the conspiracy claim.

MR PILLOW: Yes.

LORD JUSTICE SINGH: But then you go further still and this is what I need particular help on. Paragraph 11 of your note goes to ground 2B. Is that the point you have just been making to us?

MR PILLOW: It's a related point, my Lord, yes. What you will see is the premise of Privinvest's ground 2B on bribery in those references that I have set out in the note. Our bribery case is at least in part based on the idea that it procured the supply contracts. Those references are where Privinvest in its skeleton assert that is our case, and they say that that's a reason why the bribery allegation should be stayed under section 9.

The only source of the suggestion that we say the supply contracts were procured by bribery is the IFA or one of the particulars under the IFA. And the attempt to -- what the idea with the IFA was in conceding it is to say that once you see that our case against

Privinvest is not in any way, shape or form anywhere in the pleading that the bribes procured the supply contract, because that's the foundation of their appeal on 2B, it ought to dispose of 2B.

LORD JUSTICE SINGH: Forgive me, I don't want to put words in your mouth, but are you really saying this is not so much a concession, it's a clarification of what your case is? I'm sorry, somebody's got their camera on who should not have, I think. Thank you.

I think what you're saying, but forgive me if I've misunderstood, is that when properly understood, your bribery claim should still be allowed to proceed.

MR PILLOW: Yes.

LORD JUSTICE SINGH: A mandatory stay on the bribery claim is not required by section 9 because if you need to clarify this, you make it clear that it's no part of your bribery claim that the supply contracts were induced by bribery.

MR PILLOW: Yes.

LORD JUSTICE SINGH: Is that right?

MR PILLOW: Absolutely, my Lord. However you package it, as a concession or a confirmation, what we were attempting to do is to say that is no part of our case against Privinvest and we will not pursue it because it's said to be a breach of the arbitration agreement to do so in

court. We therefore accept that allegation comes out as against Privinvest.

If I'm right that Privinvest's appeal, because of the references I have just shown you, is predicated on that allegation being advanced against them as far as ground 2B is concerned, which it is, then having made it clear that it's no part of my case, the appeal will fail on ground 2B.

The reason that all flows is it relates back to my very first point, my Lord, which is that it does not need to be part of our case that the supply contracts were tainted by bribery or procured by bribery.

LORD JUSTICE SINGH: That may or may not be right. I think your submission will be that whether that's right or wrong is a matter for the merits of any trial.

MR PILLOW: Exactly.

LORD JUSTICE SINGH: The only question which the judge had to consider and therefore the only question which this court is currently considering is whether the terms of section 9 mandate that some or all of your claims must be stayed by an English Court because they are within the arbitration agreements.

MR PILLOW: Yes.

LORD JUSTICE SINGH: You say one of the reasons why, when properly understood, the bribery claim, for example,

simply cannot be within the arbitration clause in the supply contracts is that it has nothing to do with the supply contracts.

MR PILLOW: Yes.

LORD JUSTICE SINGH: That may be a bad factual assertion on its merits, but that's not, you say, the issue at this preliminary stage.

MR PILLOW: Yes. If you test it like this, my Lord: what is the vice to which section 9 is directed? Of course it's to the ventilation in court of matters that the parties have agreed must not be ventilated in court and only in arbitration. When you then say, well, if we are not going to ventilate as against Privinvest the idea that the contracts of supply were procured by bribery, obviously Privinvest aren't going to ventilate that suggestion. Therefore this is not something that could be aired in court in order to resolve the claim for bribery that we do make, which is in relation to no contracts at all or when it comes to assessing loss --

LORD JUSTICE SINGH: Do you mean could be aired in arbitration?

MR PILLOW: Sorry, maybe we're at cross-purposes, my Lord. I don't think I did. Let me repeat myself to make it clear.

LORD JUSTICE SINGH: Please do.

MR PILLOW: What we say is the thing that Privinvest object to being aired in court is the allegation that the supply contracts were procured by bribery or tainted by it or unlawful because of it. We have made it clear we are not going to raise that allegation in court. Privinvest won't raise it in court because they say the opposite is true, this is nothing to do with bribes. Therefore what's left for section 9 to grab on to? In our bribery case we won't -- we will simply say the court, as far as we are concerned, does not need to address whether the supply contracts were tainted by fraud. No part of our case. We won't be alleging it against Privinvest and they won't be doing it back.

Once you do take that out of the equation, which was the idea of the concession or whatever you call it, the question for your Lordship and the court is whether what is left is a runnable case or is a proper case of bribery, which it obviously is in law, and whether a bribery that doesn't involve an allegation to do with the supply contract has to be stayed because of an arbitration agreement in the supply contract to which we say the answer is obvious.

LADY JUSTICE CARR: Why does the IFA mean that you are withdrawing the case of bribery in relation to procuring the supply contracts? Why does the concession lead to

that? Or is that a separate concession you're making?

MR PILLOW: It does lead to it and perhaps Lord Justice Singh's point is they could be treated to be separate. The idea of it -- the only source of the allegation vis-a-vis Privinvest that the supply contracts were procured by bribery is one of those particulars in the IFA. That's what's got Privinvest so hot under the collar. We are saying take that out of this the court case.

LADY JUSTICE CARR: In the unlawful means? Are you talking about the UMIFA?

MR PILLOW: For all purposes. For all purposes, my Lady, as against Privinvest.

LADY JUSTICE CARR: Where is your concession to that effect?

MR PILLOW: It is that the IFA is a matter to be referred to arbitration.

LADY JUSTICE CARR: I don't get the link between the IFA, which alleges the supply contracts were shams --

MR PILLOW: And procured by bribery, my Lady, that's the source of it. What we have been quite careful to do is to include the particulars main heading of the IFA. I perhaps need to show you for clarity what that means in the pleading. So can I ask you to look at the IFA in paragraph...

LADY JUSTICE CARR: 64(i), page 90.

MR PILLOW: My Lady, what we have said in this pleading is that the instrument -- the Proindicus supply contract was an instrument of fraud or a sham. And then we say -- in line 4 we rely on various factors to support that allegation. It's (i) which is the only source of this idea that we are going to advance a case against Privinvest that bribery was used to procure them. That's where this whole issue has been driven from, if I may say.

LADY JUSTICE CARR: Haven't you still got the open-ended claims at 129 to 131?

MR PILLOW: Yes, my Lady, but if we don't allege, as we don't once this is taken out of the picture, that the bribery did procure the supply contracts, what is left is either an allegation that they procured no contracts but relief will follow anyway or an allegation that they procured the guarantees, which we do make because they were the only contracts to which we were party and they were the method by which we suffered loss.

LADY JUSTICE CARR: Last point from me: you are still making these allegations; you simply have agreed, oh, I am not opposing a stay. So you have not deleted or abandoned these allegations. So it seems to me -- what's going through my mind is these allegations are still being brought.

MR PILLOW: I don't think, with respect, that's the right analysis. Let's assume this was a simple one-party case against Privinvest. What Privinvest say is that you can't make the allegation that bribery is used to procure the contract as you make it in 64(i). That's arbitrable, you must have it out. What we have conceded is that is out as against Privinvest.

LADY JUSTICE CARR: You haven't withdrawn the allegation?

MR PILLOW: We have as against Privinvest because it has been stayed and will not form part of this matter. That's all Privinvest are entitled to, of course. That's what section 9 provides for.

LADY JUSTICE CARR: Right. But then we need to look at some stage -- all right, thank you.

MR PILLOW: It's a curiosity, my Lady, of how section 9 works. You'd be right if what you were required to do under section 9 is to delete the allegation that you can't pursue in court but have to pursue in arbitration. But section 9 provides that a stay be imposed, but if Privinvest were the only party and the court stayed the allegation it is equivalent to it being deleted as between the parties to the litigation. Certainly it has never been suggested to me that if we'd only agreed to delete it but not to stay it as against Privinvest we could all go home and that's the end of it, but if

that is being suggested perhaps we should all consider saying in terms this is not an allegation made against Privinvest because what we do accept is that that's the effect of the stay.

I'm afraid, my Lady, in my submission, it is one of the incidences of the section 9 procedure because Mr Matthews isn't entitled to a deletion actually even if this was the most egregious breach of an arbitration agreement and in fact it infected the whole claim. The most he could get is a stay and the effect of section 9 is vindicated, if you like. It's not an allegation that would be aired in court, which is the problem that this is all designed to avoid.

LORD JUSTICE HENDERSON: But don't we have to look at the position as it was before the judge? This is an appeal from what he decided and it's an appeal by way of review. It's not a re-hearing and it seems to me you are really inviting us to embark on a rehearing in the light of concessions that you have made in the interval between the hearing below and this hearing.

MR PILLOW: My Lord, no, that is, with respect, not the right analysis. It's not right because, first of all, at every point below, my submission was that the IFA and the allegation of procurement of the supply contracts formed no part of my causes of action.

LORD JUSTICE HENDERSON: You say that, but there it is, it's in paragraph 64.

MR PILLOW: But what I was saying to the judge, and precisely why I said it, didn't mean that the bribery allegation had to be stayed was because it's not part of my bribery case and it never was. What's happened, my Lord, is not an attempt to manoeuvre into a position, what I have done effectively is to say, well, I accept that Mr Matthews is not wrong about the IFA on the appeal. But I must be perfectly entitled to try to narrow the issues for the Court of Appeal by conceding some of them without being accused of somehow trying to create an artificiality, which I'm certainly not.

I would be happy if we wanted to try to argue about the IFA and whether it is a matter in respect of which the claims were brought and should be stayed under section 9 to run the same arguments I ran before the judge, who agreed with me.

But my Lord, we've got slightly sort of -- this has proved to be quite a big issue when it was intended to be something that narrowed the point. Imagine I hadn't conceded it and as your Lordships and your Ladyship sat together after the appeal, the first thing you said to yourselves was, well, he's obviously wrong about the IFA so we can stay that. That's the position I have put you

in and what I ask you to do, having put you in that position, which I would say ought to reflect a position you might have reached after this hearing, if I hadn't conceded it, is to then say, right, we've got rid of the problem that Mr Matthews does not like, which is the only allegation in the pleading that the claimant runs against Privinvest that these supply contracts were tainted by fraud, procured by fraud, now let's look at the bribery claim as another matter and is Mr Pillow or Mr Matthews right that that is within or without section 9?

That's what I tried -- that's what the idea behind all of this was and, in my respectful submission, when you do that, you approach the bribery case and say, right, the bribery case now does not risk trespassing on the issues in the arbitration, there is no risk that the court is going to trespass on the supply contract issues because the claimants have made it clear they will not seek to do so and the defendants could not run a completely different case. That's when what I said to my Lord, Lord Justice Singh, then applies, which is whether that case is good or bad, it's not a matter, the case that there was bribery quite apart from the supply contracts is not a case that could possibly fall within the arbitration agreements within the supply contracts.

LADY JUSTICE CARR: You will though maintain paragraph 64 against the other defendants, will you, against Credit Suisse and the CS team defendants?
MR PILLOW: Yes.
LADY JUSTICE CARR: So there will be trials of -- and what happens to the bribery... So there will be an allegation of bribery used to procure the supply contracts before the court, being adjudicated upon by the court but not as against the Privinvest defendants?
MR PILLOW: Yes. That's exactly the effect of an arbitration clause in a multi-party case.
LADY JUSTICE CARR: That is a remarkable position, isn't it?
MR PILLOW: No, my Lady, because you can imagine, in my respectful submission, very well what -- let's just imagine that there were no other parties or we hadn't even sued Privinvest in this action. For the court to decide an issue between other parties that is arbitrable as between two of them is not remarkable at all in my respectful submission, it's absolutely bog-standard. What's happened is these are all happening in parallel and this is one of the problems, I'm afraid, with the fragmentation for which Privinvest contend. But it's not in my respectful submission on analysis remarkable, it's counter-intuitive, but it's going to happen, I'm afraid, in any case where the same issues arise between

different parties, only some of which have got arbitration clauses.

It's very, very acute in this case because when you look at a conspiracy claim against all of the defendants, in respect of only some of -- for which only some of the unlawful means apply to actions by Privinvest and some apply to actions by other defendants, you get exactly the same sort of jarring effect, which is that if Mr Matthews is right, little bits of the unlawful means might have to go off, but you can run the same point, the same conspiracy claim and the same factual investigations are required in court in any event.

So remarkable, I would cavil with, but counter-intuitive, perhaps, but on analysis absolutely bog-standard. And again, the test of that is imagine we had sued Credit Suisse entirely separately from Privinvest, which is effectively what you can say we've done. Mr Matthews might have got a stay of the IFA in his action but it couldn't possibly have affected the way the court approached the IFA as against Credit Suisse, who can't assert an arbitration agreement.

So my Lady and my Lords, I just want to briefly go back to the relevance of the judge's rightly reminding

himself that we, as claimant, this is the only claimant, do not accept of course we were ever party to the supply contracts. I want to put paid to the idea that the fact that this hearing and the hearing below proceeds on the assumption that we are or might in due course be found to be somehow led the judge into error when he made the point that we say we are not.

Because as long as the question for the court is one of understanding and analysing what claims the Republic makes in order to ask what matters are in issue in respect of which these proceedings are brought, then of course you have to look at it from the end of the telescope of the Republic, who says it was not a party to the supply contracts. So when you're asked, can the bribery claim relate to something other than the supply contracts, to inducement to the supply contracts, it is highly relevant that the Republic says it was not a party to them because we cannot have been intending to put in issue matters that only arise if we are party to them. We have no locus, we say, for example, to apply for a declaration that the supply contracts are vitiated by bribery and should be rescinded.

We cannot possibly have intended to put that matter before the court because it's inconsistent with our principal position. To that extent, the judge was

clearly right to say, even though you assume for some purposes that we might in due course be held to be party, it does not affect the way the judge rightly went about looking at what our claims are necessarily and what they're necessarily limited to, nor what you should do if you have to do the same thing.

Those are assumptions -- if I might just answer the court's question posed to Mr Matthews. It is to overstate the position certainly to say that the assumptions underpinning this hearing and the hearing below was that the Republic was a party to the supply contracts as well as the arbitration agreements. If one looks, for example, at our skeleton, supplementary bundle 1, tab 14, page 248, you will see that we describe the assumption in 23.1 and 23.2 only by reference to the arbitration agreements. That was certainly our understanding of the assumption being made and that was what the judge reflected in his judgment.

You then see in a document that's described as a --

LADY JUSTICE CARR: Sorry, didn't it go on to say "then became bound to those agreements"? You have the timing point, but isn't the assumption that you then became bound?

MR PILLOW: Well, as to timing, yes. Can I finish off showing you what else was agreed? You're right, this is

possibly ambiguous, I suppose we might say. But I want to make it clear that there is an ambiguity and I don't think you can go as far as to assume that everyone was proceeding on the basis that we did become the party.

If you go to -- and certainly in relation to D9 and D10, my Lady, you see in 23.2, that assumption I don't think is -- well, it's the same point, it's made in the same way. The statement of agreement and disagreement is at S1, first bundle, supplemental bundle, tab 3, pages 18 to 19. In fact, I'm going to spend too much time on this if I go through these documents one by one. Can I just give you the reference to, for example, my learned friend's skeleton or Privinvest's skeleton below, which certainly only referred to arbitration agreements being the agreements to which they were party. That's S1, 13, 187. And it is ambiguous.

LADY JUSTICE CARR: You can understand why it was phrased that way because we were talking about section 9.

Realistically, was anybody suggesting the Republic was party only to the arbitration agreements?

MR PILLOW: I think not realistically.

LADY JUSTICE CARR: That's helpful.

MR PILLOW: I think there's some ambiguity, but I don't want to waste time on it. It doesn't seem, like Mr Matthews, to go anywhere. I don't think people gave it the

thought that we are now giving it, if I'm honest.

Putting that to one side, can I then move on to another of the analytical fallacies or legal fallacies that I do think the court needs to correct from Mr Matthews' submissions today. That relates to the ways in which the bribery case is put. In a sense it goes back to my Lord, Lord Justice Singh's point.

What we say is very clear from Privinvest's position below and now, or certainly it was until today, is that they say that somehow the validity of the supply contracts remains in issue as between us and Privinvest, despite the concession, and that if and for so long as it does, it contaminates the bribery and conspiracy and so forth and the other claims, and that is a reason why they should all be stayed as well, even though we will say, and I'll show you, they in fact don't have anything to do with the supply contracts.

If that were right, there would be a short answer, which would be for this court to say: if it's ambiguous as to what has been stayed then we will stay the proceedings against Privinvest insofar as it's alleged by the republic that the supply contracts were induced by bribery. We think that is what we have done by conceding the IFA but if there's any doubt about that then that's the solution to it, but I can't myself see

why there's a difference between that and what I thought I had conceded. We don't care because we don't want to make that allegation against Privinvest and Privinvest don't care because they don't make it of course.

You will be aware, I hope, that Privinvest do admit most of the payments, the $138 million of payments, to the Mozambican officials, and the debate in due course is going to be whether they are consultancy payments or what are described as, for example, the payments to Mr Chang of 7 million, payments on account of anticipated future investments. But if that's their case, they are not going to get into any issue in this trial of this case of whether the supply contracts were tainted by the bribery.

I took the court -- and I don't need, I think, to go back to this -- to the grounds of appeal -- to the skeleton but perhaps I should point out that the ground of appeal on point 2B is predicated on it remaining part of the Republic's case that the supply contracts were tainted by bribery. That's in the ground of appeal 2B, paragraph 6, core bundle tab 1, page 14. I do respectfully endorse Lord Justice Singh's comment that that's what I have to deal with. Whatever embellishments there might be today, you'll see that from 2B, the ground that they actually got permission to

run, it is predicated in the introductory wording to the whole ground that the bribery allegations involve an allegation that the reasons for paying the bribes included the procuring of the supply contracts.

That is not so. And if it's not clear that it's not so from my concession then I would say the short answer to that is to stay the allegation as against Privinvest that the bribes procured the supply contracts, because we don't want to make it, and once you do that, the entire premise of the bribery appeal on 2B falls away.

For completeness, but I don't want to take you to them at the moment, you'll see very much the same points made in their main skeleton argument, Privinvest's main skeleton argument, at paragraph 35, including footnote 61, which relies on the very paragraphs we accept are now stayed. That's the IFA paragraphs.

So bundle C1, tab 12, page 299, paragraph 35 and footnote 61. So their argument in support of the ground is predicated upon an allegation we no longer advance, if we ever did, and I don't want to get into that debate. I made it clear before the judge that we didn't, but it doesn't matter if we have now made it clear that we don't.

You'll see of course that is something that we tried to clarify in paragraphs 28 and 28.1 of the claim

that is going to proceed in the Commercial Court. Although I accept the question whether the judge is right or wrong has to be asked by reference to the original pleading before him, what's relevant in terms of disposition of the ultimate claim is what allegations are now sought to be advanced in the Commercial Court. It was precisely because of this issue on the IFA and what it meant and how it might have infected the bribery claims that we have obtained permission to amend our case to make it clear that it does not involve an allegation that the bribes tainted the supply contracts.

So if you go to bundle C1, tab 8, page 135, you will see in paragraph 28 that the summary of our case is that the guarantees were each the product of bribery and corruption -- I'm sorry, my Lady.

LADY JUSTICE CARR: It was my fault, Mr Pillow. Your heart must sink whenever I unmute myself. This is what's troubling me. I will have to sleep on it. At the moment nothing is stayed because we haven't decided or made an order of any sort, so at the moment everything is live. This amended document at paragraph 64, page 147, maintains the bribery allegations in terms.

MR PILLOW: Yes.

LADY JUSTICE CARR: And I am really struggling for myself, perhaps you can find a practical answer, I'm really

struggling as a matter of analysis, as my Lord, Lord Justice Henderson, has identified, quite what this court is supposed to be doing in these particular circumstances. Because the matters being brought -- the matters for present purposes include all of the IFA because you haven't struck it out, you haven't conceded it because those are not your instructions, you aren't positively defending it. As matters stand, these are all in play.

MR PILLOW: Well, my Lady, my answer to that is that that is...

LADY JUSTICE CARR: And I will stop, but it goes to my unease generally as to quite what is going on, if I can put it in the vernacular, with the shifting of positions.

MR PILLOW: My Lady, maybe what's happened is that the mechanics of our attempt to make clear what I made clear on the prompting of Lord Justice Singh doesn't satisfy your Ladyship. What we intended to do before this appeal to try to narrow the issues and foreclose the point and make it clear that the IFA is no part of our bribery case and could not be was to make it clear that we will not advance at trial the allegation against Privinvest contained in paragraph 64.

We thought that the appropriate method of doing that

in the light of an appeal in which my learned friend seeks a stay of paragraph 64 was to say, okay, you can have your stay.

LADY JUSTICE CARR: The passage you have taken us to, paragraph 28(b).5, is not consistent with 64 in that sense.

MR PILLOW: Yes, it is, my Lady. With respect, I think the problem is that when I say my positive case is that the guarantees were procured by bribery, leaving aside 64, that says nothing about whether the supply contracts were procured by bribery.

LADY JUSTICE CARR: Agreed.

MR PILLOW: And they are not inconsistent allegations. Of course, I accept that they run together quite sensibly, intuitively.

My point is that is our case against everybody who hasn't got an arbitration clause in 64, but I am not going to seek to ventilate in court as against Privinvest, who have got an arbitration clause in relation to the supply contracts, the idea that they were procured by bribery. And if it turns on whether I had amended my pleading to say, "In relation to the following paragraph at the head of 64 this allegation is not made as against Privinvest", if that would have achieved the result I intended but the stay discussion

doesn't then that would be a triumph of form over substance.

LADY JUSTICE CARR: I understand that, I am just struggling with this -- this is all about the Privinvest company supply contracts. These are claims in dishonesty, conspiracy and bribery. The idea that one can compartmentalise what will be a central part of your case, not specifically against the Privinvest defendants, about the knowledge, the circumstances of the supply contracts, that the remaining allegations against the Privinvest companies will not relate to or be in connection with the supply contracts is very difficult because when we're looking at conspiracy, dishonesty, we all know everything goes into the pot, doesn't it?

MR PILLOW: Well, not if it's done analytically and properly, my Lady. Secondly, which is what one has to assume, I know it's difficult, but the point is we're only talking about the bribery claim here at the moment. So it's easy to segue into the conspiracy and make it all sound very wide and difficult. But if this were a claim of bribery against Privinvest, there would be no question that we need to rely on the supply contracts or the tainting of them or the commerciality of them and we don't. Likewise, if this had just been a case against

Credit Suisse in relation to bribery, conspiracy to bribe or bribery affecting the guarantees, then the supply contracts don't come into it.

What the problem always is in these cases is once you assert, as the Privinvest defendants do and as now we concede in relation to one little bit of this that's not, we say, to do with bribery, the problem is fragmentation is the very thing that Privinvest want in this case and we're always going to have to have the trial against the non-Privinvest defendants involving all of these allegations. How you deal with that separately from whatever goes to arbitration is a matter of case management. It's not a matter of section 9. That's why, with respect, my Lady, you are rightly thinking like a Commercial Court judge: how am I going to try this, what compartments are we going to put the evidence into and how are we going to make sure the trial doesn't trespass on Mr Matthews' right, if he has one, not to have this ventilated in court but only in arbitration? The answer to that is not section 9, the answer to that is to case manage, but it's the age-old problem that arises where you have a partial arbitration and a multi-party situation where then there are other parties.

Another way of putting it is that paragraph 64 and

the cognate allegations do not brag everything else we say against everybody, including Privinvest, into some kind of arbitration hole.

LADY JUSTICE CARR: Thank you, you've been very patient with me, Mr Pillow, thank you very much.

MR PILLOW: No, my Lady, I know I have to deal with my Lady's difficult questions and in my submission there are sensible and powerful analytical answers to them.

We have all got to understand, in my submission, that when one seeks a stay in favour of arbitration you get odd results that arise from fragmentation.

LORD JUSTICE HENDERSON: I understand all that, Mr Pillow. I'm sorry to pester you with another question from the bench, but I'm worried there may be an element of overanalysis in all this. Of course it suits you to present the final stage of the composite transactions, namely the signing off of the guarantees, as the element of it all which caused you proximate loss and which you wish to concentrate on. But is that not fundamentally unrealistic given the obvious interconnection between all the various aspects of the composite transactions beginning with the entry into the supply contracts, which leads inexorably to the granting of the financing loans and the guarantees from the sovereign state which made it all commercially acceptable to the

counterparties? It just seems to me totally unreal to try and salami-slice all that in the way in which your submissions seek to achieve. If the result, as you now concede, is that the underlying contracts themselves and the allegation that they are an instrument of fraud has to go to arbitration, why don't the dominoes all go collapsing in the way that Mr Matthews suggests? I'm sorry that may sound terribly oversimple. I don't want to be sidetracked into an overanalytical approach which, as far as I can say, the only authority -- I say only -- the authority is quite recent and is the Supreme Court of Singapore saying it's two stages which anyway overlap and can't really be sensibly treated in isolation.

MR PILLOW: My Lord, the ultimate answer to your Lordship's point is that there has to be a certain degree of analysis because the nature of section 9 is such that there has to be a line drawn between matters which are the subject of these proceedings and matters which are not and matters which are subject to arbitration under the clause and matters which are not, the two stages.

When you have a package of contracts to which Privinvest is only party to one but the cause of action accrues in relation to the effect of another contract, the guarantees, to which (a) Privinvest is not a party and (b) the losses uniquely flow and is the only one the

Republic accepts it's a party to and the one that matters for it, and that contract has an exclusive English jurisdiction clause, then the court is always going to be put into a position where it has to analyse very carefully which claims are properly allocated to which of the contracts.

I might ask your Lordship to stand back and maybe rise above the detailed analysis perhaps and ask yourself whether the Republic of Mozambique, a state entity, could ever objectively and in good faith have intended that a claim for corruption -- criminal corruption, let's face it -- against all of these parties, including Credit Suisse and Privinvest, which put it on the line under a $2 billion guarantee governed exclusively by English law with an English jurisdiction clause, would ever go off to be arbitrated in private in Switzerland in three separate arbitrations whilst the bulk of it remained in court as against Credit Suisse and the individual bribe receivers, whether that is a remotely realistic position for the parties in the position of the parties to these contracts to have intended.

Because ultimately, what I will come on to tomorrow is that that is the question. So you may well say, my Lord, that it all sounds a bit overanalytical and

isn't it all linked together, but my answer to that is partly it is analytical and you just have to do the analysis, but secondly, if it all has to go together then the judge was entirely right that it has to stay in England in the court because these are proceedings that have at their core the only liability the Republic of Mozambique could possibly assert it might have, which is under the guarantees which have exclusive English Court jurisdiction clauses. And to turn it around and to say that because it has some connection to some supply contracts with one single Privinvest party to each one, that the entirety of the claim against Privinvest gets dragged into a private arbitration and this corruption is not aired and ventilated in public, we do submit is not what the parties in good faith can reasonably have intended their agreement to mean.

So it can go, if you like, both ways. That's why the analysis has to be done to work out which way it goes, but your Lordship should bear in mind that as against Mr Safa and in the Part 20 claims and as against Credit Suisse and the individual Credit Suisse defendants and the Mozambican officials, all of this is going to have to take place in court come what may. So the question is: is the allegation in court something that will violate the parties' arbitration agreement as

far as Privinvest is concerned? We are saying that if the problem is, as it appears to be, on the face of their own ground of appeal in bribery, that we are taken to be alleging against them that the contracts were procured by bribery, then we make it clear we will not pursue that case in court against them. And you end up then saying everything else follows but it follows in the opposite direction from that which in Mr Matthews would like it to follow.

LORD JUSTICE HENDERSON: A lot of these points are rather double edged. As you rightly point out, the whole gamut of the allegations is anyway going to be ventilated in court here by virtue of the Part 20 claims and the claim against Mr Safa. So in that case the Republic is -- what is it losing, if it actually goes off to arbitration, in the context of the supply contracts?

MR PILLOW: That's why we accept that what is relevant to the supply contracts can go off, but what we do not accept is that if I am right that Privinvest paid $140 million to officials of the Mozambican Government in and around the time at which these agreements were made, 7 million of which went to the signatory of the guarantee, Mr Chang, and they were bribes and secret commissions, the Republic -- and I respectfully suggest objectively any honest parties -- would be aghast at the

idea that their claim to vindicate that corrupt -- show that corruption and to explain why they are not therefore bound to the guarantees which have English jurisdiction clauses, they'd be aghast at the idea that that claim goes into a private arbitration because of a clause in a supply contract that could be commercial, uncommercial or even non-existent for the cause of action to succeed.

I will come on tomorrow to explain why that is the question. The sufficiency of contract question is all about what -- and it's a matter of Swiss law, what parties in the position of these parties objectively and in good faith intended to go to an arbitration versus what they intended not to go to an arbitration.

LORD JUSTICE HENDERSON: Yes, thank you.

Is that a good moment to break off, Mr Pillow? If you have a few more minutes, that's fine, but it's now 4.15.

MR PILLOW: I have one discrete point, which I think will only take a few minutes, my Lord, if you bear with me.

LORD JUSTICE HENDERSON: Yes.

MR PILLOW: This is part of my analysis submission and again it's something I say that Mr Matthews' submissions skate over. It's something that's really rather important.

His entire case assumes that even if bribery

procuring the supply contracts were an issue, that we only claim against each of the Privinvest parties to the supply contracts for bribery and conspiracy inducing the transaction to which they were party.

So for example, D6 was only party to the Proindicus supply contract, so the arbitration agreement in the Proindicus supply contract is the one that binds D6. But we claim against D6 that it bribed our officials to cause the entry into the guarantees in relation to the EMATUM and the MAM transactions too.

The EMATUM and MAM guarantees have nothing whatever to do with the supply contract and Proindicus, and even Mr Matthews has never suggested otherwise. So what is to happen to the claims brought by us against D6 in respect of bribery inducing the guarantees in the transactions to which D7 and D8 were party? That point goes every which way. We allege they're all equally jointly and severally liable for each act of bribery. That means that we are alleging against each Privinvest party that they brought about the guarantees in each of the three transactions and we claim the loss flowing from it.

You will see that if you look at our particulars, I'm not going to turn them up now, but the bribery particulars in the original form at paragraphs 129 and

131, the conspiracy allegation at 132, and the dishonesty assistance too, but I will come back to that tomorrow.

LORD JUSTICE SINGH: Mr Pillow, can I just ask you about the tort of conspiracy, particularly conspiracy by unlawful means. As a matter of legal principle -- I'm not talking about this case at all, I'm just trying to understand what the tort consists of -- is it conceivable that you could have several parties to a conspiracy but only one of them is to do anything unlawful?

MR PILLOW: Yes. Yes, my Lord. I was going to come back to this tomorrow, but briefly, I can explain what we submit the position is. That is that it's the combination between the conspirators that is the key and they have to agree that one or more of them will commit an unlawful act.

LORD JUSTICE SINGH: And you would say that they are all therefore jointly and severally liable for the whole conspiracy?

MR PILLOW: Yes.

LORD JUSTICE SINGH: And not just the bit of it under which they individually are going to do something unlawful; is that right?

MR PILLOW: Absolutely, my Lord. It's key. I was going to

finish this evening, really, with making that point because it's crucial to an understanding of the proper analysis of the claims. One of the reasons is not just because, as I have made clear, we claim in bribery against D6 for procuring guarantees that have nothing to do with the D6 supply contract and therefore nothing to do with the arbitration clause in it. That's the first point.

We then claim in conspiracy against D6 for conspiring with D7 to bribe, and D7, the bribery is alleged to induce all three contracts or three guarantees. But D6 has got no necessary connection -- the supply contract with D6 or D7 has no necessary connection to the transactions in which they are not involved. That feeds into the final point.

So let me just test it, my Lord. D6 is a party to the Proindicus supply contract. Mr Matthews says the arbitration clause bites on a claim for bribery inducing the Proindicus guarantee because, he says, it must also have induced the supply contract, which is the allegation I eschew. But the claim against D6 is not so limited, it arises in relation to D7's arrangements and therefore the EMATUM guarantee and the MAM guarantee. Those cannot possibly be sufficiently connected to D6's supply contract to fall within the arbitration

agreement.

The same therefore applies to every permutation of bribery and every permutation of conspiracy against the Privinvest defendants individually. But more importantly it applies --

LADY JUSTICE CARR: Why can't they all be sufficiently connected, because of, for example, the findings as to interdependence and integrated systems and all that kind of thing? Why does one take such a literal view of the position?

MR PILLOW: Because that's the approach that the Privinvest defendants have always taken and they've never suggested otherwise. It has never been part of their case, and it's certainly not the ground of appeal, that the claims against D6 for procuring the guarantees in relation to the other transactions to which it was not party fall within the arbitration clause because they are nonetheless sufficiently connected. That's simply never been suggested, my Lady. And it's a remarkable proposition because if you have a contract in the Proindicus supply agreement for an arbitration in connection with the Proindicus contract, Mr Matthews would be driven to say that a claim for bribery inducing another contract with a different arbitration clause to which D6 is not even party -- that claim is sufficiently

connected to his contract to fall within it.

That's certainly never been suggested, but if that's Mr Matthews' case, then it's a new one. My submission is that it can't seriously be suggested that that is sufficiently connected to the arbitration agreement in the D6 contract. But my Lady, just before I do finish, it does go further than this in quite an important way because the allegation of bribery that we make of course includes allegations of bribery by Privinvest of the Credit Suisse individuals.

We accept that those allegations of bribery are not actionable as bribes by us because we are not the principal of the people who were bribed. But the conspiracy in which bribery is a part, an unlawful means, includes the unlawful means that Privinvest employed when it bribed Credit Suisse. So let's assume the only allegations in this case were bribery by Privinvest of Credit Suisse individuals and the evidence establishes, and they admitted, that they've received tens of millions of dollars between them from Privinvest. Let's assume that's the only allegation of bribery that's made. Our conspiracy claim is that Privinvest conspired with those people to use unlawful means to procure the guarantees.

Those bribery claims and that conspiracy claim

therefore have nothing whatever to do with the supply contracts because no one involved in any of those allegations is involved in the supply contracts. Privinvest paying Credit Suisse bribes is an unlawful means if it's established and the conspiracy to do that renders each of the Privinvest defendants liable, but it has absolutely no connection whatever with the supply contracts.

LADY JUSTICE CARR: Save that without the supply contracts, there wouldn't have been the guarantees.

MR PILLOW: But my Lady, that is simply another way of saying without the guarantees, there wouldn't be the supply contracts. With respect, that is just a happenstance. It doesn't matter. The fact that --

LADY JUSTICE CARR: How can it be a happenstance?

MR PILLOW: Because the fact that a contract happens to exist that has an arbitration clause doesn't make a claim for bribery relate to that contract, my Lady, if it doesn't otherwise. If the only contract that the Republic could and does claim to vitiate or rescind for bribery is a different contract altogether then there isn't any necessary link or any real link at all to the supply contracts, it's just the fact that it's there.

LADY JUSTICE CARR: It isn't necessarily link, it's sufficient connection. We keep on slipping -- and we're

all guilty of this, Mr Pillow -- we keep on slipping into necessary, and it's not.

MR PILLOW: Sufficient connection.

LADY JUSTICE CARR: Sufficient connection in context.

MR PILLOW: That's the second stage of the analysis, I accept. The first is: is it a matter in issue in respect of which the proceedings are brought? But the sufficient connection point requires you to establish, say in relation to the D6 arbitration agreement and the Proindicus contract, that the issue of bribery by Privinvest of Credit Suisse and the allegation that D6 is liable as a conspirator in that conspiracy is not actually one arising out of the guarantees, which were the result of the conspiracy, we say, but arising sufficiently connected to supply contracts to which Credit Suisse had no involvement, in which they had no involvement or role.

With respect, I'm afraid this rather detailed analysis is necessary when you're analysing these three separate contracts because they are contained in relationships to which only one of the Privinvest defendants is part. Mr Matthews' submissions just skate over all these complexities because they assume that anything to do with Privinvest making a payment must fall within the contract to which it is party, even

if we don't seek to impugn it or need to.

Anyway, I have probably exhausted your Lordships' and your Ladyship's patience, and I'm sorry I've gone on a little bit.

LORD JUSTICE HENDERSON: Thank you very much, Mr Pillow. Thank you for answering so courteously all the questions we've been firing at you. No doubt we'll resume with more of the same, I hope not too much more of the same on our part, tomorrow. We'll continue at 10.30, I think, unless anyone has any further points to raise at this stage. No, I don't think so. So today's hearing is now at a close and I adjourn until 10.30 tomorrow morning. Thank you all very much.

(4.28 pm)

(The hearing adjourned until 10.30 am
on Thursday, 18 February 2021)

I N D E X