10 The renegotiation of sovereign debt tainted by corruption: Mozambique's 'secret' debt in perspective

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10.1 Introduction

Significant international efforts have been made to raise awareness of corruption and its harmful effects on the welfare and development of countries and their peoples.[1] The international community has increasingly acknowledged corruption as a serious obstacle to effective government, economic growth and stability.[2] This recognition has also contributed to an increasing scholarly focus on the effect of corruption on public debt.[3] This chapter aims to build on these scholarly contributions by analysing the validity of certain Mozambican sovereign debt obligations tainted by corruption.[4]

The Mozambican case is also not the first, nor is it likely to be the last, instance in the Southern African Development Community (SADC) where sovereign debt has allegedly been tainted with corruption.[5] In the case of *Donegal International Ltd v Republic of Zambia*, for example, it was alleged that a settlement agreement on certain Zambian debt obligations had been procured through bribery.[6] Despite the Mozambican case not

1 UN Office on Drugs and Crime *The global programme against corruption: UN anti-corruption tool kit* (2004) 5.

2 As above; United Nations Convention against Corruption; OECD *Managing conflict of interest in the public sector* (2005) 3.

3 See in this respect NN Henri 'Impact of corruption on public debt: Evidence from sub-Saharan African countries' (2018) 8 *American Journal of Economics* 14-17; L Benfratello et al 'Corruption and public debt: A cross-country analysis' (2017) 25 *Applied Economics Letters* (2017) 340-344; E Kim, Y Ha & S Kim 'Public debt, corruption and sustainable economic growth' (2017) 9 *Sustainability* 433; K Omoteso & H Mobolaji 'Corruption, governance and economic growth in sub-Saharan Africa: A need for the prioritisation of reform policies' (2014) 10 *Social Responsibility Journal* 316.

4 For purposes of this contribution it will be assumed that the allegations of corruption in this case are true. This is done for discussion purposes and this contribution does not purport to make a determination on the culpability of any specific individual or entity.

5 See, eg, *Donegal International Ltd v Republic of Zambia* [2007] EWHC 197 (Comm), a case involving a settlement agreement concluded by the Zambian government which had allegedly been tainted with corruption and which was also decided in the English courts.

6 *Donegal* (n 5).

being the first case in the SADC where debt has allegedly been tainted with corruption, it is one of the most prominent cases for the sheer scale of the corruption involved. The case also offers the clearest guidelines to date on how rating agencies will treat non-payment on sovereign debt allegedly tainted with corruption.[7] SADC countries, therefore, could draw important lessons from the Mozambican case on dealing with sovereign debt that may be tainted with corruption.

In pursuit of these aims this chapter will, first, provide a brief background on how the Mozambican debt was incurred before, second, proceeding to consider the legality of the debt under Mozambican law. Third, the validity of the debt is analysed in terms of English law.[8] This contribution will lastly analyse the enforceability of the debt through investor-state arbitration.

10.2 Background to the disputed debt

In 2013 and 2014 the government of Mozambique launched a series of maritime projects to 'furnish Mozambique with the means to assert sovereignty over its Exclusive Economic Zone and exploit the natural resources within it'.[9] Three companies were formed in pursuit of this objective, namely, ProIndicus SA (ProIndicus); Empresa Moçambicana de Atum SA (EMATUM); and Mozambique Asset Management SA (MAM).[10] These companies were all owned, directly or indirectly,[11] by the Mozambican state and incurred almost US $2 billion in debt guaranteed by the state.[12] Only the EMATUM loan was initially disclosed to the

7 The term 'non-payment' is used here rather than 'default'. This is a deliberate terminological choice in light thereof that such non-payment will seemingly not be regarded as a default if the state institutes judicial proceedings challenging the validity of the debt. See in this respect Fitch Rating 'Fitch affirms Mozambique at "CCC"' (9 July 2020), https://www.fitchratings.com/research/sovereigns/fitch-affirms-mozambique-at-ccc-09-07-2020#:~:text=We%20expect%20growth%20to%20rebound,a%200.2%25%20surplus%20in%202019 (accessed 20 January 2021).

8 In this contribution any reference to 'English law' should be construed as a reference to the law of England and Wales.

9 Kroll 'Independent audit related to loans contracted by ProIndicus SA, EMATUM SA, and Mozambique Asset Management SA' (2017) 12.

10 As above.

11 In *Republic of Mozambique v Credit Suisse International* [2021] EWCA Civ 329 the English Court of Appeal explained all entities as being 'wholly owned by the Republic'. Although some entities were partially owned by other state-owned enterprises and various different organs of state, all entities were ultimately wholly owned by the Mozambican government.

12 Kroll (n 9) 12.

public.[13] The disclosure of the balance of this debt, in 2016, following revelations by investigative journalists, resulted in an economic crisis as Mozambique defaulted on all of its external commercial debt obligations and the International Monetary Fund (IMF) withdrew all support.[14] In response thereto, foreign governments also ceased providing aid conditional upon IMF support and Mozambique's currency plunged.[15] These debt obligations have since been linked to widespread corruption involving high-level Mozambican government officials, including its former Minister of Finance.[16]

10.2.1 The ProIndicus debt

Privinvest Group, an Abu Dhabi-based holding company, had initiated discussions with Mozambican government officials in 2011 ostensibly aimed at establishing a coastal monitoring system through a contract with the company.[17] The Mozambican government incorporated ProIndicus to perform these activities on behalf of it.[18] It is alleged that Privinvest later approached Credit Suisse, intending to secure financing for the project.[19] Credit Suisse is said to have made it clear that it would only provide financing at market rates and subject to it being guaranteed by the government of Mozambique.[20]

13 C Reid 'Mozambique: The anatomy of corruption' (26 June 2018), https://www.theafricareport.com/607/mozambique-the-anatomy-of-corruption/ (accessed 26 October 2020).

14 IMF 'IMF executive board considers Mozambique's misreporting under the policy support instrument and breach of obligation under Article VIII, Section 5' (21 November 2016), https://www.imf.org/en/News/Articles/2016/11/21/PR16521-IMF-Executive-Board-Considers-Mozambiques-Misreporting-Under-the-Policy-Support-Instrument (accessed 17 April 2021).

15 Economist Intelligence Unit 'Undisclosed debts push Mozambique towards crisis' (26 April 2016), http://country.eiu.com/article.aspx?articleid=1494162133&Country=Mozambique&topic=Economy (accessed 20 October 2020). A group of donor nations and international organisations known as the Group of 14 (G14) collectively agreed to suspend all direct budgetary support to the government of Mozambique. The collective amount that Mozambique was set to receive from this group exceeded US $280 million. The G14 is composed of Austria, the African Development Bank, the World Bank, Canada, Spain, Finland, France, Ireland, Italy, Portugal, United Kingdom, Sweden, Switzerland and the European Union.

16 Reid (n 13).

17 Indictment, *United States v Boustani & Others* Case CR 18 681 para 31.

18 Kroll (n 9) 22.

19 *United States v Boustani* (n 17) para 34.

20 As above.

ProIndicus and Credit Suisse agreed upon a US $372 million loan facility on 28 February 2013.[21] The maximum amount available under this credit facility was subsequently increased to US $900 million of which ProIndicus utilised around US $622 million to purchase ships from PrivInvest.[22] The initial agreement and the subsequent agreements, increasing the amount available under the credit facility, were all guaranteed by the government of Mozambique acting through the Minister of Finance.[23] It has since transpired that PrivInvest has allegedly paid bribes of up to US $5 million to the Minister of Finance to secure his signature on the guarantees.[24] The vessels purchased with these funds have also remained largely unused and provide little to no benefits to the Mozambican people.[25]

10.2.2 The EMATUM and EMATUM-related debt

EMATUM was formed to develop a 'home-grown and self-sustaining fishing industry in Mozambique'.[26] To achieve these objectives, EMATUM was to acquire a fleet of vessels from the Privinvest Group.[27] EMATUM concluded a loan agreement with Credit Suisse for an amount not exceeding US $850 million on 30 August 2013.[28] Like the ProIndicus agreement, this agreement was accompanied by a government guarantee signed by the Minister of Finance on Mozambique's behalf.[29]

EMATUM initially drew US $500 million from the credit facility on 5 September 2013 and later drew a further US $350 million provided by VTB Capital, a subsidiary of the Russian state-owned bank VTB.[30] The

21 Kroll (n 9) 22.

22 As above.

23 As above.

24 *United States v Boustani* (n 17) para 38.

25 B Ballard 'Mozambique's dramatic economic reversal' (11 July 2018), https://www.worldfinance.com/special-reports/the-mozambique-debt-crisis (accessed 28 October 2020). These ships have remained largely unused because the vessels purchased were not suited for the purpose for which they were acquired.

26 F Guilenge 'Three layers of uncertainty in Mozambique: What's happening and why does It matter?' (date unknown), https://www.rosalux.de/en/publication/id/38966/three-layers-of-uncertainty-in-mozambique (accessed 30 October 2020). EMATUM was co-owned by the state holding company (IGEPE), the state fishing company (Emopesca) and the Mozambican Intelligence Service, SISE (Servico de Informacao e Seguranca do Estado).

27 Kroll (n 9) 12.

28 Kroll (n 9) 29.

29 As above.

30 As above.

existence of the EMATUM debt was disclosed to the IMF in 2014.[31] The government of Mozambique later restructured the EMATUM loan.[32] In the restructuring process holders of the EMATUM loan participation notes (LPNs) were to exchange these notes for sovereign Eurobonds issued by the government of Mozambique.[33] Mozambique defaulted on these Eurobonds shortly thereafter as the economic crises resulting from the disclosure of the ProIndicus and MAM debts severely curtailed Mozambique's ability to honour its obligations under the Eurobonds.[34] With more than US $200 million in direct foreign aid to Mozambique's budget suspended, the country could not afford to make timeous payment on these bonds.[35]

The Eurobonds were in turn again restructured in 2019.[36] In terms of this restructuring arrangement, holders of the previous Eurobond valued at US $726,5 million were to exchange these for new Eurobonds valued at US $900 million.[37] The higher debt value is said to cover missed principal and interest payments under the previous issue of Eurobonds.[38] These restructured debts will be collectively referred to as the EMATUM-related debt in this chapter.

10.2.3 The MAM debt

MAM concluded a loan agreement for US $540 million with VTB on 20 May 2014.[39] This agreement was also accompanied by a guarantee

31 IMF 'Mozambique Country Report 18/66' (21 February 2018) 36.

32 As above. The restructuring of the loan occurred as EMATUM could not meet its obligations. The Mozambican government then agreed to step in and assist EMATUM. Importantly, unlike the ProIndicus and MAM debt, Mozambique benefited, at least partially, from the EMATUM loan. US $500 million had been transferred to the Mozambican general budget by EMATUM.

33 As above.

34 Capital Markets in Africa 'Mozambique to miss coupon payment on Eurobond, ministry says' (date unknown), https://www.capitalmarketsinafrica.com/mozambique-to-miss-coupon-payment-on-eurobond-ministry-says/ (accessed 30 October 2020).

35 See para 2 of the contribution with respect to the economic crises resulting from the IMF's suspension of support and the withdrawal of foreign aid.

36 IMF 'Republic of Mozambique: Request for disbursement under the rapid credit facility-debt sustainability analysis' (17 April 2020) 3.

37 T Roca 'Fitch upgrades Mozambique to CCC after debt restructuring' 7 (November 2019), https://www.spglobal.com/marketintelligence/en/news-insights/trending/xku6e3ietvexzlqtsj6hkg2 (accessed 20 October 2020).

38 As above.

39 Kroll (n 9) 38. MAM was almost entirely owned by SISE other than the shares held by EMATUM and ProIndicus, who each held 1%.

provided by the government and signed by the Minister of Finance.[40] The MAM debt involved many of the same parties who had arranged the other unlawful debts. However, thus far no evidence has emerged indicating any participation by VTB and/or its employees in the corrupt scheme.[41]

10.3 The (in)validity of the guarantees under Mozambican law

The Constitutional Council of the Republic of Mozambique has declared all of the secret debt unlawful in terms of the law of Mozambique.[42] In all instances, the value of the guarantees provided exceeded the annual limit on the value of state guarantees authorised.[43] The 2013 and 2014 budget laws provided for a limit to state guarantees of 183,5 million Meticals (approximately US $5 million) and 15,7835 billion Meticals (approximately US $375 million) respectively.[44] In 2013 each guarantee provided in relation to the various 'secret debts' exceeded the annual limit on its own not even accounting for the combined effect of these guarantees.

The debts were also declared unlawful in light of the market rate of interest attached to these loans.[45] In terms of Mozambican law, the state cannot incur a debt obligation unless the interest rate it obtains is at least 35 per cent below the market rate.[46] The Court held that although the companies were essentially incorporated as private entities they remained bound by these laws in light of the significant state control and public functions performed by these entities.[47] The illegality of the loans and guarantees is further founded upon article 179(1)(p) of the Mozambican Constitution which provides that parliamentary approval must be obtained for debts with a maturity exceeding one year and that Parliament has the

40 As above.

41 M Goldmann 'The law and political economy of Mozambique's odious debt' Keynote address delivered at *Centro de Integridade Pública Conference* (Maputo 15 March 2019) 10.

42 Constitutional Council of Mozambique Judgment 5/CC/2019 of 3 June 2019; Constitutional Council of Mozambique Judgment 7/CC / 2020 of 8 May. In terms of art 241 of the Constitution of Mozambique the Constitutional Council is the highest judicial authority with respect to constitutional matters. It is afforded with broad authority to 'evaluate and declare the unconstitutionality of laws and the illegality of normative acts of state offices'.

43 Judgment 7/CC / 2020 (n 42) 7.

44 Judgment 7/CC / 2020 (n 42) 7, in reference to Law 1/2013 of 7 January and Law 1/2014 of 24 January.

45 Judgment 7/CC / 2020 (n 42) 7.

46 Art 9(2) of Law 1/2013 of 7 January, in reference to art 179(1) of the Constitution of Mozambique, 2004.

47 Judgment 7/CC / 2020 (n 42) 7.

exclusive competence to set the upper limit for guarantees that may be given by the state.[48]

The Constitutional Council also held Assembly Resolution 11/2016 to be void for illegality.[49] In this Resolution the assembly purportedly recognised the EMATUM debt in an attempt to cloak an otherwise void act with validity. The Constitutional Council found that the assembly had no power to recognise an invalid and unconstitutional act.[50] It went on to explain that in terms of Mozambican law 'expenditure may only be assumed during the economic year for which it has been budgeted'.[51] It is accordingly beyond dispute that as a matter of Mozambican law the guarantees and the Eurobonds emerging from the first restructuring are invalid.

10.4 The validity/invalidity of the debts under the law of England and Wales

The invalidity of the guarantees per Mozambican law would not automatically render them invalid under English law.[52] The debts are ultimately governed by English law and not Mozambican law.[53] This part, therefore, will briefly consider the validity of the guarantees in terms of

48 Judgment 5/CC/2019 of 3 June 2019 (n 42) 12.

49 As above.

50 As above.

51 Judgment 5/CC/2019 of 3 June 2019 (n 42) 11 in reference to Law 9/2002 of 12 February.

52 The principles of international comity have formed part of English law since the 18th century. It permits the English courts to give effect to decisions made by foreign courts. Mozambique may potentially argue that the English courts should, on the basis of comity, follow the decision of the Constitutional Council and hold the debts to be invalid. However, the author could not find any case law where the English courts have ever dismissed a sovereign debt claim, governed by English law, on the basis of comity. As seen in *Ukraine v Law Debentures Trust Corporation PLC* [2018] EWCA Civ 2026 (Ukraine appeal case) the English courts have generally limited deference to accepting that the debt is invalid in terms of the law of the state concerned. Questions such as ostensible or usual authority were still determined with reference to English law. See para 4.1.3 of this contribution in this respect. The extent to which Mozambique could raise this argument, therefore, is uncertain and a full discussion thereof falls outside of the scope of this contribution.

53 The Mozambican judgments also only dealt with a lack of actual authority and the breaches of the budget law. These grounds on their own may be insufficient for invalidity in terms of English law. Importantly, the Mozambican courts also did not make any findings regarding the culpability of any of the banks concerned.

English law. In this part, the validity of the EMATUM-related debt is addressed separately from the guarantees.

10.4.1 The invalidity of the guarantees

In terms of English law, it is unlawful to bribe a foreign public official.[54] The Bribery Act also provides that a failure by a commercial organisation to prevent bribery is a criminal offence.[55] However, as Goldmann correctly notes, the Bribery Act does not in itself render a contract void in instances where bribery has occurred.[56] He instead argues that the ProIndicus and EMATUM debts are invalid under the common law doctrine of illegality.[57] In this contribution, the author largely agrees with the conclusion reached by Goldmann. However, this contribution disagrees with him on the manner in which he arrived at the conclusion.

In this part it is argued that Goldmann is incorrect in suggesting that a claim would be barred by the doctrine of illegality as a result of the guarantees being procured through bribery. This contribution instead considers the distinction in English law between contracts to bribe and contracts procured through bribery.[58] The former has been held to be unenforceable under the illegality doctrine while the latter is not.[59] This contribution also disagrees with Goldmann to the extent that he implies the agreements are void, rather than voidable, by virtue of the bribery.[60] In this part it will instead be argued that the agreements are voidable at the instance of Mozambique as the innocent party.

The doctrine of illegality in English law

It is a well-established principle of English law that a contractual claim can be defeated by illegality.[61] This principle, arising from the Roman law principle of *ex turpi causa non oritur actio*, provides that a court will not aid

54 UK Bribery Act 2010 sec 6.

55 UK Bribery Act 2010 sec 7.

56 Goldmann (n 41) 5.

57 As above.

58 *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm) para 49; *Honeywell International Middle East Ltd v Meydan Group* LLC [2014] EWHC 1344 (TCC) para 184.

59 See part 10.4.1of this contribution and the authorities cited there in this respect.

60 In his paper Goldmann states that '[t]he loan agreement is therefore void'. Goldmann (n 41) 5.

61 *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225 para 28.

a party whose cause of action is founded upon an immoral or illegal act.[62] Despite its relatively simplistic formulation, the operation of illegality in the law of obligations has given rise to much controversy and at times contradictory case law.[63] However, the English courts have been quite clear on the difference between contracts procured by bribery and a contract illegal in itself such as an agreement to pay a bribe.[64]

Concerning the loan guarantees provided by the Mozambican government in connection with the hidden loans, it can be said that these agreements were likely procured through the bribery of the Minister of Finance.[65] However, the Court in *Honeywell International Middle East Ltd v Meydan Group LLC* (*Honeywell* case) held that 'whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable'.[66] The effect of this decision is that the enforcement of the ProIndicus and EMATUM guarantees are not prohibited by the *ex turpi causa* rule as Goldmann suggests.[67]

The voidability of a contract procured through bribery

The mere fact that a claim is not barred by the *ex turpi causa* rule nevertheless does not mean that Mozambique is without recourse. In *Wilson v Hurstanger* the Court held that where there had been bribery involved in the procurement of the contract such agreement would be voidable at the

62 *Holman v Johnson* (1775) 1 Cowp. 341, 343; *Hall v Woolston* (n 61) para 28.

63 A Burrows 'A new dawn for the law of illegality' in S Green & A Bogg (eds) *Illegality after* Patel v Mirza (2018).

64 *Honeywell* case (n 58) para 185.

65 *United States v Boustani* (n 17) para 38.

66 *Honeywell* case (n 58) para 185. This position was also reaffirmed in *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm) para 49.

67 It is not clear on what basis Goldmann proceeds to apply the illegality doctrine directly to the guarantees. Goldmann does not mention any of the cases that treats contracts procured by bribery differently than contracts to bribe. His reliance on *Patel v Mirza* [2016] UKSC 42 might suggest that, in his view, the distinction between illegal contracts themselves and contracts procured through bribery is no longer applicable. The author disagrees to the extent that this is his argument as the effect of Patel is that even contracts illegal in themselves would no longer per se be unenforceable. These contracts would only be unenforceable if they have the potential to bring the legal system into disrepute. *Post-Patel* cases, such as *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA (Civ) 1567, have also continued to address contracts procured through bribery as voidable rather than unenforceable under the illegality doctrine.

instance of the innocent party.[68] The Court in the *Honeywell* case agreed with this finding and indicated that bribery allows the innocent party to avoid the contract, at its election, provided counter-restitution can be made.[69] The guarantees procured through bribery, therefore, is voidable at the election of Mozambique.[70]

Article 34 of the UN Convention Against Corruption requires state parties to ensure that no person benefits from contracts, concessions or similar advantages obtained through corrupt means.[71] The UN Office on Drugs and Crime has also noted that it is common practice in many states to provide that agreements procured through bribery are voidable.[72] There are certain instances where holding such contracts as void, rather than voidable, may benefit the corrupt party.[73] It is for this reason that English law provides the innocent party with a right of election to seek rescission or to continue with the contract.[74] Therefore, it is submitted that this approach is not in conflict with the UN Convention Against Corruption.

In his analysis Goldmann also suggests that Mozambique would not need to make counter-restitution in light of the doctrine of illegality.[75] In reaching this conclusion he relies on the limited discretion conferred upon English courts to deny a claim based on unjustified enrichment where the enforcement of the claim would be contrary to the public interest or harmful to the integrity of the legal system having regard to a range of factors.[76] The author agrees with Goldmann that an English court is likely

68 *Wilson & Another v Hurstanger Ltd* [2007] EWCA Civ 299 para 39.

69 *Honeywell* case (n 58) para 184.

70 This contribution does not address the extent to which the banks were aware of the corruption. In English law it is not necessary to prove that the bank itself authorised the bribe, or even knew about it, for the contract to be voidable. Participation by some of the bank's employees in the corrupt scheme will generally suffice. See *UBS AGv Kommunale Wasserwerke* (n 67). It is known that certain CreditSuisse employees had pleaded guilty to bribery in this case (B Pierson 'Second ex-Credit Suisse banker pleads guilty in Mozambique loan scheme' (20 July 2019), https://www.reuters.com/article/us-mozambique-credit-suisse-gp-charges-idUKKCN1UE2OJ (accessed 20 October 2020).

71 UN Office on Drugs and Crime *State of implementation of the United Nations Convention against Corruption* (2017) 157.

72 As above.

73 UN Office on Drugs and Crime (n 71) 158. This would, eg, arise in instances where the innocent party has performed but the briber has yet to deliver its counter performance. In such instances the innocent party may elect to continue with the contract in addition to claiming damages.

74 *Honeywell* case (n 58) para 185.

75 Goldmann (n 41) 5.

76 Goldmann (n 41) 6; *Patel v Mirza* [2016] UKSC 42 para 120.

to decline an award against Mozambique based on unjustified enrichment considering the illegalities.[77]

In this contribution it is additionally argued that at least in as far as the Mozambican government is concerned, there has been no enrichment and, therefore, the issue of counter-restitution does not arise. In *National Commercial Bank (Jamaica) Ltd v Hew* the Privy Council held that 'with a guarantee, the surety incurs a liability but obtains no benefit, so there is nothing to disgorge by way of counter-restitution if the guarantee is set aside'.[78] It is therefore submitted that Mozambique need not make any counter-restitution as it did not directly obtain any benefit through the provision of the guarantee.[79]

The Minister of Finance's capacity to bind Mozambique to the guarantees

For purposes of this contribution, the discussion is primarily concerned with the effect of corruption on the validity of the debt or debt guarantees. However, the question of the capacity of the Minister of Finance is briefly considered as a lack of capacity has been advanced as a key reason for the invalidity of the MAM guarantee.[80] Goldmann argues that the MAM guarantee is unlawful as the Minister of Finance, who signed the guarantee, did not have the authority to do so.[81] This argument relies upon the Minister's lack of actual authority to bind Mozambique in terms of its domestic law.[82] The English courts will generally defer to the Mozambican

77 Goldmann (n 41) 6.

78 *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51 para 43. This position has also been followed in several other cases, be it explicitly or implicitly. See among others *Eastern Shipping Co v Scales Trading Ltd* [2000] UKPC 44; *TSB Bank plc v Camfield* [1995] 1 WLR 430.

79 It is important to distinguish between the parties before the court. Where ProIndicus or MAM are the parties they would need to make counter-restitution as they have received assets. However, these assets do not belong to the Mozambican government directly. The ships supplied continue to be owned by these companies and have largely been left unused. See B Aris 'Debt deals in Mozambique that go wrong' (28 November 2019), https://www.intellinews.com/long-read-debt-deals-in-mozambique-that-go-wrong-172448/ (accessed 15 January 2021). The military equipped ships that ere was to be supplied saw the order changed and was also supplied to ProIndicus rather than directly to the Mozambican government. If any of these assets have since been transferred to the Mozambican government it may need to make counter-restitution unless the court's limited discretion to refuse enforcement is exercised in its favour.

80 Goldmann (n 41) 10.

81 As above.

82 In this argument Goldmann specifically refers to art 179(1)(p) of the Constitution of Mozambique as well as the ceiling placed on debt guarantees by the 2013 and 2014 budget laws. In this contribution, these provisions are not considered to be the basis for invalidity. However, they are considered as the sources placing the banks on notice

courts and accept their findings that the Minister lacked actual authority in terms of Mozambican law.[83] However, in English law liability may in some instances be established based on usual or ostensible authority.[84]

In *Law Debentures v Ukraine* (*Ukraine* case) the Court reiterated that 'questions of ostensible authority or usual authority are to be determined by the putative applicable law of the contract'.[85] Where VTB relies upon usual or ostensible authority, the question will therefore be determined by English law, as the law governing the agreement, and not Mozambique's domestic law. In the *Ukraine* case the Court held that in English law the usual authority of a minister of finance to enter into a guarantee needs to be determined with reference to the role of the finance minister within that particular state and the particular borrowing.[86] In that case, Ukraine argued that the plaintiff should have been aware that in incurring the debt in question the minister would breach the debt limit set out in its budget law which had been public information.[87] The Court ultimately rejected this argument by Ukraine.[88]

If this approach were correct, it seems unlikely that Mozambique would succeed in similarly arguing that VTB ought to have been aware of the upper limit on the value of state guarantees provided for in the 2013 and 2014 budget laws. This approach would also contrast sharply with the United Nations Conference on Trade and Development (UNCTAD) Principles on Responsible Sovereign Lending which provides for a duty of due diligence on creditors to verify that the debt would comply with the host states law.[89] Although the Court of Appeal upheld the finding by the High Court in this respect, it also warned that where legislation was publicly available anyone lending to the country must be 'taken to know of its effects'.[90] The Court of Appeal only dismissed Ukraine's argument on this point because of its own conduct that induced the belief that it would not breach the limit.[91]

with respect to the minister's lack of capacity.

83 *Law Debentures Trust Corporation PLC v Ukraine, represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine* [2017] EWHC 655 (Comm) para 154; *Ukraine* appeal case (n 52) para 36.

84 *Marubeni Hong Kong and South China Ltd v Mongolia* [2005] EWCA Civ 395 para 46.

85 *Ukraine* case (n 52) para 154.

86 *Ukraine* case (n 83) para 160.

87 *Ukraine* case (n 83) para 96.

88 *Ukraine* case (n 83) para 164.

89 Principle 3 of the UNCTAD Principles on Responsible Sovereign Lending.

90 *Ukraine* appeal case (n 52) para 121.

91 *Ukraine* appeal case (n 52) para 125.

In the *Ukraine* case the Court was also confronted with a resolution purportedly passed by the Cabinet of Ministers of Ukraine (CMU) in which authority was conferred upon the Minister of Finance to enter into debt transactions. The Court accepted that the resolution breached Ukraine's internal law as the CMU lacked the authority to authorise the Minister of Finance to do something beyond his actual authority.[92] However, the Court held that even if the CMU 'had no actual authority to hold out the Minister of Finance as Ukraine's representative in the transaction, it did have usual authority to do so as the state's cabinet'.[93]

If this position were correct, Presidential Decree 2/2010 would have posed a substantial obstacle to any defence raised by Mozambique based on a lack of capacity by the Minister of Finance. The Decree provided that the Minister of Finance has the competency to enter into and implement agreements for the contracting of internal and external public debt, to enter into and implement agreements with international financial institutions, and to enter into contracts or agreements that entailed the assumption of financial liabilities or involved fiscal matters.[94] However, the Court of Appeals rejected this finding to the extent that the resolution violates express provisions of the Ukrainian Budget Code.[95] Similarly, although Presidential Decree 2/2010 conferred authority upon the Minister of Finance to contract debts, it did not, nor did it purport to, authorise the Minister to exceed the limit on state guarantees.

In conclusion, although English law distinguishes between actual authority and usual or ostensible authority, a party cannot rely on the latter where it has been placed on notice that the Minister lacks actual authority.[96] Publicly available legislation setting out limitations on the Minister's competence may be sufficient to serve as notice unless the state induces a belief to the contrary.[97] The courts will regard VTB as having been aware of the upper limit on state guarantees in the present case. This ought to be sufficient to defeat any reliance by VTB upon usual or ostensible authority by the Minister of Finance. This may differ if Mozambique had

92 *Ukraine* case (n 83) para 167.

93 As above.

94 Presidential Decree 2/2010 art 3.

95 *Ukraine* appeal case (n 52) para 131. The Court of Appeals went on to explain that '[t]he person holding out an "agent" so as to give them ostensible authority must have actual (express or implied) authority to do so on behalf of the principal, or ostensible authority derived from someone with actual authority. Ostensible authority is not otherwise sufficient.'

96 *Ukraine* appeal case (n 52) para 121.

97 *Ukraine* appeal case (n 52) paras 121-125.

taken some action to induce the belief that the upper limit would not be breached. However, it is submitted that such an argument would, in either event, be untenable in this case as the individual guarantee provided to VTB on its own exceeded the upper limit on state guarantees.[98]

10.5 The validity of the EMATUM-related debt

10.5.1 The Eurobonds as a new debt obligation independent from the initial guarantee

In terms of English law, a substitution of one lender for another is usually regarded as a novation.[99] Novation has the effect of terminating the initial agreement and replacing it with a new agreement independent from the previous agreement.[100] Olivares-Caminal has persuasively argued that the LPN's issued by EMMATUM were novated when Mozambique exchanged these notes for the sovereign Eurobonds issued directly by the government of Mozambique.[101] The government of Mozambique had replaced EMATUM as the principal debtor and had assumed liability separate from the initial guarantee.[102]

Importantly a transfer by way of novation is not subject to equities in terms of English law.[103] Accordingly, any right to rescind, which a party might have had concerning the original agreement, is lost upon the extinguishment and replacement thereof by the new, novated, agreement.[104] Effectively this means that the novated agreement would not be affected by any potential invalidity of the previous agreement. Mozambique would accordingly be liable to pay the EMATUM-related debt even though the original guarantee had been procured through corruption.

Goldmann, however, raises an interesting argument wherein he opines that a novated agreement may itself be invalid where it too has

98 If, eg, the VTB guarantee had been below the annual limit and Mozambique had failed to disclose the existence of other guarantees, VTB would have been able to rely on Mozambique's own conduct as inducing this belief.

99 R Gray et al 'Transfer of syndicated loans: Similar objectives, subtle differences' (2010) *International Financial Law Review* 63.

100 As above.

101 R Olivares-Caminal 'Mozambique policymakers need to act now!' (4 April 2019), https://www.linkedin.com/pulse/mozambique-policymakers-need-act-now-rodrigo-olivares-caminal/ (accessed 25 October 2020).

102 As above.

103 A Burrows *A restatement of the English law of contract* (2016).

104 *Deutsche Bank AG & Others v Unitech Global Ltd & Others* [2013] EWHC 471 (Comm) para 50.

been obtained through corruption.[105] Although this may be correct, as Goldmann himself acknowledges, mere involvement of some of the parties to the initial corruption in the restructuring would not be sufficient to prove that the restructuring itself has been affected by corruption.[106] The point has in either event also become moot as those Eurobonds have again been restructured, potentially resulting in yet another novation.

It may seem unjust to expect Mozambique to repay debts from which it has received little to no benefit.[107] In this regard, some have suggested that Mozambique ought to declare the debt as odious and refuse repayment on this basis.[108] The validity of the doctrine of odious debts is heavily disputed in international law.[109] Additionally, even if Mozambique were to satisfy a court that the doctrine is a valid norm of public international law, this would not assist it in a case before the English courts. It is well established in terms of English law that unless international norms have been incorporated into domestic law, these norms 'cannot be the source of domestic rights or duties and will not be interpreted by' the courts.[110] While it may, therefore, be tempting to seek non-repayment of the Eurobonds from a moral perspective, it is submitted that the debt remains legally valid under English law.

10.6 Investor corruption as a jurisdictional bar to international investor-state arbitration

Mozambique is a party to several bilateral investment treaties (BITs) in which jurisdiction is conferred upon the International Centre for the Settlement of Investment Disputes (ICSID).[111] The ICSID has long held that the holders of sovereign debt may be considered investors for

105 Goldmann (n 41) 8.

106 As above.

107 D Williams & J Isaksen 'Corruption and state-backed debts in Mozambique: What can external actors do?' (2016), https://www.cmi.no/publications/6024-corruption-and-state-backed-debts-in-mozambique (accessed 30 October 2020).

108 As above. It has been said that '[a]ccording to the doctrine of odious debt, loans which are knowingly provided to subjugate or defraud the population of a debtor state are not legally binding against that state under international law'; see J King *The doctrine of odious debt in international law: A restatement* (2016) 1.

109 See among others King (n 108) 62.

110 *Belhaj & Others v Straw & Others* [2017] UKSC 3 para 123.

111 See art 8 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (UK-Mozambique BIT); art 10(2) Agreement between the Belgium-Luxembourg Economic Union and The Government of the Republic of Mozambique on the Promotion and Protection of Investments.

purposes of establishing its jurisdiction.[112] Investors in the debt from any of these countries may potentially lodge a claim against Mozambique at the ICSID. This contribution will, therefore, briefly consider the ICSID's approach to investor corruption as a jurisdictional bar.[113]

States have long argued that international investment protection does not extend to investments tainted with illegality.[114] The ICSID decision in *Metal-Tech Ltd v Uzbekistan* (*Metal-Tech* case) gave recognition to these assertions by states.[115] In this case serious concerns arose over large sums paid in the form of 'consulting fees' to individuals closely connected to high-ranking government officials in Uzbekistan.[116] The tribunal in the *Metal-Tech* case explained that an investor may only claim under a BIT if it had established an investment under the BIT.[117] In that case, the tribunal concluded that the investor had been unable to rebut the suspicion of illicit activities established by Uzbekistan and, accordingly, it could not be said that the investment had been implemented in terms of the law of the host state as required by the BIT.[118] It is on this basis that the tribunal declined jurisdiction over the matter.

From the *Metal-Tech* case, it would seemingly be enough for Mozambique to establish a *prima facie* case of corruption upon which the burden would shift to the investor to rebut the 'suspicion of illicit activities'. However, to defeat a claim at the jurisdictional stage the BIT in question would need to contain a so-called 'in-accordance with its laws'

112 *Fedax NV v The Republic of Venezuela*, ICSID Decision Objections to Jurisdiction (11 July 1997) ICSID Case ARB/96/3 para 43. In a recent article Pahis criticises investment tribunals' assertion of jurisdiction over sovereign debt as investments. He argues that it undermines the core purpose of bilateral investment treaties and raises the cost of sovereign debt. This contribution agrees with the arguments raised. However, as Pahis also notes, 'recent jurisdictional decisions suggest that sovereign debt will be subject to' investment arbitration for the foreseeable future. See S Pahis 'BITs & bonds: The international law and economics of sovereign debt' (2021) 115 *American Journal of International Law* 242.

113 It is important to note that this contribution does not consider the substantive validity of debt tainted by corruption before the ICSID. This is because if corruption acts as a jurisdictional bar the tribunal would not consider the matter beyond this jurisdictional phase.

114 A Bulovsky 'Promises unfulfilled: How investment arbitration tribunals mishandle corruption claims and undermine international development' (2019) 118 *Michigan Law Review* 117 119.

115 *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Award (4 October 2013) ICSID Case ARB/10/3.

116 *Metal-Tech* case (n 115) para 279.

117 *Metal-Tech* case (n 115) para 145.

118 *Metal-Tech* case (n 115) para 373.

clause.[119] Certain Mozambican BITs contain such a clause while others do not.[120] Mozambique's ability to defeat an ICSID claim at the jurisdictional stage may thus be dependent on the nationality of the claimant.

Importantly, the principles above would only apply before the ICSID where corruption or a reasonable suspicion of investor corruption has been proven.[121] The ICSID will also not find every investment in breach of the host state's law to be a jurisdictional bar. This is so particularly where the breach of domestic law occurred through no fault of the investor and government officials of the host state had created the impression that the investment would be lawful.[122]

It is accordingly submitted that investors who subsequently purchased the EMMATUM-related Eurobonds could, therefore, potentially invoke the jurisdiction of the ICSID should Mozambique repudiate the restructured debt. These investors' claims would not be barred by the corruption of other parties involved in the proceedings unless they were aware or ought to have been aware of the corruption.[123]

10.7 Conclusion and recommendations

From the foregoing analysis it becomes clear that Mozambique finds itself in a precarious position where it may be liable for the Eurobonds in terms of English law. Mozambique is simultaneously facing significant pressure from civil society groups not to pay any of the debt including the Eurobonds.[124] The international investment community in turn expects Mozambique to honour its obligations arising from the Eurobonds. This is so particularly considering that the Eurobonds are, as argued in this contribution, valid in terms of its governing law. Were Mozambique to renege on its obligations arising from the restructured Eurobonds again, it could significantly impair investor confidence in the country. The

119 As above. The so-called 'in accordance with its laws' clause is a clause in a bilateral investment treaty indicating that all investments are to be made in accordance with the law of the host state.

120 See eg art 2 of the Agreement between the Swiss Confederation and the Republic of Mozambique Concerning the Promotion and Reciprocal Protection of Investments which contains such a clause while the UK-Mozambique BIT (n 111) does not.

121 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* ICSID Decision on Jurisdiction and Liability (10 November 2017) ICSID Case ARB/12/1 para 684.

122 As above.

123 As above.

124 Club of Mozambique 'Hidden debts: Civil society wants to sue government' (1 November 2019), https://clubofmozambique.com/news/hidden-debts-civil-society-wants-to-sue-government-dw-146045/ (accessed 30 October 2020).

Mozambican government has itself acknowledged that it will require significant private investment capital in the coming years, making it imperative for the government to boost investor confidence rather than undermining it.[125]

Yet, in honouring the debt obligations arising from the Eurobonds, Mozambique may breach the ruling of its Constitutional Council. It has been argued that the latest restructuring has so breached this ruling in light thereof that the Constitutional Council held the original EMATUM debt and all related transactions to be void.[126] Should the Constitutional Council find that the latest restructuring is void, it would impair Mozambique's ability to make payment without breaching its domestic law. As established in this contribution, it additionally seems unlikely that Mozambique would succeed in resisting a claim based on the Eurobonds in ICSID arbitration. Holding the latest restructuring invalid would thus leave Mozambique with the equally undesirable options of either (i) breaching its domestic law or (ii) defaulting upon valid debt obligations.

Mozambique's decision to honour the Eurobonds is prudent. The mere fact that Mozambique is honouring the Eurobonds also does not automatically result in the Mozambican people being unfairly burdened with the cost of debts from which they have not benefited.[127] Mozambique is seeking damages in tort against the parties who had been involved in the alleged corrupt scheme.[128] This allows Mozambique to try and recover losses suffered as a result of the corruption without defaulting upon valid debt obligations.

125 Club of Mozambique 'Mozambique Eurobonds out of debt relief to build up investors' confidence' (15 October 2020), https://furtherafrica.com/2020/10/15/mozambique-eurobonds-out-of-debt-relief-to-build-up-investors-confidence/ (accessed 30 October 2020).

126 AIM 'Mozambique: Finance Ministry defies Constitutional Council over Ematum' (1 November 2019), https://clubofmozambique.com/news/mozambique-finance-ministry-defies-constitutional-council-over-ematum-aim-report-145951/ (accessed 31 October 2020).

127 English law recognises a claim in tort against any person who had participated in bribery where rescission may not be available. See eg *Chancery Client Partners Ltd & Others v MRC 957 Ltd & Others* [2016] EWHC 2142 (Ch) paras 23-24. Importantly, this does not affect the validity of the debt but merely provides an avenue for Mozambique to obtain some form of redress. A full discussion of tort law falls outside the scope of this contribution.

128 The English Court of Appeal in *The Republic of Mozambique v Credit Suisse International & Others* [2021] EWCA Civ 329 recently held that part of Mozambique's claim is closely connected to an arbitration clause and a stay of proceedings may be warranted. The arbitral case is *PrivInvest v Mozambique* ICC Case 24325. A full commentary on those proceedings fall outside the scope of this contribution.

The Mozambican case highlights the importance for SADC states to obtain appropriate advice prior to embarking upon the restructuring of sovereign debt. Had Mozambique not restructured the EMATUM debt, the obligations may well have been invalid and unenforceable. Additionally, the treatment of the ProIndicus and MAM loans makes it clear that rating agencies do not regard a state to be in default where the debt is potentially invalid as a result of corruption provided that judicial proceedings are instituted.[129] The reprieve offered by rating agencies and international financial institutions such as the IMF in these cases should assist states to avoid rushing towards the restructuring of debts that may be invalid.[130]

129 Fitch Rating (n 7).

130 Postscript: A settlement agreement had been reached between Credit Suisse and regulatory authorities in Switzerland, the United Kingdom and the United States after this contribution had been finalized. In terms of the settlement agreement, Credit Suisse will pay large fines to these regulators and also forgive debts owed by Mozambique in the amount of $200 million. However, this settlement agreement was aimed at avoiding criminal liability on the part of Credit Suisse and does not resolve the ongoing civil litigation in the UK courts or the arbitral proceedings in Switzerland.

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