The Indian Satellite Saga and Retaliation: Recognizing the Supreme Court of India's Judgment Abroad?

Introduction

As one of the most complex and fiercely contested recent investment disputes, the Indian Satellite Saga originated from India's annulment of an agreement for leasing S-band electromagnetic spectrum on two satellites (Satellite Agreement) to Devas Multimedia Private Ltd. (Devas). The Saga involved multiple international arbitrations and domestic litigations. In 2022, the Supreme Court of India made a judgment (SCI Judgment) to wind up Devas. Devas and its foreign investors allege the SCI Judgment is a retaliatory measure against them for enforcing arbitration awards.

Since 2023, courts worldwide, including those in Australia, Canada, Germany, Mauritius, the Netherlands, Singapore, Switzerland, and the US, rendered decisions regarding whether to recognize the SCI Judgment and to allow it as a defence against the enforcement of arbitration awards.[1] This Insight analyzes these courts' judgments and reflects on the decentralized judgment/award recognition and enforcement system for addressing alleged state retaliation measures.

Investment Disputes and Alleged Retaliatory Measures

Devas was an Indian telecommunications company with investors from Germany and Mauritius. Antrix Corporation Ltd. (Antrix) was under the direct control of the Department of Space of India. In 2005, Antrix concluded the Satellite Agreement with Devas but unilaterally terminated it in 2011 on the ground of force majeure because the Government of India decided not to provide orbital slots in S-band for commercial activities.[2]

Consequently, Devas initiated a commercial arbitration seated in India before an International Chamber of Commerce (ICC) Tribunal against Antrix.[3] The ICC Tribunal rejected Antrix's force majeure argument and awarded damages to Devas, reasoning that the Chairman of Antrix failed to do everything in his power to ensure that the Satellite Agreement would remain on track.[4] Devas's investors from Mauritius and Germany also brought UNCITRAL investment arbitrations against India separately in the *CC/Devas (1)*[5] and *DT*[6] arbitrations. Both tribunals rejected, at least in part, India's defense that it had annulled the Satellite Agreement to protect essential security interests.[7]

The three arbitration tribunals rendered billion-dollar awards in favor of Devas and its investors.[8] Devas and its investors have started to enforce these awards against Indian assets abroad. Devas also entrusted its related US company, Devas Multimedia America Inc., with collecting debts arising from the ICC award.

Meanwhile, the Indian Central Bureau of Investigation filed a First Information Report against Devas and the officers of Devas and Antrix for corruption in 2015.[9] Antrix initiated proceedings to wind up Devas in 2021 at India's National Company Law Tribunal (NCLT). Devas appealed to the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India. The Supreme Court upheld the judgments of NCLT and NCLAT to liquidate Devas due to fraudulent activities, including Devas improperly enticing Antrix into the Satellite Agreement.[10] The fraud also involved collusion between Devas, Antrix, and Indian government officials.[11]

The shareholders of Devas were found to be fully aware of the fraud.[12] Notably, Devas and one of its shareholders, namely Devas Employees Mauritius Private Limited, were fully represented in the SCI proceedings. Devas's other shareholders did not participate in the SCI proceedings.

As a consequence of the SCI Judgment, under its authority at the seat of the ICC arbitration, the High Court of Delhi set aside the ICC award.[13] Devas and its investors initiated the *CC/Devas (2)* investment arbitration against India alleging the latter's retaliation for the enforcement of the ICC award.[14] Upon India's request, the Supreme Court of Mauritius issued an interim anti-arbitration injunction.[15] India also sought to set aside the *DT* and *CC/Devas (1)* awards in their respective seats in Switzerland and the Netherlands.

Devas or its investors have sought to enforce the ICC, *DT*, and *CC/Devas (1)* awards in approximately 6 different countries.[16]

Recognize or not?

In the award-setting-aside proceedings and the award-enforcement proceedings, a critically important defense for India is the finding of fraud in the SCI Judgment.

To determine whether to recognize the SCI Judgment, the focal points are: whether foreign enforcement courts can exercise jurisdiction over India and whether the SCI Judgment should create *res judicata* effects in these courts. The varying approaches taken show how enforcement jurisdictions can independently decide whether retaliation existed and how to address it based on their laws.

Sovereign Immunity of India

When deciding whether to enforce the *CC/Devas (1)* award, both the Australian Federal Court and the Superior Court of the Province of Quebec in Canada held that India waived its sovereign immunity by ratifying the 1958 New York Convention because of the "clear and unequivocal submission" in Article 3 of the Convention.[17]

When enforcing the *DT* award, the Higher Regional Court of Berlin held that India did not enjoy sovereign immunity because according to the German Code of Civil Procedure, India's liability came from Antrix's commercial activities, and it was thus irrelevant that the Satellite Agreement was revoked partially due to national security concerns.[18] Taking another path, the US District Court for the District of Columbia held that it had jurisdiction over India based on the arbitration exception to sovereign immunity, which requires "the existence of an arbitration agreement, an arbitration award, and a treaty governing the award."[19] In discussing the last requirement, the court mentioned the membership of the US and Switzerland (the seat of arbitration), rather than India's membership in the 1958 New York Convention[20] as the Australian Federal Court and the Superior Court of the Province of Quebec had. When rejecting the enforcement of the ICC award, the US Court of Appeals for the Ninth Circuit held that a minimum

contacts analysis should be satisfied.[21]

Notably, the Australian Federal Court did not consider the legality of investment under the applicable bilateral investment treaty and the validity of the arbitration agreement because, when determining sovereign immunity, Devas needed only to provide prima facie evidence that a valid arbitration agreement existed.[22] The US District Court for the District of Columbia reached the same conclusion for a different reason: because the legality of investment was an arbitrability issue falling under the merits, not a jurisdictional matter.

Res Judicata

This issue can be analyzed from four aspects:

Preclusion effects of other tribunals' decisions: India was not successful in setting aside the *CC/Devas (1)* Award on Merits at the Hague Court of Appeal, which found that India did not sufficiently substantiate the accusations of fraud.[23] After the SCI Judgment was rendered, India asked the Hague District Court to set aside the Award on Quantum.[24] An important factor for the District Court in rejecting India's request was that the Hague Court of Appeal had already rejected India's assertions of fraud in the setting aside proceedings concerning the Award on Merits, and despite some new evidence, the fraud allegations in the request to set aside the Award on Quantum were virtually identical.[25] Therefore, the Hague District Court found that the SCI Judgment should not be recognized because of the *res judicata* effect of the earlier judgment of the Hague Court of Appeal.[26] In an action to enforce the *DT* arbitration, the Court of Appeal in Singapore similarly declined to consider the SCI Judgment's fraud findings because the Swiss Federal Supreme Court at the seat of the arbitration had dismissed the setting-aside application and affirmed the *DT* arbitration tribunal's jurisdiction and the validity of the award.[27] Further, based on the competence-competence doctrine, the US District Court for the District of Columbia considered itself precluded from second-guessing the *DT* arbitrators' findings about arbitrability.[28]

Timing: In rejecting the revision proceedings against the *DT* final award, the Swiss Federal Supreme Court found that India's fraud allegation based on the SCI Judgment was time-barred.[29] This was because the 90-day limitation period to

request the revision of the *DT* final award started to run when India obtained "sufficiently certain knowledge" of fraud even before the SCI Judgment was issued.[30] Like the Hague District Court, the Swiss Federal Supreme Court held that the SCI Judgment did not provide new evidence of fraud because the Supreme Court of India did not conduct its own fact-finding investigation.

The *(un)due process of* the Supreme Court of India is also hotly debated. In 2023, the Hague District Court declared the request of Devas Multimedia America Inc. to enforce the ICC award on behalf of Devas inadmissible, after a liquidator appointed under the SCI Judgment instructed the company not to act as an agent of Devas in enforcement efforts.[32] The Hague District Court found no evidence showing that the SCI failed to act independently and impartially.[33] In contrast, when deciding to enforce the *DT* award, the Singapore International Commercial Court expressed reservations about the proceedings at the SCI, finding that they had been carried out based on summary evidence without oral evidence or the cross-examination of witness;[34] and the same view was shared by the Higher Regional Court of Berlin.[35]

Divergence of parties is a significant barrier to extending the *res judicata* effects of the SCI Judgment against Devas to its investors. At the Superior Court of the Province of Quebec, India relied on the SCI Judgment arguing that its consent to arbitration was induced by fraud. The Court held that the SCI Judgment could prove only that Devas was liquidated and addressed a different question from that in the enforcement proceeding, because it did not rule on the validity of the *CC/Devas (1)* arbitration agreement, and the Devas investors were precluded from participating in the liquidation proceeding.[36] Similarly, the Singapore International Commercial Court held that the fraud finding in the SCI Judgment should not be binding on Devas's investor, Deutsche Telekom, because it was not a party to the proceedings at the Supreme Court of India.[37]

Decentralized System to Address States' Retaliatory Measures

As the Indian Satellite Saga demonstrates, private international law and international investment law use a decentralized judgment/award recognition and enforcement system to address alleged states' retaliatory measures against foreign investors.

In terms of practical lessons, one is that fraud allegations should be argued as early as possible in the award-rendering proceedings, rather than waiting for the enforcement proceedings. Notably, India raised fraud late without reasonable justifications, so the claim was rejected by the arbitration tribunals.[38] Although some enforcement courts may allow parties to re-argue a fraud claim that has been fully litigated by a judgment/award-rendering tribunals, the Saga shows that saving these claims for the enforcement proceedings is risky because not every court will allow this practice.

More broadly, although the decentralized system produces inconsistent results, it also has an overlooked benefit of resilience when addressing state retaliatory measures, as it has no choke points and can function regardless of political tensions. This system, although sacrificing consensus and consistency, promotes democracy because each state has its voice. In contrast, some international systems to resolve alleged state retaliatory measures are centralized based on consensus. The centralized systems are supposed to bring authority, consistency, and certainty. However, the malfunction of one choke point can effectively dismantle the whole system. For example, although the WTO can authorize its members to retaliate against another member that continuously adopts non-compliance measures, the "WTO consensus" system enables one member to dismantle the WTO Appellate Body.[39] Another example is the United Nations Security Council, where the "veto privilege" and political tensions among its standing members have impeded international efforts to resolve the Gaza war.[40] The inconsistent outcomes reached over the course of the Indian Satellite Saga should thus be understood in light of the benefits of decentralization and resilience.

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[1] *Devas Multimedia Private Ltd., v. Antrix Corporation Ltd. & Anr.*, Civil Appeal No. 5906 of 2021 (India) [hereinafter SCI Judgment].

[2] *Id.*, ¶ 3.11.

[3] *Devas Multimedia Private Limited v. Antrix Corporation Limited* (Final Award) ICC Case No. 18051/CYK (Sept. 14, 2015).

[4] ICC Case No. 18051/CYK, ¶¶ 230-236, 312.

[5] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. the Republic of India*, Case No. 2013-09, UNCITRAL, Award on Quantum (Perm. Ct. Arb. 2020) ("*CC/Devas (1)*").

[6] *Deutsche Telekom AG v. India*, Case No. 2014-10, UNCITRAL, Final Award (Perm. Ct. Arb. 2020) ("*DT Arbitration*").

[7] *CC/Devas (1)* Award on Jurisdiction and Merits (July 25, 2016), ¶¶ 354-361, 371-73; *DT* Interim Award (Dec. 13, 2017), ¶¶ 280-286.

[8] Approximately USD 562.5 million (ICC), USD 93.3 million (*DT*), USD 111 million (*CC/Devas (1)*), plus interest and costs.

[9] SCI Judgment, ¶ 3.13.

[10] SCI Judgment, ¶ 12.8 (vi).

[11] *Id.* ¶ 12.8 (xii).

[12] *Id.* ¶ 12.8 (xv).

[13] *Devas Employees Mauritius Pvt. Ltd. v. Antrix*, High Court of Delhi at New Delhi, 2023: DHC: 1933-DB.

[14] *CC/Devas v. India (2)*, Case No. 2022-34 (Perm. Ct. Arb. 2022) ("*CC/Devas (2)*").

[15] *India v. CC/Devas (Mauritius) Ltd.,* SC/COM/WRT/000010/2023, Sup. Ct. Mauritius.

[16] *See CC/Devas v. India (I)* on Jus Mundi at https://jusmundi.com/en/document/decision/fr-cc-devas-mauritius-ltd-devas-employees-mauritius-private-limited-and-telcom-devas-mauritius-limited-v-republic-of-india-arret-de-la-cour-dappel-de-paris-22-11819-tuesday-13th-february-2024.

[17] *CC/Devas (Mauritius) Ltd. v. India*, 2022 QCCS 4786, ¶¶ 161 & 167; *CCDM Holdings, LLC v. India (No. 3)* [2023] FCA 1266, ¶¶ 35, 38, 45, and 51.

[18] Lisa Bohmer, *German Court Grants Application for Partial Enforcement of*

Deutsche Telekom v India *Award, as Neither Fraud Allegations Nor BIT's Unique Wording on Enforcement Sway the Judges*, Investment Arb. Rep. (Feb. 9, 2023), https://www.iareporter.com/articles/german-court-grants-application-for-partial-enforcement-of-deutsche-telekom-v-india-award-as-neither-fraud-allegations-nor-bits-unique-wording-on-enforcement-sway-the-judges/.

[19] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024), at 6.

[20] *Id.*

[21] *Devas Multimedia Private Ltd v Antrix Corp. Ltd.,* No. 20-36024 (9th Cir. 2023), ¶ 1.

[22] *CCDM Holdings, supra* note 17, ¶ 44.

[23] India's set-aside application against the *CC/Devas (1)* Award on Merits was rejected by the District Court of the Hague on November 14, 2018 (ECLI:NL:RBDHA:2018:15532), the Hague Court of Appeal on February 16, 2021 (ECLI:NL:GHDHA:2021:180), and the Dutch Supreme Court on February 3, 2023 (ECLI:NL:HR:2023:139).

[24] *India v. CC/Devas (Mauritius) Ltd*. (C/09/615682/HA ZA 21-674), October 25, 2023 issued by the District Court of the Hague.

[25] *Id.* ¶¶ 4.16, 4.19, and 4.20.

[26] *Id*. ¶ 4.09.

[27] *India v. Deutsche Telekom AG,* [2023] SGCA(I) 10, ¶¶ 142-178; 2023 SGHC(I) 7, ¶¶ 136-155.

[28] *Deutsche Telekom AG v. India*, Civil Case No. 21-1070 (RJL), Memorandum Opinion (Mar. 27, 2024).

[29] Swiss Bundesgericht Tribunal Fédéral (4A_184/2022), Urteil vom 8. März 2023.S.

[30] Lisa Bohmer, *Swiss Federal Tribunal Decides that Revision Proceedings Are not Available against Interim Award that Withstood Set-aside Request, while*

Finding that Request for Revision on Final Award is Time-Barred and Not Based on New Evidence, Investment Arb. Rep. https://www.iareporter.com/articles/analysis-swiss-federal-tribunal-decides-that-revision-proceedings-are-not-available-against-interim-award-that-withstood-set-aside-request-while-finding-that-request-for-revision-of-final-award-is-t/.

[31] *Id. India v. CC/Devas (Mauritius) Ltd.*, *supra* note 24, ¶ 4.20.

[32] Order issued by Judge H.J. Vetter at the Hague District Court (July 18, 2023), https://www.iareporter.com/articles/dutch-court-declares-request-for-enforcement-of-devas-antrix-icc-award-inadmissible/.

[33] *Id*.

[34] *India v. Deutsche Telekom,* [2023] SGHC(I) 7, paras¶¶ 126-134.

[35] Bohmer, *supra* note 18.

[36] *CC/Devas (Mauritius) Ltd. v. India*, *supra* note 17, ¶¶ 210-215.

[37] Deutsche Telekom, "would be the victim, rather than a perpetrator" in the alleged fraud, *Deutsche Telekom AG v The Republic of India*, [2023] SGHC(I) 7, ¶¶ 87 and 123.

[38] Prabhash Ranjan, *Corruption and Investment Treaty Arbitration in India*, *in* Corruption and Illegality in Asian Investment Arbitration 235, 248 (Nobumichi Teramura, et al. eds., 2024).

[39] Chad Bown & Joost Pauwelyn, The Law, Economics and Politics of Retaliation in WTO Dispute Settlement 21-86 (2010).

[40] Press Release, United Nations, Security Council passes resolution demanding "an immediate ceasefire" during Ramadan, https://news.un.org/en/story/2024/03/1147931?_gl=1*1y7ggfh*_ga*MTYxNDY2ODE4Ni4xNzA5NzczMDA4*_ga_TK9BQL5X7Z*MTcxMTQxMzkxNS4xLjAuMTcxMTQxMzkxNS4wLjAuMA.

Conflict of Laws and Diversity of Opinions—A View of The Nigerian Jurisdiction

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Introduction

At the core of Conflict of Laws or Private International Law (hereinafter PIL) is reconciling rules across jurisdictions for dispute settlement and the broader concerns of justice and public policy. PIL rules are used as a toolbox to assist litigants in resolving these problems that arise from complex litigations. This has immense significance regarding the security of contracts, enforcement of obligations, and overall predictability of solutions on these issues. Recent debates and academic discourse about the Nigerian Judiciary, its decisions, and opinions on PIL have inspired even more contemplation on the institution's place, expertise, and contribution to the evolution of PIL rules and practices in the region.[1] In this intervention, I situate these discussions in the larger structure of the judicature in Nigeria, the institution and system rather than individual opinions and expertise, and draw some lessons that should mediate academic, judicial, and legislative deliberations on this topic. I conclude that a scholarly

engagement with the issues should be more robust than looking for limited answers that conform with precedents elsewhere—especially where these precedents do not help to address the contextual challenges. Equally, one should be mindful of the danger of incoherent transplants of norms and potential poor transplant effects. It is essential to stay focused on institutional capacities, expertise and competence and how to enhance them—instead of individualized expertise, which, though important, are weak foundations for enduring legal evolution and a reliable PIL regime.

I.The Supreme Court of Nigeria and the Judicature

The Nigerian Supreme Court is necessary for the legal system's stability, coherence, and sustainable evolution.[2] On the other hand, the Court of Appeal and the High Courts (High Courts of States and the Federal Capital Territory, and the Federal High Courts) have a vertical relationship with the Supreme Court. Except where matters can commence directly at the Supreme Court, these lower courts serve as clearing houses for disputes on most commercial subjects within the country. This means that the Court of Appeal intervenes in many respects, and often, these matters do not go beyond the Court of Appeal. These courts also have several divisions across the country, and their jurisdictions and general adjudicatory competencies are recognized in the Constitution or as stipulated in their establishment laws. For instance, the Court of Appeal established by *section 237* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) has 20 Judicial Divisions spread across the six geopolitical zones of the country.[3]

Therefore, with 36 states and a Federal Capital Territory, Abuja, Nigeria has a complex judicature with subsystems designed to serve the needs of communities and regions, which are often peculiar to the regions. Indeed, there are many jurisdictions within Nigeria, although the country is also a jurisdiction. The complexity is also illustrated by the embeddedness of Sharia law, and customary law, in private law in different parts of the country. For example, a court may be called upon to interpret contracts and commercial transactions on religious and customary interests. These must be situated in the broader contexts of the legal

systems and the specific dispute.[4] In that regard, although the Supreme Court is one institution, cases are heard and determined by different judges and judicial panels that are usually constituted to hear appeals and original disputes before the court.[5] Foreign investors who may not have a sense of the complex system may become excited by the so-called "expertise in conflict of laws," which has recently formed part of the debate about PIL in Nigeria and the African region.

The case-by-case (ad-hoc) constitution of judicial panels to hear and determine causes before the Supreme Court has significant ramifications for appreciating the different workings of the institution and how to render justice to parties, even in problematic PIL circumstances. The rotation, in terms of panel constitution, increases the individual and collective mastery of all matters that come before the court for adjudication—including commercial transactions, which have broad ramifications for PIL. It also eliminates the possibility of predicting which justices may sit on a matter before each panel is constituted. This can potentially insulate the court as an institution from compromise by targeting specific justices ahead of time. The fundamental nature of this approach—rotation of judges and constituting different panels for different cases—is even more perceptive when situated within the larger problem of corruption within the Nigerian judiciary.[6] The daily debate about corruption in the Nigerian judiciary makes it imperative that the public should not predict which judges would sit on a matter because of their "expertise" as this would serve the institution better and contribute to the ongoing efforts to curb corruption within the judiciary.[7] Individual efforts can then augment this institutional capacity and competence.

The above structure and approaches to judicial deliberations mean that there is a strong institutional capacity and competence regarding subjects upon which the Supreme Court is seized by law, practice, and tradition to adjudicate. This capacity pervades the entire judicature through such capillaries as precedents, rules of courts, practice directions, law reports, and memories accumulated over time that provide valuable guidance for judicial deliberations and determination of questions before the court, albeit PIL questions. Justices are also trained across different (sub)areas of law and often have significant statutorily required practice experience in various contexts within the jurisdiction before assuming judicial offices. In essence, the weight of the expertise lies more on the experience accumulated both as individuals and, more importantly, as custodians of the institutional capacity of the Supreme Court.

Sometimes, for example as in the case of the Court of Appeal, the different judicial divisions may reach different opinions on subjects ranging from marriage to child custody, service of processes, and enforcement of awards and judgments. This aligns with the general notion that courts of equal standing (coordinate jurisdiction) may depart from the opinion of their peers. Equally, state court systems have their respective rules of procedure, which have ramifications for the outcomes of dispute settlements in the states. The differences in the rules of courts further consolidate the necessity for a diverse knowledge base, a broad experience portfolio, and a flexible approach because of the complexity of the Nigerian legal system, the complicated court structure, and the breadth of judicial constitution. These factors also advance the argument that case-by-case issues that may need to be resolved by the courts are best dealt with not only by an independent knowledge base, but also drawing from the collective knowledge reservoir and diversity that the justices of the Supreme Court bring to the court to address issues as may be appropriate.[8] Thus, the differences, approaches, plurality of views, conflicts of opinions, and diversity of questions are not unusual, considering the vastness of the jurisdiction and the interaction of different aspects of law and society.

The horizontal relationship between the courts of a particular subsystem, such as the Appeal Court divisions, does not mean there is chaos in the system or that they must depend on individual expertise to reconcile the PIL questions. Instead, it is an invitation to look to the institutional frameworks fashioned over time to manage disputes and achieve justice in cases. The wisdom of these institutional designs is more enduring because individual judges and their brilliance cannot sustain the long-term needs of any legal system. Thus, bright stars that stud the Nigerian Supreme Court's history (such as Chukwudifu Oputa, Kayode Eso, Muhammed Bello, Ignatius Pats-Acholonu, Akinola Aguda, Udo Udoma, and many others), while invaluable for the growth and evolution of the system, must be seen as part of the overall institutional structure for sustainable dispute resolution—especially on PIL—in the Nigerian legal system.

Arguably, it is potentially counterproductive to focus solely on individual judicial PIL expertise in trying to resolve PIL questions in Nigeria. This is so because it would be considerably difficult to find evidence of a fundamental miscarriage of justice merely because a preponderance of individual expertise is lacking. Furthermore, the U.S.—a bit similar to Nigeria in terms of federalism—does not

do that either. In *J. McIntyre Machinery Ltd. v. Nicastro*, although there is no evidence of individualized PIL expertise of the judges, the U.S. Supreme Court resolved the issue regarding the rules and standards for determining jurisdiction over an absent party in a fair, just and reasonable manner.[9] The court came to a reasonable and just answer despite arriving at the majority judgment from a plurality of views. It is, therefore, the collective quality of judicial deliberations and opinions that is the distinctive standard for measuring the capacity and competence of a court on matters of PIL. There are other examples of this display of institutional capacity and competence in the U.S. Supreme Court in cases such as *The Bremen v. Zapata Off-Shore Co.,**[10]* where Petitioner Unterweser agreed to tow respondent's drilling rig from Louisiana to Italy, with a forum-selection clause stipulating that any disputes would be litigated in the High Court of Justice in London. When the rig was damaged, the respondent instructed Unterweser to tow the rig to Tampa. Subsequently, the respondent filed a lawsuit in admiralty against petitioners in Tampa. Unterweser invoked the forum clause and initiated a lawsuit in the English court, which asserted its jurisdiction under the contractual forum provision. It was held that forum selection in the contract was binding unless the respondent could discharge the heavy burden of showing that its enforcement is unreasonable, unfair, or unjust.[11]

In *Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC,* Raiders, a Pennsylvania company insured a yacht for up to $550,000 with Great Lakes, a UK-based company.[12] In 2019, the yacht ran aground in Florida. Raiders submitted a claim to Great Lakes for the loss of the vessel, but Great Lakes rejected it, citing Raiders' failure to recertify or inspect the yacht's fire-extinguishing equipment on time. Great Lakes sought a declaratory judgment to void the policy. The district court dismissed Raiders' counterclaims, applying New York law per the policy's choice-of-law provision. Raiders argued that this provision was unenforceable under *The Bremen v. Zapata Off-Shore Co.**[13]* The U.S. Supreme Court disagreed, holding that choice of law provisions are enforceable unless under some narrow exception that is not applicable in the circumstance. There is therefore great wisdom in attributing competence, expertise and capacity to the institution instead of individuals.

Thus, quality judicial deliberations and decisions reflect institutional competence. In the next section, I further the discussion on the issue of diversity, looking at subject matter diversity, diversity of views, and the place of stare decisis and

precedents in light of the current debates about PIL and expertise in the Nigerian Supreme Court and its resonance for the legal system.

II. *Judex*, Expertise, and Diversity of Opinions

Quot homines tot sententiae—as there are peo, so are their opinions. A combination of factors including training, age, experience, temperament, and general background of judges affect their overarching nature and contributions to the making of legal institutions such as courts. These combinations of factors also influence the diversity of voices and views, opinions, individual competencies, and expertise. The ramification of these factors is even more vigorous and visible in PIL issues where there is a confluence of complex questions that could inspire diverse judicial decisions and plurality of opinions on controversies affecting commerce or other transnational/cross-border activities. Sometimes, this diversity can come as dissenting opinions. At other times, they may be reckoned with in the general *obiter* of superior courts such as the Supreme Court of Nigeria.

Regarding subject matter diversity, courts are usually confronted with different types of cases. These cross-cutting cases often mean that PIL rules must guide the courts in reaching a fair and reasonable dispute settlement. Equally, the rules to be applied may be implicated by background agreements or indemnities in bilateral and multilateral treaties, such as investment agreements, conventions, and soft law policies relevant to the dispute. Besides the subject matter diversity, which necessarily implicates PIL and opinion of courts, there is also procedural diversity, which affects the decisions of a court. In such situations, methods of service of processes, certification, and recognition of awards and judgments create a sort of complicated interaction between legislation and rules of court regarding how best to resolve disputes between litigants and in line with established precedents. In Nigeria's legal tradition, the rules of court support the rules of justice. Thus, the use of these tools can lead to different outcomes regarding diversity of procedure and diversity of opinion, and these have important implications for dispute settlement in PIL. For instance, a rule of court on limitation of time can influence the speed of hearing pretrial motions one way

or another.

Yet, the dispute resolution system in Nigeria is not a rudderless ship. It has anchorage on doctrines such as *stare decisis* and precedents. The primacy of precedents established by the Supreme Court provides the guardrails for making sense of the respective diversities within the legal system as it concerns PIL. *Stare decisis* and precedents ensure that the law remains strong, stable, reliable, and predictable without standing still. Overall, the stability, security, and predictability that come from this means that the broader answers to PIL questions lie in institutional and systemic resilience and capacities rather than individual efforts, expertise, or resilience. In light of all these, the doctrine of *stare decisis* and precedents further reinforce institutional competence and expertise. Individualized expertise can quickly become a weak point in the judicial institutional amour—especially if given undue prominence. For instance, judicial empaneling cannot wait for individualized expertise and competence.[14]

Equally, courts do not generally operate like that. Rather, courts must function with available human resources. Justice does not recline on individual expertise but on the entire institutional outlook of the courts. When citizens seek justice, they look up to the courts and not individual judges who may come and go at different intervals in the history of the court. Thus, even where divisions such as commercial divisions are established, the wisdom of such divisions is *functional*—to facilitate access to justice and enhance institutional competencies and efficiency for all manner of persons that appear before the court including corporate and other associated interests. Expertise in empaneling a tribunal is often a luxury preserved for arbitration tribunals or other alternative dispute resolution mechanisms. In those instances, parties can appoint their arbitrators or mediators based on their expertise. On the other hand, courts often have a set of judges already appointed by the appropriate authorities in the respective jurisdictions as at the time of commencement of actions.

Even then, expertise or expert views and opinions—whether in law or other spheres—are often subjects of evidence, and courts have procedural and institutional capacities to gain or leverage such expertise for fair and just settlement of disputes. When courts face certain difficulties, they can invite counsel to address the subject of controversy—usually through briefs. They can also invite *amicus* briefs or expert witnesses, such as professors of PIL, to testify on a matter in controversy with a view to answering critical questions for dispute

resolution. These procedural safeguards reinforce the institutional competence and capacity and anticipate the limits of individual expertise. For example, *amici curiae* (friends of the court) have since become an established tradition available to courts to assist them in understanding and applying rules, principles, doctrines, and laws that may have PIL significance.

The individual expertise of judges will not provide answers to several PIL issues that arise in complex cross-jurisdictional disputes. Moreover, the expertise of individual judges from Nigeria is attested to in several jurisdictions as such judges have, at different times, dispensed justice in Gambian, Ugandan, and Namibian courts.[15] Therefore, the current fad of trying to prop up individual judges as PIL experts is mistaken—that expertise is better attributed to the institution, else scholars unwittingly set the judges up to fail and, in the process, diminish the established tradition of competence and expertise which the Nigerian judicature has managed to curate over time.

Conclusion

The judicature in Nigeria has often been a subject of intense scholarly deliberations. What has never been doubted is the expertise and competence of the courts in all matters within their assigned jurisdiction—both institutionally and in terms of the individuals who occupy the high judicial offices of the country. Individually, Nigerian judges serve with distinction and occupy high judicial offices even in countries such as the Gambia, Namibia, Botswana, Eswatini, and Uganda. These positions often require critical competence in the cross-border application of the law on matters relating to PIL. Therefore, there is no evidence to show that the expertise and capacities attributable to the judicature and its *judex* have been suspended at any time. Thus, the idea that "an expert in conflict of laws is now at the Supreme Court after a long time"[16] is potentially misleading—especially for persons, businesses, and investors who may not know the inner workings of complex legal systems such as Nigeria.

[1] Some of the interesting debates and discourse on the courts and PIL in Nigeria include, Folabi Kuti, SAN, *Critiquing the Critique: X-raying Dr. Okoli's restatement of the Court of Appeal's decision in TOF Energy Co. Ltd & Ors. v. Worldpay LLC & Another* (2022) LPELR -57462(CA) August 14, 2023, https://lawpavilion.com/blog/critiquing-the-critique-x-raying-dr-okolis-restatement-of-the-court-of-appeals-decision-in-tof-energy-co-ltd-ors-v-worldpay-llc-anor-2022-lpelr-574/>. Chukwuma Samuel Adesina Okoli, *A Critique of the Nigerian Court of Appeal's Recent Restatement of the Principles and Decisions on the Enforcement of Foreign Jurisdiction Clause in Nigeria*, November 8, 2022< https://lawpavilion.com/blog/a-critique-of-the-nigerian-court-of-appeals-recent-restatement-of-the-principles-and-decisions-on-the-enforcement-of-foreign-jurisdiction-clause-in-nigeria/> ; The Nigerian Court of Appeal declines to enforce a Commonwealth of Virginia (in USA) Choice of Court Agreement, March 10, 2021https://conflictoflaws.net/2021/the-nigerian-court-of-appeal-declines-to-enforce-a-commonwealth-of-virginia-in-usa-choice-of-court-agreement/. Anthony Kennedy, The Recognition and Enforcement of Foreign Judgements at Common Law in Nigeria, December 15, 2020 (on why the common law action should be revived) https://www.afronomicslaw.org/2020/12/15/the-recognition-and-enforcement-of-foreign-judgments-at-common-law-in-nigeria ;Richard Mike Mlambe, *Presence as a basis for International Jurisdiction of a Foreign Court Under Nigerian Private International Law*, December 16, 2020 https://conflictoflaws.net/2020/presence-as-a-basis-for-international-jurisdiction-of-a-foreign-court-under-nigerian-private-international-law/.

[2] *Section 230* of the Constitution of the Federal Republic of Nigeria 1999 (as amended) establishes the Supreme Court as the apex judicial institution in the country.

[3] Divisions of the Court of Appeal in Nigeria < https://www.courtofappeal.gov.ng/divisions> (last visited May 29, 2024). The Federal High Court of Nigeria has 35 Judicial Divisions < https://www.nextfhc.fhc.gov.ng/court/divisions>. (last visited May 29, 2024).

[4] Pontian Okoli, *Former British Colonies: The Constructive Role of African Courts in the Development of Private International Law,* 7 University of Bologna

Law Review, 2, 126 (2022). https://bolognalawreview.unibo.it/article/view/15830

[5] Original disputes before the Supreme Court are often questions of controversy between the states as among themselves or between the states and the Federal Government of Nigeria. See *Section 232* of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[6] Ameh Ejekwonyilo, *Corruption in Nigerian Judiciary is extensive—UNODC,* Premium Times March 1, 2024.

[7] Joseph Onyekwere, *ICPC Corruption Verdict Unsettles Judiciary*, The Guardian January 26, 2021; Punch: Editorial, *Uprooting Corrosive Corruption in the Judiciary*, August 24, 2023.

[8] Computation of time can be used to show some of the differences. For example, Order 48 rule (5) of the Rivers' State High Court Civil Procedure Rules 2019 provides that time will not run when the courts are under lock and key. This unique provision arises from the difficult Chief Judge succession experience in that state in the 2015/2016 legal year. In comparison, Lagos State High Court and the High Court of the Federal Capital Territory, Abuja, have no similar provision regarding when the court is under lock and key. See *Order 49 of the High Court of the Federal Capital Territory Abuja,* 2018; *Cf* Order 48 of the Lagos State High Court Civil Procedure Rules 2019. But to show flexibility of approaches, in responding to such a situation of courts being under "lock and key" as seen in the case of Rivers State, the Chief Judge of the High Court of the Federal Capital Territory, adopted a different approach by issuing a practice direction regarding computation of time to cover the period of industrial action by judicial workers. *[S]ee* High Court of the Federal Capital Territory, FCT Computation of Time and Exemption from payment of Default fees) Practice Direction No 1, 2021 (for the period April 6th, 2021 – June 14, 2021) < https://www.fcthighcourt.gov.ng/download/PRACTICE-AND-PROCEDURE/COMPUTATION-OF-TIME-AND-EXEMPTION-FROM-PAYMENT-OF-DEFAULT-FEES-PRACTICE-DIRECTION-NO.-1-2021-FOR-THE-PERIOD-APRIL-6TH-14TH-JUNE.pdf>. See also High Court of Delta State (Exemption of Payment of Default fees for filing of processes) Practice Direction (No 2) of 2021 for the Period of JUSUN Strike from April 6, 2021, to June 14, 2021. < https://thenigerialawyer.com/wp-content/uploads/2021/06/Practice-Direction_JUSUN-strike_cover-001-converted-delta.pdf>.

[9] 564 U.S. 873 (2011). Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. V. Nicastro*, 63 S. C. L. Rev. 481 (2011) https://scholarship.law.ua.edu/fac_articles/291/ ; Elisabeth A. Beal, *J. McIntyre Machinery Ltd v. Nicastro: The Stream of Commerce Theory of Personal Jurisdiction in A Globalized Economy*, 66 University of Miami Law Rev. 233 (2011). https://repository.law.miami.edu/umlr/vol66/iss1/9/

[10] *407 U.S. 1 (1972).* Ronald A. Brand*, M/S Bremen v. Zapata Off-Shore Company: US Common Law Affirmation of Party Autonomy,* The Common Law Jurisprudence of Conflict of Laws (2023) https://scholarship.law.pitt.edu/fac_book-chapters/50/ ; Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 Vand. J. of Transnational Law 387 (1972-1973). https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2618&context=vjtl ; K. M. Edwards, *Unterweser: Choice Not Chance in Forum Clauses,* 3 California Western International Law Journal 397 (1973).

[11] See also *Carnival Cruise Lines Incorporated v. Shute*, 499 US 585, 593-594 where the Court noted that the enforcement of forum selection clauses has the salutary effect of removing confusions and reducing the time and expense of pre-trial motions.

[12] *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*, 601 U.S. (2024).

[13] Supra note 10.

[14] *Sonnar (Nig.) Ltd. & Anor. V. Partenreedri M. S. Nordwind Owners of the Ship M.V. Nordwind & Anor.* (1987) LLJR –SC. (courts can elicit expertise through evidence as in this case where the opinion of German lawyers as to the law in Germany was relevant in reaching a fair, just and reasonable decision. The courts also decide on what probative value to give the expert evidence considering the interest of justice).

[15] For instance, Hon. Justice Emmanuel Agim served in the Gambia and Swaziland (Eswatini) at the highest judicial levels in those countries < https://triplenet.com.ng/lawparliament/law_body.php?myId=2699&myView=259> . Justice Akinola Aguda was also the Chief Judge of the Supreme Court of Botswana. < https://www.news24.com/news24/renowned-african-jurist-dies-20010908>.

[16] *See* Chukwuma Okoli and Abubakri Yekini, *The Nigerian Supreme Court now has a Specialist in Conflict of Laws*, Conflict of Law.Net. January 7, 2024. https://conflictoflaws.net/2024/the-nigerian-supreme-court-now-has-a-specialist-in-conflict-of-laws/

Nygh Essay Prize in Private International Law

The Australian Branch of the International Law Association is now calling for submissions for the **2024 Nygh Essay Prize in Private International Law.**

The prize is named in honour of Dr. Peter Nygh, a leading Australian scholar of private international law and former President of the Branch.

The Nygh Essay Prize is awarded to the author of an essay in private international law (conflict of laws), including in the field of international commercial arbitration. Essays for the prize to be awarded in 2024 should be sent to the email address of the Secretary of the Australian Branch at secretary@ila.org.au.

Further details (including conditions of entry) are available here. The deadline for submission is: **31 July 2024**.

The results will be made available on the website of the ILA (www.ila.org.au) on approximately 31 August 2024. Winners will be notified by email.

Issue 1 of Journal of Private International Law for 2024

The latest issue of the *Journal of Private International Law* was published yesterday It contains the following articles.

Alex Mills, Sustainability and jurisdiction in the international civil litigation market

The sustainability of the global economy, particularly in response to the concerns of climate change, is an issue which impacts many different aspects of life and work around the world. It raises particular questions concerning globalised industries or markets which depend on long distance transportation for their function. This article takes as its focus international civil litigation – the judicial resolution of cross-border disputes – as a particular example of a globalised market in which sustainability considerations are presently neglected, and examines how this omission ought to be addressed. It proposes a modification to English law which aims to ensure that jurisdictional decisions by the English courts take into account their environmental impact – that is to say, the environmental impact of the selection of a particular forum. The article also considers the implications of adopting this change on the position of the English courts in the global litigation marketplace, arguing that the effects are likely to be limited, and it could have an incidental benefit in promoting the development and adoption of communications technologies in judicial dispute resolution.

Saloni Khanderia, The law applicable to documentary letters of credit in India: A riddle wrapped in an enigma?

Despite significantly fostering international trade in India, letters of credit and the determination of applicable law in cross-border disputes arising from the same have received negligible attention from lawmakers. The Indian Supreme Court, too, has failed to use its power to mould the law despite regularly being confronted with disputes on this subject. This paper demystifies India's conflict of law rules on the law governing disputes on letters of credit by examining relevant judicial trends. It highlights rampant references to the lex fori – and explores

reasons why it is considered the "proper law" by being the country possessing the closest and most real contractual connection. It anticipates a "ripple effect" prompting parties to evade Indian courts through choice-of-court agreements preferring a foreign forum or to avoid business with Indian traders insisting on such payment mechanisms. Accordingly, it identifies the need for coherent rules and suggests some solutions that Indian lawmakers should consider.

Frederick Rieländer, The EU private international law framework for civil disputes concerning credit ratings: Exploring the status quo and prospects of reform

This article addresses the EU private international law framework for cross-border disputes concerning credit ratings. It argues that investors harmed by faulty ratings face considerable challenges when enforcing claims against credit rating agencies. These challenges arise not only due to the high standard of proof for damages claims and additional barriers rooted in substantive law but also from the limited territorial reach of the common EU civil liability regime of Article 35a of the amended Regulation (EC) No 1060/2009. Additionally, uncertainties concerning the determination of the concurrently applicable national law and the lack of unified European cross-border collective redress mechanisms in the area of capital markets law compound the problem. Against this background, this article discusses the options for reforming the existing private international law regime to enhance investors' access to justice in disputes with CRAs.

Tony Ward & Ann Plenderleith Ferguson, Proof of foreign law: a reduced role for expert evidence?

This article considers the position as to proof of foreign law in the English courts in light of the case of FS Nile Plaza v Brownlie [2021] UKSC 45 and the 11th edition of the Commercial Court Guide. We discuss the "old notion" of proof by expert witnesses, the extent to which recent developments displace the traditional role of the expert and enhance that of the advocate, and the dicta in Brownlie concerning the presumptions of similarity and continuity and judicial notice. While welcoming the greater flexibility in the way foreign law can be put before the English court, we argue that the use of oral expert evidence and cross-

examination will remain important in at least two types of case: those where the issue of foreign law is complex or novel, and those where the English court does not just need to ascertain the "correct" interpretation of foreign law, but rather predict whether a foreign court would in reality provide appropriate relief in relation to the matter before the court.

Olivera Boskovic, Extraterritoriality and the proposed directive on corporate sustainability due diligence, a recap

Tortious actions brought against companies for the violation of human rights and/or environmental damage have raised important issues of jurisdiction and choice of law. Damage caused abroad by subsidiaries of European companies or the possibility of bringing actions against non-European companies for damage caused outside of the European union have been referred to in terms of extraterritoriality. This paper examines these issues in relation to the proposed directive on corporate sustainability due diligence.

Leonard Lusznat, The Brussels IIb Regulation – Most significant changes compared to its predecessor and enhancement of the 1980 Hague Convention on International Child Abduction

The Brussels IIb Regulation, dealing with proceedings in matrimonial matters, those of parental responsibility and international child abduction cases, is the newest instrument of the European Union in international family law. The article critically evaluates its most significant changes compared to its predecessor, the Brussels IIa Regulation, in the fields of jurisdiction and of recognition and enforcement. In addition, it analyses how the Brussels IIb Regulation optimises the provisions of the 1980 Hague Convention on International Child Abduction between the member states of the European Union. The article argues that the regulation is overall a helpful and welcome addition to international family law because it strengthens the welfare of the child and enhances the practical functionality and normative structure of its predecessor. Nevertheless, scope for further improvements in another recast regulation is identified.

Olga Bobrzy?ska & Mateusz Pilich, Cases of cross-border child abduction in times of populism: a Polish perspective

This article analyses the case law in Poland on matters of the return of children wrongfully removed or retained within the framework of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction during the period of the "populist" government (2020–2022). It takes account of the legislative and judicial developments in the EU and the European Court of Human Rights and of the aims of the Hague Convention. It seeks to ascertain whether the influence of populist reforms and politicisation of the courts has become apparent in the case law of the Polish Supreme Court on international child abduction cases.

Ye Shanshan & Du Tao, The Jurisdiction of China International Commercial Court: substance, drawbacks, and refinement

The wave of setting up international commercial courts has emerged internationally. Following the trend, China established the China International Commercial Court (CICC) in 2018. The CICC exercises consensual jurisdiction and non-consensual jurisdiction over international commercial disputes, and has jurisdiction to support international commercial arbitration. This article analyses the CICC's criteria for determining international commercial disputes and the specific requirements for each type of jurisdiction based on the relevant provisions and judicial practice of the CICC. In addition, this article identifies the drawbacks of the CICC's current jurisdiction system, and provides several suggestions for refinement, including the modification and clarification of the criteria for determining the internationality and commerciality of disputes, the removal of restrictions on jurisdiction agreements, the clarification of substantive standards for case transfer, and the expansion of its jurisdiction to support international commercial arbitration.

Gülüm Bayraktaroglu-Özçelik, When migration meets private international law: issues of private international law in divorce actions of Syrian migrants under temporary protection before the Turkish courts

The extended stay of Syrian nationals under temporary protection in Türkiye for more than a decade has caused an increase in their involvement in private law actions before the Turkish courts. Even though their substantive rights have mostly been regulated following their arrival, the private international law legislation has not yet been reviewed. This research, focusing on the most recent judgments of Turkish courts in divorce actions of Syrian migrants identifies important issues of private international law. These include questions on determination of international jurisdiction of Turkish courts, their access to legal aid and the obligation to provide security, questions of applicable law concerning marriage (including the recognition of the marriages validly celebrated in Syria), determination of the law applicable to divorce and the content of Syrian law. The study demonstrates that some of these questions arise because of the ongoing unfamiliarity of Turkish courts with "temporary protection status" as a relatively new concept in Turkish law, whereas others are related to application of general provisions to temporary protection beneficiaries and highlights the urgent need to review the Turkish private international law legislation considering the status of these persons to provide uniformity in court decisions and to ensure predictability.

Bahraini Supreme Court on the Enforceability of a Foreign Judgment Ordering the Payment of Contingent Fees

I. Introduction

Contingency fee agreements are arrangements whereby lawyers agree with their clients to receive a percentage of the final awarded amount in terms of payment of legal services. Such payment typically depends upon the lawyer winning the case or reaching a settlement. The admissibility of contingency fee agreements

varies from one jurisdiction to another, ranging from complete prohibition to acceptance. For example, in the MENA Arab region, jurisdictions such as Bahrain prohibit contingency fee arrangements (see below). However, in other jurisdictions such as Saudi Arabia, contingent fees are not only permitted but also have been described as established practice in the country (cf. *Mekkah Court of Appeal, Ruling No. 980/1439* confirming the Ruling of *Jeddah Commercial Court No. 676/1439 of 3 Rajab 1439 [20 March 2018]* considering that receiving a percentage of the awarded amount that ranges between 15% to 30% as "an established judicial and customary practice among lawyers").

With respect to the enforcement of foreign judgments, a crucial issue concerns whether a foreign award ordering the payment of contingent fees would be enforced abroad. In a country where contingent fees contracts are prohibited, the presence of such elements in foreign judgments is likely to affect their enforceability due to public policy considerations. The Bahraini Supreme Court (hereafter 'BSC') addressed this particular issue in what appears to be an unprecedented decision in the MENA region. The Court held that a foreign judgment ordering payment of contingent fees as agreed by the parties is contrary to public policy because contingency fee agreements are forbidden in Bahrain (*Supreme Court, Ruling No. 386/2023 of 20 February 2024*).

II. Facts

The case concerned an action for the enforcement of a Saudi judgment brought by X (a practicing lawyer in Saudi Arabia) against Y (the appellee, owner of a sole proprietorship, but no further indications as to Y's nationality, habitual residence or place of business were mentioned in the judgment).

According to the underlying facts as summarized by the Supreme Court, both X and Y agreed that X would represent Y in a case on a fee of 10% of the awarded amount (105,000 USD). As Y failed to pay, X brought an action in Saudi Arabia to obtain a judgment against Y requiring the latter's sole proprietorship to pay the amount. Later, X sought the enforcement of the Saudi judgment in Bahrain. The first instance court ordered the enforcement of the foreign judgment, but its decision was overturned by the Court of Appeal. There, X filed an appeal to the BSC.

Before the BSC, X argued that the Court of Appeal erred in its decision as it declared the (contingency fee) agreement between the parties null and void on public policy grounds because it violated article 31 of the Bahraini Attorneys Act (*qanun al-muhamat*), which prohibits such agreements. According to X, the validity of the agreement is irrelevant *in casu*, as the court's function was to examine the formal requirements for the enforcement of the Saudi judgment without delving in the merits of the case. Therefore, since the foreign judgment satisfies all the requirements for its enforcement, the refusal by the Court of Appeal to order the enforcement was unjustified.

III. The Ruling

The BSC rejected the appeal by ruling as follows:

"It stems from the text of the provisions of Articles 1, 2 and 7 of the [1995 GCC Convention on the Enforcement of Foreign Judgments] as ratified by Bahrain in [1996], and the established practice of this Court, that judgments of a GCC Member State rendered in civil, commercial, administrative matters as well as personal status matters that become final [in the State of origin] shall be enforced by the courts and competent judicial authorities of the other GCC Member States in accordance with the procedure set forth in [the] Convention if it was rendered by a court having jurisdiction according to the rules of international jurisdiction of the requested State or according to the provision of the present Convention. [In this respect,] the role of the judicial authority of the requested State shall be limited to examination of whether the [foreign] judgment meets the requirement set forth in the Convention without reviewing the merits of the case. [However,] if it appears that the [foreign] judgment is inconsistent with the rules of Islamic Sharia, the Constitution or the public policy of the requested State, the [requested court] shall refuse to enforce the foreign judgment as a whole or in part.

Public policy is a relative (*nisbi*) concept that [can be interpreted] restrictively or broadly [as it varies with] time, place and the prevailing customs, and it [is closely linked in terms of] existence or not with public interest. It [public policy] encompasses the fundamental principles that safeguard the political system, conventional social agreements, economic rules and the moral values that

underpin the structure of the society as an entity and public interest. [In addition,] although public policy is often embodied in legislative texts, however, it transcends these texts to form an overarching and independent concept. [Thus,] when a legislative text contains a mandatory or prohibitive rule related to those fundamental principles and aims at protecting public interest rather than individual interests, [such a rule] should not be disregarded or violated. [This is because, such a rule is] crucial for preserving the [public] interests associated to it and takes precedence over the individual interests with which it conflicts as it falls naturally within the realm of public policy, whose scope, understanding, boundaries and reach are determined in light of those essential factors of society so that public interest is prioritized and given precedence over the interests of certain individuals.

[This being said,] it is established that the judgment whose enforcement is sought in Bahrain ordered Y to pay X 105,000 USD as [contingent fees], which represent 10% of the amount awarded to Y. [It is also established that] the parties' [contingency fee] agreement, which was upheld and relied upon [by the foreign court] violates article 31 of the Attorneys Act, which prohibits lawyers from charging fees based on a percentage of the awarded amount. This provision is a mandatory one that cannot be derogated from by agreement, and judgments inconsistent with it cannot be enforced. Consequently, the [contingency fee] agreement upon which the [foreign] judgment to be enforced is based is absolutely void, [rendering] the [foreign] judgment deficient of one of the legally prescribed requirements for its enforcement. This shall not be considered a review of the merits of the case but rather a [fundamental] duty of the judge to examine whether the foreign judgment meets all the requirements for its enforcement.

IV. Comments

1. General remarks

To the best of the author's knowledge, this is an unprecedented decision not only in Bahrain, but in the MENA region in general. In addition to the crucial issue of public policy (4), the reported case raises a number of interesting questions

regarding both the applicable rules for the enforcement of foreign judgments (2) and *révision au fond* (3). (on the applicable rules in the MENA Arab jurisdictions including Bahrain, see Béligh Elbalti, "Perspectives from the Arab World", in M. Weller *et al.* (eds.), *The 2019 HCCH Judgments Convention – Cornerstones, Prospects, Outlook* (Hart, 2023) 182, 196, 199. On *révision au fond*, see *ibid*, 185. On public policy, see *ibid*, 188-190).

2. The Applicable rules

As the reported case shows, the enforcement of the Saudi judgment was examined on the basis of the 1995 GCC Convention, since both Bahrain and Saudi Arabia are Contracting States to it. However, both countries are also parties to a more general convention, the 1983 Riyadh Convention, which was also applicable (on these conventions with a special focus on 1983 Riyadh Convention, see Elbalti, *op. cit.*, 195-198). This raises a serious issue of conflict of conventions. However, this issue has unfortunately been overlooked by the BSC.

The BSC's position on this issue is ambiguous because it is not clear why the Court preferred the application of the 1995 GCC Convention over the 1983 Riyadh Convention knowing that the latter was ratified by both countries in 2000, i.e. *after* having ratified the former in 1996 (see Elbalti, *op. cit.* 196)! In any case, since the issue deserves a thorough analysis, it will not be addressed here (on the issue of conflict of conventions in the MENA region, see Elbalti, *op. cit.*, 200-201. See also my previous post here in which the issue was briefly addressed with respect to Egypt).

3. Révision au fond

In the reported case, X argued that the decision to refuse the enforcement of the Saudi judgment on public policy grounds violated of the principle of prohibition of the review of the merits. The BSC rejected this argument. The question of how to consider whether a foreign judgment is inconsistent with public policy without violating the principle of prohibition of *révision au fond* is very well known in literature. In this respect, it is generally admitted that borderline should be that the enforcing court should refrain from reviewing the determination of facts and

application of law made by the foreign court "as if it were an appellate tribunal reviewing how the "lower court" decided the case" (Peter Hay, *Advance Introduction to Private International Law and Procedure* (Edward Elgar, 2018) 121). Therefore, it can be said the BSC rightfully rejected X's argument since its assessment appears to be limited to the examination of whether the judgment, "*as rendered* [was] offensive" without "reviewing the way the foreign court arrived at its judgment" (cf. Hay, *op. cit.*, 121).

4. Public policy in Bahrain

i. Notion & definition. Under both the statutory regime and international conventions, foreign judgments cannot be enforced if they violate "public policy and good morals" in Bahrain. In the case reported here, the BSC provided a lengthy definition of public policy. To the author's knowledge, this appears to be the first case in which the BSC has provided a definition of public policy in the context of the enforcement of foreign judgments. This does not mean, however, that the BSC has never invoked public policy to refuse the enforcement of foreign judgments (see, e.g., *BSC, Appeal No. 611/2009 of 10 January 2011* in which a Syrian judgment terminating a mother's custody of her two daughters upon their reaching the age of 15, in application of Syrian law, was held to be contrary to Bahraini public policy). Nor does this mean that the BSC has never defined public policy in general (see, e.g., in the context of choice of law, Béligh Elbalti & Hosam Osama Shabaan, "Bahrain – Bahraini Perspectives on the Hague Principles", in D. Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts – Global Perspectives on the Hague Principles* (OUP, 2021) 429 and the cases cited therein).

What is remarkable, however, is that the BSC has consistently used for the definition of public policy in the context of private international law the same elements it uses to define public policy in purely domestic cases. This is particularly clear in the definition adopted by the BSC in the case reported here since it described public policy in terms of "ordinary mandatory rules" that the parties are not allowed to derogate from by agreement. It is worth noting in this regard that the BSC's holding on public policy appears, in fact, to have been

strongly inspired by the definition given by the Qatari Supreme Court in a purely domestic case decided in 2015 (*Qatari Supreme Court, Appeal No. 348 of November 17, 2015*).

Defining public policy in the way the BSC did is problematic, as it is generally admitted that "domestic public policy" should be distinguished from public policy in the meaning of private international law (or as commonly referred to as "international public policy"). It is therefore regrettable that the BSC did not take into account the different contexts in which public policy operates.

ii. Public policy and mandatory rules. As mentioned above, the BSC associates public policy with "mandatory rules" in Bahrain, even though it recognizes that public policy could "transcend" these rules "to form an overarching and independent concept". This understanding of public policy is not in line with the widely accepted doctrinal consensus regarding the correlation between public policy and mandatory rules. This doctrinal consensus is reflected in the Explanatory Report of the HCCH 2019 Judgments Convention, which makes it clear that "it is not sufficient for [a state] opposing recognition or enforcement *to point to [its] mandatory rule of the law* […] that the foreign judgment fails to uphold. Indeed, this mandatory rule may be considered imperative for domestic cases but not for international situations." (Explanatory Report, p. 120, para. 263. Emphasis added). The Explanatory Report goes on to state that "[t]he public policy defence […] should be triggered *only* where such a mandatory rule reflects a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted" (*ibid.* emphasis added).

The BSC's holding suggests that it is sufficient that the foreign judgment does not uphold *any* Bahraini mandatory rule to justify its non-enforcement, without a sufficient showing of how that the mandatory rule in question "reflects a fundamental value, the violation of which would be manifest if enforcement of the foreign judgment was permitted". By holding as it did, the BSC unduly broadens the scope of public policy in a way that potentially undermines the enforceability of foreign judgments in Bahrain.

iii. Contingency fee arrangements and Bahraini Public Policy. As noted above

(see Introduction), although contingency fee arrangements are prohibited in Bahrain, they are permitted in Saudi Arabia, where they appear to be widely used. From a private international law perspective, the presence of elements in a foreign judgment that are not permitted domestically does not in itself justify refusal of enforcement. In this sense, the non-admissibility of contingent fees in Bahrain should not in itself automatically lead to their being declared against public policy. This is because contingency fee arrangements should not be assessed on the basis of the strict rules applicable in Bahrain, but rather on whether they appear to be *manifestly* unfair or excessive in a way that violates "fundamental values" in Bahrain. Otherwise, the implications of the BSC's decision could be overreaching. For example, would Bahraini courts refuse to enforce a foreign judgment if the contingent fees were included as part of the damages awarded by the foreign court? Would it matter if the case has tenuous connection with forum (for example, the case commented here, there are no indication on the connection between Y and Bahrain, see (II) above)? Would the Bahraini courts apply the same solution if they had to consider the validity of the contingent fee agreement under the applicable foreign law? Only subsequent developments would provide answers to these questions.

V. Concluding Remarks

The case reported here illustrates the challenges of public policy as a ground for enforcing foreign judgments not only in Bahrain, but also in the MENA Arab region in general. One of the main problems is that, with a few exceptions, courts in the region generally fail to distinguish between domestic public policy and public policy in the context of private international law (see Elbalti, "Perspectives from the Arab World", *op.cit.*, 189, 205, and the references cited therein). Moreover, courts often fail to establish the basic requirements for triggering public policy other than the inconsistency with the "fundamental values" of the forum, which are often referred to *in abstracto*. A correct approach, however, requires that courts make it clear that public policy has an exceptional character, that it has a narrower scope compared to domestic public policy, and that mere inconsistency with ordinary mandatory rules is not sufficient to trigger public policy. More importantly, public policy should also be assessed from the point of view of the *impact* the foreign judgment would have on the domestic legal order by looking at the *concrete effects* it would have if its recognition and enforcement

were allowed. The impact of the foreign judgment, in this case, would largely depend on the intensity of the connection the case has with the forum.

Australasian Association of Private International Law

(Posted on behalf of Professor Reid Mortensen)

We are pleased to let you know about the establishment of the Australasian Association of Private International Law ('AAPrIL').

AAPrIL is being established to promote understanding of private international law in Australia, Aotearoa New Zealand, and the nations of the Pacific Islands. By 'private international law' (or 'conflict of laws'), we mean the body of law that deals with cross-border elements in civil litigation and practice, whether arising internationally or, in the case of Australia, intra-nationally.

To make AAPrIL a reality, we need your help. If you have an interest in Australasian private international law, please join us by attending the first general meeting of members of AAPrIL, which will be held online on **Thursday 11 July 2024**. The meeting is necessary to establish AAPrIL, approve a Constitution, and elect AAPrIL's first officers.

The beginnings of our Association

The proposal to establish AAPrIL comes from an organising group* of Australian and New Zealand scholars and practitioners who have been working together in private international law for a long period.

We believe that there is a need for a permanent regional organisation to provide support for regular events and conferences on private international law, and to help coordinate, manage and publicise them. Our vision for AAPrIL is that it will:

- Regularly distribute a newsletter on recent decisions, legislative

developments and publications, and on hot topics and upcoming events on private international law in Australasia.
- Organise proposals and submissions for law reform in private international law.
- Promote the study of private international law in universities.
- Provide a forum for the exchange of information and opinions, debate and scholarship on private international law in Australasia.
- Connect with other private international law associations worldwide.

The proposed Association already has a website and a LinkedIn page.

To our delight, the Honourable Dr Andrew Bell, Chief Justice of New South Wales, has agreed to serve as patron of the Association. His Honour is well-known as co-author of *Nygh's Conflict of Laws in Australia*, and the author of many other publications on private international law. Before being appointed to judicial office, he had a significant Australia-wide practice in cross-border litigation and international arbitration.

How do you join?

You can join the Australasian Association of Private International Law by signing up on the Membership page of AAPrIL's website.

There is initially no membership fee to join. At the meeting to establish AAPrIL, there will be a proposal to set membership fees for 2024-2025 at:

Individual members: AUD 100

Corporate members: AUD 300

Student members: AUD 20

However, membership fees for 2024-2025 will not be requested until after the first general meeting.

What will happen at the general meeting on Thursday 11 July?

Those who join as members by 18 June 2024 will be sent a notice of meeting for the general meeting on 11 July 2024. The agenda will include proposed resolutions:

- To establish the Australasian Association of Private International Law.
- To adopt the Constitution of the Association. If members have any questions about the proposed Constitution before the meeting, could you please direct them to me: mortensen@unisq.edu.au.†
- To appoint the President, Treasurer and Secretary of the Association, and potentially an Australian Vice-President, a New Zealand Vice-President and Pacific Islands Vice-President. If any member wishes to propose another member for one of these offices, please email your nomination to me: mortensen@unisq.edu.au.†
- To set membership fees for the financial year 2024-2025.

The organising group will also present plans for the activities of the Association.

We are looking forward to this exciting development for those of us who are rightly fascinated by private international law. We hope you will join us!

Best wishes

Professor Reid Mortensen

On behalf of the AAPrIL interim executive

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* The organising group comprises Dr Michael Douglas (Bennett, Perth), Professor Richard Garnett (University of Melbourne), Associate Professor Maria Hook (University of Otago), Professor Mary Keyes (Griffith University), Professor Reid Mortensen (University of Southern Queensland), Ms Cara North (Corrs Chambers Westgarth, Melbourne) and Mr Jack Wass (Stout Street Chambers, Wellington).

† I will be on leave from 3-14 June 2024, but will answer any enquiries that are made in that period as soon as possible afterwards.

The DRIG Prize for Best Article in International Dispute Resolution

The Dispute Resolution Interest Group of the American Society of International Law (ASIL) is pleased to announce the third edition of the DRIG Prize for Best Article in International Dispute Resolution. The Prize will be awarded to the author(s) of the article published in 2023 that the Selection Committee considers to be outstanding in the field of international dispute resolution. DRIG is currently accepting submissions for the Prize.

Please find below the details on the Prize and the members of the Selection Committee:

o Eligibility: The Selection Committee will consider publications on inter-State dispute settlement, investor-State dispute settlement, international commercial arbitration, and alternative dispute resolution. Any article, or book chapter from an edited volume, in the English language published during 2023 may be nominated. Sole and jointly authored papers are eligible. Membership in the American Society of International Law is not required. Submissions from outside the United States are welcome and encouraged.

o Criteria: In assessing submissions, the Selection Committee will take into account factors such as: a) depth of research; b) sophistication of analysis; c) originality; d) quality of writing; and e) potential impact on the field of international dispute resolution.

o Submission: The Dispute Resolution Interest Group is currently accepting submissions, **which must be received by November 1, 2024**. Electronic submission is required in portable document format (.pdf). All submissions must include contact information (name, e-mail, phone, address). Electronic submissions should be sent to the following email address: drig@asil.org. Please indicate “Submission for the DRIG Prize” in the subject line.

o Prize: The Selection Committee will select one publication for the award of the Prize. The Prize consists of a certificate of recognition, a complimentary registration for the 2025 ASIL Annual Meeting, a complimentary one-year

membership in the Society, and a complimentary one-year subscription to the Jus Mundi international law and arbitration search engine. The winner of the Prize will be announced at the ASIL Annual Meeting in April 2025. The Prize is sponsored by Covington & Burling LLP, Curtis, Mallet-Prevost, Colt & Mosle LLP, and Jus Mundi.

o Selection Committee: The Selection Committee consists of individuals drawn from private practice, academia, and/or government who possess expertise in the fields covered by the Prize, and also includes the DRIG co-chairs. The Selection Committee for the 2025 Prize will be presided by Esmé Shirlow (Australian National University) and will include Julian Arato (The University of Michigan), Tom Ginsburg (The University of Chicago), Sebastián Green Martínez (Uría Menéndez), Natalie Morris-Sharma (Attorney-General's Chambers, Singapore), Sabina Sacco (Independent Arbitrator), Priyanka Shetty (AZB & PARTNERS), Amer Tabbara (University of Birmingham), and Philippa Web (King's College London).

Application of Singapore's new rules on service out of jurisdiction: Three Arrows Capital and NW Corp

Application of Singapore's new rules on service out of jurisdiction: *Three Arrows Capital* and *NW Corp*

The Rules of Court 2021 ('ROC 2021') entered into force on 1 April 2022. Among other things, ROC 2021 reformed the rules on service out of jurisdiction (previously discussed here). Order 8 rule 1 provides:

'(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.

…

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

…'

A handful of decisions on the application of Order 8 rule 1 have since been delivered; two are discussed in this post. One of them considers the 'appropriate court' ground for service out of jurisdiction provided in Order 8 rule 1(1) and touches on the location of cryptoassets; the other is on Order 8 rule 1(3).

Service out under the 'appropriate court' ground

Cheong Jun Yoong v Three Arrows Capital[1] involved service out of jurisdiction pursuant to the 'appropriate court' ground in Order 8 rule 1(1). As detailed in the accompanying Supreme Court Practice Directions ('SCPD'), a claimant making an application under this ground has to establish the usual common law requirements that:

'(a) there is a good arguable case that there is a sufficient nexus to Singapore;

(b) Singapore is *forum conveniens*; and

(c) there is a serious issue to be tried on the merits of the claim.'[2]

For step (a), the previous Order 11 gateways have been transcribed as a non-exhaustive list of factors.[3] This objective of this reform was to render it 'unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions.'[4] As *Three Arrows* illustrates though, old habits die hard and the limits of the 'non-exhaustive' nature of the jurisdictional gateways remains to be tested by litigants. The wide-reaching effect of a previous Court of Appeal decision on the interpretation of gateway (n) which covers a claim brought under statutes dealing with serious crimes such as corruption and dug trafficking and 'any other written law' is also yet to be grasped by litigants.[5]

In *Three Arrows*, the first defendant ('defendant') was a British Virgin Islands incorporated company (BVI) which was an investment fund trading and dealing in cryptocurrency. It was under liquidation proceedings in the BVI; its two

liquidators were the second and third defendants in the Singapore proceedings. The BVI liquidation proceedings were recognised as a 'foreign main proceeding' in Singapore pursuant to the UNCITRAL Model Law on Cross-Border Insolvency as enacted under Singapore law.[6] The claimant managed what he alleged was an independent fund called the 'DC Fund' which used the infrastructure and platform of the defendant and its related entities. After the defendant decided to relocate its operations to Dubai, the claimant incorporated Singapore companies to take over the operations and assets of the DC Fund. Not all of the assets had been transferred to these new companies at the time the defendant went into liquidation. The claimant's case was that the DC Fund assets remaining with the defendant were held on trust by the defendant for the claimant and other investors in the DC Fund and were not subject to the BVI liquidation proceedings. The Liquidators in turn sought orders from the BVI court that those assets were owned by the defendant and subject to the BVI Liquidation proceedings.

The claimant relied on three gateways for service out of jurisdiction: gateway (a) where relief is sought against a defendant who is, inter alia, ordinarily resident or carrying on business in Singapore; gateway (i) where the claim is made to assert, declare or determine proprietary rights in or over movable property situated in Singapore; and gateway (p) where the claim is founded on a cause of action arising in Singapore.

On gateway (a), the defendant was originally based in Singapore before shifting operations to Dubai a few months before the commencement of the BVI Liquidation proceedings. The claimant attempted to argue that residence for the purposes of gateway (a) had to be assessed at the time when the company was 'alive and flourishing'.[7] This was rightly rejected by the court, which observed that satisfaction of the gateway depended on the situation which existed at the time application for service out of jurisdiction was filed or heard. On gateway (p), it was held that there was a good arguable case that the cause of action arose in Singapore because the trusts arose pursuant to the independent fund arrangement between the parties which was negotiated and concluded in Singapore. All material events pursuant to the arrangement took place when the defendant was still based in Singapore and the defendant's investment manager was a Singapore company.

It is perhaps the court's analysis of gateway (i) which is of particular interest as it deals with a nascent area of law. Are cryptocurrencies 'property' and if so, where

are they located?

The court confirmed earlier Singapore decisions that cryptocurrencies are property.[8] It held:

'Given the fact that a cryptoasset has no physical presence and exists as a record in a network of computers …. It best manifests itself through the exercise of control over it.'[9]

Between a choice of the identifying the *situs* as the domicile or residence of the person who controls the private key linked to the cryptoasset, the court preferred residence as being the 'better indicator of where the control is being exercised.'[10] Seemingly drawing from the position in relation to debts, one of the reasons for preferring residence was that this was where the controller can be sued.[11] The court was also concerned that there may be difficulties in identifying domicile.[12] On the facts, the controller was one of the Singapore incorporated companies set up by the claimant and the claimant was in turn the sole shareholder of that company. Both the company and claimant were resident in Singapore and thus gateway (p) was satisfied.

On the other requirements for service out with permission of the court under the 'appropriate court' ground, the court was persuaded that there was a serious issue to be tried on the merits and that connecting factors indicated Singapore was *forum conveniens*. The defendants' application to set aside the order granting permission to serve out of jurisdiction and to set aside service of process on them thus failed. The Appellate Division of the Singapore High Court has recently refused permission to appeal against the first instance decision.[13]

It bears pointing out that the same issue of ownership of the assets of the DC Funds was before the BVI court in the insolvency proceedings. The first instance court was unmoved by the existence of parallel proceedings in the BVI, as the BVI proceedings were at a very early stage and hence were not a significant factor in the analysis on *forum conveniens*.[14] However, as mentioned above, the BVI insolvency proceedings had been recognised as a 'foreign main proceeding' by the Singapore court. Under Article 21 of the UNCITRAL Model Law on Cross-Border Insolvency, relief granted pursuant to such recognition can include staying actions concerning the 'debtor's property'.[15] While the very issue in the Singapore action is whether the assets of the DC Funds are indeed the 'debtor's

property',[16] staying the action will clearly be in line with the kinds of relief envisaged under Article 21. Under the Model Law, the issue of *forum conveniens* should take a back seat as the emphasis is on cross-border cooperation to achieve an optimal result for all parties involved in an international insolvency.

Service out pursuant to a contractual agreement

In *NW Corp Pte Ltd v HK Petroleum Enterprises Cooperation Ltd*,[17] the contract between the claimant and defendant, who were Singapore and Hong Kong-incorporated companies respectively, contained this clause:

'This Agreement shall be governed by and construed in accordance with the English law [sic]. Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by Singapore court [sic] without recourse to arbitration and to service of process by registered mail …'

The claimant served process on the defendant in Hong Kong by way of registered post to the defendant's last known address and purportedly pursuant to Order 8 rule 1(3) ROC 2021. The issue whether the service was validly effected arose when the defendant sought to set aside the default judgment that was subsequently approved by the Singapore High Court Registry. The defendant argued that Order 8 rule 1(3) required that the agreement name not only a method of service but also specify a location out of Singapore where service could take place. The Assistant Registrar ('AR') disagreed, holding that this would be too narrow an interpretation of Order 8 rule 1(3). Pointing to the more relaxed modes of service permitted under the ROC 2021[18] in comparison with the predecessor ROC 2014,[19] the AR stated that there was no suggestion in Order 8 rule 1(3) or in the definitions provided elsewhere which suggested that both method and place of service had to be specified in a jurisdiction clause in order for a claimant to avail itself of service out without permission of the court. The AR was of the view that an agreement could come within Order 8 rule 1(3) so long as it provided for service of originating process of the Singapore courts on a foreign defendant.

The reasoning was as follows. First, Order 8 rule 1(3) was a deviation from the orthodox principles that the Singapore court's jurisdiction was territorial in nature and service on a defendant abroad ordinarily required permission of court.

If a foreign defendant agreed that jurisdiction of the court can be founded over them by way of service of originating process, that service necessarily included service out of Singapore. Thus, to come within Order 8 rule1(3), the agreement merely required the foreign defendant to consent to the jurisdiction of the court to be founded over them by way of service of originating process. Secondly, the phrase used in Order 8 rule 1(3) was service 'out' of Singapore, rather than service 'outside' Singapore. Only the latter phrase, in the AR's view, connoted that service of process at a location other than Singapore was required.

On the first rationale, the Singapore court's *in personam* jurisdiction over a defendant is founded on service of process.[20] This is the case ordinarily, with or without the defendant's agreement. If the defendant expressly agrees that this can be done, this could be used to counter a subsequent challenge by the defendant to the existence of jurisdiction of the Singapore court, but it is difficult to see how, without more, an agreement to accept service of Singapore process takes the defendant outside the orthodox territorial framework of the Singapore court's jurisdiction. Surely only the defendant's agreement to service of Singapore process abroad, rather than merely agreement to service of Singapore process, would provide justification for the deviation from orthodox principles? The AR seemed to be suggesting that it is implicit that a foreign defendant, by agreeing to accept service of Singapore process, also consents to service of process out of Singapore, but the second rationale proffered renders any implicit agreement moot as, on the AR's view, Order 8 rule 1(3) does not require the defendant to agree to accept service abroad. However, the legal difference between 'out' and 'outside' is elusive, as 'service out of jurisdiction' is uncontroversially understood to refer to service on a defendant who is abroad and thus not within the territorial jurisdiction of the court.

A parallel provision to Order 8 rule 1(3) can be found in the Singapore International Commercial Court Rules 2021 ('SICC Rules'). Permission of the SICC is likewise not required where the defendant is party to a 'written jurisdiction agreement' for the SICC or 'service out of Singapore is allowed under an agreement between the parties.'[21] Order 8 rule 1(3) is missing the first option. However, it would be unlikely for the parties to have agreed on 'service out of Singapore' without first having agreed on a Singapore choice of court agreement. Despite this slight oddity, the intention of the drafters is clearly to liberalise the service out(side) of jurisdiction rules. Whether the intention was to

liberalise it as much as was held in *NW Corp* is, however, debatable.

[1] [2024] SGHC 21.

[2] SCPD 2021 para 63(2).

[3] SCPD 2021 para 63(3).

[4] Civil Justice Commission Report, Chapter 6, p 16 (29 December 2017).

[5] *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA). The point is explained here.

[6] Insolvency, Restructuring and Dissolution Act 2018 s 252 and Third Schedule.

[7] [2024] SGHC 21 [46].

[8] *CLM v CLN* [2022] 5 SLR 273; *Bybit Fintech Ltd v Ho Kai Xin* [2023] 5 SLR 1748.

[9] [2024] SGHC 21 [60]

[10] [2024] SGHC 21 [63].

[11] [2024] SGHC 21 [63].

[12] [2024] SGHC 21 [63].

[13] *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] SGHC(A) 10.

[14] [2024] SGHC 21 [82].

[15] Insolvency, Restructuring and Dissolution Act 2018, Third Schedule, Art 21(1)(a).

[16] The respondent was clearly the legal owner; the question was whether the assets belonged beneficially to the applicant.

[17] [2023] SGHCR 22.

[18] ROC 2021 O7 r2(1)(d).

[19] ROC 2014 O10 r3.

[20] Supreme Court of Judicature Act 1969 s16(1)(a). The court also has jurisdiction if the defendant had submitted to the jurisdiction of the court (s16(1)(b)), but submission is normally used to counter a jurisdictional objection by the defendant; in the ordinary course of things, service of process must first take place.

[21] SICC Rules 2021 O5 r6(2).

Pax Moot Court and Half day conference on Dispute Resolution in Private International Law

On Tuesday 23 April the Pax Moot Court Competition will kick off in Ljubljana. The oral rounds between 29 teams from all over Europe and beyond (including Asia and Australia) will start on Wednesday 24th. Teams will be litigating against each other for two days in front of private international law experts from academia and practice. The semi-finals and finals are scheduled for Friday 26th.

Also on Friday 26 April, there will be a hybrid conference on Dispute Resolution in Private International Law, co-organised by the Pax team and the University of Aberdeen's Centre for Private International Law. This will include of three panels: Commercial Arbitration, Business and Human Rights, and Decolonial Perspectives on private international law. All welcome to join!

Please see the programme and register.

No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place

for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).

2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the courts in each jurisdiction might reach a different result, giving a parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".
5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court agreements, which is what "makes a potentially conflicting common law test unpalatable".
6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman regime as a whole".
7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The

TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the cooperative purpose of the scheme. The parallel debate within the context of the Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of*

Corrections v Fujitsu New Zealand Ltd [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).