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.

A Californian Judgment fails the Provisional Sentence test in South African Courts

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Introduction

South Africa is one of the most developed countries on the African continent and a key country in the Southern African Development Community (SADC) and the BRICS (Brazil, Russia, India, China, and South Africa) economic bloc. Its status in private international law on the African continent is evinced as the country on the African continent where two vital instruments of private international law were adopted: the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Mining, Agricultural and Construction Protocol (MAC Protocol). It is also a member of the Hague Conference of Private International Law. Thus, development in its private international is likely to significantly impact the neighboring countries in the SADC region and the continent.

In the recent case of *Lindsey and Others v Conteh* (774/2022) 2024 (3) SA 68 (SCA), the South African Supreme Court of Appeal dismissed an appeal for the recognition and enforcement of a Californian judgment. The South African Supreme Court of Appeal held that "The California Court Orders do not constitute a liquid document evidencing an unconditional acknowledgment of indebtedness, in a fixed sum of money. The appeal must accordingly fail" (para 35).

This case is significant because the case addresses the recognition and enforcement of foreign judgment in South Africa and matters concerning provisional sentence. It is, therefore, a case that other SADC countries and common law jurisdictions would find helpful when recognizing and enforcing foreign judgments, especially under the common law regime.

Facts

The case outlined below concerns the recognition and enforcement of a Californian foreign judgment in South Africa. The brief facts of the case is as follows: The sixth appellant, African Wireless Incorporated (AWI), is a corporation registered in terms of the laws of the State of Delaware in the United States of America; and the first to fifth appellants are the shareholders of AWI. The respondent is a businessman and citizen of the United States of America and now resides in South Africa. The appellants filed a suit against Mr Conteh, the respondent. The basis of the suit was that the respondent had transferred some shares of AWI to companies belonging to him without the requisite permission of AWI.

Consequently, the appellants obtained a judgment by default. Further, the Californian Superior Court ordered the respondent to turn over the shares to the appellants. The court also placed a value upon the shares 'for bond purposes only'. The appellants then brought an *ex parte* application, which *inter alia* sought to convert the earlier court order to a monetary judgment. However, the application was dismissed.

The case before the High Court

The appellants argued that the foreign default judgment and the post-judgment enforcement orders collectively constituted a final and binding money judgment. They further argued that, by operation of law, the judgment was enforceable in the same manner as a "money judgment for the value of the shares". This is because it had been converted into a liquid and executable money judgment under California law. Therefore, its nonpayment entitled them to seek a provisional sentence. However, the respondent contended that the foreign

judgment was not a money judgment; hence, it was not a liquid document. He averred that what was before the courts was merely a judgment for the delivery of shares.

The ruling of the High Court

According to the High Court, 'the judgment does not constitute prima facie proof of a debt enforceable by provisional sentence', as it did not comprise a liquid document. The court determined that extrinsic evidence on Californian law was necessary to prove that the order to turn over the shares had been converted into a debt in monetary terms, thus constituting a money judgment. The court concluded that the need to resort to such extrinsic evidence was inconsistent with South African courts' usual strict adherence to the requirements for granting a provisional sentence. Dissatisfied with this ruling, the plaintiffs appealed to the Supreme Court of Appeal.

Summary of the Judgment of the Supreme Court of Appeal

The Supreme Court of Appeal extolled the importance of recognizing and enforcing foreign judgment 'in a world of ever greater international commerce' (para 26). It reechoed its previous statement in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA), where it stated that "it is now well established that the exigencies of international trade and commerce require '. . . that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto'" (para 25). The court stated that a court judgment serves as prima facie evidence of a debt owed and constitutes an acknowledgment of the indebtedness for the amount specified in the judgment.

The central issue in this case was whether a series of orders and two writs, granted by the Superior Court of California in the State of California, United States of America, cumulatively constituted a liquid document that can be enforced through provisional sentence in South Africa. Thus, the Supreme Court of Appeal was invited to determine the true nature of the Californian court orders in relation to the granting of a provisional sentence.

The appellants argued that the foreign judgment, when read cumulatively, constitutes a liquid document despite the initial judgment being for the turnover of shares. According to them, because a monetary value was ascribed to the shares and a writ of execution for the monetary value of the shares was issued, it is sufficient to enable them to secure a provisional sentence.

The court referred to the seminal case of *Jones v Krok* 1995 (1) SA 677 (A) to set out the conditions to be met for the recognition and enforcement of a foreign judgment, namely: '(i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence")? (ii) that the judgment is final and conclusive in its effect and has not become superannuated? (iii) that the recognition and enforcement of the judgment by our courts would not be contrary to public policy? (iv) that the judgment was not obtained by fraudulent means? (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign state? and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended…'. In this case, the parties did not seek to qualify these requirements (para 27).

According to the court, a provisional sentence is a "summary remedy" that allows a judgment creditor with a liquid document to obtain relief quickly without initiating a trial action (para 19). The liquid document relied upon by the judgment creditor "must be a written instrument signed by the defendant acknowledging indebtedness unconditionally for a fixed amount of money," and the judgment debt "must be fixed, definitive, sounding in money," which is "evident on the face of the document" (para 21). Thus, the judgment creditor must satisfy the court that the foreign judgment satisfies these conditions in order to succeed under the proceedings for a provisional sentence. Under the proceedings for provisional sentence, the need for extrinsic evidence nullifies the liquidity requirement. However, over time, there has been a shift away from the strict application of the principle of "the document must speak for itself" towards the need for "greater flexibility as to what evidence extrinsic to the foreign judgment itself may be permissible" (para 22).

The Supreme Court of Appeal stated that the judgment debt contained in the California Court Orders was for the possession of property. That is, the respondent should turn over the shares to AWI. Although the California court

determined the value of those shares, it did not order Mr Conteh to pay an amount; it only required the respondent to deliver up specified shares. On this issue, the Court of Appeal of the State of California had already held that the appellants 'were not entitled to an actual money judgment in the default judgment proceedings' (para 11).

The SCA further made two observations on the relevant provisions of California law. First, court orders for the possession of property cannot be immediately enforced as a money judgment upon issuance. Some steps need to be followed: "The levying officer must have failed to take custody of the property; made demand of the judgment debtor, if the debtor can be located; the levying officer must then make a return that the property cannot be obtained" (para 31). It is only when these steps have been followed that the judgment for the possession of property will be enforced 'in the same manner' (para 31) as a money judgment. Secondly, the Supreme Court of Appeal emphasized that although the relevant provisions of Californian law allow for the enforcement of the Californian Court Orders 'in the same manner' as a money judgment, it does not render the court orders to be a money judgment (para 31).

On why a court order that can be enforced as a money judgment under Californian laws should not be recognised and enforced by a South African court, the Supreme Court of Appeal stated that it "is a matter of sovereignty" (para 33). South African courts are not simply instruments for enforcing California court orders. In addition, the summons by the appellants was for a provisional sentence and did not request a South African court to implement the enforcement procedures of Californian law (para 34).

Most crucially, the court stated that because the cause of action set out in the summons was based on a foreign judgment that is not a money judgment, the provisional sentence cannot be granted (para 35). Also, the California courts did not constitute a liquid document for a fixed sum of money. Thus, the Supreme Court of Appeal dismissed the case, but on a ground different from that of the high court. The Supreme Court of Appeal reasoned that it was not the recourse of the appellants to extrinsic evidence that rendered provisional sentence unavailable to them. Instead, the foreign judgment they relied upon is not a money judgment, hence not a liquid document (para 36). Consequently, the appeal was dismissed.

Comment

This is a case where the judgment creditors sought the assistance of the South African courts to recognize and enforce the California court orders. It was a typical case of recognition and enforcement of foreign judgments. However, the foreign judgment fell short of the requirements to be satisfied when recognizing and enforcing judgment sounding in money. One of the recognized procedures for recognizing and enforcing foreign judgment in South Africa is by way of provisional sentence. When making this application for a provisional sentence, the judgment creditor should be armed with a liquid document. As a requirement, the judgment in question needs to be a money judgment. However, in this instant case, according to the Supreme Court of Appeal, the California Court Orders do not constitute a liquid document: the judgment obtained in the Californian courts was not a money judgment. Consequently, according to both the High Court and the Supreme Court of Appeal, because this 'necessary' requirement has not been met, the foreign judgment cannot be enforced by way of a provisional sentence.

In most common law legal systems, when recognizing and enforcing a foreign judgment, one of the requirements is that the judgment should be a fixed sum of money. Although it is not stated clearly in SADC countries, it is implicit in the procedure for enforcing foreign judgments through provisional sentence summons, which are summons on liquid documents (para 21). In this case, the South African court upheld this requirement and did not recognize the Californian court orders, which did not constitute a liquid document. Although a monetary value had been placed on the shares the respondent had to transfer, it was not deemed a money judgment. Thus, the fact that a foreign court order can be converted into a monetary value does not change the nature of the judgment into a monetary value. For a judgment to qualify as a fixed sum of money, it needs to be shown clearly in the foreign judgment that the judgment debtor is required to pay a specific sum of money. In the words of the court, the debt must be "fixed, definitive, sounding in money and evident on the face of the document relied upon" (para 21). Without that, it does not qualify as a monetary judgment and cannot be recognized and enforced. The California judgment was not a money judgment. Thus, it was not recognized and enforced by way of provisional sentence. It is submitted that the Supreme Court of Appeal was right to dismiss the appeal on this ground. This decision by the Supreme Court of Appeal will be

of great importance to Southern African courts, which are influenced by the jurisprudence of South African courts (*Standic BV v Petroholland Holding (Pty) Ltd (A 289-2012) [2020] NAHCMD 197).*

This judgment also shows the clinging of South Africa's court to the common law theory of obligation (para 18). Per the theory of obligation, a foreign judgment can be recognized and enforced by initiating a new action for the judgment debt. The rationale is that the foreign judgment imposes an obligation on the individual against whom the judgment was rendered to pay the judgment debt. The claim to pay the judgment debt is separate from the original cause of action that led to the judgment in the foreign jurisdiction. The judgment obtained in this new suit, not the original foreign court judgment, is enforceable as a judgment in the domestic courts. However, one should not be quick to pin this theoretical basis on South Africa's legal regime. This is because, in other cases of recognition and enforcement of foreign judgment that have come before the South African courts, such as *Richman v Ben-Tovim* (para 4) and the *Government of Zimbabwe v Fick* 2013 (5) SA 325 (CC) (para 56-57), other bases such as comity and reciprocity have been mentioned to be the basis for enforcing a foreign judgment. One should thus be guided by the counsel of Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas*1986 (3) SA 509 (D), where she observed rightly that trying to search for a theoretical basis was "a most interesting and somewhat frustrating exercise to attempt to pin it down" (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) SA 509 (D) 513). The court thus observed that the concern should be on the applicable legal regime (that is, whether common law regime or the statutory regime) and the stipulated conditions for the recognition and enforcement of foreign judgment (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) 509 (D) 516).

Another aspect of this case concerns recognizing and enforcing non-monetary foreign judgments. It is submitted that the practice where only judgments sounding in money are recognized and enforced is problematic and does not reflect recent developments in the field of recognition and enforcement of foreign judgment. A foreign judgment, beyond the requirement for the payment of a specific sum of money, might also require that the judgment debtor perform an

act that includes the transfer of shares (like in this instant case) or delivery of property. There is a need for development in South Africa's legal regime to enable it to recognize and enforce non-monetary foreign judgments.

Current legislative developments in the arena of recognition and enforcement of foreign judgments allow for the recognition and enforcement of non-monetary judgments. For instance, the 2019 Hague Judgments Convention allows for recognizing and enforcing non-monetary judgments. According to the Garcimartín-Saumier Report, recognition and enforcement of foreign judgment "includes money and non-money judgments, judgments given by default.. and judgments in collective actions" (para 95). Further, the Report adds that "Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the Convention". Also, the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgment of 2018 allows for the recognition and enforcement of non-monetary judgments (Art 2). Even before these legislative innovations, the Supreme Court of Canada, in the case of *Pro Swing Inc v Elta Golf Inc* ((2007) 273 DLR (4th) 663), had already held that the traditional common law rule that limits enforcement to fixed sum judgments should be revised to allow for the enforcement on non-monetary judgments. Also, common law countries such as Australia and New Zealand have all, by legislation, done away with the fixed sum of money restriction (Australia: Section 5(6) of Foreign Judgments Act 1991; New Zealand: Section 3B of Reciprocal Enforcement of Judgments Act 1934).

These represent current developments in the law, and thus, the courts in South Africa, as part of their responsibility to develop the common law (section 8(3) of South Africa's 1996 constitution), should incorporate this innovation in order to develop the common law in this regard the next time they are seised with a case which requires them to recognize and enforce a non-monetary foreign judgment.

Suppose South Africa's legal regime recognizes and enforces non-monetary foreign judgments; the court might have reached a different conclusion rather than outright dismissing the case and the appeal. In that situation, the California court order, which required the respondent to transfer shares to AWI, would have been capable of being recognized and enforced by the South African court. After the recognition and possible enforcement of the order to transfer the shares, the court would subsequently be invited to determine how to handle the monetary

value placed on the shares to be transferred. However, such an opportunity was missed because South African courts do not recognize and enforce non-monetary judgments.

A Rejoinder to Dr Cosmas Emeziem's "Conflict of Laws and Diversity of Opinions—A View of The Nigerian Jurisdiction"

In this blog post, I respond to a recent critique by Dr. Cosmas Emeziem of a blog post co-authored by Dr. Abubakri Yekini and myself. Our post celebrated the elevation of Justice H.A.O. Abiru to the Nigerian Supreme Court and highlighted its significance for the development of Nigerian conflict of laws.

Dr. Emeziem argues that institutional expertise should be prioritised over individual expertise. He states, "[I]t 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." He concludes that: "Thus, the idea that "an expert in conflict of laws is now at the Supreme Court after a long time" is potentially misleading—especially for persons, businesses, and investors who may not know the inner workings of complex legal systems such as Nigeria."

Yekini and I in our blog post , clearly stated: "Nevertheless, this is not to suggest that Justice Abiru's expertise is limited to conflict of laws, *nor that other Nigerian judges do not possess expertise in conflict of laws.* The point being made is that his Lordship's prominence as a judicial expert in conflict of laws in Nigeria is noteworthy." [emphasis added]. The work of a judge is challenging, and academics should recognize and celebrate their expertise.

Celebrating judicial expertise is beneficial. For instance, Dr. Mayela Celis on 24 November 2021 in one blog post praised the appointment of Justice Loretta Ortiz Ahlf – a private international law expert – to the Mexican Supreme Court. Celis concluded in her blog post that: "This appointment will certainly further the knowledge of Private International Law and Human Rights at the Mexican Supreme Court."

It is common for judges to specialize in certain legal fields, especially at the appellate level. This specialization enables them to provide leading judgments in relevant cases. This is particularly true in common law jurisdictions, where judges are known for their individual attributes and often provide separate decisions, which can result in a diverse range of opinions even within the same case. For example, in the English case of *Boys v Chaplin*, the House of Lords was unable to provide a coherent ratio decidendi due to differing opinions regarding the law applicable to torts when applying English law to heads of damages.

In *Sonnar (Nig) Ltd v Partenreedri MS Norwind* (1987) 4 NWLR 520 at 544 Oputa JSC of the Nigerian Supreme Court, although concurring, expressed a separate view that as a matter of public policy, Nigerian courts "should not be too eager to divest themselves of jurisdiction conferred on them by the Constitution and by other laws simply because parties in their private contracts chose a foreign forum." Many other Nigerian judges have since followed this individual approach taken by Oputa JSC, despite the majority of the Nigerian Supreme Court in *Sonnar* unanimously, and repeatedly in Nika Fishing Company Ltd v Lavina Corporation (2008) 16 NWLR 509, and Conoil Plc v Vitol SA (2018) 9 NWLR 463, expressing preference for the enforcement of a foreign jurisdiction clause, except where strong cause is advanced to the contrary. In this context, the influence of an individual judge in decision-making in conflict of laws cannot be undermined.

In England, former United Kingdom Supreme Court Judges like Lord Collins and Lord Mance are renowned for their expertise in conflict of laws. Indeed, Lord Collins' academic prowess in conflict of laws is internationally renowned, as he is one of the chief editors of the leading common law text on the subject. Nevertheless, this is not to suggest that judges who are not specialists in conflict of laws cannot make significant contributions to the subject. For instance, Lord Goff, known for his expertise in unjust enrichment, significantly contributed to the principle of forum non conveniens, delivering the leading judgment in the seminal case of *Spiliada Maritime Corp v. Cansulex Ltd.* The point being made is that

judges' specialization in a subject significantly enhances the quality of judicial decisions, a fact that scholars should celebrate.

The rise of international commercial courts in Asia and the Middle East, which resemble arbitral tribunals, underscores the importance of individual judicial expertise. These courts, including those in Hong Kong, Singapore, Dubai, Qatar, Kazakhstan, and Abu Dhabi attract top foreign judicial experts to preside over and decide cases, thereby instilling confidence in international commercial parties (Bookman 2021; Antonopoulou, 2023). For instance, Lord Collins a former non-permanent Member of the Hong Kong Court of Final Appeal, delivered the leading judgment in the significant cross-border matter of *Ryder Industries Ltd v Chan Shui Woo,* with the agreement of all other judges on the panel.

Yekini and I stated in our blog post, that Justice Abiru's "dissenting opinion *in Niger Aluminium Manufacturing Co. Ltd v Union Bank* (2015) LPELR-26010(CA) 32-36 highlights his commitment to addressing conflict of laws situations even when the majority view falls short." If the bench in the conflict of laws case where Justice Abiru dissented had been conversant with private international principles in Nigeria, a different outcome might have been reached. This is crucial in the context of the numerous per incuriam decisions by Nigerian appellate courts, which hold that in inter-state matters, a State High Court can only assume jurisdiction over a cause of action that arose within its territory, regardless of whether the defendant is present and/or willing to submit to the court's jurisdiction (Okoli and Oppong, Yekini, and Bamodu) . The key point is that having more specialists in conflict of laws in Nigerian courts will significantly enhance the quality of justice delivery in cross-border issues.

In conclusion, while Justice H.A.O. Abiru is not the entire Nigerian Supreme Court for conflict of laws, there is nothing wrong with emphasizing and celebrating his specialization in this field. Therefore, I stand by my co-authored blog post and will continue to highlight such expertise.

The Dubai Supreme Court — Again — on the Enforcement of Canadian (Ontario) Enforcement Judgment

I. Introduction

The decision presented in this post was rendered in the context of a case previously reported here. All of the comments I made there, particularly regarding the possibility of enforcing a foreign enforcement judgment and other related issues, remain particularly relevant. However, as I have learned more about the procedural history preceding the decisions of the Dubai Supreme Court ("DSC"), which was not available to me when I posted my previous comment, greater emphasis will be placed on the general factual background of the case. The decision presented here raises a number of fundamental questions related to the proper understanding of foreign legal concepts and procedures and how they should be integrated within the framework of domestic law. Therefore, it deserves special attention.

I would like to thank Ed Morgan (Toronto, ON Canada) who, at the time when my previous comment was posted, brought to my attention the text of the Ontario judgment whose enforcement was sought in Dubai in the present case.

II. Facts:

1. Background (based on the outline provided by the DSC's decisions)

X (appellant) obtained a judgment in the United States against Y (appellee), which then sought to enforce it in Canada (Ontario) via a motion for summary judgment. After the Ontario court ordered enforcement of the American judgment, X sought enforcement of the Canadian judgment in Dubai by filing an application with the Execution Court of the Dubai Court of First Instance.

2. First Appeal: DSC, Appeal No. 1556 of 16 January 2024

The lower courts in Dubai admitted the enforceability of the Canadian judgment. Unsatisfied, Y appealed to the DSC. The DSC admitted the appeal and overturned the appealed decision, remanding the case for further review.

According to the DSC, the arguments raised by Y to resist the enforcement of the Canadian judgment – i.e. that the Court of Appeal erred in not addressing his argument that the foreign judgment was a "*summary judgment [hukm musta'jil]*[i] *declaring enforceable a rehabilitation order (hukm rad i'tibar)*[ii] *and an obligation to pay a sum of money rendered in the United States of America that cannot be enforced in the country [Dubai]*" – was a sound argument that, if true, might change the outcome of the case.

3. Second Appeal: DSC, Appeal No. 392/2024 of 4 June 2024

The case was sent back before the court of remand, which, in light of the decision of the DSC, decided to overturn the order declaring enforceable the Ontario judgment. Subsequently, X appealed to the DSC.

Before the DSC, X challenged the remand court's decision arguing that (i) the rules governing the enforcement of foreign judgments do not differentiate by types or nature of foreign judgments; (ii) that under Canadian law, "summary judgment" means a "substantive judgment on the merits"; and that (iii) Y actively participated in the proceedings and the lack of a full trial did not violate Y's rights of defense.

III. The Ruling

The DSC admitted the appeal and confirmed the order declaring enforceable the Canadian judgment.

After stating the general principles governing the enforcement of foreign judgments in the UAE and recalling some general principles of legal interpretation (such as the prohibition of personal interpretation in the presence of an absolutely unambiguous text, and the principle that legal provisions expressed in broad terms should not be interpreted restrictively), the DSC ruled as follows (all quotations inside the text below are added by the author):

"[it appears from the wording of the applicable legal provision[iii] that] *exequatur* decrees are not limited to "judgments" (*ahkam*) rendered in foreign countries but extends to foreign "orders" (*awamir*) provided that they meet the requirements for their enforcement. Furthermore, the [applicable legal provision][iv] has been put in broad terms (*'aman wa mutlaqan*), encompassing all "judgments" (*ahkam*) and "orders" (*awamir*) rendered in a foreign country without specifying their type (*naw'*) or nature (*wasf*) as long as the other requirements for their enforcement are satisfied. Moreover, there is no evidence that any other legal text pertaining to the same subject specifies limitations on the aforementioned [the applicable legal provision]. To the contrary, and unlike the situation [under the previously applicable rules],[v] the Legislator has expanded the concept of enforceable titles (*al-sanadat al-tanfidhiyya*),[vi] which now includes criminal judgments involving restitution (*radd*), compensations (*ta'widhat*), fines (*gharamat*) and other civil rights (*huquq madaniyyah*). […]

Given this, and considering that the appealed decision overturned the *exequatur* decree of the judgment in question on the ground that the [Canadian] judgment, which recognized a judgment from the United States, was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State, despite the broad wording of [the applicable provisions],[vii] which covers all judgments (*kul al-ahkam*) rendered in a foreign State without specifying their type (*naw'*) or nature (*wasf*) provided that the other requirements are met. In the absence of any other specification by any other legal text pertaining to the same subject, the interpretation made by the appealed decision restricts the generality of [the applicable rules] and limits its scope [thereby] introducing a different rule not stipulated therein.

Moreover, the appealed decision did not clarify the basis for its conclusion that the [foreign] judgment was a "summary judgment" (*hukm musta'jil*) enforceable only in the rendering State. [This is more so], especially since the submitted documents on the Canadian civil procedure law and the Regulation No. 194 on [the Rules of Civil Procedure] show that Canadian law recognizes the system of "*Summary judgment*"[viii] for issuing judgments through expedited procedures, and that the [foreign] judgment was indeed rendered following expedited procedures after Y's participation by submitting rebuttal memoranda and hearing of the witnesses.[…]

Considering the foregoing, and upon reviewing the [Canadian] judgment…

rendered in favor of the appellant as officially authenticated, it is established that the parties (X and Y) appeared before the [Canadian] court, [where] Y presented his arguments … and the witnesses were heard. Based on these proceedings [before the Canadian court], the court decided to issue the aforementioned "summary judgment" (al-*hukm al-musta'jil*) whose enforcement is sought in [this] country. [In addition, the appellant presented] an officially authenticated certificate attesting the legal authority (*hujjiyat*) [and the finality][ix] of the [Canadian] judgment. Therefore, the requirements stipulated [in the applicable provisions][x] for its enforcement have been satisfied. In addition, it has not been established that the courts [of the UAE] have exclusive jurisdiction over the dispute subject of the foreign judgment, nor that the [foreign] judgment is [rendered] in violation of the law of the State of origin or the public policy [in the UAE], or that it is inconsistent with a judgment issued by the UAE courts. Therefore, the [Canadian] judgment is valid as a an "enforceable title" (*sanad tanfidhi*) based on which execution can be pursued.

IV Comments

The decision presented here has both positive and negative aspects. On the positive side, the DSC provides a welcome clarification regarding the meaning of "foreign judgment" for the purposes of recognition and enforcement. In this respect, the DSC aligns itself with the general principle that "foreign judgments" are entitled to enforcement regardless of their designation, as long as they qualify as a "substantive judgment on the merits". This principle has numerous explicit endorsements in international conventions dealing with the recognition and enforcement of foreign judgments[xi] and is widely recognized in national laws and practices.[xii]

However, the DSC's understanding of the Canadian proceedings and the nature of the summary judgment granted by the Canadian court, as well as its attempt to align common law concepts with those of UAE law are rather questionable. In this respect, the DSC's decision shows a degree of remarkable confusion in the using the appropriate legal terminology and understanding fundamental legal concepts. These include (i) the treatment of foreign summary enforcement judgments as ordinary "enforceable titles" (*sanadat tanfidhiyya – titres exécutoires*) under domestic law including domestic judgments rendered in criminal matters; (ii) the

assimilation between summary judgment in common law jurisdictions and *hukm musta'jil* ("summary interlocutory proceedings order" – "*jugement en référé*"); and (iii) the confusion between summary judgment based on substantive legal issues and summary judgment to enforce foreign judgments.

For the sake of brevity, only the third point will be addressed here for its relevant importance. However, before doing so, some light should be shed on the proceedings before the Canadian court.

1. The proceedings before the Canadian Court and the nature of the Canadian Judgment

The unfamiliarity with DSC with the proceedings in Canada and underlying facts is rather surprising for two reasons: i) the proceedings were initiated by the American government in the context of a bilateral cooperation in criminal matters; and ii) the Canadian proceedings was a proceeding to *enforce* a foreign judgment rendered in criminal matters and was not simply a proceeding dealing with substantive legal issues. Therefore, a detailed review of the proceedings before the Ontario is necessary to better understand the peculiarities of the case commented here.

i) Proceedings in the context of mutual cooperation in criminal matters. The case originated in Ontario-Canada as a motion brought by the United States of America represented by the Department of Justice as plaintiff for summary judgment to recognize and enforce a "Restitution Order"[xiii] made against Y (defendant). The Restitution Order was part of Y's sentence in the USA for securities fraud and money laundering. It "*included terms as to payment and listed the victims and amounts to which they were entitled under the order*" [para. 16].

The general procedural context of the Canadian judgment is of utmost relevance. Indeed, the USA sought the enforcement of the Restitution Order on the basis of the Mutual Legal Assistance in Criminal Matters Act. The Act, as it describes itself, aims "*to provide for the implementation of treaties for mutual legal assistance in criminal matters*". According to the Ontario Court, The Act is a "*Canadian domestic legislation enacted to meet Canada's treaty obligations for reciprocal enforcement in criminal matters*" [para. 6]. These treaty obligations are based on the Canada-USA Treaty on Mutual Legal Assistance in Criminal Matters

of 1990 [para. 6].

This is why, before the Canadian Court, one of the main questions [para. 25] was whether the "Restitution Order" could be regarded as "fine" within the meaning of the Act [para. 26]. If this is the case, then the Restitution Order could be enforced as a "*pecuniary penalty* determined by a court of criminal jurisdiction" in the meaning of article 9 of the Act.

On the basis of a "*broad, purposive interpretation of "fine" … aligned with Canada's*" international obligation under the Treaty, the Ontario court considered that "*proceeds of crimes, restitution to the victims of crime and the collection of fines imposed as a sentence in a criminal prosecution*" can be regarded as "fine" for the purpose of the case [para. 30]. In addition, the court characterized the restitution order as "*a pecuniary penalty determined by a court of criminal jurisdiction*" [para. 35], and also described it as an "*order made to repay the individual members of the public who were encouraged to purchase stock at an inflated price by virtue the criminal activity*" [para. 39]. The court ultimately, concluded that "*the Restitution Order made against [Y] is a "fine" within the meaning of… the Act*" [para. 41].

From a conflicts of laws perspective, the question of whether the "Restitution Order" is of a penal nature is crucial. Indeed, it is generally accepted that penal judgments are not eligible to recognition and enforcement. However, nothing prevents derogating from this principle by concluding international conventions or enforcing the civil law component of foreign judgments rendered by criminal courts in criminal proceedings, which orders the payment of civil compensation.[xiv]

Interestingly, before the Canadian court, Y argued that the "Restitution Order" made against him *was not* a "fine" because it was a "*compensatory-type*" order [para. 27]. However, it is clear that it was an attempt to exclude the enforcement of Restitution Order from the scope of application of the Mutual Legal Assistance in Criminal Matters Act. In any event, despite the crucial theoretical and practical importance of the issue, this is not the place to discuss whether the "Restitution Order" was penal or civil in nature. What matters here is the nature of the proceeding brought before the Canadian court which is a summary proceeding to recognize and enforce a foreign judgment. This leads us to the next point.

ii) Nature of the Canadian judgment. It is clear from the very beginning of the case that the USA did not bring an action on the merits but sought "an order for summary judgment *recognizing and enforcing a judgment a Restitution Order made against [Y] as part of his sentence in [the USA] for securities fraud and money laundering*" [para. 1]. Therefore, the case was about a motion for a summary judgment to *enforce a foreign judgment*. In this respect, one of the interesting aspects of the case is that Y also relied on the enforcement of foreign judgments framework and raised, *inter alia*, "a defence of public policy" at common law [para. 79] citing *Beals v, Saldanha* (2003), a leading Canadian Supreme Court judgment on the *recognition and enforcement of foreign judgments* in civil and commercial matters.[xv] The court however dismissed the argument considering that there was "*no genuine issue for trial on the question of a public policy defence against the enforcement in Canada of the Restitution Order*" [para. 82].

Accordingly, if one puts aside the question of enforceability of foreign penal judgments, it is clear that the Canadian judgment was a judgment declaring enforceable a foreign judgment. The very conclusion of the Canadian court makes it even clearer when the court granted USA's motion for summary judgment by *ordering the enforcement in Canada of the Restitution Order* [para. 84]. Accordingly, as discussed in my previous comment on this case, and taking into account the nature of the Canadian judgment, it can be safely said that the Canadian enforcement judgment cannot be eligible to recognition and enforcement elsewhere based on the adage "*exequatur sur exequatur ne vaut*".

2. No… a summary judgment to enforce a foreign judgment is not a summary judgment based on substantive legal issues!

It is widely known that the procedural aspects of the enforcement of foreign judgments largely differ across the globe. However, it is fair to say that there are, at least, two main models (although other enforcement modalities do also exist). Generally speaking, civil law jurisdictions adopt the so-called "*exequatur*" proceeding the main purpose of which is to confer executory power to the foreign judgment and transforms it into a local "enforceable title". On the other hand, in common law jurisdictions, and in the absence of applicable special regimes, the enforcement of foreign judgments is carried out by initiating a new and original

action brought before local court on the foreign judgment.[xvi] The purpose of this action is to obtain an enforceable local judgment that, while recognizing and enforcing the foreign judgment, is rendered as if it were a judgment originally issued by the local court.[xvii] Both procedures result in similar outcome:[xviii] what has been decided by the foreign court will be granted effect in the form. However, *technically*, in civil law jurisdiction it is the foreign judgment itself that is permitted to be enforced in the forum,[xix] while in common law jurisdictions, it is the local judgement alone which is enforceable in the forum.[xx]

Such an enforcement in common law jurisdictions is usually carried out by way of *summary judgment procedure*.[xxi] However, this procedure *should not* be confused with the standard summary judgment procedure used to resolve disputes on the merits within an ongoing case. In fact, it is a distinct process aimed specifically at recognizing and enforcing foreign judgments,[xxii] which is the functionally equivalent counterpart in common law jurisdictions to the *exequatur* procedure.

This is precisely the confusion that the DSC encountered. The Court regarded the Canadian summary judgment as "a civil substantive judgment on the merits", although it was not. Therefore, – and as already explained – the summary judgment rendered in result of this proceeding *cannot* be regarded as "foreign judgment" eligible for recognition and enforcement abroad in application of the principle *"exequatur sur exequatur ne vaut*".

————————————————————-

[i] In my previous post, I translated the term "*hukm musta'jil*" as "summary judgment to highlight the nature of the Canadian procedure. However, from the purpose of UAE law, I think it is better that this word be translated as "summary interlocutory judgment – *jugement en référé*". This being said, for the purpose of this post the terms "summary judgment" will be used to highlight the terminological confusion committed by the DSC.

[ii] In my previous post, I was misled by the inappropriate terminology used in the DSC's decision which referred to this American order as "Rehabilitation order"

(*hukm rad i'tibar*). The term "rehabilitation order" is maintained here as this is the term used by the DSC.

[iii] The DSC made reference to article 85 of Cabinet Resolution No. 57/2018 on the Executive Regulations of Law No. 11/1992 on Civil Procedure Act (hereafter "2018 Executive Regulation"), which was subsequently replaced by article 222 of New Federal Act on Civil Procedure (Legislative Decree No. 42/2022 of 3 October 2022) (hereafter "New 2022 FACP").

[iv] Ibid.

[v] The DSC referred the former Federal Act on Civil Procedure of 1992 (Federal Act No. 11/1992 of 24 February 1992)

[vi] The DSC referred to article 75(2) of the 2018 Executive Regulation as subsequently supplanted by article 212(2) of the New 2022 FACP.

[vii] *Supra* n (3).

[viii] In the original. Italic added.

[ix] In the words of the DSC, the foreign judgment "was not subject to appeal".

[x] *Supra* n (3).

[xi] See Article 3(1)(b) of the HCCH 2019 Judgments Convention; article 4(1) of the HCCH 2005 Choice of Court Convention; article 25(a) of the 1983 Riyadh Convention.

[xii] See eg. the Japanese Supreme Court Judgment of 28 April 1998 defining foreign judgment as "a final judgment rendered by a foreign court on private law relations… regardless of the name, procedure, or form of judgment" "[e]ven if the judgment is called a decision or order".

[xiii] *Supra* n (2).

[xiv] On UAE law on this issue, see my previous post here and the authorities cited therein.

[xv] On this case see, Janet Walker, "*Beals v. Saldanha:* Striking the Comity Balance Anew" 5 *Canadian International Lawyer* (2002) 28; *idem*, "The Great

Canadian Comity Experiment Continues" 120 *LQR* (2004) 365; Stephen G.A. Pitel, "Enforcement of Foreign Judgments: Where *Morguard* Stand After *Beals*" 40 *Canadian Business Law Journal* (2004) 189.

[xvi] Trevor C. Hartley, *International Commercial Litigation* (3rd ed. 2020) 435.

[xvii] Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" 129 LQR (2013) 89.

[xviii] Briggs, *ibid*.

[xix] Peter Hay, *Advance Introduction to Private International Law and Procedure* (2018) 110.

[xx] Briggs, *supra* n (17).

[xxi] Adeline Chong, *Asian Principles for the Recognition and Enforcement of Foreign Judgments* (2021)13.

[xxii] Cf. Hartley, *supra* n (16) 435 pointing out that "*Procedurally*, therefore, a new action is brought; in *substance*, however, the foreign judgment in recognized and enforced" (italic in the original).

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-enfor

ce-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/

The Conflict-of-Laws Provision in

the French Influencer Legislation

by Ennio Piovesani

Certain EU Member States have enacted special rules governing the activities of content creators and influencers. In this context, the French legislature passed Law No. 2023-451 on June 9, 2023, aimed at regulating influencer marketing and addressing potential misconduct by influencers on social media platforms (1). Article 8, I, of Law No. 2023-451 requires that contracts between influencers and (influencer marketing) agents or advertisers, or their representatives, must be made in writing and include a specified set of clauses; failure to comply results in the contract being null.

One such clause mandates '[t]he submission of the contract to French law, notably to the Consumer Code, the Intellectual Property Code, and the present Law, when said contract has as its object or effect the implementation of influencer marketing activities through electronic means targeting notably an audience established on French territory' (Article 8, I, 5°, Law No. 2023-451). Scholars have highlighted the 'innovative' nature of the mechanism set forth in Article 8, I, 5°, Law No. 2023-451 and its resemblance to the (more established) concept of overriding mandatory provisions (2).

(1) LOI n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux

(2) See Sandrine Clavel, Fabienne Jault-Seseke, Droit international privé, Recueil Dalloz 2024, 987, accessed online at Dalloz.fr; see also Ermanno Calzolaio, L'attività pubblicitaria dell'influencer nel diritto francese (Loi n. 451 del 9 giugno 2023), Il Diritto dell'Informazione e dell'Informatica, 2023, no. 6, p. 909, accessed online at Dejure.it).

Israel is not Ukraine: German court orders the return of the child to Israel under the Hague Convention on the Civil Aspects of International Child Abduction

This case note is kindly provided by *Dr. Samuel Vuattoux-Bock*, LL.M. (Kiel), Freiburg University (Germany)

On May 23, 2024, the Stuttgart Higher regional Court (*Oberlandesgericht*), Germany, ordered the return of a child to Israel under the Hague Convention on the Civil Aspects of International Child Abduction. The war waged by Israel following the terrorist attack of October 7, 2023 is not sufficient in itself to establish a concrete risk of physical or psychological harm to the one-year-old child.

1. Facts

The decision is based on the following facts. A couple moved to Israel in 2020. They had a child together in 2023 (with Greek citizenship) in Haifa (northern Israel). In February 2024, the mother of the child (German citizenship) flew to Reutlingen (Germany) without the knowledge and consent of the father. Thereupon, the father filed an application for the return of the child to Israel under the regime of the Hague Convention on the Civil Aspects of International Child Abduction, as Israel is a member state thereof. Both the District Court (*Amtsgericht*) and the Higher Regional Court of Stuttgart ordered the return of the child to Israel.

2. Decision of the Court

The Higher Regional Court ruled that there was no actual, concrete risk of physical or psychological harm within the meaning of Art. 13(1)(b) of the Hague Convention for the child in Israel. The formal state of war in Israel and the region is not sufficient to justify such a risk. Furthermore, the situation is not comparable to the situation in Ukraine, where the same court refused to order the return of the child in 2022. The court based its reasoning on three main points: the alert levels of both the German and Israeli authorities do not indicate a concrete risk to the child's safety; in light of the recent situation in Israel, and in particular the "Iron Dome", there is no concrete risk to the child being in Israel; the situation, despite the state of war in the Middle East, is not comparable to the war situation in Ukraine.

a. Sufficient security level and no concrete danger for the child

The mother argued in court that the threat of "massacres and attacks" in Israel is growing, as is the threat of Hezbollah attacks from Lebanon. The mother also claimed that Hezbollah rockets had been fired into the suburbs of Haifa, where the child lived.

The court first referred to both German and Israeli travel warnings. According to the German authorities, Israel is in a "formal state of war" and an escalation is possible at any time. On the contrary, the Israeli National Emergency Portal of the Home Front Command shows the regions of Tel-Aviv/Haifa/Ashdod-Gimmel and Netanya-West as secured (lowest emergency level "green- full activity"). Since travel warnings alone are not sufficient to establish a danger under Art. 13(1)(b) of the Hague Convention, the Court gave precedence to the security assessment of the Israeli authorities.

For the Court, the risk associated with the current conflict in the Middle East is not sufficiently concrete with respect to the child's situation. To justify its decision, the Court analyzed the various actual security and war events of the past month in Israel. The hostage-taking by the terrorist group Hamas on October 7, 2023 cannot be considered an actual risk today. For the Court, the Israeli offensive in the Gaza Strip makes a repetition of such events "from a realistic point of view" very unlikely (No. 87). Furthermore, the drone and missile attacks

of April 14, 2024, from foreign countries, in particular from Iran, must be analyzed as exceptional and, as such, cannot be taken into account in the assessment of the risk to the child (No. 88). Moreover, the Israeli air defense system “Iron Dome” has been effective in this context (No. 88, 96).
The Court draws the same conclusions with regard to the suicide bombings, explosions and other rocket fire that have occurred on Israeli soil. The Court sees only an abstract risk and a need for increased vigilance. These attacks, as terrorist attacks, are merely “criminal activities of individuals” (No. 91). These events were not presented by the mother in a sufficiently concrete manner to allow the court to see a concrete physical or psychological risk for the child. Finally, the Court bases its decision on the fact that the parents moved to Israel in 2020, informed of the complex situation in the Middle East. The Court cannot ignore that the security situation in Israel has been “tense” for some time (No. 91). For the Court, the situation here is definitely different from the situation in Ukraine.

b. Situation not comparable to Ukraine

The Higher Regional Court of Stuttgart decided in 2022 to refuse the return of a child to Ukraine (specifically Odessa) based on the actual risk according to Art. 13 (1) b) due to the war provoked by Russia. The court explained in detail why the situation in Israel was not comparable.
In contrast to Israel, Ukraine faces a massive, formally organized war, with military troops on its soil (No. 94), coming from a “militarily dominant great power” (No. 97). Israel, on the other hand, faces attacks coming from outside its own country (besides the concrete events around the Gaza Strip). Even taking into account Iran, the concrete threat is not comparable (No. 97). Moreover, the number of victims in the Russian-Ukrainian war since February 2022 is massively not comparable with the (civilian and military) victims in Israel, even taking into account the victims of the Hamas attack on October 7, 2023 (No. 95). Finally, according to the Court, the (so far) efficient Israeli “Iron Dome” provides good security for the entire Israeli territory, in contrast to Ukraine, whose large territory is much harder to defend against air attacks. (No. 96).

3. Comparison with decision from neighbor states toward Israel (France, Belgium)

In the past, some other European courts have found that the explosive situation in the Middle East and Israel constituted a risk within the meaning of Art. 13(1)(b) of the Hague Convention. The Court of Appeal of Brussels, in a decision of 2003, did not find a concrete risk for the child in Israel, but (very similar to the Stuttgart Court) only a general situation for the civilian population, including in view of the then possible war of the USA against Iraq and the training of children with gas masks. A decision of the French Court of Appeal of Chambéry in 2016 (confirmed by the French Cour de Cassation in 2017) decided to order the return of children suffering from AIDS to Israel, justified by the fact that Israel offers a good treatment for AIDS patients and that Israel, even if it experiences difficulties, is "definitely not at war". The question remains whether the court would have made a similar decision today, given the current situation in Israel and the Gaza Strip.

4. Final remarks

It appears that for the Court, the fact that the one-year-old child has not yet experienced a concrete attack in Israel is sufficient to establish a risk under Art. 13(1)(b) of the Hague Convention (this was the case, for example, in the Ukraine decision 2022). In view of the highly unstable situation and the escalation in the region, it is at least questionable to disregard the psychological aspects of experiencing, for example, air defense alerts and such stressful war situations – especially for a very young child. Since the political time is much faster than the judicial time, a strong discrepancy of decision can occur regarding the abduction of children in war zones. On the other hand, the interests of such a young child, who will soon be sent to school and separated from his father for an unknown period of time, must be taken into consideration. It is regrettable that this aspect did not play a major role in the Court's decision. Thus, the state of war in Israel and the Middle East is not only extremely complex in terms of diplomacy and public international law, but also in terms of private international law.

Who is bound by Choice of Court Agreements in Bills of Lading?

According to the doctrine of privity of contract, only parties to a choice of court agreement are subject to the rights and obligations arising from it. However, there are exceptions to the privity doctrine where a third party may be bound by or derive benefit from a choice of court agreement, even if it did not expressly agree to the clause. A choice of court agreement in a bill of lading which is agreed by the carrier and shipper and transferred to a consignee, or third-party holder is a ubiquitous example.

Article 25 of the Brussels Ia Regulation does not expressly address the effect of choice of court agreements on third parties. However, CJEU jurisprudence has laid down that the choice of court agreement may bind a third party in some contexts even in the absence of the formal validity requirements. Effectively, this is a context specific harmonised approach to developing substantive contract law rules to regulate the effectiveness of choice of court agreements. Article 25 of the Brussels Ia Regulation prescribes formal requirements that must be satisfied if the choice of court agreement is to be considered valid. Consent is also a necessary requirement for the validity of a choice of court agreement. (Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* EU:C:2015:334, [26]; Case C 543/10 *Refcomp* EU:C:2013:62, [26]). Although formal validity and consent are independent concepts, the two requirements are connected because the purpose of the formal requirements is to ensure the existence of consent (*Jaouad El Majdoub*, [30]; *Refcomp*, [28]). The CJEU has referred to the close relationship between formal validity and consent in several decisions. The court has made the validity of a choice of court agreement subject to an 'agreement' between the parties (Case C-387/98 *Coreck* EU:C:2000:606, [13]; Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Ruwa Polstereimaschinen GmbH* EU:C:1976:177, [7]; Case C-25/76 *Galeries Segoura SPRL v Societe Rahim Bonakdarian* EU:C:1976:178, [6]; Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravieres Rhenanes SARL* EU:C:1997:70, [15]). The Brussels Ia Regulation imposes upon the Member State

court the duty of examining whether the clause conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated (ibid). The court has also stated that the very purpose of the formal requirements imposed by Article 17 (now Article 25 of Brussels Ia) is to ensure that consensus between the parties is in fact established (Case 313/85 *Iveco Fiat v Van Hool* EU:C:1986:423, [5]).

In similar vein, the CJEU has developed its case law as to when a third party may be deemed to be bound by or derive benefit from a choice of court agreement. In the context of bills of lading, the CJEU has decided that if, under the national law of the forum seised and its private international law rules, the third-party holder of the bill acquired the shipper's rights and obligations, the choice of court agreement will also be enforceable between the third party and the carrier (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti*EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; Cf. Article 67(2) of the Rotterdam Rules 2009). There is no separate requirement that the third party must consent in writing to the choice of court agreement. On the other hand, if the third party has not succeeded to any of the rights and obligations of the original contracting parties, the enforceability of the choice of court agreement against it is predicated on actual consent (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]). A new choice of court agreement will need to be concluded between the holder and the carrier as the presentation of the bill of lading would not *per se* give rise to such an agreement (AG Slynn in *Tilly Russ*).

Article 17 of the Brussels Convention and Article 23 of the Brussels I Regulation did not contain an express provision on the substantive validity of a choice of court agreement. The law of some Member States referred substantive validity of a choice of court agreement to the law of the forum whereas other Member States referred it to the applicable law of the substantive contract (Heidelberg Report [326], 92). However, Article 25(1) of the Brussels Ia Regulation applies the law of the chosen forum (*lex fori prorogatum*) including its choice of law rules to the issue of the substantive validity of a choice of court agreement ('unless the agreement is null and void as to its substantive validity under the law of that Member State').

The CJEU recently adjudicated on whether the enforceability of English choice of court agreements in bills of lading against third party holders was governed by

the choice of law rule on 'substantive validity' in Article 25(1) of the Brussels Ia Regulation. (Joined Cases C 345/22 and C 347/22 *Maersk A/S v Allianz Seguros y Reaseguros SA* and Case C 346/22 *Mapfre España Compañía de Seguros y Reaseguros SA v MACS Maritime Carrier Shipping GmbH & Co*.) The CJEU held that the new provision in Article 25(1) referring to the law of the Member State chosen in the choice of court agreement including its private international law rules is not applicable. A third-party holder of a bill of lading remains bound by a choice of court agreement, if the law of the forum seised and its private international law rules make provision for this. Notwithstanding, the principle of primacy of EU law precludes Spanish special provisions for the subrogation of a choice of court agreement that undermine Article 25 as interpreted by CJEU case law.

In the three preliminary references under Article 267 TFEU, the enforceability of English choice of court agreements between Spanish insurance companies and maritime transport companies was at issue. The insurance companies exercised the right of subrogation to step into the shoes of the consignees and sued the maritime transport companies for damaged goods. The central issue in the proceedings was whether the choice of court agreements concluded in the original contracts of carriage evidenced by the bills of lading between the carrier and the shipper also bound the insurance companies. The transport companies objected to Spanish jurisdiction based on the English choice of court agreements. The Spanish courts referred questions to the CJEU on the interpretation of choice of court agreements under the Brussels Ia Regulation.

At the outset, the CJEU observed that the Brussels Ia Regulation is applicable to the disputes in the main proceedings as the proceedings were commenced by the insurance companies before 31 December 2020. (Article 67(1)(a), Article 127(1) and (3) of the EU Withdrawal Agreement)

The CJEU proceeded to consider whether Article 25(1) of the Brussels Ia Regulation must be interpreted as meaning that the enforceability of a choice of court clause against the third-party holder of the bill of lading containing that clause is governed by the law of the Member State of the court or courts designated by that clause. The CJEU characterised the subrogation of a choice of court agreement to a third party as not being subject to the choice of law rule governing substantive validity in Article 25(1) of the Brussels Ia Regulation. (C 519/19 *DelayFix* EU:C:2020:933, [40]; C 543/10 *Refcomp* EU:C:2013:62, [25]; C

366/13 *Profit Investment SIM* EU:C:2016:282, [23]) The CJEU relied on a distinction between the substantive validity and effects of choice of court agreements (*Maersk*, [48]; AG Collins in *Maersk*, [54]-[56]). The latter logically proceeds from the former, but the procedural effects are governed by the autonomous concept of consent as applied to the enforceability of choice of court agreements against third parties developed by CJEU case law.

Although Article 25(1) of the Brussels Ia Regulation differs from Article 17 of the Brussels Convention and Article 23(1) of the Brussels I Regulation, the jurisprudence of the CJEU is capable of being applied to the current provision (*Maersk*, [52]; C 358/21 *Tilman*, EU:C:2022:923, [34]; AG Collins in *Maersk*, [51]-[54]). The CJEU concluded that where the third-party holder of the bill of lading has succeeded to the shipper's rights and obligations in accordance with the national law of the court seised then a choice of court agreement that the third party has not expressly agreed upon can nevertheless be relied upon against it (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98 *Coreck* EU:C:2000:606, [24], [25] and [30], C 352/13 *CDC Hydrogen Peroxide* EU:C:2015:335, [65]; *Maersk*, [51]; Cf. Article 67(2) of the Rotterdam Rules 2009). In this case, there is no distinct requirement that the third party must consent in writing to the choice of court agreement. The third party cannot extricate itself from the mandatory jurisdiction as 'acquisition of the bill of lading could not confer upon the third party more rights than those attaching to the shipper under it' (C 71/83 *Tilly Russ* EU:C:1984:217, [25]; C-159/97 *Castelletti* EU:C:1999:142, [41]; C 387/98*Coreck* EU:C:2000:606, [25]; *Maersk*, [62]). Conversely, where the relevant national law does not provide for such a relationship of substitution, that court must ascertain whether that third party has expressly agreed to the choice of court clause (C 387/98 *Coreck* EU:C:2000:606, [26]; C 543/10 *Refcomp* EU:C:2013:62, [36]; *Maersk*, [51]).

According to Spanish law, a third-party to a bill of lading has vested in it all rights and obligations of the original contract of carriage but the choice of court agreement is only enforceable if it has been negotiated individually and separately with the third party. The CJEU held that such a provision would undermine Article 25 of the Brussels Ia Regulation as interpreted by the CJEU case law (*Maersk*, [60]; AG Collins in *Maersk*, [61]). As per the principle of primacy of EU law, the national court has been instructed to interpret Spanish law to the greatest extent possible, in conformity with the Brussels Ia Regulation

(*Maersk*, [63]; C 205/20*Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* EU:C:2022:168) and if no such interpretation is possible, to disapply the national rule (*Maersk*, [65]).

The choice of law rule in Article 25(1) is not an innovation without utility. A broad interpretation of the concept of substantive validity would encroach upon the autonomous concept of consent developed by CJEU case law yet it could avoid the need for a harmonised EU substantive contract law approach to the enforceability of choice of court agreements against third parties. The CJEU in its decision arrived at a solution that upheld the choice of court agreement by the predictable application of its established case law without disturbing the status quo. In practical terms, the application of the choice of law rule in Article 25(1) would have led to a similar outcome. However, the unnecessary displacement of the CJEU's interpretative authorities on the matter would have increased litigation risk in multi-state transactions. By distinguishing substantive validity from the effects of choice of court agreements, the CJEU does not extrapolate the choice of law rule on substantive validity to issues of contractual enforceability that are extrinsic to the consent or capacity of the original contracting parties. On balance, a departure from the legal certainty provided by the extant CJEU jurisprudence was not justified. It should be observed that post-Brexit, there has been a resurgence of English anti-suit injunctions in circumstances such as these where proceedings in breach of English dispute resolution agreements are commenced in EU Member State courts.

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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.

The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects

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Introduction

After extensive negotiations, on 24 April 2024, the European Parliament approved the Corporate Sustainability Due Diligence Directive (CSDDD or CS3D) as part of the EU Green Deal. Considering the intensive discussions, multiple changes, and the upcoming elections in view, the fate of the Commission's proposal has been uncertain. The Directive marks an important step in human rights and environmental protection, aiming to foster sustainable and responsible corporate behaviour throughout global value chains. Some Member States have incorporated similar acts already, and the Directive will expand this to the other Member States, which will also ensure a level playing field for companies

operating in the EU. It mandates that companies, along with their associated partners in the supply chain, manufacturing, and distribution, must take steps to avoid, halt, or reduce any negative effects they may have on human rights and the environment. The Directive will apply to big EU companies (generally those with more than 1,000 employees and a worldwide turnover of more than EUR 450 000 000) but also to companies established under the law of a third country that meet the Directive's criteria (Article 2 CSDDD).

Among the CSDDD's key provisions is the rule on civil liability enshrined in Article 29. This rule states that companies shall be held liable for damages caused in breach of the Directive's provisions. Accompanying such a rule are also some provisions that deal with matters of civil procedure and conflict of laws, though as has been pointed out earlier on this blog by Kilimcioglu, Kruger, and Van Hof, the CSDDD is mostly silent on PIL. When the Commission proposal was adopted in 2022, Michaels and Sommerfeld elaborated earlier on this blog on the consequences of the absence of rules on jurisdiction in the CSDDD and referred to the Recommendation of GEDIP in this regard. The limited attention for PIL aspects in the CSDDD is does not mean that the importance of corporate sustainability and human rights is not on the radar of the European policy maker and legislator. In the context of both the ongoing evaluation of the Rome II Regulation and Brussels I-bis Regulation this has been flagged as a topic of interest.

This blog post briefly discusses the CSDDD rules on conflict of laws and (international) civil procedure, which underscore the growing importance of both in corporate sustainability and human rights agendas.

Conflict of laws and overriding mandatory provisions

The role of PIL in the agenda of business and human rights has increasingly received scholarly attention. Noteworthy works addressing this intersection include recent contributions by Lehmann (2020), as well as volumes 380 (Van Loon, 2016) and 385 (Marrella, 2017) of the *Collected Courses of The Hague Academy of International Law*. Additionally, pertinent insights can be found in the collaborative effort of Van Loon, Michaels, and Ruiz Abou-Nigm (eds) in their comprehensive publication, The Private Side of Transforming our World (2021). From an older date is a 2014 special issue of Erasmus Law Review, co-edited by Kramer and Carballo Piñeiro on the role of PIL in contemporary society.

While the CSDDD contains only a singular rule on PIL, specifically concerning overriding mandatory provisions, it should be viewed in the broader EU discourse. The relevance of PIL for the interaction between business and human rights extends beyond this single provision, as evidenced by the Commission's active role in shaping this development. As indicated earlier, this is further indicated by studies on both the Rome II and Brussels I-bis Regulations, both of which delve into the complexities of PIL within the business and human rights debate. Thus, the CSDDD's rule should not be viewed in isolation, but as part of a larger, dynamic conversation on PIL in the EU.

The mentioned Rome II Evaluation Study (2021) commissioned by the Commission, summarised on this blog here, assessed Rome II's applicability to matters pertaining to business and human rights in detail. With regards to overriding mandatory provisions, the study outlines several initiatives at national level in the Member States that were discussed or approved to enact a mandatory corporate duty of care regarding human rights and the environment. Likewise, the Brussels I-bis Evaluation Study (2023) also examined how the Brussels I-bis applies to business and human rights disputes. Within the EU, establishing jurisdiction over EU-domiciled companies is straightforward under the Regulation, but it becomes complex for third-country domiciled defendants. Claims against such defendants are not covered by the Regulation, leaving jurisdiction to national laws, resulting in varied rules among Member States. *Forum necessitatis* and co-defendants rules may help assert jurisdiction, but lack harmonization across Europe. In this context, as explained by Michaels and Sommerfeld, while the CSDDD applies to certain non-EU firms based on their turnover in the EU (Article 2(2)), jurisdictional issues persist for actions against non-EU defendants in EU courts, with jurisdiction typically governed by national provisions. This could result in limited access to justice within the EU if relevant national rules do not establish jurisdiction.

As was mentioned above, the CSDDD is mostly silent on PIL. However, it does include a rule on overriding mandatory provisions enshrined in Article 29(7) and accompanying Recital 90. This rule aims to ensure the application of the (implemented) rules of the CSSDD regardless of the *lex causae.* Under EU private international law rules, the application of overriding mandatory provisions is also enabled by Article 9 Rome I Regulation and Article 16 Rome II Regulation.

Article 29(7) CSDDD states that 'Member States shall ensure that the provisions

of national law transposing' Article 29 CSDDD 'are of overriding mandatory application in cases where the law applicable to claims to that effect is not the national law of a Member State'. A similar provision to that effect can be found in the draft UN Legally Binding Instrument on business and human rights.

This means that the national laws transposing Article 29 CSDDD in their liability systems are applicable irrespective of any other conflict of law provisions in force. This rule also extends to the matters of civil procedure addressed below, as explicitly stated by Recital 90 CSDDD. On this matter, the potential for the CSDDD to become a dominant global regulatory force and overshadow existing and future national regulations, which is only beneficial if effectively prevents and remedies corporate abuses, has been highlighted. However, there is concern that it might mitigate the development of stronger regulatory frameworks in other countries (see FIDH, 2022).

Matters of civil procedure

The rules contained in the CSDDD that pertain to civil procedure are essentially laid down in Article 29(3). These rules on civil procedure naturally apply to both domestic cases and cross-border situations.

Firstly, Article 29(3)(b) CSDDD states that the costs of judicial proceedings seeking to establish the civil liability of companies under the Directive shall not be prohibitively expensive. A report published in 2020 by the EU Agency for Fundamental Rights (FRA) on 'Business and human rights – access to remedy' stressed that private individuals face significant financial risks when resorting to courts due to high costs such as lawyer fees, expert opinions, and potential liability for the opposing party's costs, particularly daunting in cases involving large companies. Suggestions for improvement include making litigation costs proportionate to damages, providing free legal representation through state bodies, and setting thresholds for the losing party's financial obligations, along with supporting civil society organizations offering financial and legal aid to victims of business-related human rights abuses. Secondly, Article 29(3)(c) CSDDD provides the possibility for claimants to seek definitive and provisional injunctive measures, including summarily, of both a restorative or enforcing nature, to ensure compliance with the Directive. Lastly, Article 29(3)(d) and (e) CSDDD, respectively, outline rules on collective actions and disclosure of evidence, the latter two explained below.

Collective actions

The FRA report mentioned above emphasized that many legal systems in the EU lack effective collective redress mechanisms, leading to limited opportunities for claimants to seek financial compensation for business-related human rights abuses. Existing options often apply only to specific types of cases, such as consumer and environmental protection, with procedural complexities further restricting their scope. Article 29(3)(d) CSDDD ensures that collective action mechanisms are put in place to enforce the rights of claimants injured by infringements of the Directive's rules. This provision states that 'Member States shall ensure that […] reasonable conditions are provided for under which any alleged injured party may *authorise*' the initiation of such proceedings. In our view, if this provision is interpreted in a similar way as the alike-rule on private enforcement contained in Article 80(1) GDPR (which uses the synonym 'mandate'), then this collective action mechanism shall operate on an opt-in basis (see Pato & Rodriguez-Pineau, 2021). The wording of both provisions points to a necessity of explicit consent from those wishing to be bound by such actions. Recital 84 CSDDD further underscores this interpretation by stating that this authorisation should be 'based on the explicit consent of the alleged injured party'. Importantly, this is unrelated to the collective enforcement of other obligations, outside the scope of the CSDDD, that may impinge upon the types of companies listed in Article 3(1)(a) CSDDD, like those stemming from financial law and insurance law (e.g. UCITS Directive, EMD, Solvency II, AIFMD, MiFID II, and PSD2). All the latter are included in Annex I Representative Actions Directive (RAD) and therefore may be collectively enforced on an opt-out basis pursuant to Article 9(2) RAD (see Recital 84 CSDDD).

Furthermore, Article 29(3)(d) CSDDD grants the Member States the power to set conditions under which 'a trade union, non-governmental human rights or environmental organisation or other non-governmental organisation, and, in accordance with national law, national human rights' institutions' may be authorized to bring such collective actions. The Directive exemplifies these conditions by mentioning a minimum period of actual public activity and a non-profit status akin to, respectively, Article 4(3)(a) and (c) RAD, as well as Article 80(1) GDPR.

In our view, the most relevant aspect of the collective action mechanism set by the CSDDD is that it provides for the ability to claim damages. Indeed, Article

29(3)(d) CSDDD allows the entities referred therein to 'enforce the rights of the alleged injured party', without making any exceptions as to which rights. This is an important recognition of the potentially pervasive procedural imbalance that can affect claimants' abilities to pursue damages against multinational corporations in cases of widespread harm (see Kramer & Carballo Piñeiro, 2014; Biard & Kramer, 2018; Buxbaum, *Collected Courses of The Hague Academy of International Law* 399, 2019).

Disclosure of evidence

Finally, Article 29(3)(e) CSDDD enacts a regime of disclosure of evidence in claims seeking to establish the civil liability of companies under the Directive. This provision, similar to Article 6 IP Enforcement Directive, Article 5 Antitrust Damages Directive, and Article 18 RAD, seeks to remedy the procedural imbalance of evidentiary deficiency, existent when there is economic disparity between the parties and unequal access to factual materials (see Vandenbussche, 2019).

When a claim is filed and the claimant provides a reasoned justification along with reasonably available facts and evidence supporting their claim for damages, courts can order the disclosure of evidence held by the company. This disclosure must adhere to national procedural laws. If such a disclosure is requested in a cross-border setting within the EU, the Taking of Evidence Regulation also applies.

Courts must limit the disclosure of evidence to what is necessary and proportionate to support the potential claim for damages and the preservation of evidence. Factors considered in determining proportionality include the extent to which the claim or defense is supported by available evidence, the scope and cost of disclosure, the legitimate interests of all parties (including third parties), and the need to prevent irrelevant searches for information.

If the evidence contains confidential information, especially regarding third parties, Member States must ensure that national courts have the authority to order its disclosure if relevant to the claim for damages. Effective measures must be in place to protect this confidential information when disclosed.

Outlook

The CSDDD regime on civil procedure described above largely follows the EU's 'silo mentality' (Voet, 2018) of enacting sectoral-based and uncoordinated collective action mechanisms tied to a specific area of substantive law, such as consumer law, non-discrimination law, and environmental law (e.g. UCTD, RED, UCPD, IED, EIAD, etc.). An important difference being, however, that this time the RAD is already in force and being implemented. On this matter, Recital 84 CSDDD states that Article 29(3)(d) CSDDD 'should not be interpreted as requiring the Member States to extend the provisions of their national law' implementing the RAD.

However, being the first EU-wide collective action mechanism and prompting historically collective action-sceptic Member States to adapt accordingly, it is conceptually challenging to posit that the RAD would not potentially influence regimes on collective actions beyond consumer law, including the CSDDD. In this context, it would not deviate significantly from current developments if some Member States opted for a straightforward extension of their existing and RAD-adapted collective action regimes to the CSDDD, though that demands caution to the latter's specificities and is not legally required.

Another aspect worthy of attention is how these collective actions would be funded. Since such actions may seek damages compensation for widespread harm under Article 29 CSDDD, they can become notably complex and, consequently, expensive. At the same time, a large number of injured persons can mean that these collective actions will ask for high sums in damages. These two factors combined make these collective actions an enticing investment opportunity for the commercial third-party litigation funding (TPF) industry. The CSDDD does not make any reservations in this regard, leaving ample room for Member States to regulate, or not, the involvement of commercial TPF. A report published in mid last year by Kramer, Tzankova, Hoevenaars, and Van Doorn by request of the Dutch Ministry of Justice and Security found that nearly all collective actions seeking damages in the Netherlands make use of commercial TPF. This underscores the crucial role commercial TPF plays in financing such actions, significantly impacting access to justice.

Moreover, the complexities surrounding the integration of PIL into specialized legislation such as the CSDDD, the GDPR, and the anti-SLAPPs Directive reflect a tension between the European Parliament and the Commission. This tension revolves around the extent to which PIL should be addressed within specialized

frameworks versus traditional EU legislation on PIL. So far, a clear direction in this regard is lacking, which will trigger further discussions and potential shifts in approach within the EU legislative landscape.