Which law governs disputes involving corporations?

Guest post by Dr Sagi Peari, Senior Lecturer/Associate Professor at the University of Western Australia

When it comes to the question of the applicable law that governs disputes involving corporations: one must make a sharp distinction between two principal matters: (1) matters relating to external interactions of corporation (such as disputes between a corporation and other external actors, such as other business entities or individuals); and (2) matters relating to the internal interactions of a corporation (such as disputes within the corporate structure or litigation between a corporation and its directors). A claim of a corporation against another in relation to a breach of contract between the two is an example of a dispute related to external affairs of a corporation. A claim of a corporate shareholder against a director in the firm is an example of a dispute concerning corporate internal affairs.

The division between external and internal affairs of corporation is an important one for the question of applicable law. A review of the case law suggests a strong tendency of the courts to apply the same choice-of-law rules applicable to private individuals. Thus, the general rule of the place of tort applies equally to corporations and private individuals.[1] In similar, the advancing principle of party autonomy[2] does not distinguish between corporations and other litigants on its operational level. The very fact that litigation involves a corporation does not seem *prima facie* to affect the identity of the applicable law rules.

The situation becomes dramatically different in cases concerning the internal affairs of a corporation. These are the situations involving claims between the corporate actors (i.e. executives, shareholders and directors) and claims between those actors and the corporation itself. Here, different considerations seem to apply. *First*, internal affairs of corporations tend to be excluded by the various international statutes aiming to harmonise the applicable law rules.[3] *Second*, there is a clear tendency of the rules to adhere to a single connecting factor (such as the place of incorporation or corporate headquarters with some further constitutional implications[4]) to determine the question of the applicable law.

Thirdly, there is a clear tendency of rejecting the party autonomy principle in this sphere according to which corporate actors are not free to determine the applicable law to govern their dispute.[5]

One of the neglected frameworks for addressing the external/internal affairs distinction relates to the classical corporate law theory on the nature of corporations and the relationships within the corporate structure. Thus, the classical vision of corporations perceives a corporation as an artificial entity that places the state at the very centre of the corporate creation, existence and activity.[6] Another, perhaps contradictory vision, challenges the artificial nature of corporation. It views corporation as an independent moral actor what dissects its existence from the originating act of incorporation.[7] Lastly, the third vision of corporation evaluates the corporate existence from the internal point of view by focusing on the bundle/nexus of contracts within the corporate structure.[8]

One could argue that an exercise of tackling the various theories of corporations could provide an invaluable tool for a better understanding of the internal/external division and subsequently shed light on the question of applicable law rules. Thus, for example, the traditional insistence of choice-of-law to equalise between corporations and private individuals seems to correlate with the 'personality' vision of corporation. On a related note, the insistence of the choice-of-law doctrine on a single connecting factor that denies party autonomy seems to be at odds with the nexus-contract theory and aligns with the traditional artificial entity theory of the corporation.

From this perspective, placing this question within the conceptual framework of corporate law could enable us to grasp the paradigmatic nature of the division and contemplate on whether the various suggestions for reform in the area of choice-of-law rules applicable to corporations do not just correlate with the underlying concerns and rationales of private international law/conflict of laws, but also those of corporate law.

I have tackled these (and other) matters in my recent article published in the 45 (3) *Delaware Journal of Corporate Law* 469-530 (2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905751.

[1] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual

Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 4 (1).

[2] See eg Hague Principles on Choice of Law in International Commercial Contracts, 2015.

[3] See eg Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC), art 1 (2) (f).

[4] See eg Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, 2 C.M.L.R. 551 (1999).

[5] See eg Hague Principles, Commentaries, 1.27-1.29.

[6] See eg *Dartmauth College v Woodward* 17 U.S. 518, 636 (1819)

[7] See eg Peter A French, 'Responsibility and the Moral Role of Corporate Entities', in *Business as Humanity* (Thomas J Donaldson and RE Freeman eds, 1994) 90.

[8] Of course, the distinction between the above-mentioned three theories is not sharp and variations and overlaps have been suggested over the years in the corporate law literature.

Forum Selection Clauses, Afghanistan, and the United States

One Afghanistan-based company sues another in commercial court in Afghanistan. The plaintiff wins at trial. The Afghanistan Supreme Court reverses. It orders the parties to resolve their dispute in the United States. The plaintiff files suit in the United States. Chaos ensues.

This may sound like an unlikely scenario. It is, however, a concise description of the facts presented in Nawai Wardak Transportation Co. v. RMA Grp. Afghanistan

Ltd, No. 350393 (Mich. Ct. App. 2021). This case is noteworthy for a number of reasons. It offers insights into best drafting practices for choice-of-court clauses. It illustrates how U.S. courts decide whether these clauses should be enforced. And it suggests that the Afghanistan Supreme Court takes the principle of party autonomy pretty seriously.

In July 2012, the United States Agency for International Development ("USAID") contracted with Aircraft Charter Solutions ("ACS") to perform aircraft flight operations out of Kabul International Airport in Afghanistan. ACS entered into a contract with RMA Afghanistan ("RMA"), an Afghanistan-based company, to supply fuel to locations throughout Afghanistan. RMA, in turn, entered into a contract with Nawai Wardak Transportation Company ("NWTC"), another Afghanistan-based company, to supply fuel in support of the contract between USAID and ACS. The contract between RMA and NWTC contained the following provision:

> *The parties irrevocably agree that the courts of the United States of America shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).*

Roughly a year after the RMA-NWTC contract was signed, a dispute arose. NWTC demanded payment. RMA refused. NWTC brought a suit against RMA in commercial court in Afghanistan and won a judgment. The Supreme Court of Afghanistan reversed the judgment of the lower court. It concluded that the case should have been dismissed because the parties had previously agreed in their choice-of-court clause to litigate all disputes in the United States.

Undeterred, NWTC filed suit against RMA in state court in Michigan. RMA immediately moved to dismiss the Michigan lawsuit on the grounds that the state court lacked personal jurisdiction over it. It argued that it had only consented to suit in federal court via the choice-of-court clause. It pointed out that that clause referred to the courts "of" the United States of America. It then argued that this language necessarily excluded state courts because these courts were only "of" the State of Michigan. They were not courts of the United States as a whole.

NWTC responded to this argument by pointing out that the case could not be heard in federal court because those courts lacked subject-matter jurisdiction on

the facts presented. If the clause were interpreted the manner suggested by RMA, the plaintiff contended, then the choice-of-court clause would be rendered a nullity because no court in the United States could hear the claim and it would be deprived of a remedy altogether.

The state trial court in Michigan ruled in favor of RMA and dismissed the case. This decision was then appealed to the Court of Appeals of Michigan. That court acknowledged that "the dictionary definition of 'of' supports that, while Michigan courts may be in the United States, they are not of the United States." The court then went on to conclude, however, that dictionary definitions are not conclusive:

> *We are not constrained to follow dictionary definitions when interpreting a contract, and the effect of interpreting the forum-selection clause to refer exclusively to federal courts is to deprive both parties of a forum in which to resolve their contract disputes. In other words, for either party to have had a legal remedy for the other party's failure to perform under the subcontract, the parties must have intended "courts of the United States of America" as a geographical designation encompassing both federal and state courts. Any other reading of the forum-selection clause would render it nugatory, which is to be avoided when interpreting contracts.*

The court of appeals then considered the defendant's argument that if the clause was interpreted to refer to any state court in the United States, it would become so "overbroad and so lacking in specificity" that "enforcing it would be unreasonable and unjust." The court held that this argument had not been fully developed in the proceedings below. Accordingly, it remanded the case for further consideration by the lower court.

This case presents a number of interesting issues relating to choice-of-court clauses. The first has to do with contract drafting. As a matter of best practice, it is better to name a specific U.S. state in which a suit must be brought rather than the United States as a whole. If the clause selects the nation as a whole, however, it is better to select the courts "in" in the United States rather than courts "of" the United States to make clear that the suit may be brought in either state or federal court.

The second issue relates to clause enforcement. U.S. courts routinely decline to give effect to choice-of-court clauses selecting courts that lack subject-matter

jurisdiction to hear the dispute. If the chosen forum lacks the power to resolve the case, these courts reason, the parties may sue wherever they want. The Court of Appeals of Michigan recognized this fact and rightly rejected the defendant's arguments that would have produced a contrary result.

The third issue relates to the need for specificity in identifying the chosen forum. Under ordinary circumstances, a clause selecting the courts of "any" U.S. state would not be enforceable because it does not clearly identify where the suit may proceed. In the unique facts presented in the case described above, however, the lack-of-specificity argument is unlikely to carry the day because, if accepted, it would result in no court being able to hear the dispute.

Finally, it is important to note that the State of Michigan has adopted a statute that clearly spells out when its courts should and should not give effect to choice-of-court clauses. This is unusual. Only three other U.S. states—Nebraska, New Hampshire, and North Dakota—have adopted similar statutes based on the Model Choice of Forum Act. Judges in the remaining U.S. states apply judge-made common law to decide the issue of enforceability. The Michigan approach has a lot of recommend to it because it provides a clear, concise, and unchanging set of factors for the courts to consider when analyzing this issue.

Extraterritorial Application of Chinese Personal Information Protection Law: A Comparative Study with GDPR

Written by Huiying Zhang, PhD Candidate at the Wuhan University Institute of International Law

China enacted the Personal Information Protection Law (PIPL) at the 30th Session of the Standing Committee of the 13th National People's Congress on August 20,

2021. This is the first comprehensive national law in China concerning personal information protection and regulating the data processing activities of entities and individuals. PIPL, the Cyber Security Law (came into force on June 1, 2017) and Data Security Law (promulgated on September 1, 2021) constitute the three legal pillars of the digital economy era in China.

PIPL includes eight chapters and 74 articles, covering General Provisions, Rules for Processing Personal Information, Rules for Cross-border Provisions of Personal Information, Rights of Individuals in Activities of Processing Personal Information, Obligations of Personal Information Processors, Departments Performing Duties of Personal Information Protection, Legal Liability and Supplementary Provisions. This note focuses on its extraterritorial effect.

1.Territorial Scope

Article 3 of the PIPL provides:

"This Law shall apply to activities conducted by organizations and individuals to control the personal information of natural persons within the territory of the People's Republic of China.

This Law shall also apply to activities outside territory of the People"s Republic of China to handle the personal information of natural persons within the territory of the People's Republic of China under any of the following circumstances:

a . personal information handling is to serve the purpose of providing products or services for natural persons within the territory of the People's Republic of China;

1. *personal information handling is to serve the purpose of analyzing and evaluating the behaviors of natural persons within the territory of the People' s Republic of China; or*
2. *having other circumstances as stipulated by laws and administrative regulations."*

According to paragraph 1 of Art 3, PIPL applies to all data processing activities of personal information carried out in China. If foreign businesses processes or

handles the personal information within the territory of China, in principle, they shall comply with the PIPL. It indicates that this clause focuses on the activities of processing or handling personal information in the territorial of China, especially the physical link between the data processing or handling activities and Chinese territory.

According to paragraph 2 of Art 3, the PIPL shall be applicable to activities outside the territory of China in processing or handling the personal information within China under some circumstances. As provided in Art 53, "personal information handlers outside the borders of the People' s Republic of China shall establish a dedicated entity or appoint a representative within the borders of the People' s Republic of China to be responsible for matters related to the personal information they handle". Notably, this clause focuses on the physical location of the data processors or handlers rather than their nationality or habitual residence.

PIPL has extraterritorial jurisdiction to data processing or handling activities outside the territorial of China under 3 circumstances as provided in paragraph 2 of Art 3 of the PIPL. This is the embodiment of the effect principle, which derives from the objective territory jurisdiction and emphasizes the influence or effect of the behavior in the domain. If the purpose is to provide products or services to individuals located in China, or to analyze the behaviors of natural person in China, the PIPL shall be applicable. Crucially, the actual "effect" or "influence" of data processing or handling is emphasized here, i.e. when it is necessary to determine what extent or what requirements are met of the damage caused by the above-mentioned data processing or handling activities outside the territorial of China, Chinese courts may reasonably exercise the jurisdiction over the case. Obviously, it reflects the consideration of the element of "brunt of harm". However, if the "effect" or "influence" is not specifically defined and limited, there will be a lot of problems. It is important to figure out exactly whether data processors or handlers outside the territorial of China are aware of the implications of their actions on natural person within China and whether the "effect" or "influence" of the data-processing behaviors are direct, intentional and predictable.

The PIPL explicitly states its purported extraterritorial jurisdiction for the first time and insists on the specific personal jurisdiction and the effect principle. It is mainly because the PIPL is formulated "in order to protect personal information

rights and interests, standardize personal information handling activities, and promote the rational use of personal information", but in the process of legal protection of personal information of natural person, there are a lot of challenges, such as the contradiction between the application of traditional jurisdiction, the virtual nature of personal information and so on. In this sense, all jurisdiction of the PIPL, whether territorial jurisdiction or personal jurisdiction or effect principle, are all further supplements for the existing personal information protection regime previously provided.

2.PIPL and GDPR: a Comparative Study

The provisions on jurisdiction of GDPR are mainly concentrated in Art 3 and Art 23, 24, 25, 26, 27 of preambular 2. In Art 3, paragraph 1 and 2 identified "establishment principle" and "targeting principle" and paragraph 3 provides "This regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law".

A. Establishment Principle

Under paragraph 1 of Art 3, GDPR applies to "the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not." It set the "establishment criterion", which has the dual characteristics of territorial jurisdiction and extraterritorial jurisdiction.

Compared with establishment criterion in GDPR, the PIPL indicates that personal information handlers outside the territorial of China shall establish a dedicated entity or appoint a representative within China as previously mentioned. It highlights the significance and necessity of establishing an entity when foreign data handlers process the personal information of national persons outside China under circumstance in paragraph 2 of Art3 of PIPL.

B. Targeting Principle

Compared with targeting criterion in GDPR, PIPL has many differences. Paragraph 2 of Art 3 of the GDPR clearly states that for data processors and

controllers that do not have an establishment in the EU, GDPR will apply in two circumstances. Firstly, as stated in Art 3 of GDPR, the processing activities relate to "the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union" (Art 2 GDPR). It seems too abstract to give the definition and processing method of data processor and controller' s behavior intention. Art 23 of the GDPR provides the clarification that "it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union." The key factor to assess whether the processor or controller "targets" the EU is whether the behaviour of the offshore data processors or controllers indicates their apparent intention to provide goods or services to data subjects in the EU. This is an objective subjective test.

In contrast, Art 3 of the PIPL states that the law shall apply when the data processor processes personal information "to serve the purpose of providing products or services for natural persons within the territory of the People' s Republic of China". It indicates that the purpose of data processor or controller outside China is to provide a product or service to a domestic natural person in China. The key to the application is not only about whether it has purpose, but also about whether they have processed personal information of a natural person in China.

Secondly, the procession activities are in related to "the monitoring of their behaviour as far as their behaviour takes place within the Union". It requires both the data subject and the monitored activity be located within the EU. "Monitoring" shall be defined in accordance with Article 24 of the GDPR preamble. This provision does not require the data processors or controllers to have a corresponding subjective intent in the monitoring activity, but the European Data Protection Board (Hereinafter referred to as EDPB) pointed out that the use of the term "monitoring" implied that the data controllers or processors had a specific purpose, namely to collect and process the data. Similarly, Art 3 of the PIPL also applies to activities outside China dealing with personal information of natural persons within China, if the activities are to analyse and evaluate the acts of natural persons within China. The meaning of "analysis and evaluation" here is very broad and seems to cover "monitoring" activities under the GDPR.

Furthermore, paragraph 3 of Art 3 of the GDPR provides: "This Regulation applies

to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law." It suggests that the data processor or controller does not have an establishment in the territory of the EU and there is no circumstances under paragraph 2 of Art 3 of the GDPR. Due to that the international law applies EU member state law in the area where the numerical controller is located, this law shall apply. This condition is primarily aimed at resolving the issue of extraterritorial jurisdiction over data processing or controlling that takes place in EU without an establishment. This condition is similar to Directive 95/46 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The similar condition is not included in the PIPL, which instead shall apply to other circumstances "as stipulated by laws and administrative regulations".

C. Passive personality principle

Under the passive personality principle, a state has prescriptive jurisdiction over anyone anywhere who injures its nationals or residents. As previously mentioned, paragraph 2 of Art 3 of the GDPR states that although the personal data processors or controllers are not established in the EU, EU still applies the laws of member states in accordance with public international law. Art 25 of the preamble of GDPR provides examples of such situations which may include a Member State's diplomatic mission or consular post.

To some extent, GDPR includes all the personal data processing activities involving natural persons situated in the EU area into its jurisdiction, which is a variation of the passive nationality principle. It is because EU treats the individual data right as a fundamental human right and aims to establish a digital market of the unified level of protection. PIPL adopts the similar practice by adopting the passive nationality principle to protect Chinese citizens and residents.

3.Conclusion

The promulgation of PIPL shows that China recognizes the extraterritorial effect of data protection law. The exploration of legislation not only has the meaning of localization, but also contributes to the formulation of data rules for the international community. It marks an important step towards China' s long-term

goal of balancing the preservation of national sovereignty, the protection of individual rights and the free flow of data across borders.

The Nigerian Court of Appeal recognises the Immunity of the President of the Commission of ECOWAS from being impleaded in Nigerian courts

This is a case note on the very recent Nigerian Court of Appeal's decision that recognised the immunity of the President of the Commission of ECOWAS (Economic Community of West African States) from being impleaded in Nigerian courts.[1]

In Nigeria, the applicable law in respect of diplomatic immunities and privileges is the Diplomatic Immunities and Privileges Act, which implements aspects of the Vienna Convention on Diplomatic Relations 1961 (the "Vienna Convention"). Under the Diplomatic Immunities and Privileges Act, foreign envoys, consular officers, members of their families, and members of their official and domestic staff are generally entitled to immunity from suit and legal process.[2] Such immunities may also apply to organisations declared by the Minister of External Affairs to be organisations, the members of which are sovereign powers (whether foreign powers or Commonwealth countries or the Governments thereof).[3]

Where a dispute arises as to whether any organisation or any person is entitled to immunity from suit and legal process, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact.[4]

In a very recent case the claimant/respondent who was a staff of the Commission

of ECOWAS sued the defendant/appellant in the National Industrial Court in Nigeria for orders declaring his suspension from office by the Commission unlawful and a violation of ECOWAS Regulations, and damages from the defendant/appellant for publishing what the claimant/respondent considered a "libelous" suspension letter. The defendant/appellant responded to the suit with a statement of defence and equally filed a motion of notice objecting to the jurisdiction of the National Industrial Court on grounds of diplomatic immunity he enjoys from proceedings in municipal courts of Nigeria by virtue of the Revised Treaty of ECOWAS, General Convention on Privileges and Immunities of ECOWAS and the Headquarters Agreement between ECOWAS and the Government of the Republic of Nigeria. He also placed reliance on Principles of Staff Employment and ECOWAS staff Regulations. In addition he attached a certificate from Nigeria's Minister of Foreign Affairs which acknowledged his diplomatic immunity.

The trial court (Haastrup J) held that it had jurisdiction and dismissed the preliminary objection of the defendant/appellant. It relied on Section 254C (2)[5] of the 1999 Constitution (as amended in 2011) and Order 14A Rule 1 (1)[6] of the National Industrial Court of Nigeria(Civil Procedure) Rules, 2017 to hold that the National Industrial Court had jurisdiction to resolve all employment matters in Nigeria, including cases that have an international element.

The Nigerian Court of Appeal unanimously allowed the appeal. Ugo JCA in his leading judgment held as follows:

"So this Certificate of the Minister of Foreign Affairs of Nigeria attached to the affidavit of Chika Onyewuchi in support of appellant's application/objection before the trial National Industrial Court for the striking out of the suit is sufficient and in fact conclusive evidence of the immunity claimed by appellant. That also includes the statement of the Minister in paragraph 2 of the same certificate that the ECOWAS Revised Treaty of 1993 was *"ratified by the Federal Republic of Nigeria on 1st July, 1994,"* thus, putting paid to the trial Judge's contention that appellant needed to prove that the said treaty was ratified by Nigeria for him to properly claim immunity.
Even Section 254C(2) of the 1999 Constitution of the Federal Republic of Nigeria which states that 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any

international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith,' does not by any means have the effect of conferring jurisdiction on the National Industrial Court over diplomats. In fact Section 254C(2) of the 1999 Constitution, as was correctly argued by Mr. Obi, only confers on the National Industrial Court power to apply international conventions, protocols and treaties ratified by Nigeria relating to labour, employment, workplace, industrial relations and matters connected therewith while exercising its jurisdiction over persons subject to its jurisdiction. Diplomats who enjoy immunity from Court processes from municipal Courts in Nigeria like the Respondent are not such persons. Incidentally, the apex Court in *African Reinsurance Corporation v. Abate Fantaye* (1986) 3 NWLR (PT 32) 811 in very similar circumstances conclusively put to rest this issue of immunity from proceedings in municipal Courts enjoyed by persons like appellant. That case was cited to the trial Judge so it is surprising that she did not make even the slightest reference to it in expanding her jurisdiction to appellant who has always insisted, correctly, on his immunity. In truth, the lower Court did not simply expound its jurisdiction but attempted to expand it too. A Court is competent when, among others, the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction…
Appellant's diplomatic status and his consequent immunity from proceedings in the Courts of this country was such a feature that prevented the National Industrial Court from exercising jurisdiction over him and Suit No. NICN/ABJ/230/2019 of respondent; it was therefore wrong in holding otherwise and dismissing his preliminary objection…"[7]

Adah JCA in his concurring judgment held as follows:

"The Appellant, being an international organization enjoys immunity from suit and legal process, both by virtue of Section 11 and 18 of the 1962 Act, and Certificate issued by the Minister of External Affairs. Where a sovereign or International Organization enjoys immunity from suit and legal process, waiver of such immunity is not to be presumed against it. Indeed, the presumption is that there is no waiver until the contrary is established. Thus, waiver of immunity by a Sovereign or International Organization must be expressly and positively done by that Sovereign or International Organization.

In the instant case, the appellant from the record before the Court is an

international organization. The Foreign Affairs Minister of Nigeria had given a certificate to indicate the immunity of the appellant. Exhibit CA issued by the Ministry of Foreign Affairs on 16th January, 2020 in paragraphs 2 and 3 thereof state as follows:

"2. The ministry of Foreign Affairs wishes to reaffirm the status of the ECOWAS Commission as an international organization and the immunity and privileges of the Commission and its staff members with exception of Nigerians and holders of Nigeria permanent residency from Criminal, Civil and Administrative proceedings by virtue of ECOWAS Revised Treaty by of 1993, which was ratified by the Federal Republic of Nigeria on 1st July, 1994.
3. The Headquarters Agreement between the ECOWAS Commission and the Federal Republic of Nigeria also confers immunity on officials and other employees of ECOWAS by virtue of Article VII (3) (C) of the Agreement."

It is very clear therefore, that the appellant is covered by the Diplomatic Immunities and Privileges Act and is not amenable to the jurisdiction of the Municipal Courts. The fact that their base is in Nigeria or that Nigeria is the Host Country of the appellant does not make the appellant subserviate to the jurisdiction of Nigerian Courts. It is therefore, the law as stated lucidly in the leading judgment of my learned brother that the lower Court has no jurisdiction to entertain the claim against the appellant…"[8]

This is not the first time Nigerian courts have dealt with the issue of impleading a diplomat or foreign sovereign before the Nigerian court.[9] The decision of the trial judge was surprising in view of the weight of authorities from the Nigerian Supreme Court and Court of Appeal on the concept of diplomatic immunities in Nigeria. The claimant/respondent may have argued that matters of employment qualify as waiver of diplomatic immunity, but this position has never been explicitly endorsed by Nigerian courts. The Supreme Court of Nigeria has only accepted the concept of waiver in situations where the person claiming immunity entered into commercial transactions with the claimant.[10]

Looking at the bigger picture how does an employee who has been unfairly dismissed by a diplomatic organisation gain access to justice in Nigerian and African courts? Should the law be reformed in Nigeria and African countries to take into account the interest of employees as weaker parties?

[1] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA).

[2]Diplomatic Immunities and Privileges Act, Cap D9 LFN 2004 ss 1, 3-6.

[3]ibid, ss 11 and 12.

[4]ibid, s 18.

[5] 'Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.'

[6] It provides that:

1.—(1) Where an action involves a breach of or non-compliance with an international protocol, a convention or treaty on labour, employment and industrial relations, the Claimant shall in the complaint and witness statement on oath, include,

(a) the name, date and nomenclature of the protocol, convention or treaty ; and

(b) proof of ratification of such protocol, convention or treaty by Nigeria.

(2) In any claim relating to or connected with any matter, the party relying on the International Best Practice, shall plead and prove the existence of the same in line with the provisions relating to proof of custom in the extant Evidence Act."

[7] *President of the Commission of ECOWAS v Ndiaye* (2021) LPELR-53523(CA) 19-20.

[8] *Ibid* 24-26.

[9] See generally CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, Oxford, 2020) (chapter 7).

[10]*African Reinsurance Corporation v JDP Construction (Nig) Ltd* (2007) 11 NWLR 224, 234-5 (Akintan JSC)..

The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union

The Time is Ripe? Proposed Regulation of Third Party Litigation Funding in the European Union

Written by Adrian Cordina*, PhD researcher at Erasmus School of Law, project member of the* Vici project 'Affordable Access to Justice' *which deals with costs and funding of civil litigation, financed by the Dutch Research Council (NWO).*

The question of how to fund litigation is an essential precondition for civil justice systems. While in some countries like Australia third party litigation funding (TPLF) has been developing for decades, in Europe too TPLF is now on the rise, particularly in international arbitration and collective actions. This has also caught the attention of the European legislator.

On the 17th of June 2021 the European Parliament Committee on Legal Affairs published a Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation (TPLF). This follows the February 2021 European Parliament Research Service Study on the same matter. TPLF is the funding of litigation by an external third party in return for a share of the proceeds in case of success and is a growing commercial practice. The Draft highlights that TPLF in the EU is however currently operating in a 'regulatory vacuum', as it is not only present in consumer collective redress cases, in which case specific funding rules have already been enacted through the Directive (EU) 2020/1929 on representative actions for the protection of the collective interests

of consumers [Representative Actions Directive (RAD)].

While recognising the role TPLF plays in facilitating access to justice where otherwise not available due to the costs and risks of litigation, the Draft attempts to provide proposals on how to tackle the risks and concerns TPLF gives rise to. It focuses especially on the conflicts of interest between the litigation funders and the claimants, more specifically on the economic interest of the funder, which could drive the funder to demand excessive shares of the proceeds and to control the litigation process.

Similarly to the RAD, the Draft contains recommendations that it should be ensured that decisions in the relevant legal proceedings, including decisions on settlement, are not influenced in any way by the litigation funders and that courts or administrative authorities be empowered to require disclosure of information on third-party litigation funding.

Amongst the main recommendations which go beyond the funding rules in the RAD is that of establishing a system of supervisory authorities in each Member State which permits TPLF. These would grant authorisations and require that litigation funders comply with minimum criteria of governance, transparency, capital adequacy and observance of a fiduciary duty to claimants. Article 5 also proposes that third-party funding agreements need to comply with the laws of the Member State of the litigation proceedings or of the claimant, which could create problems if claimants and/or intended beneficiaries are from different Member States, from outside the EU or if one Member State prohibits TPLF in cross-border litigation.

It also contains recommendations on funding agreements being worded transparently, clearly and in simple language, on capping the return rate to the litigation funder at 40%, and on, subject to exceptions, preventing litigation funders from withdrawing funding midway through proceedings.

The debate on TPLF in Europe has only in recent years started to take the limelight in civil justice academia (see e.g. Kramer & Tillema 2020; Tzankova & Kramer 2021). That this topic is garnering attention is also evidenced by the September 2021 survey commissioned by the U.S. Chamber Institute for Legal Reform on Consumer Attitudes on TPLF and its regulation in the EU. While the complex matter of TPLF is in need of further research and reflection, considering

developments in legal practice perhaps now indeed the time is also ripe for regulatory discussions.

Can a Foreign Company that is not registered in Nigeria maintain an action in Nigerian Courts (Part 2)?

This is an update on my previous blog post here

Capacity to sue and be sued is an important aspect of conflict of laws. It connects very well with the issue of access to justice. For example if a foreign company that does business with a Nigerian company cannot sue in Nigeria it can result in injustice, and lead to loss of confidence in doing transactions with parties located in the Nigerian legal system.

Why is the above topic important? Having undertaken further research, it can be said that Nigerian court decisions are not consistent on the issue of capacity of a foreign company to sue and be sued in Nigeria. The latest reported authoritative source from the Nigerian Supreme Court is that by virtue of Section 54 and 55 of the Companies and Allied Matters Act 2004 Cap C20 (now Section 78 and 79 of the Companies and Allied Matters Act 2020), a foreign company that carries on business in Nigeria without being registered as a Nigerian company carries out an illegal and void transaction, and thus such a contract cannot be enforced in Nigerian courts.[1] In effect, the provision of Section 60(b) of the Companies and Allied Matters Act 2004 Cap C20 (now Section 84(b) of the Companies and Allied Matters Act 2020) cannot avail the foreign company in granting it the capacity to sue in Nigeria to enforce a contract where it *carries on business* in Nigeria without registering as a foreign company.[2] It is only where the foreign company that is not registered in Nigeria enters into a contract with a Nigerian company, *while not doing business in Nigeria,* will such a contract be enforceable in

Nigeria.[3] The key word is thus *doing business in Nigeria* in determining whether a foreign company that is not registered in Nigeria can sue or be sued in Nigeria. This decision has now been confirmed by a very recent Court of Appeal decision, though in the instant case it was held that the foreign company was not carrying out business in Nigeria (it was a single transaction), so the contract was enforceable in Nigeria.[4]

Yet this current position of Nigerian law is strange and appears to contrast with the law in other common law countries including common law African countries. The recent position of the Nigerian Supreme Court also appears to contrast with previous decisions of Nigerian appellate courts that held that foreign companies could sue and be sued in Nigeria irrespective of whether they are carrying on business in Nigeria.[5]

This aspect of law requires further reflection as it is now an important and controversial aspect of Nigerian law. Dr Abubakri Yekini and I plan to write a full blown article on this interesting subject. Please stay tuned!

[1] *Citec Intl Estates Ltd. v. E. Intl Inc. and Associates* (2018) 3 NWLR (Pt. 1606) 332, 357 – 364 (Eko JSC)

[2] *Ibid.*

[3] *Ibid.*

[4] *Mocoh SA & Anor v. Shield Energy Ltd & Anor* (2021) LPELR-54559(CA).

[5]*INFAZ v COBEC (Nig) Ltd* (2018) 12 NWLR Pt. 1632) 127; *Bank of Baroda v Iyalabani Company Ltd* (2002) 13 NWLR 551. See also *Watanmal (Singapore) Pte Ltd v. Liz Olofin and Company Plc* (1997) LPELR-6224(CA) 13 (Musdapher JCA as he then was); *NU Metro Retail (Nig) Ltd v. Tradex S.R.L & Another* (2017) LPELR-42329(CA) 41-2 (Garba JCA as he then was).

Conference Report: The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law

The Private Side of Transforming our World
UN Sustainable Development Goals 2030and the Role of Private International Law

September 9-11, 2021, Hamburg, Germany,
Max Planck Institute for Comparative and Private International Law

By *Madeleine Petersen Weiner* and *Mai-Lan Tran*

The Max Planck Institute for Comparative and Private International Law hosted a hybrid conference on the Institute's premises, and digitally via Zoom, under the above title from September 9-11, 2021, on the occasion of the publication of the nearly 600-page anthology "The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law".

The Sustainable Development Goals ("**SDGs**") include 17 goals for sustainable development. Formulated by the United Nations in 2015, they form the core of the 2030 Agenda and aim to enable people worldwide to live in dignity while respecting the earth's ecological limit. Fighting poverty and other global ills, improving health and education, reducing inequality and boosting economic growth while combating climate change are the themes of this agenda, also referred to as a "contract for the future of the world". In Public Law, including International Law, SGDs have already established themselves as a subject of research. This has not been the case for Private Law so far. The project "The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law" addresses this research gap identified by the editors and organizers of the conference, *Ralf Michaels*, Director of the Max Planck Institute for Comparative and International Private Law (D), *Verónica Ruiz Abou-Nigm*, Senior Lecturer at Edinburgh Law School , University of Edinburgh (UK) and *Hans van Loon*, former Secretary General of the Hague Conference on Private International Law (NL). The project's aim was to raise awareness that Private International Law („**PIL**"), with its institutions and methods, can also make a significant contribution to achieving these goals.

The conference was structured around the individual SDGs and was divided into six overarching thematic blocks. Renowned and emerging scholars from around the world presented excerpts from their research for the anthology on the relationship between PIL and each of the SDGs. Following the contributions of the individual speakers, discussants for each thematic block pointed out connecting lines and questions within the respective clusters and stimulated the discussion on the podium with initial questions and sometimes provocative theses. Afterwards, the floor was opened to questions from the audience. Next to the organizers, *Maria Mercedes Albornoz*, Centro de Investigación y Docencia Económicas (MEX), *Duncan French*, University of Lincoln (UK), and *Marta Pertegás*, Maastricht University (NL), took on the role of discussants.

The mix of speakers as well as the audience were very international, also thanks

to the hybrid format. The English-language conference was translated simultaneously into Spanish for the audience dialed in via Zoom.

After a warm welcome by the organizers, the conference kicked off with the "Basic Socio-Economic-Rights" cluster. The first speaker, *Benyam Dawit Mezmur*, University of the Western Cape (ZAF), focused on SDG 1 "No Poverty". He stated that this was a very ambitious goal and that the COVID-19 pandemic had actually increased poverty in the world. He went on to point out that it was the poverty of refugee children that needed to be addressed. PIL could contribute to this by simplifying the recognition of status.

Jeannette Tramhel, Organization of American States (USA), then commented on SDG 2 "No Hunger". She talked about an "elephant in the room" in the goal of eliminating world hunger by 2030, referring to the discussion of whether the industrial agri-food system ("**Big Ag**") was the solution to the puzzle, or rather its cause. This "elephant" then ran not only proverbially but also figuratively through her presentation. She then addressed harmonized regimes such as the Hague Conference on Private International Law 2005 Choice of Court Convention, which she believes provide an effective contribution to the goal. Avoiding parallel proceedings, she said, would also be beneficial for internationally operating companies in the agricultural and food sectors.

This first set of topics was concluded by the presentation of *Anabela Susana de Sousa Gonçalves*, University of Minho (PRT), on SDG 3 "Good health and well-being". She first talked about telemedicine and e-health platforms with cross-border functions. With these resources, universal health coverage and healthcare as such – even in the poorest countries of the world – could be supported by PIL.

After a joint lunch break, the participants turned their attention to the second set of topics, "Energy, Work and Infrastructure." *Nikitas E. Hatzimihail*, University of Cyprus (CYP), kicked off the session. He spoke on SDG 7 "Affordable and clean energy". He advocated using the regulatory function of PIL to help achieve some harmonization of regulatory standards at the global level and thereby contribute to the efficient achievement of regulatory goals.

Ulla Liukkunen, University of Helsinki (FIN), then outlined the main findings from her chapter on SDG 8 "Decent Work and Economic Growth". In her presentation, she spoke in favor of broadening the perspective on existing regulatory

approaches in PIL. Workers' rights should be placed at the center, and laws as well as legal practices should also be evaluated from this point of view.

In the third and last presentation on the topic, *Vivienne Bath*, University of Sydney (AUS), dealt with SDG 9 "Industry, Innovation and Infrastructure". She elaborated on PIL's fundamental role in infrastructure projects, starting with contractual issues and ending with dispute resolution. Summing up, she argued for an approach that was more concerned with sustainability than with enforcing the commercially based doctrines of choice of law autonomy and the importance of binding parties to their choice of forum.

A short coffee break refreshed the speakers and the audience for the final set of topics of the day, "Education, Gender and Socio-Economic Inequality." Here, first *Klaus D. Beiter*, North-West University, Potchefstroom (ZAF), gave an insight into his findings on SDG 4 "Quality Education". At the outset, he emphasized his difficulties in even recognizing a link to PIL, since education is a central task of the state. However, according to *Beiter*, the link becomes clear when one observes the progressive privatization of the education sector. He identified as a problem that shortcomings in the education sector on the part of the state in the Global South were being systematically exploited by companies in the global North. PIL thus must be further developed in order to offer more protection to the "weaker" actors in the education sector.

Gülüm Bayraktaro?lu-Özçelik, Bilkent University, Ankara (TUR), followed by highlighting the role of PIL in achieving SGD 5 "Gender Equality". She showed that gender equality issues can play a role in all traditional areas of PIL (such as applicable law or jurisdiction) as well as specifically in the recognition of marriages. On the one hand, a one-size-fits-all approach would not do justice to all areas. On the other hand, the opportunities of cross-cutting soft law instruments, such as the guiding principles for the realization of gender equality, also in cross-border matters, should not be negated but further explored.

Lastly, *Thalia Kruger*, University of Antwerp (BEL), spoke on SDG 10 "Reduced inequalities". Inequality exists on many levels and plays a role in many different places in PIL. In her presentation, she focused on tort law. Inequality could be countered by adequate compensation of the injured parties by the damaging parties. She also expressed her disappointment at the failed attempt to create a new conflict of laws provision in the Rome II Regulation for human rights

violations. A draft by the European Parliament's Legal Affairs Committee had envisaged giving injured parties the right to choose between four possible applicable legal systems. Criticism was voiced that the right of choice would create too much legal uncertainty for companies. *Kruger* countered that companies would simply have to comply with all and thus the highest standard of the four possible applicable laws.

The first day culminated in the live book launch of the anthology at *Intersentia*. In order to make it available to as many people as possible worldwide, it was made freely accessible online (open access) at www.intersentiaonline.com – the current preliminary version soon to be replaced by the final text. A PDF version of the book will also be available for free download on the website, as will print versions of the book.

The second day of the conference began with a presentation by *Eduardo Álvarez-Armas*, Brunel University of London (UK) and Université catholique de Louvain (BEL), on SDG 13 "Action on Climate Change". Using the example of the recent lawsuit of the environmental organization *Milieudefensie* and other environmental associations against *Royal Dutch Shell* before the District Court of The Hague, which was successful in the first instance, and the lawsuit of the Peruvian farmer *Lliuya* against *RWE AG*, which has been pending in the second instance at the Higher Regional Court of Hamm since 2017, *Álvarez-Armas* attested to the ability of PIL in the form of Private International Law Climate Change Litigation to contribute to the realization of SDG 13.

Tajudeen Sanni, Nelson Mandela University (ZAF), also attested to the discipline's potential in the context of transnational claims by local communities dependent on the sea and its resources, in light of SDG 14, "Life Below Water". He advocated further development of PIL principles in light of the SDGs; the choice of applicable law should be made on the basis of which of the possible ones called upon to apply (better) promotes sustainable development.

To conclude this fourth Cluster, "Climate and Planet," *Drossos Stamboulakis*, University of the Sunshine Coast (AUS), presented his insights on SDG 15, "Life on Land". In his view, the necessary redesign of PIL to make it fruitful for sustainable development should avoid stripping PIL of its legitimacy based on technical and dogmatic answers.

Finally, the organizers were able to secure *Anita Ramasastry*, University of Washington, Member of the U.N. Working Group on Business and Human Rights, as keynote speaker. She was able to identify overarching *leitmotifs* in the debate and at the same time set her own impulses. PIL could provide guidelines for promoting responsible corporate conduct. However, transnational corporations have so far been understood by the discipline predominantly as a problem but not as (positive) actors. Against this backdrop, her recommendation was to delve deeper into what kind of positive roles business could play in the future.

The remainder of the morning was devoted to the somewhat broader topic „Living Conditions". *Klaas Hendrik Eller*, University of Amsterdam (NL), kicked it off with SDG 11 "Sustainable Cities and Communities". He was guided by the question of how PIL's rich experience in identifying, delineating, and addressing conflicts could help create an appropriate forum for spatial justice issues in a global city.

Geneviève Saumier, McGill University (CAN), then addressed SDG 12 "Sustainable consumption and production". In her view, PIL has so far fallen short of its potential. Provisions that ensure access to justice, especially in the case of lawsuits against transnational corporations, as well as choice-of-law rules that provide *ex ante* incentives for producers to comply with higher standards of potentially applicable laws could change this.

The third presentation of this set of topics was given by *Richard Frimpong Oppong*, California Western School of Law, San Diego (USA), considering SDG 6 "Clean Water and Sanitation". He did not deny PIL's supporting role in the management of water and sanitation resources. Ultimately, however, the problems associated with achieving SDG 6 were too complex and multifaceted to be solved by the traditional methods of PIL and adversarial litigation (alone).

After the lunch break, *Sabine Corneloup*, University Paris II Panthéon-Assas (FRA), and *Jinske Verhellen*, Ghent University (BEL), commented on SDG 16 "Peace, Justice and Strong Institutions" in the last Cluster "Rights, Law and Cooperation". They put their focus on target 16.9 – legal identity in the context of migration. They showed that restrictive migration policies of the Global North counteract one of the fundamental goals of PIL, cross-border continuity. Only when issues of legal identity are separated from migration policy decisions does PIL have the potential to ensure that identity across borders has real value and enable migrants to exercise their rights.

For *Fabricio B. Pasquot Polido*, Federal University of Minas Gerais (BRA), who was scheduled to be the last speaker of the afternoon on SDG 17 "Partnerships to Achieve the Goals", but was unfortunately unable to attend at short notice, *Hans van Loon* stepped in. In light of SDG 17, he shared his practical experience regarding cross-border cooperation between administrations and courts as former Secretary General of the Hague Conference on Private International Law. He reported on the remarkable developments in the organization's relations with Latin America, and incrementally with the Asia-Pacific region. Looking to the future, he looked at efforts to build appropriate partnerships to Africa as well, and a possible Hague Conference convention on private international law aspects of environmental and climate change issues.

With heartfelt thanks to all participants, the organizers finally closed the public part of this extremely diverse and inspiring conference, which sees itself rather as the beginning than the end of the joint project under the hashtag **#SDG2030_PIL**.

On the morning of the last day of the conference, the organizers and speakers met internally to pick up on the impulses of the two previous days, to continue the threads of discussion from bilateral talks in a large group and to develop the future of the project.

The conference set itself ambitious goals in terms of both organization and content. The hybrid format, up till now untested, was a complete success and, as *Ralf Michaels* already pointed out in his introductory remarks to the conference, excellently reflected the nature of PIL; it united international and local levels.

In terms of content, the conference was in no way inferior to this (technical) success. On the contrary, it not only convinced speakers and discussants, who had shared their initial reservations about the PIL's power of impact for sustainable development in the sense of the SDGs, but also convinced the audience to acknowledge the private side of the transformation of our world through the diversity and substantive precision of the contributions. It was a great pleasure and honor for the two authors of this summary to witness the contagious commitment of the project's participants to the discipline's assumption of responsibility for the realization of the SDGs in beautiful, late-summer Hamburg.

Madeleine Petersen Weiner and Mai-Lan Tran are doctoral candidates at the Chair of Prof. Dr. Marc-Philippe Weller at the Institute for Private International Law and International Business Law at Heidelberg University. Madeleine Petersen Weiner also works as a Research Assistant at this institute.

Study Rome II Regulation published

The long-awaited Rome II Study commissioned by the European Commission, evaluating the first ten years of the application of the Rome II Regulation on the applicable law to non-contractual obligations, has been published. It is available here. The Study was coordinated by BIICL and Civic and relies on legal analysis, data collection, a consultation of academics and practitioners, and national reports by rapporteurs from the Member States. The extensive study which also includes the national reports, discusses the scope of the Regulation and the functioning of the main rules, including the location of damages under Art. 4 Rome II, which is problematic in particular in cases of prospectus liability and financial market torts. As many of our readers will know, one of the issues that triggered debate when the Rome II Regulation was negotiated was the infringement of privacy and personality rights, including defamation, which topic was eventually excluded from the Regulation. While it has been simmering in the background and caught the attention of the Parliament earlier on, this topic is definitely back on the agenda with the majority opinion being that an EU conflict of laws rule is necessary.

Three topics that the European Commission had singled out as areas of special interest are: (1) the application of Rome II in cases involving Artificial Intelligence; (2) business and human rights infringements and the application of Art. 4 and – for environmental cases – Art 7; and (3) Strategic Lawsuits against Public Participation (SLAPPs). For the latter topic, which is currently also studied by an expert group installed by the European Commission, the inclusion of a rule on privacy and personality rights is also pivotal.

The ball is now in the court of the Commission.

To be continued.

The Nigerian Court of Appeal recently revisits the principles for the grant of Mareva Injunction

The focus of this write-up is a brief case note on a recent decision of the Nigerian Court of Appeal (reported two days ago) on *Mareva* injunction.

The principal concern of a judgment creditor is that it should reap the fruits of the judgment. A judgment is useless or nugatory if the judgment debtor has no assets within the jurisdiction of the court and the judgment debtor is unwilling to comply with the court's judgment. A prospective judgment debtor could frustrate the administration of justice and commercial effectiveness of a judgment by moving away all its assets from the Nigerian jurisdiction to another jurisdiction. The remedy of a *Mareva* injunction (or freezing injunction) was developed as a means of curtailing this form of bad litigation tactics by a judgment debtor. In reality, a *Mareva* injunction is similar to interlocutory and anticipatory injunctions. It is similar to an interlocutory injunction because it is granted pending the determination of the dispute between the parties. It is similar to an anticipatory injunction because it anticipates that there is a real likelihood that a prospective judgment debtor would take its assets out of the court's jurisdiction in order to frustrate the effectiveness of a judgment.[1]

The *Mareva* injunction (as applied in Nigeria) was developed in the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA The Mareva* ("*The Mareva*").[2] It is also described as a "freezing injunction" on the basis that the order freezes the assets of a prospective judgment debtor, pending the determination of the case.[3]

Prior to the decision of the English Court of Appeal in *The Mareva*, it was uncertain[4] whether the English court had jurisdiction to protect a creditor before it obtained a judgment. The English Court of Appeal, in 1975,[5] had initially granted a "Mareva injunction" in the form of an interlocutory injunction, but the application of this concept in that case remained controversial.[6] The remedy of the *Mareva* injunction was later accepted by the then English House of Lords,[7] and is available in other Commonwealth jurisdictions.[8]

In the landmark case of *Sotuminu v Ocean Steamship (Nig) Ltd*("*Sotuminu*"),[9] the Supreme Court of Nigeria legitimised the *Mareva* injunction, though on the facts of the case, the court did not think it was appropriate to grant a *Mareva* injunction.

Interestingly, although the decision of the Supreme Court was unanimous in dismissing the plaintiff-appellant's case, Uwais JSC (as he then was), with whom two other Justices of the Supreme Court simply concurred, treated the plaintiff-appellant's case as one involving an interlocutory injunction, and applied the principles relating to the grant of interlocutory injunction. It was Nnaemeka-Agu JSC and Omo JSC in their concurring judgments who qualified the plaintiff-appellant's case as one involving a *Mareva* injunction.

Nnaemeka-Agu JSC made reference to Section 18(1) of the then High Court of Lagos Civil Procedure Rules, which provides that "[t]he High Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so"; and Section 13 (of the then High Court of Lagos State Civil Procedure Rules), which provides that "subject to the express provisions of any enactment, in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by the High Court of Justice in England." He was of the view that these provisions enabled a court in Nigeria to apply the principles of a *Mareva* injunction. The learned Justice provided the criteria to grant a *Mareva* injunction when he held that:

"Now, all decided cases on the point show that the Courts are ever conscious of the fact that because of its very nature, Mareva injunctions could be open to abuses. So they have evolved some rules and principles which are designed to

guard against such abuses. By these rules, before a Mareva injunction could be granted the applicant must show:-

(i) that he has a cause of action against the defendant which is justiciable in Nigeria:[10] See – *Siskina (Owners of Cargo lately laden on borad) v distas Compania S.A* (1979) A.C 210;

(ii) that there is a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain: See – *Barclay-Johnson v. Ynill*(1980) 1 WLR 1259, at p.1264: also –*Rahman (Prince Abdul) him Turki al Sudiary v Abu-Taha*(1980) 1 WLR 1268, at p.1272;

(iii) that the applicant has made a full disclosure of all material facts relevant to the application: see – *Negocios Del Mar SA v. Doric Shipping Corp. SA. (The Assios)* (1979) 1 LI. Rep. 331;

(iv) that he has given full particulars of the assets within the jurisdiction;

(v) that the balance of convenience is on the side of the applicant; and

(vi) that he is prepared to give an undertaking as to damages.

If he fails to satisfy the Court in any of these preconditions for a grant of a Mareva injunction, it ought not to be granted."[11]

Nnaemeka-Agu JSC's concurring judgment in *Sotuminu* has become the standard test for the application of *Mareva* injunction in Nigeria. However, it was not obvious whether this test provided by Nnaemeka Agu JSC was strict.

In the recent case of *Haladu v Access Bank,* (*Haladu*)[12] the Court of Appeal (Ojo JCA) interpreted the Supreme Court's decision (Nnaemeka Agu JSC) in *Sotuminu* as follows:

"The apex court in the above case has stated clearly the conditions that must be met for the grant of a Mareva Injunction. In other words, they are pre-conditions that must be met. To my mind, the conditions are of strict liability. It follows therefore that an applicant who seeks an order of Mareva Injunction must place sufficient materials before the court upon which it can exercise its

discretion."[13]

In the instant case, the applicant's case failed at the Court of Appeal because it failed to provide an undertaking as to damages in its application for *Mareva* injunction, and did not sufficiently prove that the defendant intends to remove its asset in Nigerian banks to a foreign country.[14]

The take away of *Haladu* is that an applicant that wants to obtain a *Mareva* injunction in Nigeria has to be thorough, hardworking, and diligent in its case. All the conditions for the grant of *Mareva* injunction as stated in Nnaemeka-Agu JSC's concurring judgment in *Sotuminu* must be met. Indeed, this is not an easy task. As stated by Ojo JCA in *Haladu,* "solid evidence" must be provided to succeed in a prayer for *Mareva* injunction. It is submitted that there is justice in this approach because if a *Mareva* injunction is granted without the right justification, it would cause great hardship to the respondent. A balance is thus struck between ensuring that a claimant should be able to reap the fruits of its judgment, and on the other hand the defendant should not be subjected to great hardship by a wrongful grant of *Mareva* injunction. *Haladu's* case demonstrates that Nigerian law tilts more towards the side of the defendant as a matter of evidence and procedure.

[1]See Omo JSC in *Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 approving the English case of *Z Ltd v AZ and AA-LL* (1982) 2 QB 558, 584-6.

[2](1980) 1 All ER 213.

[3]See generally *Dangabar v Federal Republic of Nigeria* (2012) LPELR-19732 (CA).

[4]"I know of no case where, because it was highly improbable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree." – *Lister & Co v Stubbs* (1886-90)] All ER Rep 797, 799 (Cotton LJ).

[5]*Nippon Yusen Kaisha v Karageorgis* (1975) 3 All ER 282.

[6]*Cf. Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 (Nnaemeka-Agu JSC); *Adeyemi Durojaiye v Continental Feeders (Nig) Limited* (2001) LPELR-CA/L/445/99 (Aderemi JCA, as he then was).

[7]*Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naveria SA* (1979) AC 210.

[8] AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa* (Cape Town, Juta and Company (Pty) Ltd, 2018) at 47–50, 87.

[9](1992) LPELR-SC 55/1990.

[10]The original judgment contains "in England". We have substituted it with the phrase "in Nigeria" to appropriately suit the Nigerian context.

[11]*Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990. See also *AIC LTD v. NNPC* (2005) LPELR-6 (SC) 33-4 (Edozie JSC); *Extraction System And Commodity Services Ltd. v. Nigbel Merchant Bank Ltd.*(2005) 7 NWLR (Pt. 924) 215; *R Benkay (Nig.) Ltd v Cadbury (Nig) Plc* (2006) 6 NWLR (Pt. 976)338; *International Finance Corporation v DSNL Offshore Ltd* (2007) LPELR-5140(CA) 12-3 (Rhodes Vivour JCA (as he then was); *Union Bank of Nig. Plc v. Pam* (2016) 14 NWLR (Pt. 1533) 400; *Haladu v Access Bank* (2021) 13 NWLR (Pt. 1794) 434. The Nigerian Court of Appeal has granted Mareva injunction in some cases : *Adeyemi Durojaiye v Continental Feeders (Nig) Ltd* (2001) LPELR-CA/L/445/99; *Compact Manifold and Energy Services Ltd v West Africa Supply Vessels Services Ltd* (2017) LPELR-43537 (CA). See also *AIC Ltd v Edo State Government* (2016) LPELR-40132 (CA).

[12] (2021) 13 NWLR (Pt. 1794) 434.

[13] *Haladu v Access Bank* (2021) 13 NWLR (Pt. 1794) 434, 458.

[14] ibid.

Service of process on a Russian defendant by e-mail. International treaties on legal assistance in civil and family matters and new technologies

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The Decree of the Arbitrazh (Commercial) Court of the Volga District of December 23, 2019 N F06-55840 / 2019 docket numberN A12-20691 / 2019, addresses service of process on the Russian party by the Cypriot court by e-mail and thus the possibility of further recognition of a foreign judgment.

1. Factual background

1.1. Within the framework of the court proceedings, the Russian party (the defendant in the Cypriot proceedings) was notified by the Cypriot court by sending a writ of service of process to the known e-mail addresses of the defendant. In order to substantiate the manner of service, the Cypriot court referred to Art. 9 of Decree 5 of the Rules of Civil Procedure (Cyprus), according to which “In any case, when the court considers that, for any reason, the service provided for in Rule 2 of this Decree will not be timely or effective, the court may order a substitute for personal service, or other service, or substitute for a notice of service in any way that will be found to be fair and correct in accordance with the circumstances”.

1.2. After the default judgment of the Cypriot court was rendered, an application for its recognition was lodged with the Arbitrazh Court of the Volgograd Region.

In addressing the issue of compliance with the notification rules, the Russian court referred to paragraph 2 of Art. 24 of the Treaty on Legal Assistance of the USSR-Cyprus 1984 on civil and family matters, according to which judgments are recognized and enforced if the party against whom the judgment was made, who did not appear and did not take part in the proceedings, was promptly and duly notified under the laws of the Contracting Party in the territory of which the judgment was made. The foreign judgment in question was recognized and enforced by the Russian court based on the fact that the proper manner of the notification was confirmed by the opinion of experts under Cypriot law. The Ruling of the Supreme Court of the Russian Federation of March 27, 2020 N 306-ES20-2957 in case N A12-20691 / 2019 left the acts of the lower courts unchanged.

2. Analysis of the Decree of the Arbitration Court of the Volga District of December 23, 2019 N F06-55840 / 2019 in the case N A12-20691 / 2019

2.1. At first glance the logic of the Supreme Court and lower courts appears to be flawless. Nevertheless we find it important to correlate the provisions of paragraph 2 of Art. 24 of the 1984 Legal Aid Treaty with the provisions of Art. 8 of the Treaty. Article 8 requires that: “the requested institution carries out the service of documents in accordance with the rules of service in force in its state, if the documents to be served are drawn up in its language or provided with a certified translation into this language. In cases where the documents are not drawn up in in the language of the requested Contracting Party and are not provided with a translation, they are handed over to the recipient if only he agrees to accept them. ”

2.2. In this regard, it should be taken into account that when using the wording “notified under the laws of a Contracting Party,” the Treaty States simultaneously tried to resolve the following situations:

1) where the parties were in the state of the court proceedings at the time of the consideration of the case. In this case, the national (“domestic”) law of the State in which the dispute was resolved shall apply;

2) where the parties were in different states at the time of the consideration of the case. In this case, the provisions of the relevant international treaty shall apply, since the judicial notice is [a] subject to service in a foreign state and,

therefore, it affects its sovereignty.

2.3. In this regard, attention should be paid to the fact that under the doctrine and case law of the countries of continental law, the delivery of a judicial notice is considered as an interference with the sovereignty of the respective state. The following are excerpts from case law. Excerpts from legal literature are provided for reference purposes:

1. a) “The negotiating delegations in The Hague faced two major controversies: first, some civil law countries, including Germany, view the formal service of court documents as an official act of government; accordingly, they view any attempt by a foreign plaintiff to serve documents within their borders as an infringement on their sovereignty ” – Volkswagen Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988);
2. b) “The exclusive competence to carry out acts of state power on its own territory follows from the sovereignty of states. As a rule, a state cannot perform actions of this kind within the borders of another state without violating its sovereignty and, therefore, without violating international law. An act is compatible with this right only if it is permitted by a specific international regulation, for example, if it is agreed in a treaty concluded between the states concerned, or if it is unilaterally accepted by the state in which it is carried out. When the notification is given abroad without permission under international law, this notification is invalid under Swiss domestic law due to its supremacy – Decision of the Swiss Federal Court of 01.07.2008 in case No. BGer 4A_161 / 2008.
3. c) “According to the traditional German law approach, delivery is considered to be an act of sovereignty.”- Rasmussen-Bonne H-E., The pendulum swings back: the cooperative approach of German courts to international service of process P. 240;
4. d) “From prospective of the Japanese state, certain judicial acts of foreign courts, such as the service of court notices and the receipt of evidence, are considered as a manifestation of sovereignty.”- Keisuke Takeshita, “Sovereignty and National Civil Procedure: An Analysis of State Practice in Japan,” Journal of East Asia and International Law 9, no. 2 (Autumn 016): 361-378

2.4. In light of the above, the interpretation of the Treaty on Legal Assistance of the USSR-Cyprus 1984, according to which a party located in the territory of

Russia is subject to notification in accordance with Art. 8 of the Treaty, seems to be preferable.

We welcome further discussion on this intricate matter.