# 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).

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# 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.

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# 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

*Written by Alexander A. Kostin, Senior Research Fellow at the Private Law Research Centre (Moscow, Russia) and counsel atAvangard law firm*

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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.

# Avoidance of the debtor’s transactions within the framework of a foreign insolvency before a Russian court

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Issues concerning cross-border insolvency rarely arise in Russian case law. For this reason, the Decree of the Arbitrazh Court of the Moscow District dated 22.11.2018 docket number N A40-39791 / 2018 is of particular interest to both practitioners and academics.

1. **The factual background of case No. ?40-39791 / 2018**

A bankruptcy procedure had been introduced at a German court against the Russian individual having the status of an individual entrepreneur under German law. After the opening of this procedure in Germany, the Russian debtor donated an apartment in Moscow to her daughter.

As a consequence of the said acts the bankruptcy trustee of the Russian debtor brought an action before the Moscow Arbitrazh (Commercial) Court, requesting the following relief: 1) to recognize the judgment of the German court opening the bankruptcy proceedings; 2) to set aside the agreement for donation of the apartment; 3) to enforce the judgment of the German court by prohibiting the alienation of this immovable property upon the completion of the bankruptcy procedure in Germany; 4) to attach the said immovable property in Russia.

On 01.10.2018 the Moscow Arbitrazh (Commercial) Court (First instance) dismissed the claim relating to the setting aside of the agreement of donation on the ground that that application was not heard by the German court and consequently it could not be resolved within the framework of the procedure for recognition of the German judgment. The court of First instance specifically held that the question relating to the validity of the agreement of donation should be resolved in separate proceedings to be brought before the Russian courts.

In further proceedings the Moscow Arbitrazh (Commercial) Court (First instance) recognized the judgment of the German court on the opening of the bankruptcy proceedings (decision of 07.12.2018). With reference to Art. 343 of the German Bankruptcy Ordinance and the Russian case Law (docket number No. A56-22667 / 2007), the Russian court acknowledged the existence of reciprocity in relation to the recognition of Russian court judgments in Germany as prescribed by the German Federal Law "On insolvency (bankruptcy)". The Russian court made an express finding that the foreign court order did not violate the exclusive jurisdiction over bankruptcy matters, because the debtor's activities as an individual entrepreneur are regulated by the law of the Federal Republic of Germany (Article 1201 of the Civil Code of the Russian Federation – "The law applicable to determination of the ability an individual to engage in entrepreneurial activity").

However, the Moscow Arbitrazh (Commercial) Court (1-st instance) rejected the part of the foreign insolvency judgment relating to the prohibition of the debtor to dispose of immovable property until the completion of the insolvency proceedings. In the court's opinion, in this respect the exclusive competence of the Russian courts and the public order of the Russian Federation had been violated (Article 248 of the Arbitrazh [Commercial] Procedure Code of the Russian Federation). At the same time, the court of first instance also noted that the bankruptcy trustee is entitled to institute separate bankruptcy proceedings against the debtor in order to set aside the agreement for donation of the apartment before the Russian courts.

**2. Analysis of case ?40-39791 / 2018**

The key question in this situation concerns the correct procedure for setting aside the transaction for the transfer of the immovable property as the restitution of the proper value is dependent on the said action. In turn the success of the said

action depends on the following issues: 1) **procedural capacity of a bankruptcy trustee**, including the issue whether the recognition of a foreign judgment is a prerequisite for granting procedural capacity to a foreign bankruptcy trustee; 2**) the law applicable to avoidance of the donation agreement**.

2.1. Procedural capacity of a foreign bankruptcy trustee.

In view of the fact that the foreign bankruptcy trustee is regarded as the legal representative of the debtor, his/her powers (including the power to bring an action) are recognized if the corresponding limitation of the capacity of the debtor is recognized in its turn.

Under Art. 1197 of the Civil Code of the Russian Federation, the legal capacity of an individual is governed by his *personal law (lex personalis).The personal law* of an individual refers to the law of the country of his/her nationality (clause 1 of article 1195 of the Civil Code of the Russian Federation). Consequently, the *personal law* of a Russian national is the law of the Russian Federation.

In the present situation, the legal capacity of the Russian debtor had been limited by a foreign judgment. In this case, the legal effect of the foreign judgment on limitation of capacity did not fall within the scope of the applicable substantive law since the judgment was not rendered by the country of his/her nationality. For that reason, the bankruptcy trustee's legal capacity (including procedural capacity) could not be recognized by virtue of the Russian national conflict of laws rule.

In its turn the possibility of recognition of the foreign judgment on the opening of bankruptcy proceedings is questionable for the following reasons. Although in the present matter the Moscow Arbitrazh (Commercial) Court argues that the capacity of the debtor shall be governed by the German law as the law of the country where the defendant was doing business (Art. 1201 of the Russian Civil Code) it needs to be noted that the capacity of the person to conduct business-related activities arises from general civil legal capacity (Art. 1195-1197 of the Civil Code of the Russian Federation). Taking into account the above, the said judgment on the opening of the insolvency proceedings appears to be in conflict with the Russian public order.

2.2. Law applicable to avoidance of the donation agreement.

In order to establish that the agreement for donation of the apartment is void the bankruptcy trustee referred to the fact that the apartment forms an integral part of the bankruptcy estate pursuant to paragraph 1 of Art. 35 of the German Insolvency Ordinance, as well as under clause 1 of Art. 213.25 of the Federal Law "On Insolvency (Bankruptcy)". With reference to the fact that the agreement for donation of the apartment was concluded after the commencement of foreign bankruptcy proceedings against the Russian debtor, the trustee argued that the transaction should be deemed void under Art. 61.2. of The Federal Law "On Insolvency (Bankruptcy)" as a "suspicious transaction".

In our view application of Art. 61.2. of The Federal Law "On Insolvency (Bankruptcy)" to invalidate the debtor's agreements within the framework of a foreign insolvency does not seem to be entirely justified due to the following. Due to the fact that the bankruptcy procedure against the Russian debtor had been opened by a German court, the legal consequences of this procedure should also be determined by German law. Another question is whether these legal consequences are recognized in the Russian Federation). In this case, the fact of initiation of bankruptcy proceedings against a Russian national at a foreign court does not provide grounds for the application of Russian bankruptcy law.

In our view the following ways to set aside the agreement within the framework of the foreign insolvency exist.

Primarily, it appears that the donation agreement entered into after the commencement of foreign insolvency proceedings may be regarded as a void transaction under the Russian law due to the fact that it was intended to defraud creditors (Articles 10 and 168 of the Civil Code of the Russian Federation).

Secondly, it could be argued that the recognition of a foreign bankruptcy entails that the effects of that foreign bankruptcy also apply to all actions that took place in the territory of Russia, including the possibility to apply foreign bankruptcy grounds to avoid contracts. However, this line of argument may not be entirely in line with the provisions of the Russian Civil Code under which Russian law applies to contracts in relation to land plots, subsoil plots and other real estate located in the territory of the Russian Federation (paragraph 2 of Art. 1213 of the Civil Code of the Russian Federation).

**Conclusion**

The Decree of the Arbitrazh (Commercial) Court of the Moscow District dated 22.11.2018 docket number N A40-39791 / 2018 as well as other court findings represent an interesting interplay between the legal provisions relating to the recognition of foreign insolvency and the application of Russian law for avoidance of the debtor's transactions. In the present matter the Russian court clearly ruled in favor *territoriality* of foreign insolvency proceedings. However, we remain hopeful that one day the approach will change and the Russian courts will uphold the principle of *universality* of foreign insolvency.

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# New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part II)

*This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.*

Recently, the issue of foreign sovereign immunity became a hot topic in India due to the new judgment of the Delhi High Court ("DHC") in the case of (*KLA Const Tech v. Afghanistan Embassy*). The previous part of the blog post analyzed the decision of the DHC.  Further, the post focused on the relevance of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The post also explored the interplay between state immunity and diplomatic immunity.

This part focuses on two further issues which emanate from the decision of the DHC. Firstly, the post deals with the impact of the consent to arbitrate on immunity from enforcement. Then, the post explores the issue of attachment of state's property for satisfying the commercial arbitral award against a diplomatic mission.

**Consent to Arbitrate: Waiver Of Immunity From Enforcement?**

As highlighted in the last post, one of the main arguments of the KLA Const Technologies ("claimant") was that the Embassy of the Islamic Republic of Afghanistan's ("respondent", "Embassy") consent to arbitrate resulted in the waiver of the sovereign immunity. The DHC accepted the argument and ruled that a separate waiver of immunity is not necessary to enforce an arbitral award in India as long as there is consent to arbitrate. The DHC also stated that this position is in consonance with the growing International Law principle of restrictive immunity while referring to the landmark English case (*Trendtex Trading Corp. v. Central Bank of Nigeria*).

However, there's more to the issue than what catches the eye. First of all, the *Trendtex* case was decided before the English Sovereign Immunity Act ("UKSIA") came into effect. Therefore, the DHC could have examined the relevant provisions under UKSIA and the more recent cases to track the jurisprudential trend on sovereign immunity under English law. For example, Section 13(2) of the UKSIA recognizes the difference between jurisdictional immunity and immunity from enforcement and requires an express waiver of immunity from enforcement. Even the ICJ has noted the requirement of an express waiver of immunity from enforcement in the *Jurisdictional Immunities* case. (para 118).

Furthermore, there was an opportunity to undertake a more detailed cross-jurisdictional analysis on the issue.  In fact, the issue of arbitral consent as a waiver of immunity from enforcement was dealt with by the Hong Kong Courts in *FG Hemisphere v. Democratic Republic Of The Congo*. Reyes J, sitting in the Court of First Instance, ruled that consent of the state to arbitrate does not in itself imply the waiver of immunity from enforcement. The ruling on the issue was confirmed by the majority decision of the Court of Final Appeal. The position has also been confirmed by scholars.

However, this position is not the settled one. The DHC's decision is in line with

the approaches adopted in France (*Creighton v. Qatar*), Switzerland (*United Arab Republic v. Mrs. X*) that no separate waiver of immunity from enforcement would be required in the existence of an arbitration agreement.

However, the decision made no reference to the reasoning of the cases from these jurisdictions. Regardless of the conclusion, the DHC's decision could have benefited from this comparative analysis, and there would have been a clearer answer as to the possible judicial approaches to the issue in India.

**Attachment of State's Property for Satisfying an Award Against A Diplomatic Mission**

In the current case, the DHC ordered the respondent to declare not only its assets and bank accounts in India but also all its commercial ventures, state-owned airlines, companies, and undertakings in India, as well as the commercial transactions entered into by the respondent and its state-owned entities with the Indian companies.

It is not entirely clear whether the Islamic Republic of Afghanistan's ("Afghanistan") properties and commercial debts owed by private Indian companies to the state-entities of Afghanistan would be amenable to the attachment for satisfying the award against the Embassy. To resolve the issue of attaching Afghanistan's property to fulfill the liability of the Embassy, a critical question needs to be considered – while entering into the contract with the claimant, was the respondent (Embassy) acting in a commercial capacity or as an agent of the state of Afghanistan?

The contract between the claimant and the respondent was for the rehabilitation of the Afghanistan Embassy. The DHC found that the respondent was acting in a commercial capacity akin to a private individual. Additionally, there's no indication through the facts elaborated in the judgment that the contract was ordered by, or was for the benefit of, or was being paid for by the state of Afghanistan. In line with these findings, it can be concluded that the contract would not be a sovereign act but a diplomatic yet purely commercial act, independent from the state of Afghanistan. Consequently, it is doubtful how the properties of state/state-entities of Afghanistan can be attached for fulfilling the award against the Embassy.

The attachment of the state's property to fulfill the liability of the Embassy would

break the privity of contract between the claimant and the respondent (Embassy). According to the privity of contract, a third party cannot be burdened with liability arising out of a contract between the two parties. Therefore, the liability of the Embassy cannot be imposed on the state/state-entities of Afghanistan because they would be strangers to the contract between the claimant and the respondent.

That said, there are a few well-known exceptions to the principle of privity of contract such as agency, third party beneficiary, and assignment. However, none of these exceptions apply to the case at hand. It is accepted that an embassy is the agent of a foreign state in a receiving state. However, in this case, the contract was entered into by the Embassy, in its commercial capacity, not on behalf of the state but in the exercise of its diplomatic yet commercial function. Afghanistan is also not a third-party beneficiary of the contract as the direct benefits of the contract for the rehabilitation of the Afghanistan Embassy are being reaped by the Embassy itself. Additionally, there is no indication from the facts of the case as to the assignment of a contract between the state of Afghanistan and the Embassy. Therefore, the privity of contract cannot be broken, and the liability of the Embassy will remain confined to its own commercial accounts and ventures.

In addition to the above, there also lacks guidance on the issues such as mixed accounts under Indian law. Regardless, the approach of the DHC remains to be seen when the claimant can identify attachable properties of the respondent. It also remains to be seen if the respondent appears before the DHC and mounts any sort of defence.

**Conclusion**

There remains room for growth for Indian jurisprudence in terms of dealing with issues such as immunity from the enforcement of arbitral awards. An excellent way to create a more conducive ecosystem for this would be to introduce stand-alone legislation on the topic as recommended by the Law Commission of India in its $176^{th}$ report. Additionally, the issues such as the use of state's properties to satisfy the commercial liability of diplomatic missions deserve attention not only under Indian law but also internationally.

(*The views expressed by the author are personal and do not represent the views*

*of the organizations he is affiliated with. The author is grateful to Dr. Silvana Çinari for her feedback on an earlier draft.*)

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# Can a Foreign Company that is not registered in Nigeria maintain an action in Nigerian Courts?

This note briefly analyses the recent decision of the Nigerian Supreme Court in *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[1]on the issue of a foreign company that is not registered in Nigeria having the capacity to sue in Nigeria.

Generally, Section 78 of the Companies and Allied Matters Act, 2020 requires that a foreign company must be registered in Nigeria before it can carry on business in Nigeria. This provision is a carryover of the former Section 54 of the Companies and Allied Matters Act, 1990, which contains a similar provision.

However, Section 84(b) of the Companies and Allied Matters Act 2020, makes express provisions for a foreign company to sue and be sued in its corporate name or that of its agent (despite the fact that it is not a registered or incorporated company in Nigeria for the purpose of carrying on business (under Section 78). The same provision was previously enacted in Section 60(b) of the Company and Allied Matters Act 1990. Section 60(b) of the Company and Allied Matters Act 1990 has been applied by Nigerian courts in some cases prior to the enactment of the Companies and Allied Matters Act, 2020.

In *Companhia Brasileira De Infraestrututira (INFAZ) v Companhia Brasileira De Entrepostos E Commercio (COBEC) (Nig) Ltd*,[2] the plaintiff-appellant was a company allegedly registered in accordance with Brazilian law. The plaintiff-appellant was also a shareholder with some Nigerian persons, which constituted the defendant-respondent company. There was a change in the name of the

plaintiff-appellant to Companhia Brasileira De Infraestutura Fazendaria, which was allegedly in accordance with Brazilian law. The plaintiff-appellant prayed for the winding-up of the defendant-respondent company. The application was dismissed by the trial court and the appeal to the Court of Appeal was dismissed as well.  One of the issues for consideration was whether the plaintiff-appellant was competent to sue and be sued in Nigeria.

The Court of Appeal held that by virtue of Section 60(b) of the Companies and Allied Matters Act 1990, a foreign company not registered in Nigeria can sue and be sued in Nigerian courts provided that said foreign company was duly incorporated according to the laws of a foreign state recognised in Nigeria. But, if there is a change in the name of that foreign company, evidence of compliance with the law of the land where it was incorporated must be given. In the instant case, the Court of Appeal held that there was no material evidence placed before the court to establish the change of name of the plaintiff-appellant company, and the resolution for change of name in Brazil that was provided before the court was deemed insufficient.[3]

In *Edicomsa International Inc and Associates v CITEC International Estates Ltd*,[4] the plaintiff-appellant was a foreign company incorporated in the United States of America. However, it was not registered in Nigeria. The plaintiff-appellant was engaged by the defendant-respondent to provide some services. Subsequently, there was a disagreement between the parties on payments due to the plaintiff-appellant, which led to the action before the court. The defendant-respondent, *inter alia*, challenged the jurisdiction of the trial court on the basis that the plaintiff-appellant was not registered in Nigeria. The trial court upheld the submission of the defendant-respondent. The plaintiff-appellant appealed to the Court of Appeal, which unanimously allowed the appeal. The majority of the Court of Appeal rightly applied Section 60(b) of the Companies and Allied Matters Act 1990 to the effect that the plaintiff-appellant, though not registered in Nigeria, could sue in Nigeria.[5]

In the recent case of *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[6] the Nigerian Supreme Court did not consider Section 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act 2020), though its final decision was correct. In that case, the claimant/1st appellant claimed that it entered into a consultancy service

agreement with the defendant/respondent which the latter unlawfully terminated. The plaintiff/1st appellant therefore filed an action via originating summons in the Federal High Court, Lagos State Judicial Division, seeking declaratory reliefs to that effect. It further claimed the total value of outstanding claims on invoices submitted by it, special and general damages. One of the issues canvassed at the Supreme Court was whether the Court of Appeal was right when it held that the contract entered into by the claimant-1st appellant a foreign company without incorporation in Nigeria was illegal and unenforceable? The Supreme Court Justices unanimously agreed with Peter-Odilli JSC who held as follows in her leading judgment:

"I agree with learned counsel for the appellants that section 54 of the Companies and Allied Matters Act [Cap C20 LFN 2004][7] does not apply to the facts of this case because the situation before the court in this case is one of a firm registered in Nigeria and entering into contract with the respondent but subsequently to the execution of the contract incorporating itself outside Nigeria as a limited liability company".[8]

It is submitted that the Supreme Court should also have had regard to Article 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act, 2020) in holding that assuming the claimant-1st appellant was a foreign company that was not registered in Nigeria, it was capable of maintaining an action in Nigeria. This would have put to rest any question as to the capacity of a foreign company that is not registered in Nigeria to sue or be sued in Nigeria. It would also have made the Supreme Court's decision exhaustive in this regard.

[1] (2021) All FWLR (Pt. 1083) 359.

[2](2004) 13 NWLR 376.

[3]*Companhia Brasileira De Infraestrututira v Cobec (Nig) Ltd* (2004) 13 NWLR 376, 391, 395 (Aderemi JCA, as he then was) (overturned on the point of proof of change of the name of the foreign company, but the decision that the foreign

company could sue and be sued was affirmed by the Nigerian Supreme Court in *INFAZ v COBEC* (*Nig*) *Ltd* (2018) 12 NWLR 127). 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 & Anotherr* (2017) LPELR-42329(CA) 41-2 (Garba JCA as he then was).

[4](2006) 4 NWLR 114.

[5]*Edicomsa International Inc and Associates v CITEC International Estates Ltd* (2006) 4 NWLR 114, 125-26 (Rhodes-Vivour JCA, as he then was), 130 (Omage JCA). See also *B.C.N.N. Ltd. v. Backbone Tech. Net. Inc.* (2015) 14 NWLR (Pt. 1480) 511. *Cf. AG Butler (Nig) (Ltd) v The Sanko Steamship Co. Ltd* (2020) LPELR -51141 (CA). *Cf. Hung & Ors v. EC Investment Co. (Nig) Ltd* (2016) LPELR -42125 (CA) (Tur JCA dissenting).

[6] (2021) All FWLR (Pt. 1083) 359

[7] "Subject to sections 56 to 59 of this Act, every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than receipt of notices and other documents, as matters preliminary to incorporation under this Act." This provision is now contained in Section 78 of the the Companies and Allied Matters Act, 2020.

[8] ibid, 396.

# New Principles of Sovereign Immunity from Enforcement in India: The Good, The Bad, And The Uncertain (Part I)

*This post was written by Harshal Morwale, an India-qualified international arbitration lawyer working as an associate with a premier Indian law firm in New Delhi; LLM from the MIDS Geneva Program (2019-2020); alumnus of the Hague Academy of International Law.*

Sovereign immunity from enforcement would undoubtedly be a topic of interest to all the commercial parties contracting with state or state entities. After all, an award is only worth something when you can enforce it. The topic received considerable attention in India recently, when the Delhi High Court ("DHC") ruled on the question of immunity from enforcement in case of commercial transactions (*KLA Const Tech v. Afghanistan Embassy*). This ruling is noteworthy because India does not have a consolidated sovereign immunity law, and this ruling is one of the first attempts to examine immunity from enforcement.

This post is part I of the two-part blog post. This part examines the decision of the DHC and identifies issues emanating from it. The post also delves into the principles of international law of state immunity and deals with the relevance of diplomatic immunity in the current context. The second part (forthcoming) will explore the issue of consent to the arbitration being construed as a waiver of immunity from enforcement and deal with the problem of whether the state's property can be attached to satisfy the commercial arbitral award against a diplomatic mission.

**DHC: No Sovereign Immunity From Enforcement In Case Of Commercial Transactions**

In the case of *KLA Const Tech v. Afghanistan Embassy*, KLA Const Technologies ("claimant") and the Embassy of the Islamic Republic of Afghanistan in India ("respondent") entered into a contract containing an arbitration clause for rehabilitation of the Afghanistan Embassy. During the course of the execution of

works, a dispute arose between the parties. The claimant initiated the arbitration. An *ex parte* award was passed in favor of the claimant by the Sole Arbitrator. Since the respondent did not challenge the award, the claimant seeks its enforcement in India in line with Section 36(1) of the Arbitration & Conciliation Act 1996, whereby enforcement cannot be sought until the deadline to challenge the award has passed. In the enforcement proceedings, the DHC inter alia focused on immunity from enforcement of the arbitral award arising out of a commercial transaction.

The claimant argued that the respondent is not entitled to state immunity because, in its opinion, entering into an arbitration agreement constitutes "waiver of Sovereign Immunity." Further, relying on Articles 10 and 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCJIS"), the claimant argued that the states cannot claim immunity in case of commercial transactions and the UNCJIS expressly restricts a Foreign State from invoking sovereign immunity against post-judgment measures, such as attachment against the property of the State in case of international commercial arbitration.

After analyzing the claimant's arguments and relevant case laws, the DHC reached the following decision:

1. In a contract arising out of a commercial transaction, a foreign state cannot seek sovereign immunity to stall the enforcement of an arbitral award rendered against it.
2. No separate consent for enforcement is necessary, and consent to arbitrate is sufficient to wave the immunity. The DHC opined that this ruling is in "consonance with the growing International Law principle of restrictive immunity."

The DHC ordered the respondent to declare inter alia all its assets, bank accounts in India, etc., by a stipulated date. Since the respondent did not appear and did not make any declaration by that date, the DHC has granted time to the claimant to trace the attachable properties of the respondent.

The decision has been well received in the Indian legal community and has been lauded as a pro-arbitration decision as it promotes prompt enforcement of arbitral awards in India, regardless of the identity of the award-debtor. The decision is

also one of the first attempts to define immunity from 'enforcement' in India. The existing law of sovereign immunity in India is limited to section 86 of the Indian Civil Procedure Code, which requires the permission of the Central Government in order to subject the sovereign state to civil proceedings in India. Therefore, the DHC's decision is critical in the development of sovereign immunity jurisprudence in India.

**Difference Between Jurisdictional Immunity And Enforcement Immunity Under The UNCJIS**

It is worth noting that the DHC did not explicitly address the claimant's argument regarding the UNCJIS. Regardless, it is submitted that the claimant's argument relying on articles 10 and 19 of the UNCJIS is flimsy. This is particularly because the UNCJIS recognizes two different immunities – jurisdiction immunity and enforcement immunity. Article 10 of the UNCJIS, which provides for waiver of immunity in case of commercial transactions, is limited to immunity from jurisdiction and not from enforcement. Further, Article 20 of the UNCJIS clearly states that the state's consent to be subjected to jurisdiction shall not imply consent to enforcement. As argued by the late Professor James Crawford, "waiver of immunity from jurisdiction does not per se entail waiver of immunity from execution."

Notwithstanding the above, even the DHC itself refrained from appreciating the distinction between immunity from jurisdiction and immunity from enforcement. The distinction is critical not only under international law but also under domestic statutes like the English Sovereign Immunity Act ("UKSIA"). It is submitted that Indian jurisprudence, which lacks guidance on this issue, could have benefitted from a more intricate analysis featuring the rationale of different immunities, the standard of waivers, as well as the relevance of Article 20 of UNCJIS.

**Curious Framing Of The Question By The DHC**

In the current case, the DHC framed the question of sovereign immunity from enforcement as follows: Whether a Foreign State can claim Sovereign Immunity against enforcement of arbitral award arising out of a commercial transaction? On the face of it, the DHC decided a broad point that the award is enforceable as long as the underlying transaction is commercial. The real struggle for the claimants would be to determine and define which property would be immune

from enforcement and which wouldn't.

The framing of the issue is interesting because the sovereign state immunity from enforcement has generally been perceived as a material issue rather than a personal issue. In other words, the question of state immunity from enforcement has been framed as 'what subject matter can be attached' and not 'whether a particular debtor can claim it in a sovereign capacity'. In one of the case laws analyzed by the DHC (*Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania*), the defendant had argued that under the terms of the US Foreign Sovereign Immunities Act, its "property" was "immune from the attachment." Further, in the operative part of the judgment, the US District Court stated, "the property at issue here is not immune from attachment." Unlike the DHC's approach, the question of immunity from enforcement in the *Birch Shipping* case was argued and ruled upon as a material issue rather than a personal one.

While the decision of the DHC could have a far-reaching impact, there is a degree of uncertainty around the decision. The DHC ruled that as long as the transaction subject to arbitration is commercial, the award is enforceable. There remains uncertainty on whether this ruling means that all properties of the sovereign state can be attached when the transaction is commercial. Would this also mean diplomatic property could be attached? The DHC still has the opportunity to clarify this as the specific properties of the respondent for the attachment are yet to be determined, and the claimant has been granted time to identify the attachable properties.

**Diplomatic Immunity or Sovereign Immunity: Which One Would Apply?**

While state immunity and diplomatic immunity both provide protection against proceedings and enforcements in the foreign court or forum, the subjects of both immunities are different. While sovereign immunity aims to protect the sovereign states and their instrumentalities, diplomatic immunity specifically covers the diplomatic missions of the foreign states. The law and state practice on sovereign immunity are not uniform. On the other hand, the law of diplomatic immunity has been codified by the Vienna Convention on Diplomatic Relations ("VCDR"). Unlike the UNCJIS, the VCDR is in force and has been adopted by over 190 states, including India and Afghanistan.

Since the party to the contract, the arbitration, and the enforcement proceedings in the current case is an embassy, which is independently protected by the diplomatic immunity, the decision of the DHC could have featured analysis on the diplomatic immunity in addition to the state immunity. Like the UNCJIS, the VCDR recognizes the distinction between jurisdictional and enforcement immunities. Under Article 32(4) of the VCDR, the waiver from jurisdictional immunity does not imply consent to enforcement, for which a separate waiver shall be necessary.

Additionally, the DHC had an opportunity to objectively determine whether the act was sovereign or diplomatic. In *Re P (Diplomatic Immunity: Jurisdiction)*, the English Court undertook an objective characterization of the entity's actions to determine whether they were sovereign or diplomatic. The characterization is critical because it determines the kind of immunity the respondent is subject to.

In the current case, the contract for works entered into by the embassy appears to be an act undertaken in a diplomatic capacity. Hence, arguably, the primary analysis of the DHC should have revolved around diplomatic immunity. It is not to argue that the conclusion of the DHC would have been different if the focus was on diplomatic immunity. However, the analysis of diplomatic immunity, either independently or together with the sovereign immunity, would have substantially bolstered the significance of the decision considering that the interplay between sovereign and diplomatic immunities under Indian law deserves more clarity.

One might argue that perhaps the DHC did not deal with diplomatic immunity because it was raised neither by the claimant nor by the non-participating respondent. This raises the question – whether the courts must raise the issue of immunity *proprio motu*? The position of law on this is not entirely clear. While section 1(2) of the UKSIA prescribes a duty of the Court to raise the question of immunity *proprio motu*, the ICJ specifically rejected this approach in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (para 196). Both of these approaches, however, relate to sovereign immunity, and there lacks clarity on the issue in the context of diplomatic immunity.

**Conclusion**

As noted above, despite being one of the first Indian decisions to deal with state

immunity from an international law perspective, the decision leaves several questions open, such as the determination of attachable properties and the relevance of diplomatic immunity in the current context. It remains to be seen what approach the DHC takes to resolve some of these issues in the upcoming hearings.

The next part of the post explores the issue of consent to the arbitration being construed as a waiver of immunity from enforcement. The next part also deals with the problem – whether the state's property can be attached to satisfy the commercial arbitral award against a diplomatic mission.

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# Forum Selection Clauses and Cruise Ship Contracts

On August 19, 2021, the U.S. Court of Appeals for the Eleventh Circuit issued its latest decision on foreign forum selection clauses in cruise ship contracts. The case was *Turner v. Costa Crociere S.P.A.* The plaintiff was an American cruise ship passenger, Paul Turner, who brought a class action in federal district court in Florida alleging that the cruise line's "negligence contributed to an outbreak of COVID-19 aboard the Costa Luminosa during his transatlantic voyage beginning on March 5, 2020."

The cruise line moved to dismiss the case on the basis of a forum selection clause in the ticket mandating that all disputes be resolved by a court in Genoa, Italy. The contract also contained a choice-of-law clause selecting Italian law. By way of background, it is important to note that (1) the parent company for the cruise line was headquartered in Italy, (2) its operating subsidiary was headquartered in Florida, (3) the cruise was to begin in Fort Lauderdale, Florida, and (4) the cruise was to terminate in the Canary Islands.

The Eleventh Circuit never reached the merits of the plaintiffs' claims. Instead, it

sided with the cruise line, enforced the Italian forum selection clause, and dismissed the case on the basis of *forum non conveniens*. A critique of the Eleventh Circuit's reasoning in *Turner* is set forth below.

Years ago, the U.S. Congress enacted a law imposing limits on the ability of cruise lines to dictate terms to their passengers. 46 U.S.C. § 30509 provides in relevant part:

The owner . . . of a vessel transporting passengers . . . between a port in the United States and a port in a foreign country, may not include in a . . . contract a provision limiting . . . the liability of the owner . . . for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . . A provision described in paragraph (1) is void.

Boiled down to its essence, the statute provides that any provision in a cruise ship contract that caps the damages in a personal injury case is void. If the cruise ship were to write an express provision into its passenger contracts capping the damages recoverable by plaintiffs such as Paul Turner at $500,000, that provision would be void as contrary to U.S. public policy.

The cruise lines are sharp enough, however, to know not to write express limitations directly into their contracts. Instead, they have sought to achieve the same end via a choice-of-law clause. The contract in *Turner* had a choice-of-law clause selecting Italian law. Italy is a party to an international treaty known as the Athens Convention. The Athens Convention, which is part of Italian law, caps the liability of cruise lines at roughly $568,000 in personal injury cases. If a U.S. court were to give effect to the Italian choice-of-law clause and apply Italian law on these facts, therefore, it would be required to apply the liability cap set forth in the Athens Convention. It seems highly unlikely that any U.S. court would enforce an Italian choice-of-law clause on these facts given the language in Section 30509.

Enter the forum selection clause. If the forum selection clause is enforced, then the case must be brought before an Italian court. An Italian court is likely to enforce an Italian choice-of-law clause and apply the Athens Convention. If the Athens Convention is applied, the plaintiff's damages will be capped at roughly $568,000. To enforce the Italian forum selection clause, therefore, is to take the first step down a path that will ultimately result in the imposition of liability caps

in contravention of Section 30509. The question at hand, therefore, is whether the Eleventh Circuit was correct to enforce the forum selection clause knowing that this would be the result.

While the court clearly believed that it reached the right outcome, its analysis leaves much to be desired. In support of its decision, the court offered the following reasoning:

[B]oth we and the Supreme Court have directly rejected the proposition that a routine cruise ship forum selection clause is a limitation on liability that contravenes § 30509(a), even when it points to a forum that is inconvenient for the plaintiff. Shute, 499 U.S. at 596–97 ("[R]espondents cite no authority for their contention that Congress' intent in enacting § [30509(a)] was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § [30509(a)] suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that 'the question of liability and the measure of damages shall be determined by arbitration.' There was no prohibition of a forum-selection clause.")

The problem with this argument is that there was no evidence in *Shute*—none—suggesting that the enforcement of the forum selection clause in that case would lead to the imposition of a formal liability cap. Indeed, the very next sentence in the passage from *Shute* quoted above states that "[b]ecause the clause before us . . . *does not purport to limit petitioner's liability for negligence*, it does not violate [Section 30509]." This language suggests that if enforcement of a forum selection clause *would* operate to limit the cruise line's liability for negligence, it would not be enforceable. The Eleventh Circuit's decision makes no mention of this language.

The *Turner* court also cites to a prior Eleventh Circuit decision, *Estate of Myhra v. Royal Caribbean Cruises*, for the proposition that "46 U.S.C. § 30509(a) does not bar a ship owner from including a forum selection clause in a passage contract, even if the chosen forum might apply substantive law that would impose a limitation on liability." I explain the many, many problems with the Eleventh Circuit's decision in *Myhra* here. At a minimum, however, the *Myhra* decision is inconsistent with the Supreme Court's admonition in *Mitsubishi Motors Corp. v.*

*Soler Chrysler-Plymouth, Inc* that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." There is no serious question that the cruise line is here attempting to use an Italian choice-of-law clause and an Italian forum selection clause "in tandem" to deprive the plaintiffs in *Turner* of their statutory right to be free of a damages cap. This attempt would seem to be foreclosed by the language in *Mitsubishi*. The Eleventh Circuit does not, however, cite *Mitsubishi* in its decision.

At the end of the day, the question before the Eleventh Circuit in *Turner* was whether a cruise company may deprive a U.S. passenger of rights guaranteed by a federal statute by writing an Italian choice-of-law clause and an Italian forum selection clause into a contract of adhesion. The Eleventh Circuit concluded the answer is yes. I have my doubts.