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

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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.*)

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.

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.

EPO and EAPO Regulations: A new reform of the Luxembourgish Code of Civil Procedure

Carlos Santaló Goris, Researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and Ph.D. candidate at the University of Luxembourg, offers a summary and a compelling analysis of the Luxemburgish domestic legislation regarding the EPO and EAPO Regulations.

On 23 July 2021, a new legislative reform of the Luxembourgish Code of Civil Procedure ("NCPC"), entered into force amending, among other articles, those concerning Regulation No 1896/2006, establishing a European Payment Order ("EPO Regulation") and Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation").

The EPO and the EAPO Regulations embody, respectively, the first and third European uniform civil procedures. While the EPO, as its name indicates, is a payment order, the EAPO is a provisional measure that allows temporary freezing of the funds in the debtor's bank accounts. Although they are often referred to as uniform procedures, both leave numerous elements to the discretion of the Member States' national laws.

With this strong reliance on the Member State's national laws, it is not surprising that most Member States have enacted domestic legislation to embed these Regulations within their national civil procedural systems. Luxembourg is one of them. The EPO Regulation brought two amendments to the NCPC. The first one was introduced in 2009, four months after the EPO Regulation entered into force. In broad terms, the 2009 reform integrated the EPO procedure in the Luxembourgish civil judicial system, identifying the authorities involved in its application. The second legislative amendment stemmed from the 2015 reform of Regulation No 861/2007, establishing a European Small Claims Procedure ("ESCP Regulation") and of the EPO Regulation. Among other changes, this reform

introduced the possibility, once the debtor opposes the EPO, of continuing the procedure "in accordance with the rules of the European Small Claims Procedure" (Article 17(1)(a) EPO Regulation). The change brought to the NCPC pursued the objective to facilitate the swift conversion from an EPO into an ESCP (Articles 49(5) and 49(8) NCPC).

Before the reform of 23 July 2021, the Luxembourgish legislator had already twice modified the NCPC to incorporate the EAPO Regulation. The first EAPO implementing act was approved in 2017 (Article 685(5) NCPC). It mainly served to identify the domestic authorities involved in the EAPO procedure: from the competent courts to issue the EAPO to the competent authority to search for information about the debtor's bank accounts (Article 14 EAPO Regulation). The second reform, introduced in 2018, aimed at facilitating the transition of the EAPO's temporary attachment of accounts into an enforcement measure (Article 718(1) NCPC). In brief, it allowed the transfer of the debtor's funds attached by the EAPO into the creditor's account.

The 2021 legislative reform of the NCPC was not introduced specifically bearing in mind the EPO and the EAPO Regulations: rather, it was meant as a general update of the Luxembourgish civil procedural system. Among the several changes it introduced, it increased the value of the claim that may be brought before the Justice of the Peace (*Justice de paix*). Before the reform, the Justice of the Peace could only be seized for EPOs and EAPOs in claims up to 10.000 euros, while District Courts (*Tribunal d'arrondissement*) were competent for any claims above that amount. As a result of the reform, the Luxembourgish Justice of the Peace will now be competent to issue EPOs and EAPOs for claims up to 15.000 euros in value.

Leave to Issue and Serve

Originating Process Outside Jurisdiction Versus Substituted Service: A Distinction with a Difference

Witten by Orji A Uka (Senior Associate at ALP NG & Co) and Damilola Alabi (Associate at ALP NG & Co)

Introduction

The issuance and service of an originating process are fundamental issues that afford or rob a court of jurisdiction to adjudicate over a matter. This is because it is settled law that the proceedings and judgment of a court which lacks jurisdiction result in a nullity[1]. Yet, despite the necessity of ensuring that the issuance and service of an originating process comply with the various State High Court Civil Procedure Rules or Federal High Court Civil Procedure Rules ("the relevant court rules") or the Sheriffs and Civil Process Act, legal practitioners and sometimes judges commonly conflate the issuance and service of court process on defendants outside jurisdiction with the concept of service of court process by substituted means on defendants within the jurisdiction[2]. This paper set outs the differences between both commonly confused principles with the aim of providing clarity to its readers and contributing to the body of knowledge on this fundamental aspect of the Nigerian adjectival law.

Territorial Jurisdiction of Courts in Nigeria

Historically, Nigerian courts have always exercised jurisdiction over a defined subject matter within a clearly specified territory as provided for under the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "Constitution"). As an illustrative example, a High Court of a State in Nigeria or that of the Federal Capital Territory, Abuja has jurisdiction over the subject matter of a simple contract. However, the jurisdiction of each High Court is, as a general rule, confined to persons within the territorial boundaries of the State or

the Federal Capital Territory, as the case may be. As highlighted below, there are three established bases under which a High Court in Nigeria can validly exercise jurisdiction in an action *in personam*.[3]

Firstly, a court in Nigeria is donated with jurisdiction in an action *in personam* where the defendant is present or resides or carries on business within the territorial jurisdiction of the court and the defendant has been served with the originating process.[4]In the oft-cited case of *British Bata Shoe Co. Ltd v. Melikan*[5], the Federal Supreme Court held that the High Court of Lagos State, rightly exercised its jurisdiction in an action *in personam* for specific performance of a contract because the defendant resided in Lagos State even though the land in respect of which the subject matter of the dispute arose, was situated at Aba, outside the territorial jurisdiction of the court.

Thus, jurisdiction can be invoked either by residence[6] or simply by presence within jurisdiction.[7] Upon a finding that the defendant is present or resident within the jurisdiction of the court, and the originating process has been duly served on the defendant within jurisdiction, the court automatically assumes jurisdiction over such defendant, subject to the provisions of the Constitution or statutes that confer exclusive jurisdiction on other courts e.g. the Federal High Court or the National Industrial Court in respect of such subject matter.

Secondly, a court can validly exercise jurisdiction over a defendant in an *action in personam* where such defendant submits to the court's jurisdiction or waives his right to raise a jurisdictional challenge. Submission may be express, where the defendant signed a jurisdiction agreement or forum selection clause agreeing to submit all disputes to the courts of a particular legal system for adjudication either or an exclusive or non-exclusive basis. Submission may also be implied where the defendant is served with a court process issued by a court other than where he resides or carries on business and the defendant enters an unconditional appearance and/or defends the case on the merit.[8]

A third basis for the valid exercise of the jurisdiction of a High Court in Nigeria is where the court grants leave for the issuance and service of the originating process on a defendant outside the court's territorial boundaries. As noted above, historically, Nigerian courts could only validly exercise jurisdiction over a defined subject matter within its specified territory. With time, the powers of the court have now extended to the exercise of judicial power over a foreigner who owes no

allegiance to the court's territorial jurisdiction or who is resident or domiciled out of its jurisdiction but is called to appear before the court in the jurisdiction[9]. It is important to note that as an attribute of the concept of sovereignty, the exercise of jurisdiction by a court of one State over persons in another State is *prima facie* an infringement of the sovereignty of the other State. In *Nwabueze v. Okoye*,[10] the Supreme Court highlighted the fundamental rule of Nigerian conflict of laws on exercise of jurisdiction over a foreign defendant by stating as follows:

*"Generally, courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … It should be noted that except where there is submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute."***[11]**

Thus, a court may only stretch its jurisdictional arm outside its territory in certain limited circumstances.[12]Where such circumstances apply, the claimant is not entitled as of right to have the originating process issued by the court for service on a defendant who is resident or present outside the jurisdiction and must seek and obtain leave to this effect.**[13]**

The Issuance and Service of Originating Process Outside Jurisdiction

The power of courts to exercise jurisdiction beyond their territorial boundaries has been variously described as "long-arm jurisdiction", "assumed jurisdiction" or even "exorbitant jurisdiction". However, the power is only activated using the instrumentality of the grant of leave for the issuance and service of such originating process outside jurisdiction. While applying for leave, the claimant must convince the court that there exists a special reason for it to exercise its long arm to reach a defendant outside its jurisdiction. The special reasons which must be established by a claimant are contained in the relevant rules of courts.[14] Where none of the conditions outlined in the Rules are met, the courts must refuse the application for leave. This is because – in the language commonly employed in private international law -there would be no real and substantial

connection between the cause of action and the jurisdiction of Nigeria and therefore no special reason to justify the exercise of the court's long arm jurisdiction. Further, even where it is established that the claimant's case falls within one or more of those jurisdictional pathways contained in the Rules, the claimant is nevertheless not entitled as of right to be granted leave and the courts are not automatically bound to grant leave as a matter of course. The claimant must still demonstrate to the court that it is the *forum conveniens* to hear and determine the claim.[15] Unfortunately, in practice, apart from a few instances, which are exceptions rather than the general rule, Nigerian courts hardly give this serious consideration during the *ex-parte* hearing stage for the application for leave.

The failure of a claimant to seek leave to issue and serve an originating process on a defendant outside jurisdiction, is not a rule of mere technicality. As the learned authors of "Private International Law in Nigeria" brilliantly summarised,[16] there are at least three reasons for this conclusion. First, courts are wary of putting a defendant who is outside jurisdiction through the trouble and expense of answering a claim that can be more conveniently tried elsewhere. Two, a court has to satisfy itself before granting leave that the proceedings are not frivolous, vexatious, or oppressive to the defendant who is ordinarily resident outside jurisdiction. Three, Nigerian courts, on grounds of comity, are wary of exercising jurisdiction over a foreign defendant who is ordinarily subject to the judicial powers of a sovereign foreign state. These also explain why the grant of leave is a judicial act – that can only be done by a Judge in chambers or the court; but not by the Deputy Chief Registrar or other court official, even if such leave is subsequently ratified or endorsed by the court. Thus, there is a long line of authorities by appellate courts in Nigeria (including the Supreme Court)to the effect that where leave was not obtained before the Writ of summons was issued and served, such writ is void and must be aside.[17]

Substituted Service

Substituted service on the other hand is resorted to when personal service of an originating process on a defendant within jurisdiction is not possible due to reasons such as evasion of service by the defendant or the inability to locate the defendant. A claimant seeking to serve a defendant within jurisdiction by

substituted means must seek and obtain an order of court to serve the defendant by a specific means as stated in the relevant court rules. For example, Order 9 Rule 5 of the Lagos State High Court Civil Procedure Rules provides that upon an application by a claimant, a judge may grant an order for substituted service as it may seem just. Some of the popular modes of effecting substituted service include by pasting the originating process at the last known address of the defendant, by newspaper publication, or especially more recently, by sending same to the defendant by email. Since the defendant is otherwise within the court's territorial reach, and the court has jurisdiction over him, there is no need to comply with real and substantial connection test set out in Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules.

Leave to Issue and Serve Versus Substituted Service

As simple as these concepts are, legal practitioners repeatedly confuse an application for leave for the issuance and service of originating process outside Nigeria with an application for substituted service within Nigeria.

In *Kida v. Ogunmola*[18]the appellant commenced an action for specific performance against five defendants. The court bailiff however was not able to serve the respondent, who was resident outside the jurisdiction of Borno State. It was known to the appellant that the 2nd respondent was resident in Ibadan. The appellant then applied for leave to serve the originating process on the 2nd respondent out of jurisdiction. Curiously, the appellant also applied for leave to serve the originating process on the 2nd, 3rd & 4th respondentsby substituted means by pasting same at their last known address in Maiduguri, Borno State and the court granted same. When the respondent failed to file a defence, the High Court entered default judgment against him. When the appellant initiated enforcement proceedings against the respondent, the respondent brought an application to set aside the judgment on grounds that leave of court was not obtained to issue the originating process outside jurisdiction. The High Court refused the application but upon an appeal to the Court of Appeal, the appellate court overturned the trial court's decision. The Appellant ultimately appealed to the Supreme Court which upheld the decision of the Court of Appeal.

The Supreme Court reasoned that the respondent was outside the jurisdiction of the court at the material time and could not be served by substituted means, and that substituted service can only be employed in situations where a defendant is within jurisdiction but cannot be served personally. The Supreme Court further held per Musdapher JSC (as he then was), at page 411 as follows:

"For a defendant to be legally bound to respond to the order for him to appear in Court to answer a claim of the plaintiff, he must be resident within jurisdiction, see National Bank (Nig.) Ltd. v. John Akinkunmi Shoyoye and Anor. (1977) 5 SC 181. Substituted service can only be employed when for any reason, a defendant cannot be served personally with the processes within the jurisdiction of the Court for example when the defendant cannot be traced or when it is known that the defendant is evading service. Also, where at the time of the issuance of the writ, personal service could not in law be effected on a defendant, who is outside the jurisdiction of the Court, substituted service should not be ordered, see Fry vs. Moore (1889) 23 QBD 395. If the defendant is outside the jurisdiction of the Court at the time of the issue of the writ and consequently could not have been personally served in law, not being amenable to that writ, an order for substituted service cannot be made, see Wilding vs. Bean (1981) 2 QB 100."

In the same vein the Court of Appeal stated as follows in *Abacha v. Kurastic Nigeria Ltd*[19]

"Courts exercise jurisdiction over persons who are within its territorial jurisdiction: Nwabueze vs. Obi-Okoye (1988) 10-11 SCNJ 60 at 73; Onyema vs. Oputa (1987) 18 NSCC (Pt. 2) 900; Ndaeyo vs. Ogunnaya (1977) 1 SC 11. Since the respondent was fully aware that before the issuance of the writ the appellant's abode or residence for the past one year was no longer at No.189, Off R.B. Dikko Road, Asokoro, Abuja within jurisdiction, substituted service of the processes should not have been ordered by the learned trial Judge."

The above cases emphasise that a writ issued in the ordinary form cannot be served by substituted means on a defendant who is not present or resident in the jurisdiction of the court, except the leave of court was sought and obtained in accordance with the relevant rules of court. As Okoli and Oppong lucidly put it, where a writ cannot be served on a person directly, it cannot be served indirectly by means of substituted service.[20]

One area of law where parties commonly make the mistake of conflating an application for leave to issue and serve out of jurisdiction with an application for substituted service is in maritime claims. This, in our experience, stems from a historically commonplace mischaracterisation of actions as *actions in rem* instead of *actions in personam*.[21] In *Agip (Nig) Ltd v Agip Petroli International***[22]**the Supreme Court held where an action is not solely an action *in rem* but also an action *in personam*, the plaintiff is bound to comply with the procedural rules, such as obtaining leave of the court.

Further, there is a common practice – particularly in cases with multiple defendants, with one defendant residing within jurisdiction and another outside jurisdiction – where parties apply to the courts to serve the originating process on the party outside jurisdiction through substituted service on the party within jurisdiction. It is pertinent to state that the above practice does not cure the defect and that the only circumstance where it is acceptable is where the party within jurisdiction is the agent of the party outside jurisdiction, and that is not the end of the story. The position of the law is that where a foreign company carries on business through an agent or servant company resident within a court's jurisdiction, the principal company is deemed to also be carrying on business within the same jurisdiction.[23] However, the courts have also held that where the agent company has no hand in the management of the company and receives only the customary agent's commission, the agent's place of business in Nigeria is not the company's place of business. Thus, the company has no established place of business in Nigeria and is not resident in Nigeria,[24] therefore leave of court is still required for the issuance and service of the writ.

Conclusion

The power vested in an appellate court to set aside a judgment of a lower court on the grounds of improper issuance or service of the originating process which is for service out of jurisdiction is symbolic of the imperativeness for claimants and their legal practitioners to ensure that the issuance and service of the originating process are done in conformity with the law and relevant court rules. It is respectfully submitted that the confusion between the service of an originating process outside the jurisdiction of a court and the service of an originating process by substituted means is unnecessary. The principles are clear and distinct

and should not be mixed up.

[1]See. *Boko v. Nungwa (*2019) 1 NWLR (Pt. 1654) 395. In *CRUTECH v. Obeten (*2011) 15 NWLR (Pt. 1271) 588 the Court of Appeal reemphasised the importance of jurisdiction when it stated that "the lack of jurisdiction is detrimental, disastrous, devastating and without leverage for salvaging the situation, regardless of desirability of such a course of action."

[2] See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) 644; *Bimonure v. Erinosho* (1966) 1 All NLR 250; *Mbadinuju v. Ezuka* (1994) 8 NWLR (Pt. 364) 535; and *Khatoun v. Hans Mehr (Nigeria) and Anor.* (1961) NRNLR 27.

[3] According to the 10th Edition of the Black Law Dictionary, an action is said to be *in personam* when its object is to determine the rights and obligation of the parties in the subject matter of the action, however, the action may arise, and the effect of the judgment may bind the other. A common example is a breach of contract claim.

[4]*Ogunsola v. All Nigeria People's Party* (2003) 9 NWLR (Pt. 826) 462.

[5]*British Bata Shoe Co. Ltd v Melikan* (1956) 1 FSC 100.

[6]*United Bank of Africa v. Odimayo* (2005) 2 NWLR (Pt. 909) 21.

[7]*Ayinule v. Abimbola* (1957) LLR 41.

[8]See *Barzani v Visinoni* (1973) NCLR 383; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195;*Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250.

[9]*Caribbean Trading & Fidelity v. Nigerian National Petroleum Corporation* (2002) LPELR- 831 (SC).

[10](1988) 4 NWLR (Pt 91) 664.

[11]See also *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 40

[12] Bamodu, G. (1995) 'Jurisdiction and Applicable Law in Transnational Dispute Resolution before the Nigerian Courts' 29 Int'l L 555 available at https://scholar.smu.edu/til/vol29/iss3/6.

[13] *Broad Bank of Nigeria v. Olayiwola* (2005) LPELR-806 (SC).

[14]For instance, Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules 2019 provides that a judge may allow its originating process to be served on a defendant outside Nigeria where, *inter alia*, the whole subject matter of the dispute is land which located within jurisdiction; the claim is for the administration of the personal estate of any deceased person who was domiciled within jurisdiction at the time of his death; the action is brought in respect of a contract that is made within the jurisdiction, made by an agent residing or carrying on business within jurisdiction, or governed by Lagos State laws; the claim is in respect of a contract breached within jurisdiction regardless of where it was executed; the claim is founded on a tort committed within the jurisdiction; etc.

[15]While it is beyond the purview of this paper to undertake a comprehensive exposition on the concept of *forum conveniens*, it is pertinent for the present purposes to note that another commonly mistaken belief among lawyers is to equate the rule of *forum non conveniens* with the convenience of the parties or their legal practitioners. The word, conveniens is a Latin word for convenient or appropriate. The rule simply means that that there is another forum in which the case may most suitably be tried in the interests of all the parties and the ends of justice.

[16]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 75.

[17] An illustrative example is the case of *Owners of the MV Arabella v. Nigeria Agricultural Insurance Corporation (2008) LPELR- 2848 (SC).*Some later authorities have however held that such writ is not void but voidable and is capable of being waived by the defendant if not timeously raised. Whether a writ which is issued without leave is void or voidable is not within the purview of this paper. Either way, such writ is capable of being set aside.

[18]*Mohammed Kida v. A. D. Ogunmola* (2006) All FWLR (Pt. 327) 402.

[19](2014) LPELR-22703(CA).

[20]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 59.

[21]For a detailed treatment of the distinction between *actions in rem* and *actions in personam* please see Okoli, C. S. A. and Oppong, R. n. (16) above.

[22](2010) 5 NWLR (Pt. 1187) 348, 416.

[23]*Spiropoulos and Co Ltd v. Nigerian Rubber Co Ltd* (1970) NCLR 94; *Eimskip Ltd v. Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

[24]See *In re Gresham Life Assurance Society (Nig) Ltd (*1973) (1) ALR Comm 215, (1973) 1 All NLR (Pt. I) 617, (1973) NCLR 215.

Defending the Rule in Antony Gibbs

By Neerav Srivastava

The Rule in *Antony Gibbs*[1] ('the Rule') provides that if the proper law of a contract is Australian, then a discharge of the debt by a foreign jurisdiction will not be a discharge in Australia unless the creditor submitted to the foreign jurisdiction.[2] The Rule is much maligned, especially in insolvency circles, and has been described as "Victorian".[3] In 'Heritage and Vitality: Whether Antony Gibbs is a Presumption'[4] I seek to defend the Rule.

Presumption

The article begins by arguing that, in the modern context, that the Rule should be recognised as a Presumption as to party intentions.

Briefly, *Gibbs* was decided in the 1890s. At the time, the prevailing view was that the proper law of a contract was either the law of the place of the contract or its

performance.[5] This approach was based on apportioning regulatory authority between sovereign States rather than party intentions. To apply a foreign proper law in a territory was regarded as contrary to territorial sovereignty. Freedom of contract and party intentions were becoming relevant to proper law but only to a limited extent.[6]

As for *Gibbs*, Lord Esher's language is consistent with the 'Regulatory Approach':

It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract …[7]

Notice that the passage makes no reference to party intentions.

By the early 20th century, the position had evolved in that it was generally accepted that party intentions determined the proper law.[8] Even so, it was not until the late 1930s that the Privy Council stated that the position was "well-settled".[9] Party intentions has evolved into being the test for proper law universally.[10]

Under the modern approach, party intentions as to proper law are a question of fact and not territorial. Parties are free to choose a proper law of a jurisdiction with which they have no connection.[11] As a question of fact, party intentions are better understood as a 'Presumption'. Further, the Presumption might be displaced. The same conclusion can be reached via an implied term analysis.

The parties can also agree that there is more than one proper law for a contract. That, too, is consistent with party autonomy. Under *depeçage*, one law can govern a contract's implementation and another its discharge.[12] Likewise, the Second Restatement in the US[13] and the International Hague Principles allow a contract to have multiple proper laws.[14]

Cross-border Insolvency

The second part of the article addresses criticisms of *Gibbs* by cross-border

insolvency practitioners. In insolvency, issues are no longer merely between the two contracting parties. The body of creditors are competing for a share of a company's remaining assets. Under pari passu all creditors are to be treated equally. If a company is in a foreign liquidation, and its discharge of Australian debt is not recognised by an Australian court, *Gibbs* appears inconsistent with pari passu. Specifically, it appears that the creditor can sue in Australia and secure a disproportionate return.

That is an incomplete picture. While the foreign insolvency does not discharge the debt in Australia, when it comes to enforcement comity applies. Comity is agitated by a universal distribution process in a foreign insolvency. Having regard to comity, the Australian court will treat local and international creditors equally.[15] If creditors are recovering 50% in a foreign insolvency, an Australian court will not allow an Australian creditor to recover more than 50% at the enforcement stage. Criticisms of the Presumption do not give due weight to enforcement.

Gibbs has been described as irreconcilable with the United Nations Commission on International Trade Law *Model Law on Cross-Border Insolvency 1997* (the *1997 Model Law*),[16] which is generally[17] regarded as embodying 'modified universalism'. That, it is submitted, reflects a misunderstanding.

Historically, in a cross-border insolvency "territorialism" applied.[18] Each country collected assets in its territory and distributed them to creditors claiming in those insolvency proceedings. In the past 200 years, universalism has been applied.[19] Under 'pure universalism', there is only one process for collecting assets globally and distributing to all creditors. Modified universalism:

> *accepts the central premise of [pure] universalism, that assets should be collected and distributed on a worldwide basis, but reserves to local courts discretion to evaluate the fairness of the home-country procedures and to protect the interests of local creditors …[20]*

Modified universalism can be understood as a structured form of comity.[21] It asks that all creditors be treated equally but is a tent in that it allows States to choose how to protect the interest of creditors. A State may choose to couple recognition of the foreign insolvency – and the collection of assets in its jurisdiction – with the discharge of creditors' debts. However, the *1997 Model*

Law does not require a State to follow this mechanism.[22] Under the Anglo-Australian mechanism (a) a debt may not be discharged pursuant to *Gibbs* (b), but creditors are treated equally at the enforcement stage. It is a legitimate approach under the tent that is modified universalism.

[1] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

[2] Albert Venn Dicey, A Digest of the Law of England With Reference To The Conflict of Laws (Stevens, 1896) rule 113.

[3] Varoon Sachdev, "Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism" (2019) 93 *American Bankruptcy Law Journal* 343.

[4] (2021) 29 Insolvency Law Journal 61. Available at Westlaw Australia.

[5] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 53, citing *Peninsular and Oriental Steam Navigation Co v Shand* (1865) 16 ER 103.

[6] Alex Mills, *The Confluence of Public and Private International Law* (CUP, 2009), 53.

[7] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, 405 (*Gibbs*).

[8] Alex Mills, *Party Autonomy in Private International Law* (CUP, 2018) 56, Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2017), [32-004]–[32-005].

[9] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.

[10] Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.6]; Lord Collins et al, *Dicey, Morris & Collins, The Conflict of Laws* (Sweet & Maxwell, 15th ed, 2017), [32-004]–[32-005], [32-042]; and Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.

[11] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, Martin Davis et al, *Nygh's Conflict of Laws in Australia* (Lexis Nexis, 2019), [19.15].

[12] *Club Mediterranee New Zealand v Wendell* [1989] 1 NZLR 216, *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380.

[13] *Restatement (Second) of Contracts* § 188.

[14] Principles on Choice of Law in International Commercial Contracts promulgated by the Hague Conference on Private International Law in 2015.

[15] *Galbraith v Grimshaw* [1910] AC 508, *Chapman v Travelstead* (1998) 86 FCR 460, *Re HIH Casualty & General Insurance Ltd* (2005) 190 FLR 398.

[16] In Australia the *1997 Model Law* was extended to Australia by the *Cross-Border Insolvency Act 2008* (Cth).

[17] Adrian Walters, "Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-border Insolvency Law" (2019) 93 *American Bankruptcy Law Journal* 47, 64.

[18] Although Rares J has pointed out, "centuries earlier, maritime lawyers had developed a sophisticated and generally harmonious system of dealing with cross-border insolvencies": Steven Rares, "Consistency and Conflict – Cross-Border Insolvency" (Paper presented at the 32nd Annual Conference of the Banking & Financial Services Law Association, Brisbane, 4 September 2015).

[19] *Re HIH Casualty & General Insurance Ltd* [2008] 1 WLR 852, [30]; [2008] UKHL 21.

[20] Jay Lawrence Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 *Brooklyn Journal of International Law* 499, 517.

[21] UNCITRAL, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency* (2014) [8].

[22] *Akers v Deputy Commissioner of Taxation* (2014) 223 FCR 8; [2014] FCAFC 57. See too *Re Bakhshiyeva v Sberbank of Russia* [2019] Bus LR 1130 (CA); [2018] EWCA 2802.

The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective

A foreign judgment that cannot be enforced is useless no matter how well it is/was written. The fact that a foreign judgment can be readily enforced aids the prompt settlement of disputes and makes international commercial transactions more effective. The importance of the enforcement of foreign judgments cannot be over-emhpasised because international commercial parties are likely to lose confidence in a system that does not protect their interests in the form of recognising and enforcing a foreign judgment.

Today Hart published a new private international law monograph focused on the recognition and enforcement of foreign judgments. Its title is "The Hague Judgments Convention and Commonwealth Model Law: A Pragmatic Perspective." The author of this monograph is Dr Abubakri Yekini of the Lagos State University. The monograph is based on his PhD thesis at the University of Aberdeen titled "A Critical Analysis of the Hague Judgments Convention and Commonwealth Model Law from a Pragmatic Perspective."

The abstract of the book reads as follows:

"This book undertakes a systematic analysis of the 2019 Hague Judgments Convention, the 2005 Hague Choice of Court Convention 2005, and the 2017 Commonwealth Model Law on recognition and Enforcement of Foreign Judgments from a pragmatic perspective.

The book builds on the concept of pragmatism in private international law within the context of recognition and enforcement of judgments. It demonstrates the practical application of legal pragmatism by setting up a toolbox (pragmatic goals and methods) that will assist courts and policymakers in developing an effective

and efficient judgments' enforcement scheme at national, bilateral and multilateral levels.

Practitioners, national courts, policymakers, academics, students and litigants will benefit from the book's comparative approach using case law from the United Kingdom and other leading Commonwealth States, the United States, and the Court of Justice of the European Union. The book also provides interesting findings from the empirical research on the refusal of recognition and enforcement in the UK and the Commonwealth statutory registration schemes respectively."

I have had the benefit of reading this piece once and can confidently recommend it to anyone interested in the important topic of recognition and enforcement of foreign judgments. The pragmatic approach utilised in the book makes the work an interesting read. My prediction is that this book will endure for a long time, and will likely be utilised in adjudication.

Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law



Tort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

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This blog post is part of the article 'Tort Conflicts Rules in Cross-border Multi-

party Litigation: Which Law Has a Closer or the Closest Connection?' published by the Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177/1023263X211034103. A related previous post is 'Personal Injury and Article 4(3) of Rome II Regulation', available here https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/

This article compares Owen v. Galgey under Article 4 Rome II Regulation and YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act in the context of cross-border multi-party litigation on tort liability. As to the interpretation of tort conflicts rules, such as lex loci delicti, the notion of 'damage', lex domicilii communis and the closer/closest connection test, these two cases demonstrate different approaches adopted in European and Chinese private international law. This article does not intend to reach a conclusion which law is better between Rome II Regulation and Chinese Conflicts Act, but rather highlights on a common challenge faced by both Chinese courts and English courts in international tort litigation and how to tackle such challenge in an efficient way.

I. Tort conflicts rules in China and the EU

It is widely accepted rule that lex loci delicti will be the applicable law for cross-border tort liability in private international law. This is also the case in China and the EU. The application of lex loci delicti, as a general rule, is stipulated in Article 44 Chinese Conflicts Act and Article 4(1) Rome II Regulation. However, Article 4(1) Rome II Regulation explicitly refers to the place of damage, namely 'the law of the country in which the damage occurs' (lex loci damni), and expressly excludes the place of wrong ('the country in which the event giving rise to the damage occurred') and the place of consequential loss ('the country or countries in which the indirect consequences of that event occur'). By contrast, it remains unclear whether lex loci delicti in Article 44 Chinese Conflicts Act merely refers to lex loci damni, as such provision does not expressly state so.

The application of lex loci delicti in China and the EU is subject to several exceptions. Specifically, lex loci delicti is superseded by the law chosen by the parties under Article 44 Chinese Conflicts Act and Article 14 Rome II Regulation, while lex domicilii communis takes precedence over lex loci delicti under Article 44 Chinese Conflicts Act and Article 4(2) Rome II Regulation. Moreover, the escape clause enshrined in Article 4(3) Rome II Regulation gives priority to the

law of the country which has a ‘manifestly closer connection’ with the tort/delict, of which the pre-existing relationship between the parties might be a contract. By contrast, Article 44 Chinese Conflicts Act does not provide an escape clause, but the closest connection principle, which is comparable to the closer connection test in Article 4(3) Rome II, is stipulated in several other provisions.

The questions raised in YANG Shuying v. British Carnival Cruise and Owen v. Galgey were how to determine the applicable law to tort liability in multiparty litigation under Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation and what are the criteria for the closer/closest connection test.

II. Owen v. Galgey under Article 4 Rome II Regulation

In case Owen v. Galgey , a British citizen Gary Owen domiciled in England, fell into an empty swimming pool which was undergoing renovation works at a villa in France owned by the Galgey Couple, domiciled in England, as a holiday home. The British victim sued the British couple, their French public liability insurer, the French contractor carrying out renovation works on the swimming pool and its French public liability insurer for personal injury compensation. As regards which law is applicable, the British victim contended that French law should be applied by virtue of Article 4(3) Rome II Regulation, since the tort was manifestly more closely connected with France than it was with England. The British defendants held that English law should be applicable law under Article 4(2) Rome II Regulation, because the claimant and the defendants were habitually resident in England. The English High Court held the case was manifestly more closely connected with France, because France was the country where the centre of gravity of the situation was located.

III. YANG Shuying v. British Carnival Cruise under Article 44 Chinese Conflicts Act

In case YANG Shuying v. British Carnival Cruise, a Chinese tourist domiciled in China, sued the British Carnival Cruise Company, incorporated in the UK, for personal injury sustained in a swimming pool accident happened in the cruise when it was located on the high seas. The plaintiff signed an outbound travel contract with Zhejiang China Travel Agency for such cruise tour. The plaintiff held that English law, as the lex loci delicti, should be applicable since the parties did not share common habitual residence in China and the accident occurred on the cruise, which can be regarded as the territory of the UK according to the

floating territory theory. The place of wrong and the place of damage were both on the cruise under Article 44 Chinese Conflicts Act. The defendant and the third party argued that Chinese law should be applied since the parties had common habitual residence in China, the floating territory theory was inapplicable and the (indirect) damage of the tort took place in China.

The Shanghai Maritime Court adopted a strict interpretation of the term 'the parties' by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis ofTort Choice of Law Rules in Cross-border Multi-party Litigation under European and Chinese Private International Law

Zhen Chen

This blog post is part of the article 'Tort Conflicts Rules in Cross-border Multi-party Litigation: Which Law Has a Closer or the Closest Connection?' published by the Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177/1023263X211034103. A related previous post is 'Personal Injury and Article 4(3) of Rome II Regulation', available here https://conflictoflaws.net/2021/personal-injury-and-article-43-of-rome-ii-regulation/

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The Shanghai Maritime Court adopted a strict interpretation of the term 'the parties' by excluding the third party and denied the application of floating territory theory in this case. The court held that the application of the lex loci delicti leads to neither English law nor Chinese law. Instead, it is advisable to apply the closest connection principle to determine the applicable law. Based on a quantitative and qualitative analysis of all connecting factors, the court concluded that China had the closest connection with the case and Chinese law applied accordingly.

IV. Comments

Both Article 44 Chinese Conflicts Act and Article 4 Rome II Regulation apply to multi-party litigation on tort liability. Article 4(1) Rome II merely refers to lex loci damni and limits the concept 'damage' to direct damage, whilst Article 44 Chinese Conflicts Act can be interpreted broadly to cover the law of the place of

wrong and the term ‘damage’ include both direct damage and indirect damage or consequential loss. As to lex domicilii communis, the law of the country of the common habitual residence of some of the parties, instead of all parties, should not be applicable in accordance with Article 4(2) Rome II and Article 44 Chinese Conflicts Act. The exercise of the closest connection principle or the manifestly closer connection test under 44 Chinese Conflicts Act and Article 4(3) Rome II Regulation requires the the consideration of all relevant factors or all the circumstances in the case. When conducting a balancing test, the factor of the place of direct damage should not be given too much weight to the extent that all other relevant factors are disregarded. A quantitive and qualitative analysis should be conducted to elaborate the relevance or weight of each factor to determine the centre of gravity of a legal relationship.
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Professor Burkhard Hess on "Reforming the Brussels Ibis Regulation: Perspectives and Prospects"

A thought-provoking and much welcome contribution was posted by Prof. Dr. Dres. h.c. Burkhard Hess on SSRN, setting the stage for the discussion on the status quo in the application and the prospects of the Brussels IbisRegulation.

The article, titled "Reforming the Brussels Ibis Regulation: Perspectives and Prospects", may be retrieved here.

The abstract reads as follows:

> According to article 79 of Regulation (EU) 1215/2012, the EU Commission shall present a report on the application of the Brussels Ibis Regulation by 11 January 2022. This paper intends to open the discussion about the present state of affairs and the necessary adjustments of the Regulation. Although there is no need to change its basic structure, the relationship of the Brussels Ibis Regulation with other EU instruments (as the General Data Protection Regulation) should be reviewed. There is also a need to address third-State relationships and cross-border collective redress. In addition, the paper addresses several inconsistencies within the present Regulation evidenced by the case law of the CJEU: such as the concept of contract (article 7 no 1), the place of damage (article 7 no 2), the protection of privacy and the concept of consumers (articles 17 – 19). Finally, some implementing procedural rules of the EU Member States should be harmonised, i.e. on the assessment of jurisdiction by national courts, on judicial communication and on procedural time limits. Overall, the upcoming review of the Brussels Ibis Regulation opens up an opportunity to improve further a central and widely accepted instrument of the European law of civil procedure.