

The Enforcement of Foreign Judgments and Arbitral Awards

In the Eastern Caribbean

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A judgment or an arbitral award given by a court or tribunal is of little practical value to a party that obtained it until that party realizes the fruits of the judgment or award. All too often the realization requires resort to enforcement proceedings. Cognizant of this, the Eastern Caribbean Supreme Court Civil Procedure Rules 2000¹ provide an elaborate framework for the enforcement of the orders of municipal courts and tribunals in Parts 43-55.² These rules buttress various relevant legislative provisions in each Member State or territory.³

This presentation is however intended to focus on the enforcement in the municipal courts of Member States⁴ and Territories⁵ of the Eastern Caribbean

¹ Hereinafter referred to as "CPR 2000".

² Part 43 provides general provisions. Part 44 provides for oral examination in aid of enforcement. Part 45 provides for the manner in which judgments and orders may be enforced by a variety of orders for payment into court; by way of orders for the possession of land, for the delivery of goods and by requiring a person or corporation to act or not to act. It also provides for enforcement by charging orders under Part 48 by which stock or personal property may be charged for debt. Part 46 provides for enforcement by way of execution by the seizure and sale of goods to satisfy the judgment or order, while Part 50 deals with enforcement by way of attachment or garnishee orders. Part 51 provides for enforcement by way of receivership, while Part 52 provides for enforcement by way of judgment summons proceedings. Part 53 provides for enforcement by way of committal or sequestration proceedings, while Part 54 provides for interpleader proceedings. Part 55 provides for enforcement by the sale of land.

³ By Judgments Acts, Debtors Acts, Title by Registration Acts and Deeds Acts, for example.

⁴ These are Antigua and Barbuda; the Commonwealth of Dominica; Grenada; St. Christopher (St. Kitts) and Nevis; St. Lucia and St. Vincent and the Grenadines. See rule 2.4 of CPR 2000.

⁵ These are Anguilla; Montserrat and the British Virgin Islands. See rule 2.4 of CPR 2000.

Supreme Court of judgments and awards obtained from courts outside of the jurisdiction. The term “jurisdiction” is used here in the context of its definition in rule 2.4 of CPR 2000 to mean the Member States and Territories, which fall within the jurisdictional purview of the court.

At heart, these proceedings are cross-border, extra-jurisdictional or extra-territorial in nature. They have become increasingly important in this jurisdiction in recent years because of the growth of offshore commercial activity and concomitant international commercial litigation, particularly in Anguilla and the Virgin Islands (“the BVI”). This paper cannot presume to consider the plethora of legal issues that arise in this area of the law. It seeks only to focus on issues that have been raised in some of the decisions of various courts within the Member States and Territories.

General Considerations

Enforcement of foreign judgments and awards is governed by a complex maze of treaties or convention, which provide for reciprocal arrangements, as well as statutory regimes⁶ and general principles of law as they govern the extension of comity.

Statutory Provisions

Part 72 of CPR 2000 provides for the registration of foreign judgments or arbitral awards for the purpose of enforcing them. Rule 72.2 provides for the manner in which an application for recognition should be made. It states that an

⁶ The statutory regimes include, for example, Foreign Judgments (Reciprocal Enforcement) Acts and Arbitration Acts. For Anguilla and the British Virgin Islands they may also include UK statutes such as the Administration of Justice Act 1920; The Civil Jurisdiction and Judgments Order 2001; The Civil Jurisdiction and Judgments Act 1982 and the Protection of Trading Interest Act 1980.

application, which must be supported by affidavit evidence, may be made without notice. Rule 72.3 empowers the court to order a judgment creditor to give security for the costs of an application to set aside the application. Rule 72.4 provides for the contents of the order for registration of the judgment. Rule 72.5 requires the court office to keep a register of foreign judgments. A notice of the registration of the judgment must be served on a judgment debtor pursuant to rule 72.6. Rule 72.8 provides for the execution of a registered judgment, while rule 72.9 provides for the manner in which certified copies of a High Court judgment in the jurisdiction of the Eastern Caribbean Supreme Court should be prepared for enforcement abroad. These rules are by no means intended to cover the entire ambit of recognition and enforcement of foreign judgments since, by the terms of Part 72, these rules are to be exercised in accordance with relevant statutory provisions.

In some instances the statutory provisions are based on the terms of treaties or international convention. The Arbitration Act of the BVI,⁷ for example, provides for the enforcement of judgments and orders, including Convention Awards. Some of the provisions of this Act will be the subject of discussion later in this paper.

The case **Leon Plaskett v Stevens Yacht Inc. DBA Sunsail Charters and Another**⁸ discussed the application of a United States Virgin Island statutory provision in the context of an application for security for costs in the High Court.

Leon Plaskett arose out of a motor vehicle accident that occurred in 1998 in the BVI. The claimant, Leon Plaskett, was injured by a vehicle that was driven by an employee of Stevens Yacht. He sought damages for negligence. He gave his address in the documents filed in the High Court as Cruz Bay, St. John, United States Virgin Islands (“USVI”). The defendants applied for an order that the claimant should give security for costs and for a stay of proceedings pending

⁷ Cap. 6 of the Revised Laws of the British Virgin Islands, 1991.

⁸ British Virgin Islands High Court Claim No. BVIHCV 2002/0001 (31st January 2003).

the entry of security. The application was made on the ground that the claimant was ordinarily resident out of the jurisdiction.

The main issues considered on that application were, first, whether, having regard to all of the circumstances of the case, it is just for the court to order the claimant to give security for costs, and, second, whether it was discriminatory for the court to make such an order based solely upon the fact of the claimant's residence outside of the jurisdiction.

The claimant deposed,⁹ *inter alia*, that he was the owner of a lot of land in St. Thomas, USVI which was assessed by the Tax Assessor's Office in 1999 at a value of US\$32,971.00. This was the most recent assessment that was available when the application for security for costs was heard. The claimant stated that in the event that he did not prevail in his claim and he was ordered to pay costs, he had assets in the USVI against which the order for costs may be enforced. He deposed, however, that he did not have liquid assets available from which to give security. In effect, he was entreating the court to dismiss the application because this property was available notwithstanding that it is not within the jurisdiction. This raised enforcement issues.

There was in effect in St. John, USVI, a statute, to wit the Uniform Foreign Money-Judgments Recognition Act, 5 V.I.C. §561 *et seq.* It provided for the enforcement of foreign money judgments¹⁰ in the USVI in the same manner as a judgment of any state or territory of the United States. In **Leon Plaskett** the BVI High Court noted that in **Guardian Insurance Company v Bain Hogg International Limited and Eagle Star Reinsurance Company Limited**,¹¹ the USVI court applied this statute as the applicable local law for the enforcement of such judgments and noted the grounds on which a USVI court may refuse to recognize and enforce a foreign judgment.

⁹ See paragraph 8 of the judgment.

¹⁰ In the Act a foreign judgment includes a judgment of a court outside of the United States, which is entitled to full faith and credit in the United States Virgin Islands.

¹¹ (1999) 52 Federal Supplement 2nd Series 536.

Under section 565 of the Uniform Recognition Act, the court may refuse to recognize and enforce a foreign judgment, which was rendered under a system of law that does not have impartial tribunals and due process of law. It may also refuse to enforce a foreign judgment if the foreign court does not have personal jurisdiction over the defendant; if the foreign court does not have jurisdiction over the subject matter of the case; if the defendant does not have timely notice of the action to enable him to defend the claim; if the judgment was obtained by fraud; if the cause of action is repugnant to the public policy of the USVI; if the judgment conflicts with another final and conclusive judgment; if the foreign court proceeding is contrary to an agreement between the parties; or if the foreign court was an inconvenient forum for the trial of the action.¹²

The BVI court also noted, in **Leon Plaskett**, that in **Guardian Insurance**, the USVI court stated that the party seeking to enforce the foreign judgment bore the burden of establishing that the judgment did not fall within any of the excepting ground. The USVI court held that that party met its burden in **Guardian Insurance**, because it was well established that English courts were impartial tribunals which acted in accordance with due process.¹³ In **Leon Plaskett** the BVI court noted, with apparent approval, submissions that the BVI court system, which devolved from the same English common law principles and practice, and with final appeals to Her Majesty's Privy Council, would be viewed in the USVI as meeting the statute's requirements for recognition and enforcement of a money or costs order from the BVI court.¹⁴

In **Leon Plaskett**, the BVI court further noted that in **Guardian Insurance**, the USVI court went on to state that the English court must have had personal jurisdiction over the party against whom the judgment was granted. The BVI court concluded that inasmuch as Plaskett had himself invoked the jurisdiction of the BVI court to adjudicate his claim, it would be impossible for him later to

¹² See pages 541 to 542 of the judgment.

¹³ See page 542 of the judgment.

¹⁴ See paragraphs 23 and 50 of the Leon Plaskett.

claim that his case fell within any of the excepting provisions. The court also reproduced sections 553, 554 and 563 of the Uniform Act Recognition Act.¹⁵

Section 553 provides for the filing and status of foreign judgments as follows:

“A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of the United States Virgin Islands may be filed in the Office of the Clerk of the Territorial Court. The Clerk shall treat the foreign judgment in the same manner as a judgment of the Territorial Court of the Virgin Islands. A judgment so filed shall have the same effect and shall be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the Territorial Court of the Virgin Islands and may be enforced or satisfied in like manner.”

Section 554, which provides for procedures on notice for the filing of foreign judgments, states, in sub-sections (a) and (b):

“ (a) At the time of the filing of the foreign judgment, the judgment creditor or his attorney shall make and file with the Clerk of the Territorial Court an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor. (b) Promptly upon the filing of the foreign judgment and the affidavit, the Clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor’s attorney, if any, in the United States Virgin Islands. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the Clerk. Lack of mailing notice of filing by the Clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.”

¹⁵ In paragraphs 47, 48 and 49 of the judgment.

Section 563, which provides for recognition and enforcement of foreign judgments, states:

“Except as provided in section 565, a foreign judgment meeting the requirements of section 553 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a state or territory of the United States which is entitled to full faith and credit.”

Under section 566, a foreign judgment is not to be refused recognition for lack of personal jurisdiction, *inter alia*, if the Defendant was served personally in the foreign state.

The BVI court did not order Plaskett to give security for costs because his case was not frivolous, vexatious or abusive of the process of the court. More importantly, the decision was based on the court’s finding that the defendants would have been facilitated in the enforcement of any costs award that they may have obtained against Plaskett in the BVI court. This was because of the geographical proximity of the USVI and the BVI, and, in particular, because of the statutory regime for recognition and enforcement of any order.¹⁶

It is significant and noteworthy that

Comity

In **Nasser v United Bank of Kuwait**¹⁷ the English Court of Appeal also considered an application for security for costs. The court noted that the mere absence of reciprocal arrangements or legislation providing for enforcement of judgments would not of itself justify an inference that enforcement will not be possible.¹⁸ The court also noted that there was willingness on the part of the

¹⁶ See paragraphs 54 to 56 of the judgment.

¹⁷ [2001] 1 All ER 401.

¹⁸ [2001] 1 All ER 401, at 419–420.

United States to recognize and enforce foreign judgments on a liberal and flexible basis. Citing *Clermont on Jurisdictional Salvation and The Hague Treaty*,¹⁹ the court stated:

“Certainly no evidence has been put before us to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant.”

The “liberal and flexible basis” to which the court referred was the doctrine of comity. In **Guardian Insurance**, the court examined the issue of the enforceability of a judgment of an English court against a company resident in the USVI. In its analysis, the court stated:

“United States courts recognize foreign judgments under the doctrine of ‘comity’ which is defined as ‘a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws’.”²⁰

Comity is most critical where there are no reciprocal arrangements by Treaty or no statutory regime for the enforcement of foreign awards. My experience is that the BVI court is usually ever willing to extend comity. However, the judgment of the Ontario Superior Court of Justice in **Eastern Pacific Industrial Corporation Berhad v Vela Financial Holdings Limited**²¹ gave me pause to recall that we need to consider the applicable principles as a precursor to extending comity.

In **Eastern Pacific** the Ontario court refused to extend comity for the enforcement of an extra-territorial interim Mareva injunction which the BVI High Court had issued. The injunction was issued at the same time that it granted an order that permitted Eastern Pacific to register the arbitration award of CAD\$10.5 million and costs on which the Mareva application was based. The

¹⁹ (1999) 85 Cornell Law Review 89 at 97 -98.

²⁰ See page 540 of the judgment.

²¹ Court File No.: 05-CL-5823 (6th April 2005)(Hoy J.).

order, which Eastern Pacific obtained from the London Court of International Arbitration against Vela, also contained non-monetary provisions. The Canadian Court had itself recognized the final arbitration award.²² However, it refused to enforce the BVI interim Mareva injunction on the ground that the Ontario court will not enforce a foreign judgment that is not final or conclusive.²³ The Ontario court noted that BVI court procedures require the leave of the BVI court for its judgments to be enforced outside of the BVI, but that the applicant had not obtained leave. The court further noted that the face of the order indicated that the order was interim in nature because it was in force for only a further period of one month.

In **Eastern Pacific**, the court stated that enforcing a foreign judgment before leave was obtained was analogous to enforcing a foreign judgment that was not final and conclusive, and, additionally, that the injunction was obtained *ex parte* with liberty to the respondent to apply to discharge it on 48 hours notice. On the authority of **Pro-Swing Inc. v Elta Golf Inc.**²⁴ the court reiterated that a domestic court does not wish to enforce a foreign judgment that is interim in nature and which may therefore be subsequently changed.²⁵ The court also noted the unsettled state of the law relating to the enforcement of a non-monetary judgment. Although the Court of Appeal had indicated a willingness to relax the rules to facilitate the enforcement of such judgments, that court had held in **Pro-Swing** that that the order had to be sufficiently certain in its terms to permit an Ontario court to enforce it without having to interpret or vary the order.²⁶ The judge made some interesting comments on the BVI order for the

²² See paragraph 4 of the judgment.

²³ See paragraphs 4 and 5 of the judgment.

²⁴ 68 O.R. (3d) 443, reversed by the Court of Appeal but not on that point.

²⁵ See paragraph 5 of the judgment.

²⁶ See paragraphs 6 and 7 of the judgment.

benefit of the parties,²⁷ as a precursor to suggesting that an application for a Mareva injunction should perhaps be made to the Ontario court.²⁸

Comity in Insolvency Cases

In Eastern Caribbean the enforcement of foreign insolvency orders is not governed by statute. The BVI Government passed the Insolvency Act 2003, which is a modified version of the UK Insolvency Act 1886, with the stated intention of establishing a statutory regime for insolvency cases. The Act contemplates the enactment of Insolvency Rules that mirror the 1986 UK Insolvency Rules. Part XVIII of the Act²⁹ provides for cross-border insolvency. It contains sections which mirror the UNCITRAL Model Law on Cross-Border Insolvency, which contain rules to facilitate the enforcement of foreign insolvency orders.

The Insolvency Act 2003 was declared in force as of 16th August 2004. However, Parts III and XVIII were not brought into force. This was because the Government thought that inasmuch as the UNCITRAL Model Law is based on the concept of reciprocity they should not be brought into force until a significant number of other countries have adopted similar statutory provisions.³⁰

Basically then, the enforcement of foreign insolvency orders in the Eastern Caribbean is based on judicial co-operation by way of comity. The jurisdiction to extend comity is discretionary. It is exercised in accordance with common law rules, which have been and are being developed by the courts.

²⁷ See paragraphs 9-13 of the judgment.

²⁸ In paragraph 14 of the judgment.

²⁹ Sections 436 to 465.

³⁰ See the commentary on the Insolvency Act 2003 provided by the BVI Law Firm Conyers Dill & Pearman at conyersdillandpearman.com.

In considering the issue of the international recognition by the BVI court of foreign insolvency proceedings conducted in Germany in **Autland Heavy Equipment & Construction v Phillip Holzmann International/Nord France EI JV**,³¹ the BVI High Court stated:³²

“Whether this Court would recognize the insolvency proceedings in Germany is a matter of our law. We have no provisions for the reciprocal recognition and/or enforcement of Orders that issue from a German Court. I am not aware of any relevant [t]reaty provisions that Her Majesty’s Government extended to this Territory. This Court recognizes the importance of extending and accepting recognition of Judgments by comity, particularly in commercial cases... I would be willing to extend it, once there was sufficient evidence to satisfy me that, under German law, the assets of Holzmann, including its foreign assets, vested in the insolvency trustee prior to the institution of the claim...”

The approach of Eastern Caribbean courts in extending comity in insolvency cases tend to be quite facilitating and in keeping with statements which the Privy Council made in **Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc**.³³ This case was concerned solely with the operation of common law principles in a cross-border insolvency context. The court considered the question: What are the limits of the assistance which the court can give? Their Lordships stated as follows:³⁴

“At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in

³¹ Claim No. BVIHCV 2002/0111 (16th April 2004)(Rawlins J.).

³² At paragraph 14.

³³ [2007] 1 AC 508.

³⁴ At paragraph 22 of the judgment.

the domestic forum.”

Thus in **Globe-X Management Limited et al v Clifford Johnson et al**³⁵ Gordon JA stated that the High Court of Anguilla had an inherent jurisdiction, exercised with comity, to recognize a winding-up order issued by a Bahamian court.³⁶

Estoppel and Fraud

The general question that usually arises under this head is whether a finding by a foreign court that the judgment or award that it issued was not obtained by fraud provides an estoppel *per rem judicatam* which creates a bar to the enforcement of the award in our courts.

Etoile Commerciale SA v Owens Bank Limited,³⁷ came on an application to the Eastern Caribbean Court of Appeal by the Bank. The application was made under section 99(2)(a) of the Constitution of St. Vincent and the Grenadines for leave to appeal to Her Majesty in Council from a judgment of the said Court of Appeal. Under this provision, the Court of Appeal may grant leave in civil proceedings where that Court is of the opinion that the appeal raises a question of great general or public importance.

By way of background, Etoile had applied to the High Court of St. Vincent and the Grenadines to enforce a French judgment on a counter guarantee that Etoile alleged the Bank had provided to Etoile. The judgment was given by the Commercial Court of Paris and affirmed by the Paris Court of Appeal. In the enforcement proceedings, Monica Joseph J ordered Etoile to produce the counter guarantee for inspection. On appeal, the Eastern Caribbean Court of appeal

³⁵ Anguilla Civil Appeal No. 4 of 2003 (23rd May 2005)(Alleyne CJ (Ag.), Gordon JA and Barrow JA (Ag.).

³⁶ See particularly paragraphs 13 to 15 of the judgment.

³⁷ St. Vincent and the Grenadines Civil Appeal No. 7 of 1991 (5th April 1993)(Sir Vincent Floissac CJ, Byron and Liverpool JJ.A.).

indicated that 2 issues arose for consideration. One issue was whether the counter guarantee was falsified so that Etoile obtained the French judgment by fraud so that the judgment was unenforceable in St. Vincent and the Grenadines. The other issue was whether the order by the High Court to produce the guarantee was necessary in order to determine the issue of fraud.

In its judgment on the appeal from the decision of Monica Joseph J the Court of Appeal had found that the production of the counter guarantee was unnecessary because the French Court had already decided that there was no fraud. The Court of Appeal therefore held that this estopped the Bank from re-litigating that issue at all in the enforcement court.

In granting leave to appeal to Her Majesty in Council from its own judgment, the Court of Appeal noted that there were prior conflicting statements of principle on the question whether a determination by a foreign court that a foreign judgment was obtained by fraud was capable of creating an estoppel on that issue in the enforcement jurisdiction. Sir Vincent Floissac, CJ, who delivered the judgment of the Court stated as follows:³⁸

“In this jurisdiction, where several international companies are domiciled and transact business, it is necessary to clarify the law governing the circumstances under which the enforcement of a foreign judgment may be resisted on the ground that it was received by fraud. I am therefore of the opinion that the question involved in the proposed appeal is ‘one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty on Council’.”

In suggesting that there was a need to have the law clarified, Sir Vincent noted³⁹ a statement by Lord Reid in **Carl Zeiss Stiftung v Ryner & Keeler Ltd. (No.2)**⁴⁰ that while in principle issue estoppel may arise on a foreign judgment, there are reasons to exercise caution in applying it in any particular case. This,

³⁸ At page 7 paragraph 3 of the judgment.

³⁹ At page 3 paragraph 2 of the judgment.

⁴⁰ [1967] 1 AC 855, at page 918.

according to Lord Reid, was because the enforcing court may not know, by reason of the mode of procedure in the foreign court, whether the particular issue was actually decided, or whether the decision on the issue was merely collateral or obiter. Lord Reid stated that, in the second place, the party seeking to resist enforcement might not have had the opportunity to make his case to the foreign court. He said that it would be unjust for these reasons for the enforcing court to prevent the party from litigating the point in the enforcement proceedings.

Sir Vincent also considered that conflicting statements in the cases on the related issue, whether where in a foreign judgment the foreign court determined the question of fraud, that determination precludes a judgment debtor from re-litigating that issue in the enforcing court. Sir Vincent recalled that in arriving at its decision that the issue could not be relitigated in the enforcing court, the Court of Appeal had relied on statements by Stuart-Smith LJ in **House of Spring Garden Ltd. v Waite**⁴¹ that it would amount to a travesty of justice to permit the issue to be tried afresh in the enforcing jurisdiction when it was extensively investigated and decided in the natural forum, for 2 main reasons. The first reason was that public policy requires litigation to come to an end and a litigant should not be vexed in the same cause more than once. The second reason was that permitting re-litigation of the issue could occasion inconsistent decisions.

Sir Vincent noted that the Bank relied on **Jet Holdings Inc. v Patel**⁴² to support its claim for the litigation of the issue of fraud in the enforcing jurisdiction. He noted, in particular, the statement by Staughton LJ⁴³ that where in enforcement proceedings a party asserts that a claim and evidence in the foreign proceedings were fraudulent the matter must be tried afresh. This, he said, was because a foreign judgment obtained by fraud cannot be enforced “even though the allegation of fraud was investigated and rejected in the foreign

⁴¹ [1990] 1 All E.R. 991, at page 998.

⁴² [1989] 2 All E.R. 648.

⁴³ [1989] 2 All E.R. 648, at page 652.

court.” Straughton LJ referred to the decisions in **Abouloff v Openheimer & Co.**⁴⁴ and **Vadala v Lawes**⁴⁵ as authorities for these statements.

Sir Vincent noted⁴⁶ that in **Owens Bank v Bracco**,⁴⁷ the House of Lords approved **Abouloff** and **Vadala**. He also noted that Lord Bridge stated that in these 2 cases the courts correctly did not accord the same finality that precludes the re-litigation of issues already determined by English courts in further English proceedings to judgments that were obtained in foreign courts, preferring to give primacy to the principle that fraud unravels everything.

In **Owens Bank Limited v Etoile Commerciale SA**,⁴⁸ the Privy Council noted that section 9(2)(d) of the Administration of Justice Act 1920 provided, with respect to Commonwealth judgments, that no order shall be made for the registration of a judgment that is obtained by fraud. Their Lordships also noted that section 4(1)(a)(iv) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 contained a similar provision with respect to foreign countries with which the UK concluded reciprocal arrangements.

Their Lordships further stated that, while **Bracco** was not wrongly decided, they did not regard **Abouloff** with enthusiasm, especially in its application to countries whose judgments the UK has agreed to enforce, and that the rule that favours finality in litigation seemed more appropriate.⁴⁹ Their Lordships held, however, but that every court of justice has an inherent power to prevent the misuse of its process by any party. This, according to their Lordships, would permit a party in foreign enforcement proceedings to obtain judgment or an order to strike out a pleading on the ground of fraud. Full particulars of fraud must be given in each case. Their Lordships dismissed the

⁴⁴ [1882] 10 QBD 295, [1881-5] All E.R. Rep. 307.

⁴⁵ [1890] 25 QBD 310; [1886-90] All E.R. Rep. 853.

⁴⁶ At pages 5 to 6 of the judgment in *Etoile Commerciale SA*.

⁴⁷ [1992] 2 WLR 621.

⁴⁸ Privy Council Appeal No. 6 of 1994 (6th July 1994)(Lord Templeman).

⁴⁹ See page 6 of the judgment.

appeal with costs because they found that the allegations of fraud in the case were ambivalent.

[QUAERE: What is the “fraud” – is it that the order was obtained by a fraud upon the court? OR is the ambit wider so that the reference is to any fraud that touches and concerns the any aspect of the case?]

The Enforcement of Arbitral Awards

The issue of the enforcement of extra-jurisdictional arbitral arose recently in our court in **IPOC International Growth Fund Limited v LV Finance Group Limited**.⁵⁰ The critical questions in this case were whether enforcement was precluded because a Convention Award was declaratory only, and whether enforcement was precluded on the ground of illegality or because of the act of state doctrine.

The IPOC case came on an *ex parte* application by LV Finance to the High Court in the BVI. LV Finance applied to register in the BVI and to enforce 2 declaratory Convention Awards obtained against IPOC in arbitration proceedings in Zurich, Switzerland. LV Finance’s application in the BVI was made pursuant the Arbitration Act⁵¹ and rule 43.10 of CPR 2000. The Arbitration Act provides for the enforcement of judgments and orders, including Convention Awards. Part 43.10 of CPR 2000 provides for the enforcement of awards that are made by any authority, other than the court, which are enforceable by a statutory provision, as if it were an order of the court.⁵² It also provides for the registration of such awards so that it may be enforced as if it were an order of the court.⁵³ In the High Court Joseph-Olivetti J granted the application.

⁵⁰ British Virgin Islands Civil Appeal No. 36 of 2006 (18th June 2007).

⁵¹ Cap. 6 of the Revised Laws of the British Virgin Islands, 1991.

⁵² See rule 43.10(1)(a).

⁵³ See rule 43.10(1)(b).

By way of background, IPOC is an International Business Company (“IBC”) incorporated in Bermuda. LV Finance is also an IBC incorporated in the BVI. Both companies are allegedly owned by Russian nationals. The arbitration proceedings were instituted by IPOC under an option agreement between the parties dated 10th April 2001 (“the agreement”). The shares in OAO Megafon, a Pan-Russian mobile telecommunications company, were the subject of the agreement. In the arbitration proceedings, LV Finance sought to avoid the performance of its obligations under the agreement on the ground that IPOC had not validly exercised the option under it. LV Finance also contended that the agreement was an illegal transaction the purpose and performance of which were illegal and therefore unenforceable. LV Finance prevailed and the arbitration awards were declared in these terms. In **LV Finance Group Limited v IPOC International Growth Fund Limited**,⁵⁴ LV Finance obtained an order that permitted the registration and enforcement of those Convention Awards in Bermuda.

IPOC applied, in the BVI proceedings, for an order to set aside the *ex parte* order issued by Joseph-Olivetti J. This application was heard *inter partes*. The application was supported an affidavit and IPOC also filed another affidavit that was deposed by Ricardo E. Ugarte, one of the principal advocates in the Zurich arbitration. The Ugarte affidavit was filed without leave of the court 4 days before the scheduled hearing of the application. IPOC also applied for an adjournment of the hearing of its application to set aside the *ex parte* order pending the decision on its appeal against the second Convention Award to the Swiss Supreme Court. When Joseph-Olivetti J heard the application to set aside as scheduled on 26th September 2006 she dismissed that adjournment application. The Court of Appeal dismissed IPOC’s appeal against that decision.

At that hearing on 26th September 2006, the judge refused to admit or to rely on the Ugarte affidavit. The Court of Appeal also upheld that decision.

⁵⁴ Commercial Court of the Supreme Court of Bermuda Suit No. 176 of 2006 (31st August 2006).

The judge also dismissed IPOC's application to set aside the *ex parte* enforcement order. The order that was eventually filed as a result states that LV Finance was given leave to enforce the awards by entering the declaratory judgment in the terms of the awards which LV Finance obtained from the Zurich Arbitration Tribunal.

The Enforceability of a Declaratory Convention Award

In **the IPOC case**, in the BVI proceedings, IPOC appealed the decision of the High Court on grounds, *inter alia*, that the judge erred by refusing to hold that the partial awards were unenforceable. IPOC's main contention on this ground was that the judge should have found the Awards unenforceable because they are declaratory in nature and are Convention awards, which are not amenable to enforcement. The Court of Appeal found that the judge correctly found that the awards were enforceable.

As the BVI High Court noted in **the IPOC case**, the Arbitration Act of the BVI is intended to facilitate the enforcement of Convention awards in the BVI. The Act defines a Convention award as an award that is made pursuant to an arbitration agreement in the BVI or a State, other than the BVI or the United Kingdom, which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention, which was adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958,⁵⁵ is usually referred to as "the New York Convention."

In her judgment, Joseph-Olivetti J observed⁵⁶ that Parliament had set out the whole of the New York Convention in the schedule to the Act and that the scheme of the Act, which accords with the intention of the Convention, is to facilitate the recognition and enforcement of Convention Awards. The judge also

⁵⁵ In section 2.

⁵⁶ In paragraph 26 of the judgment.

noted that Part IX of the Act, which encompasses sections 33-37, provide a general scheme to give effect to the New York Convention by a simple, straightforward method of enforcement of Convention Awards.

Section 34(1) provides that a Convention Award shall, subject to the provisions of Part IX, be enforced either by action or in the same manner as an arbitration award is enforceable under section 28. Section 28 which provides for the enforcement of domestic awards, states that an arbitration award may, by leave of a judge, be enforced in the same manner as a judgment or order of the High Court. Section 28 also states that where leave is given the judgment may be entered in terms of the award. This was done in the order of the High Court in **the IPOC case**.

Section 34(2) of the Act provides for recognition of Convention Awards. This subsection states that, in the Act, the term enforcement shall include recognition. Section 35 of the Act requires a party seeking to enforce a Convention Award to produce the original award and the original arbitration agreement.

Section 36 of the Arbitration Act provides the guidelines which a court in the BVI must follow on an application for the enforcement of a Convention Award. Section 36(1) of the Act states that the court may only refuse to grant the application to enforce a Convention Award on grounds set out in section 36, and, accordingly, will always be critically important in determining whether an award should be enforced in the BVI.

Section 36 states:

- “36 (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
- (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –
 - (a) that a party to the arbitration agreement was, under the law applicable to him, under some incapacity;
 - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any

- indication thereon, under the law of the country where the award was made;
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
 - (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
 - (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
 - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.
- (4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
- (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

By interpretation, both the High Court and the Court of Appeal found in **IPOC** that the Zurich Arbitration Awards did not fall within the exceptions in section 36(2) or (3) of the Act. The courts rejected the submissions by counsel for **IPOC** that other exceptions arose from the operation of common law principles.

Counsel for IPOC had submitted that the partial awards were purely declaratory, and that such awards cannot be enforced under the Act. Counsel relied, in particular, on the decision of the English Court of Appeal in **Margulies Brothers Ltd v Dafnis Thomaidis & Co (UK) Ltd**⁵⁷ and **Tongyuan (USA) International Trading Group v Uni-Clan Limited**⁵⁸ to support this submission. Alternatively, learned counsel submitted that even if purely declaratory awards are enforceable, the awards could not be enforced by giving judgment in terms of the awards because they conferred no material benefit or utility on LV Finance. Counsel relied on **Tridon Australia Pty Ltd. v ACD Tridon Inc.**⁵⁹ as authority for this statement. The court found that these statements did not provide further grounds on which the court may refuse to grant the application for leave to enforce a Convention Awards.

In construing section 36, Olivetti-Joseph J noted the use of the words “shall not be refused” in section 36(1) and “may be refused” in section 36(2). She concluded, correctly, I thought, that the court only has discretion to refuse to enforce a Convention Award in the circumstances set out on section 36(2). She also concluded, correctly, that the opening words of section 36(2) mean that the grounds on which enforcement may be refused are exhaustive and that the burden lies on IPOC, as the party seeking to resist enforcement, to raise and prove a clear case for refusal. The judge stated that the court usually takes a pro-enforcement approach to New York Convention awards. For this she adopted and relied on the statement of Gross J in **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn**,⁶⁰ which Kawaley J restated in **LV Finance v IPOC**⁶¹ as follows:

“For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that section 103 of the Act

⁵⁷ [1958] 1 Lloyd’s Rep 205.

⁵⁸ Unreported 19th January 2001; Bick-Moore J.

⁵⁹ [2004] NSWCA 146.

⁶⁰ [2005] 2 L1 Rep 326, paragraph 16.

⁶¹ At paragraph II.

embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill & Boyd, *Commercial Arbitration*, 2nd edn, 2001 Companion, at page 87.”

The judge found, and the Court of Appeal agreed, that there is nothing in section 36(2) which indicates that a purely declaratory Convention Award is excluded from the terms of the subsection and the Partial Awards were therefore enforceable. This, she noted, was in contradistinction to the provisions of the Reciprocal Enforcement of Foreign Judgments Act,⁶² which, in section 2(1), provides only for the registration and enforcement of money orders.⁶³ The judge also concluded that the New York Convention itself does not exclude the enforcement of purely declaratory awards and imposes no restrictions as to the nature and form of an award that is enforceable.⁶⁴ In this regard she noted that Article III of the Convention provides, *inter alia*:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

The Court of Appeal agreed with the judge’s finding⁶⁵ that since the Zurich Awards met the certainty and intelligibility criteria and the Act does not prohibit enforcement of declaratory judgments, IPOC’s application to set aside

⁶² Cap. 65 of the Revised Laws, 1991, of the British Virgin Islands.

⁶³ See paragraph 30 of the judgment.

⁶⁴ See paragraphs 30 and 31 of the judgment.

⁶⁵ At paragraph 43 of the judgment.

failed on the ground of unenforceability. This finding was buttressed by adopting the statement of Kawaley J in **LV Finance v IPOC**:⁶⁶

“The restrictive interpretation contended for would, in any event, potentially drive a coach and horses through the entire edifice of reciprocal enforcement of arbitral awards, because declarations of liability and/or non-liability and declarations on points of construction are an important feature of commercial arbitration law, particularly in the field of insurance and reinsurance law. And the reciprocal enforcement regime is intended to provide a summary mechanism for enforcing awards, with a strong policy bias against refusing enforcement. It is also noteworthy, in terms of appreciating the mischief which could result from excluding declaratory Convention awards from recognition and enforcement, that such awards are more likely today than in the past.”

The Court of Appeal also agreed with the judge’s finding⁶⁷ that it was not necessary for LV Finance to show any utility in enforcing the awards because this is not a criterion for enforcement under the Act. The judge had also correctly observed, however, that the court has a discretion whether to grant leave to enter judgment under section 28 of the Act and that LV Finance was no doubt interested in seeking to ensure that IPOC does not benefit in any way from the agreement. As far as the judge was concerned this was sufficient reason for giving judgment in terms of the declarations contained in the award. She also thought that IPOC had not shown any good reason why leave to enter judgment accordingly should not be granted to LV Finance.

In passing, it is noteworthy that the judge⁶⁸ and the Court of Appeal agreed with IPOC’s contention that in these proceedings it was not necessary to obtain an order for the recognition of a Convention award in order to enforce the award in the BVI. This was because the Arbitration Act makes a clear distinction between the recognition and the enforcement of a Convention award. In this regard sections 34(1) and 28 of the Arbitration Act make specific provision for

⁶⁶ At page 25 of the judgment.

⁶⁷ At paragraph 44 of the judgment.

⁶⁸ At paragraph 47 of the judgment.

enforcement by stipulating that judgment may be entered in terms of the award. By the same token the court may by order recognize a Convention award without enforcing it. Both courts accepted the statement of Kawaley J, in **LV Finance v IPOC**, that section 40(2) of the Bermuda Arbitration Act (which is equivalent to section 34(2) of the BVI Act) did not empower the Court to make an order declaring that the awards were recognized.

Illegality

IPOC's main contention on this ground was that the awards were unenforceable because they were tainted by illegality since the Arbitration Tribunal stated that there was illegal conduct by both parties. Counsel for IPOC sought to move the court to find that this meant that the award was based on a contract which was illegal, and, as a matter of BVI public policy, the court should refuse to recognize or enforce the agreement pursuant to section 36(3) of the Act. It would be recalled that this section provides that a court may refuse to enforce a Convention Award if it would be contrary to public policy to enforce it. It is important to remember that LV Finance obtained the declaratory awards, and, accordingly, avoided its obligations under the agreement on the ground of illegal acts or omissions on the part of IPOC.

The Tribunal found that LV Finance was complicit in the illegality but still entered the awards for LV Finance. Relying on **Soleimany v Soleimany**,⁶⁹ counsel for IPOC contended that it was contrary to public policy to allow LV Finance to benefit from its own wrongdoing by recognizing and enforcing the awards. On the other hand, counsel for LV Finance contended that no public policy considerations were involved. This, according to counsel, was because LV

⁶⁹ [1999] QB 785.

Finance was seeking to enforce an award rather than to enforce or exercise any rights or obtain money under the agreement.⁷⁰

Joseph-Olivetti J noted that in **Westacre Investments Inc v Jugoimport-SDPR Holding Co**⁷¹ the English Court of Appeal held that it was not contrary to public policy to enforce a foreign award. This was notwithstanding that it was argued that the underlying contract involved a conspiracy to break the laws of a foreign state. She also noted that **Soleimany** involved a foreign award for the payment of money made by the Beth Din under Jewish law which on its face purported to enforce an illicit enterprise for smuggling carpets out of Iran. This was contrary to the laws of Iran, a friendly, foreign state. She further noted that the court took the view that at the enforcement stage it was to ensure that its powers of enforcement were not abused. Further, that the proper law to consider on that issue was English law as part of the *lex fori*. Accordingly, the court refused to enforce the award as it would have been contrary to English public policy to do so.

However, Joseph-Olivetti J distinguished **Soleimany** on the ground that the application in **Soleimany** was for enforcement to recover monies under an illegal contract, whereas in the present case, LV Finance's enforcement application was to prevent IPOC from in the future relying on an illegal agreement. She noted that LV Finance was not seeking to benefit from its own complicity by seeking to extract money or any other pecuniary benefits from IPOC under the illegal agreement. She also noted the principles which state that the public policy defence to an enforcement application is one which has a narrow scope and extends only to a breach of the most basic notions of morality and justice. She therefore held that IPOC failed to satisfy the court that LV Finance was seeking to benefit materially from an illegal contract or that

⁷⁰ See paragraphs 52 and 53 of the Judgment.

⁷¹ [1999] Q.B. 740.

enforcing the award would be wholly offensive to the ordinary reasonable man in the BVI or that it would breach some basic notion of morality and justice.

The Court of Appeal agreed. In so doing it stated that it seems clear that while the Tribunal declared that the agreement was tainted with illegal conduct by both parties, the Second Partial Award was not tainted by that illegality. The Court of Appeal stated that had LV Finance relied on the agreement to enforce contractual rights or benefits under it, the principles in **Soleimany** may have precluded enforcement.

The Court of Appeal also stated that by its enforcement application, LV Finance sought to enforce the decision in the Second Partial Award that the agreement is unenforceable. The court held that this could not be contrary to public policy under section 36(3) of the Act. To buttress this finding the court relied on the statement of Kawaley J in the Bermuda proceedings in **LV Finance v IPOC**.⁷² He said that LV Finance was merely seeking to uphold the finality of the Tribunal's decision that the agreement is not enforceable by IPOC, in circumstances where it is not contended that the arbitration agreement was itself vitiated by the illegality in question. LV Finance had merely sought to enforce the benefits of the agreement to arbitrate.

Act of State

The applicable BVI provision in relation to this issue is section 36(3) of the Arbitration Act. It provides that the court may refuse to enforce a Convention Award if the award is in respect of a matter which is not capable of settlement by arbitration. In **IPOC**, the High Court and the Court of Appeal held that IPOC's contention that the award was unenforceable because they were affected by act of state which rendered the Agreements non-arbitrable was totally unmeritorious. In short, there was no act of state because although Minister

⁷² See paragraph 37-39 of the judgment.

Reiman, the supposed beneficial owner of IPOC, was a Minister of the Russian Government, he was acting in his private rather than in his ministerial capacity in relation to the illegal acts or omissions on his part which vitiated the agreement.

Additionally, it was clear that the Zurich Tribunal was concerned simply with determining the purpose for which the parties had entered into the agreement and the intended manner of its performance. This was in order to determine whether it was illegal or not, and thus unenforceable under the public policy of England (the governing law of the contract). They were not questioning any decision of the Russian State or its policy. The Tribunal was not sitting in judgment on the validity of acts done by an official of the Russian government in his official capacity within Russia. The Tribunal was not sitting in judgment on the acts of the Russian state in its sovereign or governmental capacity. The Tribunal found that the Minister's omission to act was an illegality that had so tainted the Agreement that it was unenforceable.⁷³ His omissions were in breach of law to further his personal interests.

The Enforcement of Foreign Land Orders

Marina Maclean v Fatima Raeburn⁷⁴ is an interesting case, in my view, for 2 reasons. Although the first reason is not a focal point of this aspect of this paper it is worthy of mention. It is the admonition which Matthew JA sounded against the ready grant of *ex parte* orders in property cases.⁷⁵ More importantly, however, the case serves as a reminder of the difficulty that often arises when our courts decide whether to enforce orders of foreign courts in respect of land.

⁷³ At paragraph 483 of the Award.

⁷⁴ Antigua and Barbuda Civil Appeal No. 2 of 2000 (24th July 2000)(Satrohan Singh, Albert Redhead and Albert Mathew JJ.A.).

⁷⁵ In paragraph 10 of the judgment.

The difficulty revolves mainly around the issue whether a foreign land judgment or order operates *in rem* or *in personam*.

The Respondent, Fatima Raeburn, was the wife of Raymond Raeburn, deceased. When they married in 1983 Raymond was 65 years of age and Fatima was 33. They became joint tenants of the land in Antigua, which was the subject of this case, in 1986. The marriage soon unraveled and they obtained a decree absolute in January 1988. In March 1988 a County Court in England made an ancillary order touching properties in their names, including the subject property in Antigua. The order was served on Fatima Raeburn personally in Antigua in April 1988. Various proceedings were instituted in the High Court in Antigua in relation to the Antigua property. Raymond Raeburn died in 1999 and the Appellant, Marina Maclean, who was then his common law wife and who was his Personal Representative at the time stepped into his shoes so that the land dispute in relation to that property became the subject of litigation between her and Fatima Raeburn.

The English order had directed Fatima Raeburn to transfer her interest in the Antigua property to Raymond Rayburn. She did not comply with that direction.

In the judgment of the Court of Appeal in **Marina Maclean**, Matthew JA noted⁷⁶ that the parties agreed that the English order did bind Fatima Raeburn *in personam*. He agreed with the following submission which counsel for the appellant made:⁷⁷

“[T]he judgment did not affect the title to the land. It created an obligation on the wife by judicial decision to transfer whatever interest she had to the husband. She could not thereafter have any enforceable rights to deal with the property save to transfer her interest in it to her husband. The order created a legal obligation which equity would have enforced against her to ensure she made

⁷⁶ In paragraph 24.

⁷⁷ See paragraphs 24 and 25 of the judgment.

the transfer and in default an order could have been made directing the Registrar to do it for her.”

Matthew JA stated that while in his view the English order did not operate directly upon the property in Antigua; the court should recognize the *in personam* order made against the wife to transfer all her interest in the property to the husband absolutely. According to the judge, it was evident that Fatima Raeburn will not obey the order but she should not be able to use her default and willful disobedience to her advantage. The Court of Appeal therefore allowed the appeal, declared that the Antigua property was owned by the Appellant, Marina Maclean and directed the Registrar of Lands to do the necessary transfer, so that in the final analysis the Antigua land should revert to the Estate of Raymond Raeburn. The court also made an order that the Appellant was entitled to damages for wrongful dispossession to be assessed.⁷⁸

In arriving at this decision, Matthew JA agreed⁷⁹ with the finding in the High Court by Benjamin J that the judgments in **Razelos v Razelos**,⁸⁰ in which it was held that the English Court could act *in personam* notwithstanding that the property concerned was in Greece, and the decision in **Hamlin v Hamlin**,⁸¹ in which the Court of Appeal approved the decision in **Razelos** were sound in principle. He noted,⁸² however, that Benjamin J stated that the case must be viewed from the perspective of the Antigua Courts and thereby preferred to apply the decision of the Supreme Court of Canada in **Duke v Andler**.⁸³

In **Duke v Andler** the Canadian Supreme Court held that the judgment of the Court of California did not, in British Columbia, affect the title of the land in question and was therefore not a judgment that should be enforced by the Courts

⁷⁸ See paragraphs 25 and 34 of the judgment.

⁷⁹ At paragraph 26 of the judgment.

⁸⁰ [1969] 3 ALL E.R. 929.

⁸¹ [1985] 2 All E.R. 1036.

⁸² At paragraphs 27-29 of the judgment.

⁸³ (1932) 4 DLR 529.

of British Columbia as binding there on the parties. In this regard he noted⁸⁴ that Benjamin J had accepted the contention on behalf of Fatima Raeburn that there had been no final determination on the merits of the respective rights of the parties relative to the Antigua property by a court of competent jurisdiction.

Matthew JA referred⁸⁵ to Rules 77 and 78 of the tenth edition of **Dicery and Morris** on **The Conflict of Laws**. He relied in particular on an aspect of Rule 78 which he said stated, indirectly, that a foreign immovable may be affected by a judgment of an English court *in personam* ordering some person subject to the control of the Court to execute a conveyance or mortgage. He found that this aspect of the commentary was applicable to the case. He concluded as follows:⁸⁶

“This Court’s perspective is not to give effect to fraud or other inequitable behaviour. I have already referred to the way in which the Guildford County Court dealt with the properties located in the three countries. There is no effective decision of the Antigua Court giving Herbert’s Mill to the Respondent. It would be in my judgment unconscionable for the Respondent to retain it.”

In **Susan Dodge and Others v Michael Simanic and Others**,⁸⁷ Belle J followed the decision in **Marina Maclean**, and in doing so agreed with the submissions by counsel that the decision was not intended to change the common law on the effect of a foreign court’s decision *in rem* affecting immovables. According to Belle J, in **Marina Maclean** Matthew JA was trying to prevent a possible injustice from being perpetrated on one of the parties and recognized the foreign judgment in doing so. He said that this demonstrates what may happen where the court decides to consider the justice of the case. He therefore rationalized the decision on the ground that in such circumstances the

⁸⁴ At paragraph 29 of the judgment.

⁸⁵ In paragraphs 30 to 32 of the judgment.

⁸⁶ In paragraph 33 of the judgment.

⁸⁷ St. Kitts Civil Claim No. SKBHCV 2001/0191 (22nd November 2007).

just course was to determine whether the foreign court followed the strict guidelines that it should have followed in making its order.⁸⁸

The **Susan Dodge** case was concerned, *inter alia*, with the question whether the St. Kitts court should have issued an order for the registration of an order by an Ontario court as an order of the High Court of St. Kitts. The case came before Belle J on applications by the Defendant, Simanic, to strike out the statement of claim and to set aside a default judgment. Both applications were dismissed. In doing so the judge held, in relation to the application to strike out, that a genuine cause of action arose on the Ontario orders affecting land in St. Kitts as well as on other grounds contained in the claim. The judge stated that the second and third defendants were estopped from re-litigating the matters that were litigated in the Ontario court.⁸⁹ He also dismissed the claimant's application for summary judgment.

These judgments show that in this area of the law there is usually a tension between the application of the general principle that a court would not usually enforce foreign *in personam* order affecting property and what may be seen as the injustice that this general principle may occasion.

Consider: The idea of seeking to do justice is desirable but it could be a ground for uncertain principles.

Conclusion

Perhaps more than anything, this presentation highlights the need for legislatures in the Eastern Caribbean to consider the provision of properly rationalized reciprocal arrangements for the enforcement of foreign awards by treaty or statutory provisions. For this purpose it would be necessary to embark

⁸⁸ See paragraph 36 of the judgment.

⁸⁹ See paragraphs 23 and 24 of the judgment.

upon a study of the present arrangements, or lack of them, and policy decisions with regard to the ambit that the provisions should provide for enforcement.

This presentation has also highlighted the anomaly that the statutory facility for the enforcement of a declaratory Convention award from a Swiss Arbitration in the BVI provides by provisions contained in the Arbitration Act. A declaratory non-convention judgment of a Swiss Court would not have had the same facility for registration and enforcement in the BVI Court because there are no similar legislative provisions for court judgments.

A question: What of reciprocal enforcement legislation for arrangements between Commonwealth Caribbean countries?