In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL LIST

2013: No. 59

DESSAROLLO INMOBILIARO Y NEGOCIOS INDUSTRILES DE ALTO TECNOLOGIA DE HERMISSILLO, S.A. DE CV.

Plaintiff

-v-

KADER HOLDINGS COMPANY LIMITED

Defendant

RULING

(in Chambers)

Date of hearing: July 1, 2013
Date of Ruling: July 9, 2013

Mr. Scott Pearman, Conyers Dill and Pearman Limited, for the Plaintiff

Mr. Henry Tucker, Appleby (Bermuda) Limited, for the Defendant

Introductory

1. On March 1, 2013, the Plaintiff issued a Specially Endorsed Writ of Summons seeking to enforce at common law an Arizona Superior Court money judgment entered in favour of the Plaintiff against the Defendant on June 8, 2011 ("the Arizona Judgment"). The

Plaintiff, a Mexican real estate development company, based its claim against the Defendant, a Bermudian company, on a guarantee entered into between the parties on October 21, 1992 ("the Guarantee") under which the Defendant guaranteed the obligations of a Lease entered into between the Plaintiff and a third party on the same date and which was signed by the Defendant as Guarantor ("the Lease")[1].

2. The Arizona Judgment became final when, the Court of Appeals having affirmed on April 16, 2012 Judge Soto's first instance judgment, the Arizona State Supreme Court on September 24, 2012 denied the Defendant's 'Petition for Review' of the appellate decision. This brought an end under Arizona law to the Defendant's challenge to the jurisdiction of the Arizona courts to adjudicate the dispute and to the Arizona Court's decision on the merits of the dispute. However, it signalled the beginning of the Plaintiff's efforts to enforce the Arizona Judgment in jurisdictions where the Defendant had commercial and/or legal ties. Most pertinently for present purposes, the Plaintiff commenced enforcement proceedings in:

    (a) Hong Kong on or about May 9, 2012 ("the Hong Kong Proceedings"); and
    (b) England and Wales on or about October 26, 2012 ("the English Proceedings").

3. The challenge to the jurisdiction of the Arizona Court centred on the Defendant's argument that the Arizona governing law and jurisdiction clause contained in the Lease (as amended in October 1993) was not incorporated into the Guarantee. The latter contract had no jurisdiction clause at all and provided for the potential application of Sonera/Mexican law, Hong Kong law and/or Bermudian law as the governing law of the Guarantee upon which the Plaintiff sued.

4. This Court is now required to decide two cross-Summonses. Firstly, the Defendant seeks to stay the present action pending the determination in the more advanced Hong Kong Proceedings of the question of whether the Defendant did indeed contractually submit to the Arizona Court as the Arizona Court determined. Its Summons was issued on April 2, 2013. The Plaintiff by Summons dated May 3, 2013 seeks to obtain summary judgment in respect of its enforcement claim. Each side invites this Court to follow the conflicting approach adopted in respect of essentially identical summary judgment applications made in Hong Kong and London.

5. In Hong Kong, the Plaintiff's summary judgment application was abandoned after the Hong Kong Court granted leave for expert evidence to be adduced resulting in the

[1] The Plaintiff is in fact the assignee of the original parties to these two agreements.

Plaintiff feeling bound to concede the threshold for summary judgment could not be met. In England however, Master Leslie on April 19, 2013 granted the Plaintiff's summary judgment application on the grounds that it was no longer open to the Defendant to seek to challenge the Arizona Court's findings on the jurisdiction issue. The Defendant has appealed that decision to the English Court of Appeal.

6. With the background facts now essentially agreed, the Court is required to determine what ought ultimately to be a straightforward question: in deciding whether the Plaintiff is entitled to summary judgment on its common law claim to enforce the Arizona Judgment, is the Defendant entitled to re-litigate the issue of the Arizona Court's jurisdiction which the Defendant apparently elected to permit the Arizona Court to determine in proceedings which it fully participated in at the first instance and appellate levels? If the answer to this question is affirmative, then:

   (a) summary judgment must logically be refused; and

   (b) it would clearly be open to this Court to decide whether it is more convenient in case management terms for the Hong Kong Court or this Court to determine this threshold issue, taking into account the more advanced stage of the Hong Kong Proceedings.

7. If the Defendant is bound by the Arizona Court's findings on jurisdiction, the Plaintiff would clearly be entitled to summary judgment as the Defendant has advanced no other arguable grounds for this Court to refuse to enforce the foreign judgment.

8. The primary question appears to me to be the question of whether or not the Defendant may be said, summarily, to have voluntarily submitted to the jurisdiction of the foreign court. However, since this question is not routinely considered by this Court on a fully contested basis, it may be helpful to start with an analysis of the basic principles governing foreign money judgment enforcement at common law.

Findings: basic principles applicable to enforcing foreign money judgments under Bermudian common law

9. The principles of common law foreign judgment enforcement have seemingly never been considered by the local courts above the first instance level. Because the United Kingdom Civil Jurisdiction and Judgments Act 1982 (the "1982 Act") has seemingly altered the English common law on this topic, the English case law and commentaries which would normally inform the shape of our own legal rules must be read with

considerable caution. I am also chastened by the fact that, dealing with common law enforcement of the same Arizona Judgment, the Hong Kong Court was seemingly willing to re-investigate the merits of the contractual jurisdiction issue determined by the Arizona Court while the English Court was not.

10. Mr. Pearman submitted the essential common law principles on jurisdiction were stated in *Dicey Morris & Collins*, Rule 43, on personal jurisdiction. However, Mr. Tucker helpfully placed a fuller extract from Chapter 14 ("*Jurisdiction and Personal Judgments*") before the Court and the logical starting point is Rule 41:

> "*A judgment of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may*
>
> *(1) be enforceable by claim or counterclaim at common law or under statute, or*
>
> (2) *be recognised as a defence to a claim or as conclusive of an issue in a claim.*"

11. The practicalities of enforcement are explained in paragraph 14-011 as follows:

> "*A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgement. But he can apply for summary judgment …on the ground that the defendant has no real prospect of successfully defending the claim; and if his application is successful, the defendant will not be allowed to defend at all. The speed and simplicity of this procedure, coupled with the tendency of English judges to narrowly circumscribe the defences that may be pleaded to a claim on a foreign judgment, mean that foreign judgments are in practice enforceable at common law much more easily than they are in many foreign countries.*"

12. Rule 42 (1) provides that a foreign judgment *in personam* for a debt or definite sum of money (apart from taxes or similar charges) which is made by a court with jurisdiction under Rules 43 to 46 final and conclusive and not impeachable under rules 49 to 54 may be enforced. Rule 42(2) states that such a judgment "*is entitled to recognition at common law*". As it was common ground that none of Rules 44 to 46 or 49 to 54 apply to the present case, the crucial issue is indeed whether or not under Bermudian conflict of law rules the Arizona Court had jurisdiction to enter judgment against the Defendant. Rule 43 provides as follows:

"*a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:*

> *First Case—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.*
>
> *Second Case—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.*
>
> *Third Case—If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.*
>
> *Fourth Case—If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.*"

13. It is common ground that the Defendant is not by virtue of presence subject to the territorial jurisdiction of the Arizona Court. The Plaintiff's reliance on the Fourth Case notwithstanding, it seems clear that the Fourth Case cannot apply to the Defendant as a freestanding basis of jurisdiction unless this Court itself determines that the jurisdiction clause in the Lease also forms part of the Guarantee, either (a) *de novo* (which would potentially require a trial of the issue here or in Hong Kong), or (b) on the basis that the Arizona Court's determination of this jurisdictional issue against the Defendant is *res judicata* (which would require this court to find that, on some other jurisdictional ground, the Arizona Court was competent to decide that issue as against the Defendant).

14. Accordingly, the Plaintiff can only rely for summary judgment purposes upon the Second or Third Cases, and must establish that the Defendant either claimed or counterclaimed in the Arizona Proceedings or submitted to the jurisdiction of the Arizona Court by voluntarily appearing in the proceedings. The learned authors of *Dicey, Morris & Collins* make the following assertions about these two jurisdictional grounds:

(a) "*a defendant who resorts to a counterclaim or like proceeding in a foreign court clearly submits to the jurisdiction thereof*" : paragraph 14-068;

(b) "*Some systems of law require or allow a defendant to plead to the merits at the same time as, and as an alternative to, an objection to the jurisdiction. In Boissiere & Co-v-Brockner a plea on the merits put forward in this way was regarded as a submission at common law. But it should now be so regarded, provided at least that, having lost on the issue of jurisdiction, the defendant does not put forward his case on the merits*": paragraph 14-073.

15. It is also necessary to bear in mind that while the Dicey Rule may, as a starting point, be presumed to reflect the Bermudian common law position as much as it does the English common law position, the English position has been impacted by statute. As regards the Third Case, the impact of a decision by a defendant to contest the jurisdiction of the English Court is governed, to some extent at least, by section 33 of the 1982 Act. The 1982 Act only seemingly applies where, under common law rules, the defendant would be deemed to have voluntarily submitted to the jurisdiction of the foreign court: *Dicey, Morris & Collins*, paragraph 14-071. Be that as it may, English cases must be read with care to distinguish judicial pronouncements on the scope of common law rules from judicial statements about the application of section 33 in the voluntary submission context.

16. One must also not overlook the somewhat more oblique implications of section 32 of the 1982 Act. Section 32 of the 1982 Act provides in material part as follows:

"**32 Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes.**

(1)Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—

(a)the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b)those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c)that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2)Subsection (1) does not apply where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3)In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)." [emphasis added]

17. Section 32 of the 1982 Act only concerns determinations by a foreign court as to the invalidity of a jurisdiction or arbitration clause in relation to "*an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country*" (section 32(1)). The policy concerns sought to be addressed are, clearly, foreign courts making binding determinations as to the invalidity of contractual clauses selecting English law and/or jurisdiction for the resolution of civil disputes, in circumstances where the defendant did not voluntarily submit to the jurisdiction of the foreign court. Section 32 would not on the face of it be engaged in England and Wales where the foreign court is located in the only jurisdiction to which the parties have actually or potentially agreed to refer their disputes-as is the case here.

18. Under Bermudian law, therefore, not only is there is no statutory prohibition on this Court accepting as binding the determination of a foreign court as to the invalidity of Bermuda exclusive jurisdiction clauses. There can, it should logically follow, be no corresponding broader common law rule constricting this Court's discretionary power to recognise the judgment of an Arizona Court to the effect that the parties have contractually agreed to refer any disputes to that very court. Because if any such broadly restrictive common law rules had existed, the need to enact section 32 in the United Kingdom to deal with the narrower scenario it embraces would not have arisen[2].

19. Counsel placed before the Court all of the local cases they could find on enforcing foreign money judgments at common law. In *Arabian American Insurance Company (Bahrain) EC-v- Al Amana Insurance and Reinsurance Company Ltd.*[1994] Bda LR 27,

[2] Subject, of course, to any argument that the Bermudian common law on this topic has radically altered since 1982.

Ground J (as he then was) rejected (at page 8) the argument that at common law where a defendant appeared in the foreign court merely to dispute jurisdiction and lost, the defendant should be held to have submitted to the jurisdiction of the foreign court. The following statement of Ground J in *Muhl-v-Ardra* [1997] Bda LR 36 has long been recognised by this Court as reflecting the Bermudian common law position:

> "*There was no real dispute as to the law concerning the enforcement at Common Law of a foreign judgment, although there was a great deal of dispute as to its application to the facts of this case. I summarised the relevant law in my judgment in Ellefsen -v- Ellefsen. Civil Jurisdiction 1993, No. 202 (22nd October 1993), and I consider that that statement of it still represents the law of Bermuda. I will, therefore, simply set it out:*
>
> > *'The legal position as to the enforcement of foreign judgments is set out in Dicey & Morris on the Conflict of Law, 11th ed. p. 421—*
> >
> > > *"A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment. But he can apply for summary judgment under Order 14 of the Rules of the Supreme Court on the ground that the defendant has no defence to the claim; and if his application is successful, the defendant will not be allowed to defend at all."*
>
> *There is no statutory mechanism here for enforcing American judgments by means of registration and execution by the local Court, and so this statement of the common law represents the normal method for enforcing such judgments in Bermuda, and there is no dispute about that.*
>
> *A final judgment* in personam *given by a court of a foreign country with jurisdiction to give it may be enforced by an action for the amount due under it if it is for a debt or a definite sum of money (not being a sum payable in respect of taxes or in respect of a fine or other penalty). The only grounds for resisting the enforcement of such a judgment at common law are: (1) want of jurisdiction in the foreign court, according to the view of the English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the*

proceedings in which the judgment was obtained were contrary to Natural Justice (or the English idea of 'substantial justice,' as it was put in the leading case). Unless the judgment can be impeached on one of those four grounds, the court asked to enforce it will not conduct a rehearing of the foreign judgment or look behind it in any way: see Dicey & Morris. Ibid., p. 420—

> *"Rule 42—A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 [which are the four grounds I have set out above] is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either*
>
> *(1) of fact; or*
>
> *(2) of law."*

The commentary states that this has not been questioned since 1870.'

In fact, in Ellefsen I enforced a judgment of the Superior Court of New Hampshire by summary judgment here. I therefore cite that case not just for the statement of principle, but to make it quite clear that the Courts of Bermuda stand ready to enforce a foreign judgment if it does not fall within the excluded categories."

20. The language used (in particular the word "impeached") suggests that on an application for summary judgment it will be for the Plaintiff to establish that the foreign judgment is for a sum of money and final and, it seems to me, was made by a court which was, *prima facie*, competent to deal with the matter. It will then be for the Defendant to show that the grounds it relies upon for impeaching the judgment ought to be tried and ought not to be determined summarily without a full trial. This view is supported by *Halsbury's Laws*, 5th edition, Volume 19, which states at paragraph 426 as follows:

> "*…a judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on the merits is conclusive in England between parties and privies as to any issue upon which it adjudicates….*
>
> *Although every presumption is to be made in favour of a foreign judgment, and the burden of proof lies on the party who seeks to impeach it, such a judgment may be impeached on the ground that it was obtained by fraud, or that its recognition or enforcement would be contrary to public policy, or that it was obtained in proceedings which were contrary to natural or substantive justice.*"

21. Ground J in *Muhl-v-Ardra* asserted that Bermuda's courts as a matter of common law would adopt a pro-enforcement stance to foreign judgments. I have previously endorsed that view in the analogous domain of recognising and enforcing foreign insolvency judgments at common law: *Re Saad Investment Co. Ltd*. [2013] SC (Bda) 28 Com (15 April 2013). In the latter case, after quoting the passage in Ground J's judgment reproduced in paragraph 16 above, I observed:

> "66. *The last quoted words, in the ears of a cross-border common law judicial cooperation lawyer, have a distinctly familiar ring. The aim of common law proceedings to enforce a foreign money judgment is fundamentally to achieve recognition of such judgment on a summary basis without a full trial in the form of a final local judgment which can then be enforced utilising all of the procedural mechanisms available under local law. In my judgment the aim and function of common law enforcement of a foreign winding-up order and/or order appointing foreign liquidators is broadly similar.*"

22. *Dicey, Morris & Collins* (at paragraphs 14-007-14-008) explain the theoretical basis for enforcement of foreign judgments, in light of nineteenth century English case law and the Court of Appeal's more recent decision in *Adams-v-Cape Industries* [1990] Ch. 433 as being a combination of (a) the principle that the foreign judgment creates a legal obligation for the defendant to pay the judgment debt, an obligation which the local court is bound to enforce, and (b) underlying notions of comity. The English Court of Appeal in that case, after noting that there was no clear guidance as to why foreign judgments were enforced, concluded with the following remarks:

> "…*The most one can say is that the duty of positive law first identified in Schibsby v. Westenholz, L.R. 6 Q.B. 155, must stem from an acknowledgment that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found.*"[3]

23. The most authoritative recent judicial statement on the theoretical basis for enforcing foreign money judgments, cited in the Plaintiff's Skeleton Argument, is found in the judgment of Lord Collins in *Rubin-v-Eurofinance SA* [2013] AC 236 at 251:

[3] Slade LJ at 552H.

> "9. *The theoretical basis for the enforcement of foreign judgments at common law is that they are enforced on the basis of a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained: Williams v Jones (1845) 13 M & W 628, 633 per Parke B; Godard v Gray (1870) LR 6 QB 139, 147, per Blackburn J; Adams v Cape Industries plc [1990] Ch 433, 513; Owens Bank Ltd v Bracco [1992] 2 AC 443, 484, per Lord Bridge of Harwich. As Blackburn J said in Godard v Gray, this was based on the mode of pleading an action on a foreign judgment in debt, and not merely as evidence of the obligation to pay the underlying liability: LR 6 QB 139, 150. But this is a purely theoretical and historical basis for the enforcement of foreign judgments at common law…*"

Findings: legal requirements for establishing a voluntary submission to the jurisdiction of a foreign court in circumstances where the defendant has fully contested both the jurisdiction of the foreign court and the merits of the action giving rising to the foreign judgment

24. The specific question which falls for determination to dispose of the applications presently before the Court does not appear to have been directly considered by the local courts before. That is, where a defendant has actively participated in the foreign action and has also fully contested both jurisdiction and merits, does this constitute a voluntary submission on his part? This question, on the facts of the present case, blurs any meaningful delineation between the Second and Third Cases under the current Rule 43 in *Dicey, Morris & Collins*.

25. In both '*Dicey & Morris on the Conflict of Laws*', 12th edition, Vol. 1 (at page 479) and Dicey Morris & Collins, 15th edition (at paragraph 14-070), the learned authors state: "*Where the defendant contests the jurisdiction of a foreign court, the position is regulated by section 33 of the Civil Jurisdiction and Judgments Act 1982.*" As noted above, it is crucial to distinguish those parts of English cases, heavily cited before this Court, which speak to purely common law principles and those which are simply interpreting statutory rules. Section 33 so far as is material provides:

> "*33* ***Certain steps not to amount to submission to jurisdiction of overseas court.***
>
> *(1)For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be*

regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely—

(a)to contest the jurisdiction of the court;

(b)to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country;

(c)to protect, or obtain the release of, property seized or threatened with seizure in the proceedings."

26. It is generally accepted that section 33 was enacted to reverse the effect of much criticised common law decisions, which culminated in *Henry-v-Geoprosco International* [1976] Q.B. 726. These decisions appeared to construe the common law rule on voluntary submission as embracing cases where the defendant merely appeared in the foreign court to challenge the jurisdiction of the foreign court and lost. Whether or not such cases do accurately reflect the common law of Bermuda, which Ground J doubted in *Muhl-v-Ardra* [1997] Bda LR 36, must now be decided. There is no section 33 here to prevent this Court from deciding that a jurisdictional challenge which has been lost may be construed as a voluntary submission; nor indeed, that participation to enforce an arbitration or jurisdiction clause or to protect property from seizure may be construed as a voluntary submission.

27. However, even where section 33 does apply, and the English courts are concerned with a scenario where, as in the present case, jurisdiction and merits are simultaneously challenged by the defendant, a voluntary submission will not be held to have taken place "*provided at least that, having lost on the issue of jurisdiction, the defendant does not put forward his case on the merits*": *Dicey, Morris & Collins*, 15th edition, paragraph 14-073. One must remember that there is no statutory bar in Bermuda to construing participation in the foreign proceedings merely to challenge the jurisdiction of that court as constituting, without more, a voluntary submission. However there appears to be no obvious reason why English cases, considering what forms of participation on the merits of the foreign claim will constitute a voluntary submission to the foreign court's jurisdiction, may not assist this Court in analysing similar issues under Bermudian common law.

28. Accordingly, Mr. Tucker relied heavily on the following passage in Dicey, Morris & Collins at paragraph 14-075:

> "*The general thrust of the authorities, which were all examined in AES Ust-Kamenogorsk Hydropower Plant LLP-v-Ust-Kamenogorsk Hydropower Plant JSC is that for so long as the defendant asserted, and is obviously still asserting, as his primary defence that the court has no jurisdiction over him in relation to the merits of the claim, his doing so should not be taken to mean that he has submitted to the jurisdiction for the purposes of the common law of submission, and has abandoned his challenge for the purpose of s.33."*

29. *AES Ust-Kamenogorsk Hydropower Plant LLP-v-Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 was a case where sections 32 and 33 of the 1982 Act were both engaged. Burton J's first instance decision, upheld by the Court of Appeal, to the effect that no submission to the foreign jurisdiction had for summary judgment purposes occurred was clearly shaped by the impact of those statutory provisions which created a clear policy tilt against recognising the foreign judgment. However, even in this context, the pivotal analysis of the question of whether participation to challenge the jurisdiction of the foreign court combined with defending the merits amounted to a voluntary submission centred on the extent to which the local procedural regime compelled the defendant to deal with the merits of the case. In *AES* (where earlier cases on the question of submission were considered), the defendant was also subject to the general territorial jurisdiction of the foreign court. Thus Rix LJ described the relevant factual matrix and the question before the Court in that case as follows:

> "*170. The position in this case is complicated by the facts that (a) the operator, as a Kazakh company incorporated and operating in Kazakhstan, was in any event within the jurisdiction of the Kazakhstan courts; (b) although the operator did plead to and participate in a hearing on the merits, that was always under a reservation as to jurisdiction based on its reliance on the arbitration agreement, and latterly under the protection and assertion of the English court's (albeit ex parte) anti-suit injunction; and (c) on the expert evidence of Kazakhstan law and practice, accepted by the judge, at any rate for the purposes of the hearing below, the operator "de facto has no other choice than to participate in the hearing of the substance of the dispute and to appeal a decision on jurisdiction…only after the decision on the merits has been reached…*
>
> 183. *In the context of section 32 itself, then, how should the provisions of section 33(1) be applied where a defendant in a foreign court, otherwise within the*

domestic jurisdiction of that court, as would be recognised by English conflict of laws rules, nevertheless challenges its jurisdiction on the ground of a jurisdiction or arbitration agreement? And what if it argues the substance of a claim under the reserves of that challenge? It cannot stand aloof, because the court has jurisdiction over it, unless it declines that jurisdiction. Such a defendant therefore has no realistic option but to argue the merits if the court is unwilling to decline jurisdiction. Has a party in such circumstances "submitted" to the jurisdiction? And in particular should he be regarded as having "submitted" on the issue of jurisdictional challenge? "

30. The conclusion that a triable issue on submission existed in the *AES* case was made in a statutory policy-laden factual context.

31. Mr. Pearman, sensibly accepting that under Arizona law defending a case on its merits at first instance having lost a jurisdictional challenge does not appear to constitute a waiver of the right to challenge jurisdiction by way of a subsequent appeal, submitted that the Arizona law position on this issue is not binding on this Court. I agree: "… *the English court is not bound to follow the law of the foreign court on whether the defendant has succumbed to its jurisdiction*…" (*Dicey Morris & Collins*, paragraph 14-073).

32. In my judgment, the assessment of whether or not a defendant has voluntarily submitted to the jurisdiction of the foreign court as a matter of Bermudian common law is subject to far more fluid legal policy considerations than under English law. Because under Bermudian law there is no statutory prohibition on:

    (a) this Court construing participation in foreign proceedings to challenge jurisdiction alone as a voluntary submission;

    (b) this Court recognising a foreign judgment arrived in breach of an arbitration or exclusive jurisdiction clause; or

    (c) this Court recognising the determinations by a foreign court (being one which is <u>not</u> located in the parties' contractually agreed forum) as to the validity of a contractually agreed jurisdiction clause.

33. Nevertheless, this Court is generally likely to set the bar for voluntary submission higher in cases where:

    (a) the defendant was subject to the jurisdiction of the foreign court on residential/territorial grounds in any event so could not easily ignore the proceedings altogether; and/or

(b) the foreign court has vitiated the parties' apparently valid choice of arbitration or litigation in another forum (especially where that forum is Bermuda); and/or

(c) the defendant appears to have had little choice but to participate in the proceedings on the merits and/or to challenge jurisdiction to the extent that it did.

34. Without uncritically construing the bare fact of the defendant having fully contested jurisdiction and/or merits in the foreign court as a voluntary submission, this Court is generally likely to set the bar for establishing a voluntary submission to the jurisdiction of the foreign court somewhat lower where:

(a) the defendant was not subject to the territorial jurisdiction of the foreign court in any event so that ignoring the foreign proceedings altogether was at least a potential option; and/or

(b) the foreign court was the parties' purported chosen forum and in assuming jurisdiction the foreign court has purportedly upheld rather than undermined the parties' contractual bargain; and/or

(c) the defendant has participated fully on the merits without exhausting all available options to avoid doing so.

Findings: the extent of the Defendant's participation in the Arizona proceedings

Background facts

35. The following facts are either admitted by the Defendant (i.e. derived from its own evidence), agreed or not subject to serious argument. The Plaintiff is a Mexican real estate company and the assignee of the rights of the landlord who entered into the Lease with Kadermex, SA CV ("Sinomex"), also a Mexican company. The Lease concerned a tract of land in Sonora Mexico on which the Plaintiff was to construct a building. The Defendant signed the Lease as Guarantor of Sinomex's obligations to the Plaintiff. On the same date the Plaintiff's predecessor in title and the Defendant executed the Guarantee in respect of Sinomex's obligations under the Lease. According to its recitals, the purpose

of the Guarantee being provided by the Defendant was to "induce" the Plaintiff to enter into the Lease.

36. As originally executed, the Lease (clause 23) had a Sonora State, Mexico governing law and jurisdiction clause. The Guarantee (clause 7) stated that this agreement was governed by the laws of Sonora State, Mexico, Hong Kong or Bermuda. There was no jurisdiction clause. Clause 5 of the Guarantee was a "whole agreement" clause which concluded with the following words: "*This Guarantee can be modified only by a written instrument signed by GUARANTOR AND LANDLORD*". Clause 20 of the Lease provided as follows:

> "*KADER HOLDINGS COMPANY LTD parent company of the TENANT, (herein referred to as 'the Guarantor') delivers at this date a guaranty duly signed by an authorized representative, as evidenced by the attached corporate resolution granting such corporate authorization, through which it accepts to be jointly obligated with the TENANT, in the due fulfilment of each and all of the obligations arising from this Contract and accepts that such guaranty is valid and enforceable during the term of this agreement and any extension thereof. The Guarantor agrees to execute any documents necessary to make the guaranty enforceable in the country where the Guarantor is incorporated.*"

37. In a memorandum dated August 10 1993, Bank One Arizona (from whom the Plaintiff was seeking funding for the construction project contemplated by the Lease) advised the Plaintiff to amend the Guarantee to provide that it was governed by only one governing law, either Arizona law or Sonora Mexico. The Bank also requested in any event that a forum clause be included providing for Arizona as a forum "*to enable the Bank to closely monitor any litigation*". The Guarantee was never expressly amended. In or about October 1993, in a document signed by the parties to the Lease and again the Defendant as Guarantor, the Lease was modified by the insertion of the following clause:

> "*THE PARTIES DECIDE AND AGREE THROUGH THEIR REPRESENTATIVES THAT APPLICABLE LAW AND JURISDICTION IN THIS LEASE SHALL BE INTERPRETED, IN THE DUE FULFILLING COMPLAISANCE INTERPRETATION, ALSO IN ACCORDANCE WITH, AND BE SUBJECT OF LAWS AND COURTS OF ARIZONA STATE, IN THE UNITED STATES OF AMERICA.*"

38. The Defendant had no presence or connections with Arizona apart from the fact it signed as Guarantor a written document expressly agreeing that the Lease with which the

Guarantee was closely connected should be governed by Arizona law and subject to the jurisdiction of the Arizona courts.

The Arizona Proceedings

39. In February 1997, the Plaintiff sued Sinomex and the Defendant; the Defendant challenged the jurisdiction of the Arizona Court and the case was settled.

40. When the Plaintiff commenced the Arizona Proceedings in 2003 (and indeed when or after the 1998 proceedings were commenced there), it must be have been open to the Defendant to seek declaratory and/or injunctive relief in Bermuda on the hypothesis that the Guarantee had not been amended by the 1997 amendment to the Lease and that the Arizona Proceedings were being brought in breach of a Bermuda governing law clause. This Court could potentially have been invited to restrain the Plaintiff from pursuing the Arizona Proceedings. Similar proceedings could have been commenced in Hong Kong and, possibly, Mexico. It is difficult to resist the strong suspicion that such alternative jurisdictional options were not pursued because, on the face of the contractual documentation, Arizona was the most plausible forum to decide whether or not an Arizona jurisdiction clause admittedly contained in the Lease had also been incorporated into the related Guarantee which contained no conflicting jurisdiction clause.

41. Instead (and there is no or no clear explanation as to why this was considered necessary at all), the Defendant applied to the Arizona Court to dismiss the action for lack of jurisdiction. The Plaintiff's case on jurisdiction was that the forum selection clause incorporated by amendment into the Lease in 1997 applied to both the Lease and the Guarantee. On or about January 24, 2005, the Arizona Superior Court dismissed the Defendant's jurisdictional challenge on the grounds that the governing law and jurisdiction clause in the Lease was binding on the Defendant. Meanwhile, Sinomex did not participate in the proceedings and the Plaintiff obtained a default judgment against it.

42. On March 4, 2005, the Defendant filed an answer (which expressly reserved its jurisdictional challenge) and a counterclaim and cross-claim which it contends it was required to do under applicable Arizona procedural rules. In May, 2005, the Plaintiff filed a motion for summary judgment; the Defendant filed a cross-motion contending that amendments to the Lease had extinguished the Guarantee. In December 2005 the Arizona Court dismissed the Defendant's Counterclaim. The Court granted the Plaintiff partial summary judgment and dismissed two motions filed by the Defendant seeking reconsideration of the interim decision.

43. On March 8, 2011 the Arizona Court signed an Order granting partial summary judgment; a final judgment was entered on June 8, 2011. The Defendant then appealed and the Arizona Court of Appeal affirmed Judge Soto's decisions on both jurisdiction and the merits of the Plaintiff's claim. The Court of Appeal on April 16, 2012 rejected the Plaintiff's contention that by defending the claim on the merits the right to pursue an appeal on jurisdiction had been waived. The Arizona Supreme Court denied the Defendant's petition for a review of the Court of Appeal's decision on September 24, 2012.

44. The Defendant relies in Hong Kong on the expert evidence of a former Arizona Chief Justice, Thomas A. Zlaket, for two propositions. Firstly (and as held by the Court of Appeal) the Defendant's defence of the Arizona Proceedings at the Superior Court level did not constitute a submission to the jurisdiction of the Arizona Court as a matter of Arizona law. Secondly (and contrary to the finding of the Arizona Court of Appeal and Superior Court), under Arizona law the jurisdiction clause in the Lease was not incorporated into the Guarantee.

45. In my judgment the first proposition is uncontroversial. However, it is of limited relevance to the question of whether the Defendant's participation in the Arizona Proceedings as a whole constituted a submission under Bermuda's private international law rules to a sufficiently clear extent to exclude the need for a trial on this issue. If this issue is resolved in the Plaintiff's favour, no need to reconsider the merits of the Arizona law position on jurisdiction arises. If the Defendant voluntarily submitted to the jurisdiction of the Arizona Court for Bermuda law purposes in relation to both jurisdiction and merits, it must be bound by the finding in the Arizona Proceedings not just on the merits of the Plaintiff's claim, but also on the issue of jurisdiction.

46. I also find that the proposition that the Defendant did not, as a matter of Arizona law, submit to the jurisdiction of the Arizona courts in pursuing its appeal is simply unarguable. It seems obvious that the Arizona Court of Appeal considered that its determinations on both jurisdiction and merits would be binding on the Defendant, in the absence of any successful further appeal to the Arizona Supreme Court. The Defendant has not suggested that its appeal was argued on the basis that the Defendant would still be free, as a matter of Arizona law, to re-litigate the jurisdiction issue in other fora if it lost there. Had this been the case, the Arizona Court of Appeal would likely have stayed its judgment pending the determination of the jurisdiction issue elsewhere. The bare assertion by Justice Zlaket in his Hong Kong Declaration that the Defendant's filing appeals did not involve a submission to the jurisdiction of the Arizona courts cannot be

sensibly read as implying that the Defendant is not now regarded by Arizona law as being bound by the June 8, 2011 judgment.

47. Justice Zlaket in his Hong Kong Declaration adds no flesh to the bare bones of his assertion that the Defendant was required to deal with jurisdiction and merits together under applicable rules of procedure at the Superior Court level. He does not assert that Arizona procedural rules are applied so inflexibly that it is not possible to apply for extensions of time for filing pleadings or to apply for a stay while an issue is dealt with in a more appropriate forum. In fairness, these matters were probably irrelevant from an Arizona law perspective. However, it would be surprising if the courts of any part of the United States, a nation which is noted for its constitutional protection of due process, operated in such an inflexible manner. In the absence of expert evidence on this issue, this Court is entitled to presume that the applicable foreign law rules are the same as under Bermudian law. Be that as it may, the record shows that the Defendant made no overt attempt in the Arizona Proceedings to avoid a situation whereby the Plaintiff was compelled to argue the merits and jurisdiction at both trial and appellate levels in fully contested hearings before obtaining a truly final judgment on the merits, nine years later.

Findings: did the Defendant voluntarily submit to the jurisdiction of the Arizona Court as regards jurisdiction and merits?

48. The Plaintiff has satisfied me on a balance of probabilities based on underlying facts that are not in dispute that the Defendant voluntarily submitted to the jurisdiction of the Arizona Court and that the Defendant has no real prospects of successfully defending the judgment enforcement claim on jurisdictional grounds. In so finding, I have had regard in particular to the following factors:

(a) the Defendant was not, the disputed Arizona jurisdiction clause apart, subject to the jurisdiction of the Arizona Court. There is no evidence that the Defendant had no choice but to dispute jurisdiction in Arizona as a first litigation option;

(b) there is no or no credible evidence that the Defendant had to fully contest the jurisdiction and/or liability and quantum issues in Arizona, even if this was what the usual Arizona practice was. The Defendant made no overt attempts to apply for extensions of time or stays obtain rulings on the jurisdiction issue from the courts it now contends, in the context of defending judgment enforcement proceedings, were more appropriate fora for adjudicating the Plaintiff's claim;

(c) the Defendant, a Bermuda company, with its commercial base in Hong Kong, sought no interim relief from the courts of these jurisdictions with a view to restraining the Arizona's Court's supposedly improper exercise of jurisdiction over the Defendant;

(d) while Arizona law clearly preserved the Defendant's right to challenge jurisdiction and merits at the trial court level, there is no credible evidence that the appeal was pursued (roughly 9 years after the commencement of the Arizona proceedings) on the basis that the Defendant was reserving its rights to challenge the final determination of the Arizona courts on either issues in various courts around the globe. This would potentially render wasted all the costs incurred by the Plaintiff and the Arizona courts between 2003 and 2012. No rational court system would operate in such a manner and the Defendant's own Arizona law expert in Hong Kong has deposed that Arizona's procedural rules are designed to promote efficiency and save costs;

(e) The pursuit of the appeal justifies the same inferences drawn by the English Court of Appeal in the pre-1982 UK Act era in *S.A. Consortium General Textiles-v-Sun and Sand Agencies Ltd.* [1978] Q.B. 279, upon which the Plaintiff's counsel aptly relied. Lord Denning (at page 299) opined:

> "*By inviting the Appeal Court to decide in its favour on the merits, it must be taken to have submitted to the jurisdiction of the original court. If the Appeal Court had decided in its favour, it would have accepted the decision. It cannot be allowed to say that it would accept the decision of the Appeal Court if in its favour, and reject it if it was against it...*";

(f) the Arizona Court's decision to exercise jurisdiction does not entail abrogating any express contractual agreement in favour of any other forum;

(g) the Lease was closely tied to the Guarantee which formed the primary basis of the Plaintiff's claim against the Defendant. The Defendant signed the amendment to the Lease (as Guarantor) in 1997 which admittedly incorporated an Arizona jurisdiction and governing law clause into the Lease. The Plaintiff's related claim against the Tenant under the Lease (which proceeded by way of default) was admittedly subject to the

same Arizona jurisdiction and governing law clause and the Guarantee itself contained no conflicting jurisdiction clause;

(h) there are no obvious legal discretionary and/or policy reasons why this Court should construe the Defendant's nine year defence of the Plaintiff's claim in the Arizona Proceedings on both the jurisdiction and merits, looked at as a whole, as anything other than an ultimately voluntary submission to the jurisdiction of the Arizona Court as competent to determine the jurisdictional and substantive issues which were finally determined when the Arizona Supreme Court on September 24, 2012 declined to review the Court of Appeal's decision to affirm the final judgment entered in favour of the Plaintiff by the Arizona Superior Court on June 8, 2011;

(i) this Court's clearly established policy leaning is in favour of recognising and enforcing foreign money judgments and that policy would be undermined for no good or rational cause were this Court to adopt an unprecedentedly narrow and technical view of voluntary submission in all the circumstances of the present case.

Findings: is the Plaintiff entailed to obtain summary judgment?

49. It follows that this Court is bound to find that the Defendant is barred by issue estoppel from seeking to challenge the findings made by the Arizona Court on the jurisdiction issue. The Arizona Court was competent to decide the jurisdiction issue because, at the end of the day, the Defendant as a matter of Bermudian common law voluntarily agreed to that Court determining the jurisdiction issue. The Defendant seeks to have this Court or the Hong Kong Court determine precisely the same factual and legal issue determined against it by the Arizona Superior Court and Court of Appeal: was the jurisdiction clause admittedly found in the Lease incorporated into the Guarantee as well? The concerns expressed by Evans LJ about the need for clarity when relying upon interlocutory decisions by foreign courts in *Desert Sun Loan Corpn-v-Hill* [1996] 2 All ER 847 at 860, to which Mr. Tucker referred, do not arise on the present facts. Each requirement of Lord Brandon's three-limbed test for issue estoppel in *The Sennar (No.2)* [1985] 1 W.L.R. 490 at 499A-B (referred to by Mr. Pearman in the course of argument) is clearly met in the present case:

"*The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action.*"

50. Mr Pearman for the Plaintiff understandably placed considerable stock on the substantive result in favour of the Plaintiff arrived at in relation to the same facts by Master Leslie in the English High Court, with far greater brevity and apparent ease than are reflected in the present judgment. Mr. Tucker, referring to the arguments proposed to be advanced in support of the appeal against Master Leslie's Ruling to the English Court of Appeal, made the interesting submission that the impugned reasoning was circular in that the finding that the Arizona Court was competent was based on that Court's own determination of its disputed competence. To my mind it would indeed be circular to find that the Arizona Court had jurisdiction over the Defendant based solely on that very Court's determination that the disputed jurisdiction clause applies to the Plaintiff's claim. To the extent that Master Leslie relied upon the jurisdiction clause as construed by the Arizona Court as the sole basis for jurisdiction (the Fourth Case under Dicey, Morris & Collins' Rule 32), I would respectfully disagree with this aspect of his Ruling, while concurring in the final overall result.

51. However, the circularity argument is clearly misconceived if the pivotal basis for concluding that the Arizona Court was competent to enter judgment in this case is that the Defendant's participation in the foreign proceedings amounted to a voluntary submission to the jurisdiction of the foreign court (the Second and/or Third Cases under Rule 32)[4]. The circularity complaint directed at this analysis ignores the true content and purpose of the relevant private international legal rules in the present factual matrix. It is for the enforcing court invited to reconsider the foreign court's jurisdiction over the defendant to decide whether the defendant has waived the right to renew its jurisdictional challenge before the enforcing court by the way it conducted its defence of the proceedings before the foreign judgment-granting court.

[4] As indicated above, the distinction between the Second and Third Cases appears to me to be to immaterial in the context of the present case. The Dicey Morris & Collins Cases are, after all, intended for use merely as analytical aids; they are not strict statutory categories which are cast in stone.

52. Where a defendant, such as the Defendant in this case, effectively submits the question of jurisdiction and merits to the foreign court (at both trial and appellate levels) without taking meaningful steps to reserve its rights to pursue its challenge before this Court, it loses the right to renew its jurisdictional challenge and take a second bite of the cherry before the local court. If this were not so, there would be no finality in cases with a cross-border dimension and the litigation process would become subject to abuse here and abroad. This mischief is what the common law rules on enforcement of foreign money judgments are designed to avoid.

Conclusion

53. The Plaintiff is entitled to summary judgment in respect of its claim to enforce the judgment of the Arizona Court. This judgment was made by a court of competent jurisdiction. Although the Defendant disputed the jurisdiction of the Arizona Court, as a matter of Bermudian common law, I find that it voluntarily submitted to the jurisdiction of the Arizona Court before which it contested both jurisdiction and merits at the trial and appellate levels for some nine years during which time it sought no assistance from this or any other supposedly more jurisdictionally competent court. The Defendant is accordingly bound by the Arizona Court's findings on both issues as to which there is no longer any triable issue as a matter of Bermudian law.

54. This appears to be the first time this Court has considered the question of what constitutes a voluntary submission to the jurisdiction of a foreign court which, a disputed jurisdiction clause apart, has no personal jurisdiction over the defendant. The Bermudian Court, while still likely to take a strong general steer from English conflict of law rules, has a distinctly more flexible scope for recognising and enforcing foreign money judgments than does the English court in post-1982 Act England and Wales.

55. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the Plaintiff is awarded the costs of the present application to be taxed if not agreed. I will of course hear counsel if necessary on matters, such as the terms of the formal Judgment and Order, arising from the present Ruling.

Dated this 9th day of July, 2013 _____

IAN R.C.KAWALEY CJ