Neutral Citation Number: [2024] EWHC 2448 (Comm)

Case No: CL-2024-00153 & CL-2024-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/10/2024

Before :

MR STEPHEN HOUSEMAN KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) HIS EXCELLENCY SHEIKH KHALID BIN AHMED AL HAMED
(2) HIS EXCELLENCY SHEIKH MOHAMED BIN AHMED BIN HAMED AL HAMED
(3) HAMDAN BIN SHAYAA AHMED AL AHMED
(For and on behalf of the estate of the late His Excellency Sheikh Shaya Ahmed Al Hamed) — **Claimants**

- and -

(1) HIS EXCELLENCY SHEIKH HAMED BIN AHMED AL HAMED
(2) AL FARIDA INVESTMENTS COMPANY LLC
(A company incorporated in the United Arab Emirates) — **Defendants**

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PETER HEAD (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
ANDREW THOMAS (instructed by **City Solicitors Limited T/A Farani Taylor Solicitors**) for the **Defendants**

Hearing date: 26 September 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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STEPHEN HOUSEMAN KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

MR STEPHEN HOUSEMAN KC :

INTRODUCTION

1. By these actions commenced together on 13 March 2024 the claimants seek:

   (a) an order for recognition and enforcement at common law of a judgment of the Abu Dhabi Court of Cassation dated 22 February 2022 ("ADCC Judgment") pursuant to CPR Part 7; and

   (b) a domestic freezing injunction in support of foreign proceedings under s.25 of the Civil Jurisdiction and Judgments Act 1982 ("CJJA") pursuant to CPR Part 8.

   I refer to these as the "Enforcement Action" and "Interim Relief Claim".

2. The ADCC Judgment relates to the estate of the late Sheikh Ahmed Bin Hamed Butti Al Hamed who died in November 2012. It concerns a long-running dispute between his four sons involving litigation in the British Virgin Islands and California as well as civil and criminal proceedings in the United Arab Emirates.

3. The claimants are - or, in the case of the third claimant, represent the estate of - three of the four brothers. The first defendant is the youngest sibling. It is said that he directly or indirectly owns the second defendant ("AFIC"). He is accused of misappropriating over USD 1 billion, through AFIC or by other means, from their late father or his legal estate. The allegations include serious dishonesty with an international footprint involving offshore corporate structures.

4. On 13 March 2024 at a hearing conducted without notice, Mr Justice Picken gave the claimants permission to serve the defendants out of the jurisdiction pursuant to CPR 6.36/6.37. Such permission was based on PD6B 3.1(10) for the Enforcement Action and PD6B 3.1(5) for the Interim Relief Claim. Picken J also granted a domestic freezing injunction up to the value of AED 650 million pursuant to s.25 CJJA ("Freezing Order"). The Freezing Order was continued at the return date on 25 March 2024.

5. By their application notice dated 16 May 2024 the defendants seek to challenge jurisdiction and set aside service permission in respect of the Enforcement Action. Their principal argument is that the ADCC Judgment is not a final and conclusive judgment for a definite sum of money in favour of the claimants, such that this Court could not enforce it as a matter of principle or public policy. They dispute whether England is the proper place for enforcement in the absence of any executable domestic assets and in the context of pending foreign enforcement actions. Additionally, they criticise aspects of the presentation of the without notice application by or on behalf of the claimants.

6. There is no application to set aside the Freezing Order. The defendants do not challenge jurisdiction in respect of the Interim Relief Claim.

7. Both sides have been permitted to rely upon expert evidence of UAE law, in so far as it represents the law of Abu Dhabi, as to the status and effect of the ADCC Judgment. I have considered such evidence on the basis of submissions, so far as necessary to determine the present application.

RELEVANT BACKGROUND

8. The procedural backdrop is complex and need not be summarised. The defendants observe that a 95-page document described as a "*set of summaries of all the various proceedings*" was exhibited by the claimants as part of their supporting evidence at the without notice hearing in March. It is not said to be inaccurate as a summary, but its size is invoked as a theme if not specific ground of alleged unfair presentation.

9. A month or so after the death of the sheikh, a so-called *Limitation of Inheritance* was decreed by a court in Abu Dhabi in accordance with *Sharia* principles. The legal estate was divided into 72 shares which were allocated amongst six heirs, namely his widow (9 shares), four sons (14 shares each) and daughter (7 shares). According to the claimants, each of the sons thereby became entitled to a 19.44% share in the value of the legal estate once administered according to law.

10. The proceedings that led to the ADCC Judgment were commenced in the Abu Dhabi Court of First instance (Case No.439/2018) in December 2018 by the two surviving older brothers (who I refer to for convenience as "the Brothers") against, amongst others, the first defendant ("Sheikh Hamed") and AFIC. There was no counterclaim seeking payment in the other direction. Various other parties were named on both sides of those civil proceedings. My summary concentrates on the current protagonists in the interests of simplicity.

11. The first instance court entered a monetary judgment on 29 September 2020 pursuant to the report of a court-appointed expert committee. The Brothers appealed to the Abu Dhabi Court of Appeal on the issue of AFIC's joint liability, whilst Sheikh Hamed and AFIC cross-appealed on liability and quantum. The appeal decision given on 29 November 2020 dismissed the appeal and allowed the cross-appeal in part.

12. Sheikh Hamed and AFIC then appealed to the Abu Dhabi Court of Cassation ("ADCC"). This is the highest non-federal court with jurisdiction over civil claims in Abu Dhabi. The Brothers successfully cross-appealed in respect of their own dismissed appeal concerning joint liability.

13. The ADCC Judgment was given on 22 February 2022. It is in Arabic and has been translated for the purposes of these proceedings. The translation runs to 17 pages, including 11 pages of substantive text in small font and compact format. The claimants say that it ordered the following amounts to be paid to them:

    (a) AED 879,126,156 (which is about £186 million) plus interest to be paid jointly by Sheikh Hamed and AFIC to each of them according to their "*legitimate share*" in the estate of their deceased father, i.e. 19.44% each of the total amount;

    (b) AED 327,504 plus interest to be paid by Sheikh Hamed to each of them in the same share or proportion, representing sums withdrawn from their late father's bank account following his death; and

    (c) AED 300,000 by way of compensation to be paid jointly by Sheikh Hamed and AFIC to each of them.

14. The dispositive section at the end of the ADCC Judgment deals separately with the two distinct appeals by reference to their respective appeal reference numbers: No.586/2020 and No.594/2020. The two appeal reference numbers may be mixed up in this summary.

It is suggested that this dispositive wording is ambiguous or confused as to whether the relevant amounts are to be paid to the Brothers or to Sheikh Hamed and AFIC. This is said notwithstanding the fact that the only claim for payment was by the Brothers and AFIC had no "*legitimate share*" in the testamentary estate.

15. There has been and could be no further appeal from the ADCC Judgment. There is no stay of execution of the judgment debt in Abu Dhabi. Under local law it became enforceable on and constitutes *res judicata* as from the date it was issued.

16. The Brothers subsequently obtained an execution order for the judgment debt, as it stood following the first-tier appeal decision, in the local execution court. That sum was reduced following an execution appeal brought by Sheikh Hamed to reflect the amount of the judgment debt stated in the meantime in the ADCC Judgment. As to this:

    (a) The written judgment of the execution appeal court in July 2023 ("EAC Judgment") contains a quoted extract from the dispositive section of the ADCC Judgment. In translation this extract says "*the Appellants*" as compared with "*the appellees*" in the translated version of the ADCC Judgment prepared and exhibited by the claimants. There is also reference to a "*material mistake*" in the appeal reference numbering in the dispositive section of the ADCC Judgment, which did not inhibit or preclude execution according to local laws.

    (b) The premise of such execution appeal and the terms of its outcome contradict the point now advanced by the defendants to the effect that the ADCC Judgment erroneously ordered the Brothers to pay the relevant sums. Neither Sheikh Hamed nor AFIC has attempted to enforce a judgment debt in their favour pursuant to this purported interpretation of the ADCC Judgment.

17. On 16 March 2022 Sheikh Hamed and AFIC issued a petition asking the Court of Cassation to reconsider its final monetary judgment. This petition was rejected on 18 August 2022. On 14 November 2022 they issued a further so-called 'petition for review' in relation to the ADCC Judgment. That was rejected on 14 December 2022. The following may be noted in this context:

    (a) None of the criticisms of the ADCC Judgment now made in resistance to the Enforcement Action featured in either of the petitions pursued by the judgment debtors in Abu Dhabi during 2022 (together, "ADCC Petitions").

    (b) On the contrary, the premise of both petitions was that the ADCC Judgment imposed a payment obligation upon the petitioners, Sheikh Hamed and AFIC, not the other way around. There was no other reason to have questioned the outcome in this way, from what I understand.

18. The Brothers obtained a local execution order or certificate in August 2024 against Sheikh Hamed and AFIC in respect of the ADCC Judgment. This order is for a sum representing each of their 19.44% shares in the value of the ADCC Judgment, so far as applicable: see paragraph 13 above. They have also brought enforcement proceedings in California and *Norwich Pharmacal* proceedings in the BVI. No part of the judgment debt has yet been satisfied.

19. The precise impetus for the commencement of the Enforcement Action and seeking of the Freezing Order in March of this year is not said to be material. The claimants have

adduced evidence to the effect that Sheikh Hamed had assets within this jurisdiction during a period prior to the ADCC Judgment.

20. In response to the disclosure requirements of the Freezing Order, the defendants have stated that there are no relevant assets exceeding £10,000 in value located within this jurisdiction. The claimants do not accept the accuracy of that disclosure; but they have not sought to challenge it or identify any specific reason to doubt it for present purposes.

21. The defendants' application notice is an uninformative document. It says the Court will be asked to decline (to exercise) jurisdiction by reference to a witness statement. It contains no grounds. It makes no reference to a draft order. The supporting witness statement of Mr Farani identified some grounds of challenge. The complaints of material non-disclosure or unfair presentation were not, however, identified with appropriate clarity or particularity.

22. As noted above, the Court has given permission for expert evidence relating to the ADCC Judgment. The claimants rely upon two reports of Nasser Al Osaiba. The defendants seek to rely on a report of Khalid Atiq Al-Marri. Mr Al-Marri's report does not include an expert's statement in accordance with CPR 35.10(2). Nor does it state the substance of the instructions given to him as required by CPR 35.10(3). No instructions have been provided despite requests being made through solicitors. I was told that his instructions were given orally.

23. The claimants invite me to treat Mr Al-Marri's report as inadmissible. Given my approach to the threshold merits on this jurisdiction challenge, I am content to take account of the points made by Mr Al-Marri about the ADCC Judgment. This is so despite his conspicuous omission of any reference to either of the ADCC Petitions filed and pursued by his clients during 2022.

24. As explained below, it has not been necessary for me to resolve any differences of view on matters of genuine expert evidence as between Mr Al-Marri and Mr Al Osaiba. With that in mind I turn to the jurisdiction challenge.

JURISDICTION: ANALYSIS

25. The defendants contest jurisdiction in respect of the Enforcement Action on threshold merits, proper forum and residual discretion. Despite references to 'good arguable case' and 'much the better of the argument' in their written submissions, there is no notified challenge to the relevant gateway.

26. PD6B 3.1(10) empowers the Court to grant permission to serve a claim out of the jurisdiction where it is made "*to enforce any judgment or arbitral award*". I will refer to it as "Gateway (10)".

    (a) This gateway appears to fall within the first category discussed by Lord Sumption in *Brownlie v. Four Seasons Holdings Inc.* [2017] UKSC 80; [2018] 1 WLR 192 at [4]. Unlike gateways which depend upon the existence of an enforceable contract or trust, for example, Gateway (10) does not presuppose demonstration of a "*jurisdictional fact*" beyond the existence of a judgment or arbitral award.

    (b) There is some debate as to whether a "*claim to enforce*" should be purposively construed as meaning one that meets the applicable requirements for enforcement - in other words, implying the word "*enforceable*" into the gateway as if it says

"*enforce any* ***enforceable*** *judgment*": see *Briggs: Civil Jurisdiction & Judgments* (7th ed. 2021) at 24.20.

(c) I need not resolve this debate. I can, however, see difficulties with implying a predictive condition into the descriptive language. Save for rare cases of fabricated judgments or awards, the Court is entitled to assume that an enforcement claim is what it says it is. This is just taxonomy. Threshold merits and proper forum can do the real work.

(d) There may also be uncertainties as to what 'enforceable' means in the different contexts of a foreign judgment or arbitral award. For example, the effect of s.103(5) of the Arbitration Act 1996 in the latter case might mean that a foreign award becomes *more* readily enforceable after a pending curial challenge is subsequently dismissed. Such uncertainties are likely to make jurisdictional hearings longer and more expensive by pitching rival sets of foreign law evidence against one another in a contest over who has much the better of the argument.

27. I am satisfied that the Enforcement Action falls within Gateway (10) as a matter of bare characterisation. This is so whether or not any steps to execute such judgment, if recognised in this jurisdiction, are actually taken here in the future: see paragraphs 38 to 44 below.

28. I deal separately with the challenge to threshold merits and proper forum. The defendants' submissions gave emphasis to a fourth limb of the traditional test, namely the Court's discretion to refuse permission to serve out even where the other three stages of the test have been satisfied.

(i) Threshold Merits

29. The claimants need only show a real prospect of success on the Enforcement Action. The Court at this stage is not concerned to interrogate the merits of such claim beyond this threshold standard of viability.

30. In terms of legal principles it is common ground that a judgment of a foreign court of competent jurisdiction:

(a) may be recognised and enforced at common law if it is final and conclusive in its jurisdiction of origin, i.e. if it is treated as creating a *res judicata* according to the laws of that jurisdiction: see *Dicey, Morris & Collins: The Conflict of Laws* (16th ed. 2022) at 14-027 ("*Dicey*"); and

(b) may be duly enforced if it is for a debt or definite sum of money, including an amount capable of ascertainment even if not quantified on the face of the judgment itself: see *Dicey* at 14-026; but

(c) may have its recognition or enforcement refused if the same would be contrary to public policy in this jurisdiction: see *Dicey* at 14-148 to 14-157.

31. I am satisfied that there is (at least) a real prospect of success on the Enforcement Action. This is so despite the linguistic attack on the ADCC Judgment through Mr Al-Marri on behalf of the defendants.

32. Two main points are made in this regard. First, it is said that the ADCC Judgment contains a material error which bars its recognition or enforcement in this jurisdiction,

including as a matter of public policy - at any rate unless or until such error is rectified or corrected by the ADCC itself: see paragraph 14 above. Secondly, it is said that the ADCC Judgment does not order payment of a definite sum or one which can be readily ascertained. I address both points below, mindful of the applicable standard of proof.

33. As regards the alleged material error, the claimants clearly have at least a real prospect of success in establishing that the ADCC Judgment ordered Sheikh Hamed and AFIC to pay relevant sums, rather than the other way around. As to this:

    (a) In so far as there is a dispute as to the meaning of the Arabic original of the judgment, that must be for trial if the point is maintained. It is not clear to me whether such a dispute exists given the limitations of Mr Al-Marri's own analysis and the inherent improbability of such an interpretation. It appears to have been spotted through the different language used in the EAC Judgment: see paragraph 16(a) above.

    (b) The key translated phrase in paragraph 1 of the dispositive section of the ADCC Judgment is "*to pay in concert to compensate the appellees each according to his legitimate share of the amount*". As to this:

        i. The words "*in concert*" denote the joint liability aspect on which the Brothers prevailed in their own cassation appeal. It can only refer to the joint liability of Sheikh Hamed and AFIC.

        ii. The word "*appellees*" appears in contrast to the phrase "*the first and second appellants (the first and second respondents*") a few words earlier in the same sentence.

        iii. As noted above, AFIC was not a beneficiary of the late father's estate and so enjoyed no "*legitimate share*" at all.

        iv. The word "*his*" appears before "*legitimate share*" which is likewise inapt to describe AFIC.

    (c) To English legal eyes, accustomed to construing words in their context, this dispositive language imposes a joint payment obligation upon Sheikh Hamed and AFIC. This comes as no surprise given that the civil claim under appeal was one against them and not the other way around.

    (d) So far as relevant, the claimants refer to the EAC Judgment and subsequent execution order in Abu Dhabi, described above, as showing that there is no material mistake in the ADCC Judgment such as to vitiate its enforceability as a matter of local law or procedure.

    (e) Further and as observed above, Sheikh Hamed's own execution appeal as well as the ADCC Petitions which he and AFIC pursued have all presupposed that he is a (or they are) judgment debtor(s) pursuant to the ADCC Judgment.

34. As regards what was ordered to be paid and whether it is readily ascertainable on the face of the ADCC Judgment, the claimants clearly have at least a real prospect of success on this requirement for recognition and enforcement at common law:

(a) It is sufficiently arguable - and may prove not to be disputed - that each of the four brothers has a 19.44% share in their late father's legal estate. The phrase "*each according to his legitimate share of the amount*" in paragraph 1 of the dispositive section of the ADCC Judgment would, on this basis, apportion 19.44% of the primary judgment debt to each of the Brothers.

(b) The fact that the claimants' skeleton argument for the without notice hearing in March described the ADCC Judgment in high-level terms as " *a judgment debt owed to the late Sheikh Ahmed's Estate as a whole*" does not alter its proper characterisation or effect as a matter of local law. The underlying claim was for restoration of economic value taken from the deceased or his estate, being a named claimant / appellant / respondent. The apportionment of that legal estate is a matter for local law or laws.

(c) The execution order obtained by the Brothers in Abu Dhabi is stated to be in the amounts which represent their 19.44% shares in the sums ordered to be paid in the ADCC Judgment: see paragraph 18 above.

35. In these circumstances, I am satisfied that there is - putting it modestly - a real prospect of success on the Enforcement Action despite the points of resistance raised by the defendants. Whether either or both of those points may prevail as a basis for persuading the Court to decline recognition or enforcement in its discretion is a matter for another judge on another day. Neither point looks hopeful to me based on the submissions and evidence considered at the present hearing.

36. In light of the debate as to the meaning of Gateway (10) alluded to in paragraph 26 above, and in view of my observations in this section of the judgment, I am satisfied so far as necessary or relevant that the claimants have shown a good arguable case and have much the better of the argument on the articulated objections to the Enforcement Action. The defendants did not cite Professor Briggs to me on this aspect, but I felt it appropriate to cover the point in their favour and for good measure.

(ii) Proper Forum

37. A claim to enforce a foreign judgment can only be served out of the jurisdiction where the Court is satisfied that England & Wales is the "*proper place*" to bring it: CPR 6.37(3). The burden rests and remains upon a claimant. Nothing said below alters this position.

38. What that phrase means in practice depends upon the nature of the claim and the corresponding jurisdictional gateway leading to this stage of inquiry. Gateway (10) directs focus upon a potential or prospective legitimate benefit to the judgment creditor / claimant. Without that feature being present there is no connection to this jurisdiction and (therefore) insufficient interest on the part of the English Court to entertain a claim for recognition or enforcement of the foreign judgment.

39. Two propositions appear to be settled by the Court of Appeal:

(a) First, it is not necessary for a judgment creditor / claimant to show that there are executable assets presently within this jurisdiction in order to establish proper forum pursuant to Gateway (10). A reasonable expectation or "*sufficient possibility*" of a benefit suffices. Such benefit can be "*indirect or prospective*". This is the effect of the decision in *Tasarruf Mevduati Sigorta Fonu v. Demirel & another* [2007] EWCA Civ 799; [2007] 1 WLR 2508 at [27]-[29], [45]-[46]

(concerning the predecessor provision in identical language: CPR 6.20(9)): see 2024 White Book, Volume 1 at 6HJ.24.

(b) Second, a challenge to permission to serve out of the jurisdiction is conducted by reference to the factual position pertaining at the time of the relevant permission order - subsequent events are ignored save in so far as informing that prior position: see *Erste Group Bank AG v. JSC 'VMZ Red October' & others* [2015] EWCA Civ 379; [2015] 1 CLC 706 at [44].

40. The evaluation as to a potential or prospective legitimate benefit pursuant to Gateway (10) is, therefore, conducted at the time permission to serve out is granted. Thus:

(a) Whilst a domestic freezing order might be susceptible to discharge if it turns out there were no assets capable of being frozen at the relevant time, or enforcement of a foreign judgment *might* ultimately be refused in similar circumstances, the same approach does not apply to establishing jurisdiction.

(b) The enforcement of a foreign judgment or award may be justified because it could facilitate enforcement steps elsewhere through or by virtue of London's pre-eminent role in the international banking system or the extensive powers of the English Court in terms of asset-tracing, asset-freezing and ancillary disclosure.

41. This reflects the distinction between private international law and private domestic law. There is a difference between the *existence* of jurisdiction which confers remedial powers available under municipal law, on the one hand, and the subsequent *exercise* of such remedial powers by the Court pursuant to such jurisdiction, on the other hand.

42. Pausing there, it might be questioned why the proper forum analysis should look ahead to the ultimate exercise of remedial discretion in this way. As to this:

(a) The practical utility or juridical legitimacy of a recognition/enforcement claim is baked into threshold merits: there could be no real prospect of obtaining a final order if it cannot be shown there is a real prospect of any potential or prospective legitimate benefit to the claimant in the first place; and once that is shown, there is no obvious need to show it again as part of the *forum conveniens* analysis.

(b) A parallel suggests itself with the notion of 'sufficient interest' or 'sufficient connection' emanating from *Airbus Industrie GIE v. Patel* [1999] 1 AC 119 at 138G-H. Statutory manifestations of or proxies for such considerations are found, for example, in s.37(1) of the Senior Courts Act 1981 ("*just and convenient*"), s.25(2) CJJA ("*makes it inexpedient*") and ss.2(3) & 2(4)(b) of the Arbitration Act 1996 ("*makes it inappropriate*" / "*is appropriate to do so*"). These comity-based requirements are sometimes carried across or brought forward from the projected exercise of remedial discretion into the forum analysis for jurisdiction purposes, e.g. claims for negative declaratory relief or certain kinds of anti-suit relief.

(c) The touchstones are utility and legitimacy. They could be packaged together in plain language as the justified use of the court process, as distinct from its misuse or abuse. Ultimately, it might be said, the English Court will not *assert* jurisdiction in circumstances where there is no prospect of *using* it in the particular circumstances. This is acute in the case of final discretionary remedies, but can also be seen in the phrase "*reasonable for the court to* try" in the first limb of PD6B 3.1(3), for example. Come what may, circumstances may change between

establishing jurisdiction and later coming to decide whether to exercise an interim or final remedial power.

(d) Satisfaction of Gateway (10) does not imply or supply an intrinsic connection to this jurisdiction. This can be contrasted with PD6B 3.1(5) (claim for interim relief under s.25 CJJA) or 3.1(20) (claim under an enactment which allows proceedings to be brought) or CPR 62.5 (arbitration claims) where, in each case, domestic legislation regulates the jurisdiction of the English Court, reflecting the statutory examples given above.

(e) In the context of Gateway (10), therefore, a controlling mechanism invoking the intuitive baseline of utility and legitimacy (i.e. justified use of the court process) makes sense at the jurisdictional stage. This is so even if borrowed from the language of remedial discretion and even if overlapping with threshold merits to some extent: see paragraph 26 above.

43. The White Book commentary suggests there is some uncertainty as to whether *Fonu v. Demirel* stands as indisputable authority for the proposition I have summarised in paragraph 39(a) above. The case of *Linsen International Ltd. & others v. Humpuss Transport Kimia* [2011] EWCA Civ 1042, an *ex tempore* interlocutory decision about permission to appeal, is cited to contrary effect; and such ostensible conflict was noted by Gloster J (as she then was) in *Parbulk II AS v. PT Humpuss Intermoda Transporasti TBK & others* [2011] EWHC 3143 (Comm); [2011] 2 CLC 988.

44. I regard *Fonu v. Demirel* as binding appellate authority for the proposition summarised above. It has been followed at first instance in a number of cases: see *Nomihold Securities Inc. v. Mobile Telesystems Finance SA* [2011] EWHC 2143 (Comm); *Habib Bank Ltd. v. Central Bank of Sudan* [2014] EWHC 2288 (Comm); and *Caterpillar Financial Services (Dubai) Ltd. v. National Gulf Construction LLC* [2022] EWHC 914 (Comm). It is also cited in *Dicey* at 11-207 for the following proposition: "*The claimant does not have to show that there are assets in England available for execution.*"

45. This suggested uncertainty as to the authority of *Fonu v. Demirel* forms one of the grounds of the defendants' complaint about unfair presentation at the without notice hearing before Picken J. I return to it in that context below.

46. In light of the legal position which I have summarised above, the defendants' challenge to proper forum fails. The fact that the underlying dispute has no intrinsic connection to this jurisdiction is immaterial. Likewise the absence of executable assets within this jurisdiction, according to the defendants' asset-disclosure evidence in response to the Freezing Order: see paragraph 20 above.

47. Leaving aside that there is no application to discharge the Freezing Order, the stated absence of current executable assets does not itself deprive the Enforcement Action of all potential utility or legitimacy. Put another way, there is no basis for doubting the judicial evaluation conducted by Picken J when granting permission to serve the Enforcement Action pursuant to Gateway (10).

48. There remains a real prospect of a legitimate benefit to the claimants qua judgment creditors if the ADCC Judgment is recognised and thereby capable of being enforced here. This is especially so given the defendants' international activities during the relevant period, alleged assets within this jurisdiction during some of that period (see paragraph 19 above) and notwithstanding the Freezing Order.

49. Whether that means that a final order is made is a matter for another judge in the future based on the circumstances prevailing at such time. I need only be satisfied that this Court is the proper place to seek recognition and enforcement based on the position as at 13 March 2024. I am amply satisfied that it is and, so far as relevant, that remains the position at the present time.

(iii) Discretion - Injustice, Comity & Public Policy

50. As noted above, the defendants' jurisdiction challenge gives emphasis to this further stage of analysis. The hook for this submission appears to be what is said *obiter* in paragraph [46] of *Fonu v. Demirel* to the effect that the Court could decline to grant permission to serve out under (what is now) Gateway (10) where it would "*not be just … because of the risk of multiplicity of proceedings*".

51. It is an accepted feature of this gateway that there may be parallel recognition and enforcement proceedings in more than one foreign jurisdiction at any given point in time. Objections such as those taken by the defendants in the present case may come before one court or another for determination. Satellite disputes may then arise about preclusion or priority. This in turn might lead to injustice in the absence of effective and courteous international case management.

52. It strikes me that the risk of injustice arising in a complex multi-jurisdictional enforcement scenario is better dealt with through the Court's power to stay its own process once it has established jurisdiction, rather than through the binary (and potentially terminal) decision as to service out. That chimes with what is said about "*sensible case management*" at the end of paragraph [46] in *Fonu v. Demirel*. The Court will be anxious to avoid any misuse of its process or undue harassment of a judgment debtor. The Court will do what it can to ensure the optimum conduct of curial business in any multi-jurisdictional context.

53. This discussion is academic in the present case. I perceive no risk of injustice to either of the defendants caused by multiplicity of proceedings or inconsistent outcomes on common issues as matters stand. The fact that there are parallel proceedings on foot in California and involving the BVI courts does not generate a spectre of unjust multiplicity. There is nothing vexatious or oppressive about the Enforcement Action in this wider international context. The ADCC Judgment is for a considerable amount of money. The defendants choose how to defend each enforcement process. It may serve a legitimate purpose and achieve a practical benefit to the judgment creditors in having such judgment recognised and enforced here in England. This is enough to establish jurisdiction.

54. Finally, I am unable to accept the submission that this Court's assertion of jurisdiction over the Enforcement Action would infringe international judicial comity or contravene domestic public policy:

    (a) This contention, as foreshadowed in Mr Farani's witness evidence, appears to be a label attached to the other points of objection raised by the defendants. If those points had sufficient merit they would have operated to defeat jurisdiction at a prior stage of analysis. I see no basis for them being used to thwart jurisdiction as a matter of residual discretion.

    (b) It is trite that this Court cannot rectify or augment a judgment of a foreign court or an arbitral award. Doing so would offend international judicial comity or contravene international convention obligations, as the case may be. However,

declining jurisdiction over the Enforcement Action on this residual basis would require the defendants to show that they had (at least) the better of the argument on (at least) the alleged material error in the ADCC Judgment. That finding is precluded by my conclusion on threshold merits.

55. As noted above - and save as discouraged by my observations on various matters - the defendants are free to run whatever defences to recognition or enforcement they can conscientiously and credibly advance during these proceedings. That might include new arguments not raised on this jurisdiction challenge so long as it is not abusive to raise them later. Likewise, if circumstances changed such as to justify this Court staying its process as a matter of sensible case management, that is for another day.

UNFAIR PRESENTATION: ANALYSIS

56. The duty to make full and frank disclosure and give a fair presentation of the case on a without notice application is taken very seriously by the Court. The principles are derived from numerous authorities. They are summarised in the 2024 White Book, Volume 1 at 6.37.4 and codified in primary colours in Appendix 9 to the Commercial Court Guide. Aspects of this guidance appear elsewhere, for example PD25A paragraph 3.3 and in Form PF 6A. This received guidance calls upon judicial pragmatism.

57. In the absence of any application to set aside the Freezing Order itself, there is no reason to approach this exercise with any heightened scrutiny of the claimants' procedural behaviour on the without notice application. I approach the task by applying the general principles outlined in the guidance referred to above.

58. The defendants make two main criticisms of how the without notice application was presented to Picken J. Both criticisms are counterpoints to arguments addressed above when dismissing the jurisdiction challenge; but that does not mean they lack cogency in this different context based upon due process and protection of the interests of an absent respondent.

59. The first criticism concerns the points made by the defendants about the status and effect of the ADCC Judgment itself: see paragraphs 32 to 35 above. I am satisfied that the claimants' presentation in this regard was sufficiently fair and frank. As to this:

    (a) The fact that time and money has been spent by the defendants on developing these points of objection after the event does not show that fairness required the claimants to broach such points on the without notice application months earlier. The claimants say that such objections are opportunistic attempts to exploit potential linguistic anomalies.

    (b) I have found that there is comfortably a real prospect of success - and, indeed, a good arguable case - on the merits of the Enforcement Action despite these criticisms of the dispositive (but not preceding) language in the ADCC Judgment; although that is not to say that the Court ultimately will be persuaded that it should grant recognition or enforcement.

    (c) The claimants cannot be criticised for failing to anticipate the various points made by Mr Al-Marri in his (non-compliant) expert report. Such criticisms are inconsistent with the defendants' own reactions to the ADCC Judgement in the local court system, as described above.

60. The second criticism concerns the legal analysis as to proper forum or discretion pursuant to Gateway (10): see paragraphs 43 & 44 above. I am satisfied that there was no unfairness or deficiency in this context. Whatever controversy may be said to exist as to the scope or status of *Fonu v. Demirel* that is academic in circumstances where as at 13 March 2024 there was shown to be some potential or prospective legitimate benefit to the claimants in seeking enforcement of the ADCC Judgment in this jurisdiction.

61. I cannot see how Picken J or any other commercial judge in his position would have concluded that Gateway (10) should be read down in light of *Linsen* or the proper forum analysis otherwise focussed upon the existence of executable assets in this jurisdiction. That narrow approach would have carried with it a serious risk of legal error in light of *Fonu v. Demirel*. The commentary in the White Book does not begin to suggest that *Linsen* is to be preferred, and nor could it.

62. The following points are also worth noting:

    (a) *Fomu v. Demirel* does not appear to have been cited to the two-judge interlocutory bench in *Linsen* meaning that such decision, in so far it has any precedential status, could be said to be *per incuriam* in light of that omission: see *Dicey* at fn.614 to 11-207; *Briggs* (above) at fn.246 to 24.20.

    (b) As noted above, the decision in *Linsen* was about permission to appeal and the *ex tempore* judgment itself does not state that it is intended to be capable of citation in future; cf. *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001 (2024 White Book, Volume 1, p.2618): see observations of Burton J in *Habib Bank* (above) at [5]-[6].

    (c) Further, as observed in *Parbulk II* (above) at [80], *Linsen* concerned permission to serve out upon a so-called NCAD pursuant to the *Chabra* injunctive jurisdiction, and so can be distinguished from *Fonu v. Demirel* which concerned (as here) permission to serve out on a substantive defendant / judgment debtor.

63. In these circumstances, the fact that the claimants' legal team did not draw Picken J's attention to the full commentary in 2024 White Book, Volume 1 at 6HJ.24 is not a material deficiency in due process. That commentary may afford more status to *Linsen* than the decision itself warrants in light of the considerations set out above, as reflected in leading practitioner texts and subsequent decisions of experienced commercial judges.

64. Likewise and in so far as admissible as a distinct complaint of procedural misconduct, there was no unfairness in the claimants' omission to broach the points now made by the defendants which I have addressed in paragraphs 50 to 54 above. I have no reason to believe that they were foreseeable to, still less foreseen by, the claimants.

65. Further, in so far as the original presentation could be said to have fallen short of the exacting standard required of such applicants, I am satisfied that this was minor and innocent. There is no basis, in my judgment, for setting aside the permission granted by Picken J as a matter of proportionality and in the interests of justice or furtherance of the overriding objective. On the contrary, I would regard it as disproportionate and punitive to set aside such permission or refuse to grant it afresh in the context of these complaints about unfair presentation.

DISPOSAL

66. For the reasons set out above, I dismiss the jurisdiction challenge and refuse to set aside the Order of Picken J made without notice on 13 March 2024.

67. There will be a short further hearing to deal with matters consequential to the handing down of my approved judgment in so far as not agreed between the parties. The circumstances summarised in paragraphs 21 to 23 above may impact the basis of assessment of costs to be paid by the defendants.