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Foreign Evidence Collection and Judgment Enforcement

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What Is § 1782?

- Section 1782 is a statute that authorizes U.S. federal courts to order discovery for use in foreign proceedings:
  - "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.
  - The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court." See 28 U.S.C. § 1782.

Mandatory Requirements

- Seminal case: *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
- (1) the request must be made by a **foreign or international tribunal**, or **by any interested person**;
- (2) the request must **seek evidence**, whether it be the testimony or statement of a person or the production of a document or other thing;
- (3) the evidence must be **for use** in a **proceeding in a foreign or international tribunal**; and
- (4) the person from whom discovery is sought **must reside or be found in the district of the district court ruling on the application for assistance**.

1. Interested Person

The Applicant must be an "**interested person**."

- In Intel, the U.S. Supreme Court defined an "interested person" as encompassing more than just a litigant in a foreign proceeding. Intel, 542 U.S. at 256.
- "An interested person includes a **party to the foreign litigation, whether directly or indirectly involved**."
- An interested person is someone who has a role in submitting evidence and has participation rights in the foreign tribunal and includes someone who has a "reasonable interest in obtaining judicial assistance." *Id.*

2. Seek Evidence

- Discovery under 28 U.S.C. § 1782 may be conducted pursuant to the Federal Rules of Civil Procedure.
  - **Broad scope of discovery:** Documents, testimony (via deposition), records, electronic data, physical evidence.

- **Extraterritorial reach:** The court may order the production of documents regardless of their physical location. *Sergeeva v. Tripleton Int'l Ltd.*, 2016 WL 4435616 (11th Cir. Aug. 23, 2016).

3. For Use In a **Proceeding** In a Foreign or International Tribunal

The evidence must be for use in a "**proceeding**" in a foreign or international tribunal.

- The proceeding need not be pending or imminent, but only **reasonably contemplated**.
- The future proceeding must be **more than speculative**.
- The applicant must show **reliable indications** of the likelihood that proceedings will be instituted within a reasonable time.
- A tribunal qualifies under 1782 only if it exercises **government-conferred** adjudicatory authority; purely private bodies do not qualify. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022).

3. **For Use** In a Proceeding In a Foreign or International Tribunal

The evidence must be "**for use**" in a foreign proceeding.

- Whether the foreign court will admit the evidence is **not relevant**. *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012).
- Once documents are properly obtained under section 1782, documents may be used in other proceedings, including in the United States. *Glock v. Glock Inc.*, 797 F.3d 1002 (11th Cir. 2015).

4. Target Resides or Is Found In The District

Individual – Residence or physical presence

Entity

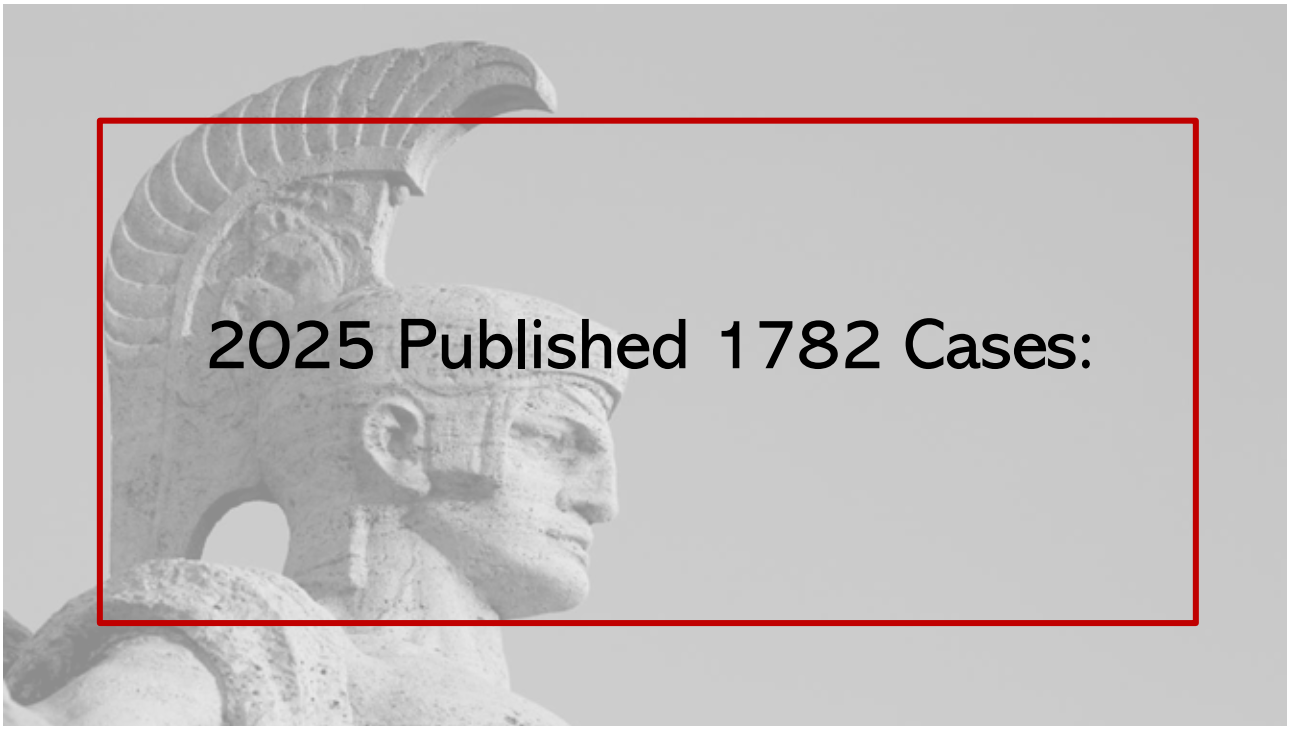
- **S.D.Fla** – Has an office and regularly transacts business in the District.
- **2nd Cir** - "Personal jurisdiction consistent with due process."
  - General personal jurisdiction - "At home"
  - Specific personal jurisdiction
    - Causal relationship between contacts and the existence of the evidence sought.
    - If target has broader contacts - evidence would not be available "but for" the target's forum contracts.

Discretionary Factors

Discovery under 1782 is discretionary. *See Intel* (" § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance.").

Other Considerations: The 4 *Intel* Discretionary Factors

- Whether "the person from whom discovery is sought is a **participant in the foreign proceedings,**" because "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant;"
- "The **nature of the foreign tribunal,** the **character of the proceedings** underway abroad, and the **receptivity** of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;"
- "Whether the § 1782(a) request conceals an attempt to **circumvent foreign proof-gathering restrictions** or other policies of a foreign country or the United States;" and
- Whether the request is otherwise "**unduly intrusive or burdensome.**"



Novalpina Cap. Partners I GP S.A.R.L v. Read, 149 F.4th 1092, 1105 (9th Cir. 2025)

- The Ninth Circuit joined the Second and the Eleventh Circuits in holding that documents obtained via 1782 for one proceeding may be used in other proceedings by default unless the district court enters an order to the contrary.

Banoka S.a.r.l. v. Elliott Mgmt. Corp., 148 F.4th 54, 59 (2d Cir. 2025)

- Affirming denial of 1782 petition under the third and fourth Intel discretionary factors.
  - Finding that seeking discovery in a forum other than that identified in contractual forum selection clause may demonstrate "an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country" (Third *Intel* factor).
  - Documents requests were "unduly broad" and "burdensome" where they were primarily held and controlled by overseas affiliate entity (Fourth *Intel* factor).

In re Amgen Inc., 139 F.4th 265, 268 (3d Cir. 2025)

- Joining the Ninth and Fifth Circuits in holding that an order granting discovery under § 1782, but declining to determine the scope of permissible discovery, is not a final appealable order under § 1291.

In re Gliner, 133 F.4th 927, 935 (9th Cir. 2025)

- The Ninth Circuit vacated the district court's denial of a §1782 application because the lower court improperly relied on the First Amendment. The Ninth Circuit found no evidence that the anonymous website operator or author were U.S. persons or that U.S. First Amendment rights were implicated. The case was remanded for consideration of the statutory requirements and Intel discretionary factors.

In re Banco Mercantil del Norte, S.A., 126 F.4th 926, 931 (4th Cir. 2025)

- The Fourth Circuit affirmed the district court's grant of petitioners § 1782 application, finding that the requested discovery was "for use" in foreign proceedings and that respondent failed to meet its burden of showing that a foreign privilege barred disclosure.

[2008 CILR 301]

BANDONE SDN. BHD. and BRUNEI INVESTMENT AGENCY

v.

SOL PROPERTIES INCORPORATED and DULI YANG TERAMAT MULIA PADUKA SERI PENGIRAN DIGADONG SAHIBUL MAL PENGIRAN MUDA HAJI JEFRI BOLKIAH

Grand Court

(Henderson, J.)

5 June 2008

Companies—register of shareholders—rectification—summary procedure—applications for rectification of company's register of members amenable to summary procedure under Companies Law (2007 Revision), s.46, if to direct full trial would case delay—undesirable to leave corporate register incorrect for too long

Conflict of laws—recognition of foreign proceedings—judgment in personam—foreign order for specific performance of agreement to transfer shares and rectify Cayman company's register not judgment in rem but in personam—order does not determine title to, or disposition of, shares but merely helps fulfil contractual obligation to transfer

Conflict of laws—recognition of foreign proceedings—judgment in personam—may recognize and enforce foreign non-money in personam order for equitable remedy such as specific performance (e.g. order for share transfer and rectification of Cayman company's register), if comity requires it and integrity of Cayman judicial system not jeopardized—court to have regard to fairness, mutuality and public policy considerations

The plaintiffs sought the recognition and enforcement of an order of the High Court of Brunei for the specific performance of the second defendant's obligations to them.

A settlement agreement was made between the plaintiffs and the second defendant ("Prince Jefri"), requiring him to transfer his shares in the first defendant ("Sol"), a Cayman company, to either of the plaintiffs. The settlement was in respect of litigation seeking the restoration of more than US$15bn. misappropriated by him when he was Brunei's Minister of Finance and chairman of the second plaintiff ("BIA").

When Prince Jefri did not make the transfer and claimed to be no longer bound by the terms of the settlement agreement, the High Court of Brunei ordered specific performance of his obligations arising from it. Both the Court of Appeal of Brunei and the Privy Council dismissed Prince Jefri's

appeal against that order, holding that BIA was entitled to the order, on summary application. In the meantime, the High Court of Brunei appointed the Registrar to act in Prince Jefri's place to make the share transfer. However, when BIA asked Sol to rectify its register of members to reflect the transfer, it refused. BIA therefore brought the present proceedings, seeking the rectification of the Sol register.

The plaintiffs submitted that the register should be rectified because (a) the court had the jurisdiction to, and should, recognize and enforce the orders of the Brunei court, as although they were non-money *in personam* judgments, the court had a discretion to recognize and enforce them when the principle of comity required it, provided that the integrity of domestic law was maintained; (b) the exercise of this discretion was to be based on considerations of fairness, and the defendants had failed to demonstrate that the Brunei orders should not be recognized and enforced here, as (i) the Brunei Court of Appeal had established that BIA could be subject to an order for the specific performance of its own obligations under the settlement agreement, and therefore there was no issue of mutuality which would make the recognition and enforcement of the orders against the defendants unfair; (ii) the Privy Council had already held that Prince Jefri was able to receive a fair trial in Brunei and so he was estopped from relying on that issue again; and (iii) to conclude that the authoritarian nature of Brunei meant that orders made by its courts should be ignored here as a matter of public policy would be contrary to the principle of comity; and (c) they had correctly applied for the rectification of the register by way of a summary application and although the law enabled a full trial to be ordered, one was not necessary and would merely result in delay.

The defendants submitted in reply that (a) the court did not have the jurisdiction to recognize and enforce the Brunei orders because (i) the order for specific performance of the settlement agreement was an *in personam* judgment, which was not for debt or a definite sum of money; and (ii) the appointment of the Registrar to execute the share transfer was an *in rem* order, regarding property of which the *lex situs* was the Cayman Islands, not Brunei; (b) even if the court decided to amend the common law rule prohibiting the enforcement of foreign non-money judgments, it retained a discretion which should be exercised in their favour, in the interests of fairness and of maintaining the integrity of domestic law, because (i) BIA was immune from similar orders for the specific performance of its obligations to the defendants in Brunei and there was therefore a lack of mutuality; (ii) Prince Jefri was unable to receive a fair trial in Brunei; and (iii) it would be contrary to public policy for the court to recognize and enforce the judgment of an authoritarian judicial system such as Brunei; and (c) the plaintiffs should have instituted the proceedings with a writ of action, as the case was too complex to be dealt with via summary procedure.

Held, granting the application:

(1) The court would order the rectification of Sol's register of members, and substitute the name of Bandone for that of Prince Jefri as the holder of the shares. The court had the jurisdiction to recognize and enforce the Brunei orders for the specific performance of the settlement agreement and the appointment of the Registrar to effect the share transfer. Although it did not have jurisdiction to recognize a foreign *in rem* judgment in respect of Cayman property, the Brunei orders were, in fact, *in personam* judgments; the first did not determine the title to, or disposition of, the shares, but merely ordered the specific performance of a contractual obligation regarding their transfer, while the second order simply effected that fulfilment, in light of Prince Jefri's non-compliance. The direct enforcement of foreign *in personam* judgments and orders was no longer confined to those for debt, or definite sums of money. Non-money orders could be recognized and enforced, by way of equitable remedies such as specific performance, if the principle of comity required it, provided that the court did not have to extend domestic law to do so, and the foreign order was final and conclusive, as was the case here (paras. 14–15; para. 22).

(2) There had been a change to the common law rule against the enforcement and recognition of foreign non-money *in personam* judgments and it had been accompanied by judicial discretion to ensure that it did not jeopardize the integrity of the Cayman judicial system. The court should have regard to general considerations of fairness and ensure that domestic law was not extended to suit foreign litigants, when deciding whether or not to enforce non-money judgments. However, the defendants had failed to show that the court should not recognize and enforce the Brunei orders in the exercise of that discretion. The Brunei Court of Appeal had held that BIA, being a statutory corporation, was amenable to suit and therefore that court was not precluded from ordering the specific performance of BIA's obligations under the settlement agreement. As a result, no mutuality issue existed to prevent the recognition and enforcement of the orders, in respect to the defendants, in the Cayman Islands, in the interests of fairness. Similarly, Prince Jefri was unable to rely on the authoritarian nature of the judicial regime of Brunei as a ground for exercising the court's discretion in his favour; such a conclusion would mean that an order made by its courts must be ignored in the interests of public policy, and would violate the principles of comity and justice which were relevant considerations in the exercise of such discretion. In any case, the main concern in relation to the judicial system of Brunei was Prince Jefri's ability to receive a fair trial there, but he was estopped from raising that issue as he had already failed to satisfy the Privy Council that he could not (paras. 23–24; paras. 29–30; paras. 37–39).

(3) The application for rectification of the register had correctly been brought by the plaintiffs under s.46 of the Companies Law (2007 Revision), which contemplated a summary procedure on the basis that it was undesirable to leave a corporate register in a state of error for too long.

Although the law enabled the court to direct a trial, therefore, nothing but delay would result from such course and it would not make such an order (para. 40).

Cases cited:

(1) *Bolkiah v. Brunei Darussalem*, [2007] UKPC 63, referred to.

(2) *Castrique v. Imrie*, [1861–73] All E.R. Rep. 508; (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 3 Mar. L.C. 454, considered.

(3) *Flight v. Bolland* (1828), 4 Russ. 298; 38 E.R. 817, referred to.

(4) *Indyka v. Indyka*, [1969] 1 A.C. 33; [1967] 2 All E.R. 689, referred to.

(5) *Lumley v. Ravenscroft*, [1895] 1 Q.B. 683, referred to.

(6) *Luther v. Sagor*, [1921] 3 K.B. 532; (1921), 7 Ll. L. Rep. 218, referred to.

(7) *Miller v. Gianne*, 2007 CILR 18, applied.

(8) *Pattni v. Ali*, 2005–06 MLR 586; [2007] 2 A.C. 85; [2007] 2 W.L.R. 102; [2007] 2 All E.R. (Comm.) 427; [2006] UKPC 51, applied.

(9) *Pro Swing Inc. v. Elta Golf Inc.*, [2006] S.C.R. 612; 2006 SCC 52; 2006 CarswellOnt 7203, applied.

(10) *Schibsby v. Westenholz*, [1861–73] All E.R. Rep. 988; (1870), L.R. 6 Q.B. 155, referred to.

M. Pascoe, Q.C., C. Russell and *W. Jones* for the plaintiffs;

J. Walton for the defendants.

1. **HENDERSON, J.:** This application for rectification of the register of members of the first defendant, Sol Properties Inc. ("Sol"), by the Brunei Investment Agency ("BIA") and its wholly-owned subsidiary, Bandone Sdn. Bhd. ("Bandone"), raises issues concerning the enforcement of foreign non-money judgments. The second defendant, referred to in these proceedings as "Prince Jefri," is the youngest brother of His Majesty the Sultan of Brunei Darussalam. Two of Prince Jefri's sons are directors of Sol, a Cayman exempt company.

The facts

2. In February 2000, proceedings were instituted in the High Court of Brunei Darussalam against Prince Jefri, and others, by the Government of His Majesty the Sultan, claiming the restoration of in excess of US$15bn., on the ground that it had been misappropriated by Prince Jefri when he was Minister of Finance of Brunei and chairman of the BIA. Eventually, on May 12th, 2000, the litigation was compromised by a settlement agreement, which, among other things, required Prince Jefri to transfer his shares in Sol to the BIA, or its nominee, Bandone. Sol owns, indirectly, the Hotel Bel-Air in Los Angeles, an asset said to be worth approximately US$100m.

3. Although Prince Jefri did perform some of his obligations under the settlement agreement, he has never transferred the Sol shares. By October 2004, Prince Jefri was claiming that he was no longer bound by its terms. The BIA brought an application in the High Court of Brunei Darussalam, to enforce the terms of the agreement against Prince Jefri.

4. This application, which was resisted, resulted in an order in favour of the BIA. The order, in its material parts, reads as follows:

". . . [T]he BIA is entitled to have the first defendant specifically perform each of the first defendant's obligations under the settlement agreement, dated May 12th, 2000 . . . [It is ordered that] the first defendant . . . within 45 days of the first and second undertakings ceasing . . . effect [the] transfer to the BIA, or as the BIA may in writing direct, the following—

. . .

(c) the shares of or any interest in or rights over Sol Properties Inc."

5. Prince Jefri appealed to the Court of Appeal of Brunei Darussalam against this order. His appeal was dismissed. He then asked the Privy Council for special leave to appeal. Meanwhile, since no stay of execution had been granted, the BIA sought and obtained an order of the High Court of Brunei Darussalam, appointing the Registrar of that court to execute the documentation required to effect the transfer of the shares of Sol, to Bandone. This order, in its material parts, reads:

"It is ordered and directed that, pursuant to O.45, r.8 of the Rules of the Supreme Court—

The Registrar of the High Court of Brunei Darussalam be appointed to, and do, execute as soon as reasonably practicable the following documents, namely:

. . .

(3) Instruments (in the forms attached to this order at Schedule 3) transferring all the shares of Sol Properties Inc. . . . and any and all of Prince Jefri's interests in, or rights over, the shares of Sol Properties Inc., to Bandone Sdn. Bhd. . . ."

6. On September 19th, 2006, the Registrar executed, on behalf of Prince Jefri, a deed of transfer and related documentation in respect of the Sol shares. BIA's solicitors have asked Sol to record the name of Bandone in its register of members, in place of that of Prince Jefri. The directors of Sol have refused.

7. On November 8th, 2007, the Privy Council handed down two judgments dismissing Prince Jefri's appeal. One dealt with what has been described as "the procedural issue," and rejected Prince Jefri's claim that

he could not obtain a fair hearing in Brunei Darussalam. The other, which dealt with the "substantive issue," confirmed that the lower courts were correct in deciding that the BIA was entitled to an order, upon summary application, requiring specific performance of the settlement agreement by Prince Jefri. Sol has continued to refuse to amend its register of members.

The issues

8. This application for rectification of the register of Sol is resisted on these grounds. First, the respondents say that the second order of the High Court of Brunei Darussalam (directing the Registrar to execute documents) is an order *in rem*, relating to property of which the *lex situs* is the Cayman Islands, and is therefore an order of which this court should take no notice. The respondents also say that the earlier order of the High Court for specific performance is an order *in personam* and cannot be enforced directly in the Cayman Islands, because it is not a judgment for a debt, or for a definite sum of money. Secondly, Sol and Prince Jefri say that should this court "decide to amend the common law rule which currently prohibits the enforcement of a foreign non-money judgment," I should find that the court retains discretion and should exercise that discretion in their favour. Thirdly, the respondents emphasize that their case is complex and cannot be dealt with appropriately on a summary basis. They say the plaintiffs should have commenced a writ action.

First issue: jurisdiction to enforce the order

9. The distinction between judgments *in rem* and *in personam*, in connection with company shares, has been the subject of a recent judgment of the Privy Council in *Pattni* v. *Ali* (8). The appeal arose from a petition brought by the plaintiff in the Chancery Division of the Isle of Man, seeking rectification of the register of members of "World Duty," an Isle of Man company. The plaintiff had obtained a judgment from the High Court of Kenya, ordering the defendants to "transfer all the 100% shares in [World Duty] to the plaintiff as per the said sale and purchase agreement . . ." The court found that the plaintiff had paid for certain shares but that the defendants had failed to transfer the shares to him, in breach of their agreement. Both of the lower courts had accepted an argument that this was a judgment *in rem*, and was, therefore, incapable of enforcement, or recognition, in the Isle of Man. The rule relied upon is set out in Rule 40 of Dicey, Morris & Collins, 1 *The Conflict of Laws*, 14th ed., para. 14R–099, at 611 (2006), in these terms:

"Rule 40—(1) A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.

(2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country."

10. Their Lordships quoted from the judgment of Blackburn, J., in *Castrique* v. *Imrie* (2), which described (L.R. 4 H.L. at 428) a decision *in rem* as one by a tribunal with "jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing." Their Lordships commented (2005–06 MLR 586, at para. 24):

"24 For present purposes, a judgment *in rem* in the sense of Rule 40 is thus a judgment by a court where the relevant property is situate adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it)."

11. The contrast with an order or judgment made *in personam* was described in these words (*ibid.*, at para. 28):

"28 An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the *lex situs* of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to Rules 120 and 124 in *Dicey, Morris & Collins.*"

12. In the result, the Privy Council found (*ibid.*, at para. 33) that the Kenyan order was a—

". . . classic order *in personam* for specific performance in terms reflecting and predicating the judge's findings of an agreement for sale and of its breach by [the defendants] . . . which are findings central to [the plaintiff's] . . . claim in the Isle of Man to rectify [the] . . . register."

13. The order of the Kenyan court did not purport to pass legal title to the shares from defendant to plaintiff; that could only take place in the Isle of Man, upon alteration of the register of members. Beneficial ownership of the shares, on the other hand, was transferred to the plaintiff under the share transfer agreement, well before the Kenyan court took cognizance of the claim.

14. Similarly, I conclude, without difficulty, that the first order of the High Court of Brunei Darussalam, for specific performance, was a judgment *in personam.* The judgment is final and conclusive and was

pronounced by a court with jurisdiction to give it. The judgment imposed an obligation of a personal nature upon Prince Jefri—the obligation to take the necessary steps to transfer the shares to Bandone. He did not do so.

15. The Registrar of the High Court was then appointed to act in Prince Jefri's stead. In doing so, he was simply carrying into effect obligations of a personal nature which Prince Jefri should have, but did not, carry out. The order appointing the Registrar was entirely ancillary to the earlier order and made only for the purpose of perfecting it. The later order can assume no greater significance than the earlier one. It, also, is an order made *in personam*.

16. In the course of reaching their decision in *Pattni* v. *Ali* (8) (that the Kenyan order was made *in personam*), the Privy Council said (*ibid.*, at paras. 30–31):

"30 Their Lordships are not, however, concerned with immovables, which represent as stated an exceptional case in private international law. For present purposes, it is the converse of the above propositions relating to movables or intangibles that is important. As presently advised, though the arguments did not address the point (or, it may be, need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state *A* makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state *B*, the courts of state *B* can and should recognize the foreign court's *in personam* determination of such rights as binding *and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B.* The extent to which this was possible might be limited by the law of state *B* as the *situs* or, in the case of shares, as the place of incorporation of the relevant company (in this case, as both). For example, if a person to whom a court in state *A* held that shares had been contractually agreed to be transferred was not eligible under the company's constitution to be registered as their legal owner, there could be no actual registration in state *B*, but no such suggestion appears in this case.

31 Their Lordships turn to the relevance and application of these principles to the present circumstances. Whatever else might be in doubt about the course of the Kenyan proceedings, it is clear that they involved contractual issues between parties to the proceedings who are also the parties to the Isle of Man proceedings—[the plaintiff] . . . on the one side and [the defendants] . . . on the other." [Emphasis supplied.]

17. There is a clear, but not always sufficiently recognized, distinction between recognition and enforcement of a foreign court order or judgment. The general rule concerning recognition of an *in personam* judgment is given in Rule 35(2) (*Dicey, Morris & Collins*, *op. cit.*, para. 14R–018, at 574):

"A foreign judgment given by the court of a foreign country, with jurisdiction to give that judgment in accordance with the principles set out in Rules 36 to 39, which is not impeachable under any of Rules 42 to 45, and which is final and conclusive on the merits, is entitled to recognition at common law and may be relied on in proceedings in England."

18. The right to enforce directly a foreign judgment *in personam* is described in Rule 35(1) (*ibid.*):

". . . [A] foreign judgment *in personam* given by the court of a foreign country . . . which is not impeachable under any of Rules 42 to 45 [*i.e.* due to lack of jurisdiction of the foreign court (*ibid.*, para. 14R–118, at 619); fraud (*ibid.*, para. 14R–127, at 622); contravention of public policy (*ibid.*, para. 14R–141, at 629); or opposition to natural justice (*ibid.*, para. 14R–150, at 633)], may be enforced by a claim or counterclaim for the amount due under it if the judgment is

(a) is for a debt or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and

(b) final and conclusive."

19. The emphasized words in the quotation from *Pattni* v. *Ali* (8), set out above, appear to alter the traditional rule that a foreign judgment *in personam* can be enforced directly in England (and, by extension, in the Cayman Islands) only if it is for a debt, or definite sum of money. The judgment of a foreign court, to the effect that a plaintiff is entitled to specific performance of an agreement for the purchase and sale of shares, would not fall within Rule 35(1).

20. The BIA argues that the passage in *Pattni* v. *Ali* (2005–06 MLR 586, at paras. 30–31) quoted above, was a step in the reasoning adopted by the Privy Council, in its resolution of the first issue before it (the characterization of the Kenyan judgment as *in rem*, or *in personam*) and must, therefore, be regarded as part of the ratio. Prince Jefri, on the other hand, says that the passage was unnecessary to the decision, is mere *obiter*, and contains opinion on matters which were not argued.

21. This question itself has been considered and resolved in a recent decision of this court (Smellie, C.J.), in *Miller v. Gianne (7)*. Smellie, C.J. said (*2007 CILR 18, at para. 62* and *paras. 64–68*):

"62 The Privy Council, in allowing [the plaintiff's] . . . appeal, declared that the courts of the Isle of Man had jurisdiction and the right to recognize and enforce the Kenyan judgment by way of *in personam* orders directing [the first defendant] . . . (as a shareholder of World Duty Free and director of Dinky S.A. and Dinky S.A. itself as the majority shareholder) to grant specific performance, among other things, by the rectification of the share register of World Duty Free.

. . .

64 While the prefatory words of Lord Mance above suggest that that pronouncement of principle was not the subject of arguments directly on point, the principle cannot be regarded as mere *obiter dictum*; it was central to the decision taken by which the appeal was allowed and the Kenyan judgment declared to be enforceable. The fact, therefore, that the long-standing rule derived from *Sadler* v. *Robins* . . . (itself described by *Dicey, Morris & Collins*, *op. cit.*, vol. 1, at 574, note 62, as a limitation worthy of being reconsidered) appears not to have been the subject of arguments before their Lordships, is no basis for doubting that it has been disapproved.

65 Further, clear indication by way of high judicial authority that *Sadler* v. *Robins* should no longer represent the law on enforcement of foreign judgments *in personam* at common law is to be found in the judgment of the Supreme Court of Canada in *Pro Swing Inc.* v. *Elta Golf Inc.* . . . There the majority of the court held (in the context of an application to enforce a trademark judgment) that the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Further, that the appropriate modern conditions for recognition and enforcement can be expressed generally as follows. The judgment must have been rendered by a court of competent jurisdiction and must be final and conclusive, and it must be of a nature that the principles of comity require the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one.

66 This invocation by the Canadian Supreme Court of equitable principles is derived from an examination of the history of the traditional common law limitations set now against the realities of modern day commerce and the global mobility of people and assets. Those are realities which exist no less so in our jurisdiction.

67 Moreover, the jurisdiction in the courts to provide relief by way of recognition and enforcement of foreign non-monetary judgments

may well have existed in equity even before the emergence of the rule in *Sadler* v. *Robins* . . . in 1808. See, for instance *Morgan's Case* . . . The inclination in modern jurisprudence to grant recognition and enforcement by way of equitable remedies such as specific performance, injunctive or declaratory relief and pleas of *res judicata*, may well be regarded as a re-emergence of that jurisdiction which has always existed in equity, even if rendered dormant over the years in deference to the limitations of the traditional common law rule. For an elucidatory discussion on the subject, see White, *Enforcement of Foreign Judgments in Equity* (1980–82) 9 *Sydney Law Review* at 630–648.

68 The consequence of all this is, in my view, the appropriate conclusion that [the plaintiff] . . . should be allowed to seek the recognition and enforcement of the stipulated judgment itself in this jurisdiction, notwithstanding that it is not a judgment for a debt by way of a definite sum of money. It is highly arguable that this court, in the exercise of its equitable jurisdiction, will be able to recognize and enforce the orders and declarations of the California court (whether as presently contained in the stipulated judgment or as may be later expanded) *in personam*, as to the entitlement to property located here and declared to be community property. The fact that this form of pleading is one not previously settled as a matter of Cayman law, is no bar to the amendment, provided that it is *prima facie* arguable: *Grupo Torras S.A.* v. *Bank of Butterfield Intl. (Cayman) Ltd.* . . ."

22. This recent considered judgment, in a case whose facts are not as close to those in *Pattni v Ali* (8) as the present case, is conclusive of the point. The ability to enforce directly foreign judgments and orders made *in personam* is no longer confined in the Cayman Islands to judgments for a debt or a definite sum of money. Of course, enforcement of a foreign *in personam* non-money judgment requires that the judgment be final and conclusive and of such a nature that the principles of comity require this court to enforce it: see *Miller v. Gianne (2007 CILR 18, at para. 65*). Subject to what I will say below on aspects of comity, those criteria are met here.

Second issue: discretion to refuse to enforce

23. In *Miller v. Gianne*, Smellie, C.J. followed the judgment of the Supreme Court of Canada in *Pro Swing Inc.* v. *Elta Golf Inc.* (9). The majority in that case found a "compelling" case for altering the common law to permit the direct enforcement of foreign non-money judgments, but warned that this change must be accompanied by a judicial discretion to ensure that enforcement does not "disturb the structure and integrity of the [domestic] . . . legal system" (*per* Deschamps, J., 2006 CarswellOnt 7203,

at para. 15). There is a need for balance and restraint and a careful and nuanced approach. The majority said (*ibid.*, at para. 31):

"For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one."

24. The minority judgment added that "general fairness considerations" are relevant, and emphasized that the foreign judgment must be final, clear in its terms, and free of ambiguity. I accept these comments on discretion as applicable in the present case.

25. Section 84B (2) of the Brunei Constitution grants an immunity from civil and criminal proceedings to any person "acting on behalf, or under the authority, of [His Majesty the Sultan] . . . in respect of anything done, or admitted to have been done, by him, in his official capacity . . ." Prince Jefri says that the BIA is acting on behalf of the Sultan and is, therefore, immune from any order for specific performance that the High Court of Brunei Darussalam might otherwise decide to pronounce against it. This is relevant because the BIA still has undischarged obligations arising from the settlement agreement.

26. When Prince Jefri transferred assets to the BIA and Bandone, as required by the settlement agreement, he transferred two residences, which he had been using as his official and private residences, respectively. There is reason to believe that this was a simple mistake, capable of rectification in Brunei: see *Bolkiah* v. *Brunei Darussalem* (1) ([2007] UKPC 63, at para. 29 (the judgment of the Privy Council on the "substantive issue")). Much was made, in argument before me, of the possible inability of the High Court of Brunei Darussalem to compel the BIA to transfer these, or any other, residences back to Prince Jefri, in accordance with its assumed contractual obligation.

27. The orders of the Brunei court which the plaintiffs seek to enforce in this jurisdiction are for specific performance. Where there is a lack of mutuality, in the sense that the party seeking to enforce a contractual obligation cannot itself be ordered to perform its own obligations under the contract, specific performance will ordinarily be refused: see *Flight* v. *Bolland* (3) and *Lumley* v. *Ravenscroft* (5).

28. Mr. Pascoe, for the plaintiffs, says that the Court of Appeal of Brunei

entertained this very argument regarding immunity and lack of mutuality, and rejected it (the Privy Council did not rule on the immunity question, as it is precluded from doing so by the terms of the Brunei (Appeals) Order No. 2396, the statutory instrument giving the Privy Council jurisdiction to consider appeals from Brunei). The unanimous judgment of the Court of Appeal contains this passage:

"Submitting that His Majesty, the government and the BIA are all one and the same, Mr. Lewis says that the BIA's obligations under the agreement cannot be enforced and that the absence of mutuality, and provisions of the Act to the same effect, prevent the court ordering specific performance in its favour; it would be manifestly unjust.

In answer, Mr. Pascoe, for the BIA, contends that his client is a statutory corporation and amenable to suit. Therefore, the principle of mutuality and similar provisions in the Act, do not bite. He further submits that the absence of mutuality is, in any event, not an absolute bar, but only a circumstance to be taken into account in the exercise of the court's discretion. We accept Mr. Pascoe's submission that the BIA is amenable to suit.

The Brunei Investment Agency Act, Cap. 13, draws a clear distinction between the BIA and the government. Note, for example, s.19(1), which provides that the agency shall act as financial agent of the government, and s.26, which provides that the government shall be responsible for the payment of all monies due by the agency, but that nothing in the section authorises a person who has a claim against the agency to sue the government in respect of that claim. Also, the transitional provision draws the same distinction, by preserving any legal proceedings by, or against, the government, before the commencement of the Act, to be continued by, or against, the agency.

In these circumstances, it is unnecessary for this court to investigate whether mutuality provides an absolute bar, although we have little doubt that it does not, as the principle and provisions of the Act to similar effect, have no application against the BIA. Mr. Lewis' argument on this point falls to the ground."

29. It is true, as Mr. Walton points out, that the express finding of the Court of Appeal is simply that the "BIA is amenable to suit." This terse observation, considered in isolation, might suggest that the BIA is amenable to suit only on certain occasions—those where it is not acting for, or on behalf of, the Sultan—but not in circumstances of the sort arising from enforcement of the settlement agreement. In the context, however, this submission is bound to fail. The Court of Appeal was considering the BIA's possible immunity from suit specifically in connection with obligations imposed upon it by the

settlement agreement. The court had no reason to consider the BIA's liability to suit in any other context. Immediately after that finding, the Court of Appeal provides two examples in the BIA's founding legislation, which imply that the BIA can be sued when acting as a financial agent of the Government. Moreover, the Court of Appeal said, when dealing with the question of mistake, that "if it was a mistake, one would expect separate proceedings would have been taken to put matters right." This suggestion, that Prince Jefri could take separate proceedings against the BIA for the rectification of a mutual mistake, is another indication that the Court of Appeal of Brunei considers that the BIA's obligations under the settlement agreement can be enforced by legal action. My conclusion is that the BIA is not immune from proceedings taken against it to enforce the settlement agreement, and that the Court of Appeal of Brunei has so decided.

30. Prince Jefri's second point concerning discretion is that he did not receive a fair trial in Brunei. Many of his complaints about a lack of trial fairness have already been considered and decided against him by the Privy Council in *Bolkiah* v. *Brunei Darussalem* (1) (the Privy Council's decision on the "procedural issue"). Prince Jefri's complaints about the lack of availability of judicial review, that the proceedings were heard *in camera*, and that judgments in the case may not be published, have been dealt with conclusively by the Privy Council, and he is, therefore, estopped from raising those same issues before me.

31. The one complaint of Prince Jefri upon which the Privy Council felt unable to comment was the fact that constitutional amendments granting immunity to agents of the Sultan were made in Brunei shortly before the BIA issued its summons to enforce the judgment in its favour. Prince Jefri says that the only reasonable inference is that these amendments were aimed at the present litigation. The BIA disputes this, and has adduced evidence that the amendments had been under consideration for many years.

32. This argument is disposed of effectively by my conclusion immediately above. Given my decision that the Court of Appeal of Brunei has decided that the BIA can be ordered, by the High Court there, to perform its remaining settlement agreement obligations, neither the timing of the constitutional amendments nor their substance (immunity) can support an assertion that Prince Jefri has not had, and cannot have, a fair trial in Brunei.

33. Prince Jefri also argues that he has, at present, no security for his counterclaim in New York, which is said to be worth at least US$100m. He contends that the Sol shares and its underlying asset, the Hotel Bel-Air, are the only assets of substance available to satisfy any judgment he might get, and says they should be preserved to secure his counterclaim.

34. Prince Jefri applied recently to the Supreme Court of the State of New York for a temporary restraining order and preliminary injunction,

restraining Bandone from (among other things) acquiring ownership of the Hotel Bel-Air. The application was refused. In her reasons for judgment dated March 6th, 2008, Freedman, J. made the following findings against Prince Jefri:

"Prince Jefri has not shown that he will suffer irreparable harm in absence of a preliminary injunction . . . Prince Jefri has not shown likelihood of success on the merits . . . [and] the balance of equities do not weigh in Prince Jefri's favour."

35. I find it curious that I should be asked to refuse rectification of the register in order to secure Prince Jefri in a counterclaim pending in New York, where the New York judge has recently concluded that Prince Jefri has not demonstrated a likelihood of success on the merits, and not shown that he will suffer irreparable harm if the shares are transferred. If I were to accept his assertions before me on the need for security, I would be undermining a considered judgment of the court to which Prince Jefri has submitted his counterclaim for adjudication. I cannot view the supposed need for security as a basis for refusing rectification.

36. A final argument in favour of my exercising my discretion against rectification has consisted of references to the "authoritarian nature of the Brunei regime." It is said that the Sultan retains supreme and exclusive executive power, and that Brunei is ruled under a state of emergency, allowing him to rule by decree. Prince Jefri argues that there is no legitimate justification for the state of emergency.

37. In reality, this argument is subsumed in the other arguments, disposed of above. What is important for my consideration is not the nature of the regime generally, or the nature and extent of the Sultan's power, but the availability of a fair trial for Prince Jefri in Brunei. That question has been disposed of by the judgment of the Privy Council and my conclusion on the immunity question. Nothing additional to those points has been advanced in argument and I am left, therefore, with an absence of evidence exposing any unfairness in the Brunei judicial system, which has, or may, prejudiced Prince Jefri in litigation relating to this settlement agreement.

38. In *Miller v. Gianne (7)*, Smellie, C.J. echoed the conclusion of the Supreme Court of Canada in *Pro Swing* (9), that one discretionary consideration is whether the foreign judgment is "of a nature that the principle of comity requires the domestic court to enforce." Prince Jefri argues that the principle of comity militates against enforcement, because of the authoritarian nature of the Brunei regime, and because the plaintiffs are "for all intents and purposes" agents of the Sultan. However, comity has never been a basis upon which English courts recognize, or enforce, foreign judgments: *Indyka* v. *Indyka* (4), citing *Schibsby* v. *Westenholz* (10); quoted in *Dicey, Morris & Collins* (*op. cit.*, para. 14–082, at 604). In

light of that position, considerations of comity will not ordinarily assume any central importance on this question of discretion, although I accept that comity (or a lack thereof) may be relevant.

39. Moreover, the nature of the Bruneian regime, and the relationship between the Sultan and the BIA, have little to do with comity at all. Comity involves questions of reciprocity, a consideration which usually requires answering the question: "Would we expect this foreign court to enforce a judgment of our own if the situation were to be reversed?" It is true that a foreign judgment may be impeached on the ground that its enforcement or recognition would be contrary to public policy: Rule 44, *Dicey, Morris & Collins* (*op. cit.*, para. 14R–141, at 629). However, any facile conclusion that the governmental, or judicial, structure in a foreign jurisdiction is such that a judgment of its courts must be ignored on the ground of domestic public policy, would itself be an egregious violation of the principle of comity. *Dicey, Morris & Collins*, quoting Scrutton, L.J. in *Luther* v. *Sagor* (6), put it this way (*op. cit.* para. 1–014, at 8): "[I]t would be a serious breach of international comity to postulate that the legislation of a foreign sovereign State was contrary to essential principles of justice and morality." There is no merit in the suggestion that the principles of comity militate against enforcement of this foreign order.

Third issue: summary procedure

40. The application for rectification of the register is brought under s.46 of the Companies Law (2007 Revision). That section contemplates a summary procedure. For obvious reasons, it is undesirable that a corporate register, if it needs rectification, be left in a state of error for long. The section does leave it open to the court to direct that an issue be tried in the usual manner. I recognize that I have jurisdiction to convert this summary application into what is, in effect, a writ action, complete with pleadings, document disclosure, and cross-examination of witnesses. I am satisfied that nothing but delay would result from such a course. Mr. Walton has said all that can be said against the application, and has done so with his usual skill. There is no justification for any additional proceeding. For these reasons, I order that the register of members of Sol be rectified, by substituting the name of Bandone, for the name of Prince Jefri, as the holder of the shares.

Application granted.

Ogier for the plaintiffs; *Appleby* for the defendants.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 117 OF 2024 (IKJ)

IN THE MATTER OF THE ESTATE OF MAAN ABDUL WAHED AL-SANEA, A BANKRUPT

AND IN THE MATTER OF A REQUEST FOR RECOGNITION

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Ms Dunzelle Daker and Ms Raedean Simpson of Ogier (Cayman) LLP, for the Plaintiff
Heard:	On the papers
Date of decision:	8 May 2024
Draft Judgment Circulated:	27 May 2024
Judgment Delivered:	28 May 2024

Bankruptcy-foreign bankruptcy proceedings-application for recognition at common law-governing principles

REASONS FOR DECISION

Introductory

1. By an Ex Parte Originating Summons dated 16 April 2024, Mr Aiman Meqham Almeqham (the "Applicant") applied for recognition of his status as bankruptcy trustee of Mr Maan Abdul Wahed Al-Sanea (the "Bankrupt"). The Summons was provisionally listed for 7 May 2024. On 1 May 2024, the Applicant's attorneys requested a hearing on the papers in the interests of proportionality, a request to which I acceded.

2. The Summons was supported by the Applicant's First Affidavit, sworn on 14 April 2024. The Applicant's counsel also submitted a Skeleton Argument (supported by a Bundle of Authorities), which summarised the evidence and clearly set out the governing legal principles. On 8 May 2024, I granted an Order in the following terms:

> "*1. The Applicant is recognised as the bankruptcy trustee of the assets of the Bankrupt in the Cayman Islands.*
>
> *2. The Applicant, as the bankruptcy trustee of the assets of the Bankrupt, has the power and authority to act for and on behalf of the Bankrupt – and in the Applicant's own name – in relation to assets, claims and liabilities of the Bankrupt in the Cayman Islands.*
>
> *3. Paragraph 2 above shall include, without limitation, and without obtaining any further order of the Court:*
>
> > *3.1 The right to participate in any and all proceedings in which the Bankrupt is named as a party, including but not limited to accessing the Court file in case number FSD107 of 2012 (AJEF), and to obtain copies of all documents (including evidence, exhibits, skeleton arguments, orders and judgments) relied upon in such proceedings;*
> >
> > *3.2 The right to request and receive and gather in copies of any material or information held by any former service provider to the Bankrupt located within the Cayman Islands; and*

> *3.3 The right to submit claims within any insolvency process within the Cayman Islands or commence proceedings within the Cayman Islands, in each case as if the Applicant himself is acting in the name of and for the Bankrupt.*"

3. As it appears that foreign personal bankruptcy recognition applications are uncommon in the Cayman Islands, I now give reasons for that decision.

The foreign bankruptcy proceedings

4. On 30 March 2023, the Bankrupt was found guilty on various criminal charges and sentenced to serve 9 years in prison. He was a prominent businessman believed to be of Kuwait origin who has been a national of the Kingdom of Saudi Arabia ("KSA") for many years. However troubled his business fortunes may have been in recent years, the trials and tribulations faced by his Caymanian companies such as Singularis Holdings Limited ("Singularis") and Saad Investment Company Ltd ("SICL") have contributed greatly to the development of cross-border insolvency law both here and elsewhere in the common law world. Singularis and SICL have been in liquidation in the Cayman Islands for more than 10 years.

5. In 2019, KSA implemented a new Bankruptcy Law and at the Bankrupt's request, the First Chamber of the Dammam Commercial Court on 18 February 2019 appointed one Mr Al-Naeim as trustee of the Financial Restructuring Procedure. The Applicant was appointed in his place on 22 July 2020 upon the death of the incumbent trustee. On 2 March 2022, the KSA Appeal Court rejected the restructuring plan, and appointed the Applicant as bankruptcy trustee responsible liquidating the bankrupt's estate ("Foreign Bankruptcy Order"). A certified translation of a certified copy of the Foreign Appointment Order was exhibited to the Applicant's First Affidavit.

6. The Judgment pursuant to which the Foreign Bankruptcy Order was made explained the Applicant's functions and powers, according to paragraph 21 of his First Affidavit, as follows:

> "*The Circuit deems it fit to appoint the officeholder, Aiman Meqham Almeqham, as the officeholder for the liquidation procedure, as he was the officeholder for the financial restructuring procedure. Accordingly, the Circuit rules with appointing him as the officeholder for the procedure. Based on Article 100 of the Law, as a result of the appointment of the officeholder in the liquidation procedure, the debtor shall cease to manage its activities. The officeholder shall replace the debtor in the management of its activities and in the fulfilment of the debtor's regulatory duties*

> *during the procedure. Additionally, based on his appointment .the officeholder becomes the representative of the debtors before all judicial, government authorities, including the executive authorities, in the matters required by the officeholder's work. The officeholder shall also be entitled to file cases on the debtors' behalf, as well as plead and defend in any case to which the debtors are parties, and claim the debtors' rights from third parties. He shall further be entitled to grant third parties power of attorney to act on his behalf in relation to cases and to refer to government and private entities. ... In addition to the foregoing, the officeholder shall be entitled to obtain any information or document related to the debtor's real estate assets or investment portfolios, or any information or document from any entity whatsoever. All entities shall provide the officeholder with any information or document without requiring a letter from the court, whenever such information or document is required by the officeholder's work. This in accordance with the Bankruptcy Law's aim to complete the liquidation procedures promptly maximize the bankruptcy assets and protect the rights of the creditors. (emphasis added)* "

7. The KSA not only has a different legal system and language, but also operates under an entirely different calendar. However, it was clear that the Applicant's role as the Bankrupt's Trustee is broadly similar to the role of bankruptcy trustee under Cayman Islands law: (a) assessing claims, (b) gathering in assets, and (c) making distributions to creditors, if possible. Under KSA Bankruptcy Law, the Applicant deposes, foreign and local creditors have equal standing right (i.e. the ranking of debts is not based on the creditor's place of origin). The Applicant had recently turned his attention to substantial loans made by the Bankrupt to SICL and Singularis. This occurred in the context of his being required by the KSA Court to evaluate claims made by the Liquidators of SICL against the Bankrupt's estate. The need for recognition of the Recognition Order flowed from the Applicant's need for proper legal authority to take primarily information gathering steps within the Cayman Islands on behalf of the Bankrupt's estate. The Applicant deposed:

> "*46. As to the question of reciprocal recognition between our two nations, I note that the SICL Liquidators have been permitted to act on behalf of the estate before the KSA Courts and judgments of the KSA Courts are enforceable in in the Cayman Islands. At pages 143 to 145 is a certified copy of a letter dated 4 October 2018 from the then Chief Justice of the Cayman Islands confirming the ability to get reciprocal relief from the Grand Court of the Cayman Islands.*"

8. That letter by the then Chief Justice was seemingly written in response to steps taken by the Bankrupt to obstruct the Cayman Liquidators' legal progress in KSA. It stated that a 12 December 2014 Order made in the SICL and Singularis liquidation proceedings (FSD Nos. 15 and 16 of 2010)

had confirmed that "*judgments in the courts of the Kingdom of Saudi Arabia are, in principle, enforceable in the Cayman Islands.*"

9. Against this background, it seemed clear that this Court's starting assumption should be that it should if possible assist the KSA Court by recognising the Foreign Bankruptcy Order and not requiring the application to be noticed to the SICL and Singularis Liquidators who appeared to have no discernibly legitimate basis for opposing it. In any event, any person adversely affected by an Order which was made in their absence would be entitled to apply to set aside or vary it.

Governing legal principles for common law recognition of the Recognition Order

10. The Applicant's counsel submitted that it was unclear whether under section 240 of the Companies Act (2023 Revision), a foreign debtor who was a natural person qualified for recognition. The term "*debtor*" is defined as meaning "*a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established*". Bearing in mind that the Companies Act winding-up regime only applies to companies and, to limited extent, exempted limited partnerships, there can be little doubt that foreign personal bankruptcy proceedings fall without rather than within the international recognition provisions in Part XVII of the Companies Act.

11. It was rightly submitted that it was perfectly clear that no international recognition jurisdiction was conferred by section 156 of the Bankruptcy Act (1997 Revision): *In the Matter of Al Sabah* [2004-05 CILR 373] (Privy Council). Reliance was placed on the fact that at first instance (*Al Sabah* [2002 CILR 148]) , Smellie CJ found that, apart from any statutory jurisdiction:

> "*31. ...this Court has inherent common law powers to recognise and enforce the appointment of a foreign trustee in bankruptcy for the purposes of bringing into the estate the assets of a bankrupt which may exist in this jurisdiction. These are powers which have been acknowledged and invoked by this court in the past in analogous circumstances: see Blum v. Bruce Campbell & Co. and Gray v. Royal Bank of Canada. Those cases recognised the principles of Didisheim's case in which Lindley, M.R. stated the principle as based upon the doctrines of obligation and comity as between the courts of friendly states ([1900] 2 Ch. at 51):*
>
> *'On general principles of private international law, the courts of this country are bound to recognise the authority conferred on [the foreign appointee] unless [equivalent] proceedings in this country prevent them from doing so.*

> *32 The common law principles require me to be satisfied that the bankrupt was subject to the jurisdiction of the Bahamian court and that that court would be prepared reciprocally to recognize and enforce similar orders of this court. Both of those matters are satisfactorily addressed in the written judgment and order of Lyons, J. of the Bahamian court. The orders I make in recognition and enforcement of the orders of the Bahamian court appointing the trustee are made in reliance also upon this inherent jurisdiction of the court*".

12. The Cayman Islands Court of Appeal upheld the Chief Justice's decision on the primary basis that statutory recognition jurisdiction existed and saw no need to consider the Court's "*inherent jurisdiction*" ([2003 CILR 413]), per Taylor JA at paragraph 82. The Privy Council primarily considered the statutory jurisdiction under 156 to respond to a letter of request. It also found that section 122 of the Bankruptcy Act 1914 (UK) was still in force in the Cayman Islands, and so the Court's inherent jurisdiction was constrained by the limits of that statutory power. The Applicant's counsel, somewhat ambiguously, relied on Smellie CJ's alternative findings on the common law recognition powers while noting in a footnote that the decision had been overturned by the Privy Council.

13. The *ratio* of the Privy Council's decision was clearly not binding for the purposes of the present case. Section 122 of the UK 1914 Bankruptcy Act (from which section 156 of the Cayman Act is derived) is concerned with cooperation between courts within the British Empire. It provides:

> "*122:-- The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and <u>every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other</u> in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions*." [Emphasis added]

14. In *Al Sabah*, the foreign bankruptcy court was in The Bahamas, and section 122 of the 1914 UK Act was apparently in force in both The Bahamas and the Cayman Islands. Section 156 of the Bankruptcy Act is simply not engaged when the foreign bankruptcy order this Court is asked to enforce derives from a territory where that provision is not also in force. Accordingly, the only Cayman Islands authority on the common law power to recognise a foreign bankruptcy proceeding is this Court's decision in the *Al Sabah* case. The alternative findings of Anthony Smellie CJ (as he then was) which were overruled on the basis of submissions seemingly first raised at the highest appellate level, provide clear and valuable guidance for the recognition of foreign bankruptcy

orders made in territories which do not have provisions derived from section 122 of the Bankruptcy Act 1914. A previous case where a foreign trustee had been recognised at common law to which Smellie CJ referred in *Al Sabah* was also helpfully placed before the Court: *Blum-v-Bruce Campbell and Company* [1992-93 CILR 591].

15. To my mind it was not necessary to have regard to case law in parallel fields such as receivership. However, with no other direct local authority, the approach taken in the receivership context did reflect the application of essentially similar principles in an analogous commercial context. In *Re Silk Roads Fund Limited*, FSD 234/2017 (ASCJ), Judgment dated 8 February 2018, Smellie CJ recognised Bermudian joint receivers at common law applying similar principles to those he articulated in the bankruptcy sphere in *Al Sabah*. Those principles may be summarised as follows:

(a) the bankrupt must be subject to the jurisdiction of the court which appointed the foreign trustee;

(b) the foreign court must be willing to reciprocally enforce similar orders of this Court.

16. In *Re Silk Roads Fund Limited*, reference was made to the leading authority on common law recognition and assistance in insolvency matters, *Singularis Holdings Limited-v-PricewaterhouseCoopers* [2015] 1 AC 1675. That case confirms the existence of longstanding common law power, originally developed in the personal bankruptcy sphere, to recognise foreign insolvency proceedings and officers appointed by a foreign court to take control of the debtor's estate. The case also illustrates the fact that it is important to identify a basis in the common law for the forms of assistance actually provided. In *Singularis*, it was held (by the majority) that there was a common law power to apply for information relevant to the liquidation of the insolvent estate.

17. That the common law recognition and assistance principles in personal bankruptcy and corporate insolvency cases are largely indistinguishable is demonstrated by various authorities to which I was understandably not referred. It will suffice to briefly mention two. Firstly, the English Court of Appeal decision in a personal bankruptcy case, *Kireeva-v-Bedzhamov* [2023] Ch 45, Newey LJ considered the corporate insolvency cases on common law recognition and assistance under the principle of modified universalism (at paragraphs 81-88).

18. Secondly, it is now uncontroversial that if a foreign bankruptcy trustee is recognised at common law, they are entitled to lawfully act on behalf of the bankrupt with a view to, *inter alia*, collecting

debts due to the bankruptcy estate. In *Koldyreva-v- Motylev* [2020] EWHC 3083 (Ch), Meade J held:

> "*27. If the Russian court's order is recognised, the following consequences would flow. First of all, on the authority of Fletcher, again 29-057, the English court would recognise the manager's right to sue in her own name for the debts of the bankrupt under Russian bankruptcy law. That appears in paragraph 50.1 of Mr. McGrath's skeleton. Secondly, assignment of movable but not immovable property situated in England to the manager would take place…*
>
> *29. Common law recognition, however, has its limits. In particular it does not entitle the manager, i.e. the intended claimant, to make use of the statutory provisions and powers which arise under the Insolvency Act 1986…*"

Merits of application

19. The two main requirements for recognition, that the Bankrupt should be domiciled in the place where the Foreign Bankruptcy Order was made and that it be shown that reciprocal recognition would be afforded by the courts of that jurisdiction to orders of this Court were both met.

20. The Applicant sought recognition of his status as Trustee in Bankruptcy for the Bankrupt in order to be able to act in the name of and behalf of the Bankrupt in the Cayman Islands. He was appointed by a Court in KSA, the Bankrupt's domicile. The KSA Courts had already demonstrated their willingness to accord reciprocity by recognising years ago the Orders made by this Court appointing Joint Official Liquidators of, *inter alia*, SICL and Singularis. This Court had already on 12 December 2014 formally confirmed that, in principle, Orders of the KSA would be recognised here.

21. The purpose of the present application was, in particular, to enable the Applicant to participate in any relevant pending proceedings here and obtain information about the Bankrupt's affairs in this jurisdiction where various entities either formed by or invested in by the Bankrupt are known to have been established. Indeed, the application appeared to be motivated by the fact that the Applicant's ability to make the enquiries he wished to pursue had been impeded by his lack of formal standing to act on behalf of the Bankrupt under Cayman Islands law.

22. The form of Order sought was unremarkable. It sought recognition to authorise the Applicant to act within the jurisdiction in the name of and on behalf of the Bankrupt. It did not seek any powers beyond the scope of well-recognised forms of powers typically conferred in similar recognition orders, in accordance with well-established principles of private international law.

23. Faced with such an application, and having regard to the common law principles articulated by Anthony Smellie CJ (as he then was) in the *Al Sabah* case, this Court was "*bound to*" grant the Applicant the recognition he sought. It was also self-evidently appropriate to do so on an *ex parte* basis, on the papers, because there was no basis for believing that either:

(a) any valid grounds for challenging the Applicant's standing to seek recognition existed;

(b) any valid grounds for refusing recognition existed; and/or

(c) any person with standing to raise any such objections existed and/or could be identified.

Conclusion

24. For these reasons, on 8 May 2024 I granted the Recognition Order.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

Faculty

Adam D. Crane is a partner in the George Town, Grand Cayman, Cayman Islands office of Broadhurst LLC, an offshore specialist litigation and corporate boutique. He helps law firms, insolvency practitioners, corporations, financial institutions and high-net-worth individuals navigate high-value disputes and special situations involving Cayman holding companies, investment funds, complex corporate structures and assets. With a focus on asset recovery, commercial litigation and contentious insolvency, Mr. Crane provide strategic counsel to clients seeking to locate, freeze, recover, protect and preserve value. His work frequently bridges the Cayman Islands with major global financial hubs, including the U.S., U.K., Hong Kong, China, Singapore and the UAE. Mr. Crane specializes in fraud and asset-recovery, contentious insolvency, complex commercial litigation, digital assets and enforcement. He is a member of ABI's 2021 "40 Under 40," Newsletter Editor of ABI's International Committee, co-chair of ABI's International Committee, chair of the International Insolvency Institute's NextGen Program and its Regional Committee for the US, Canada and Caribbean, and was inducted into the III NextGen Leadership Program in 2020. Mr. Crane received his Bachelor's degree from Acadia University in 2005 and his J.D. in 2010 from the Schulich School of Law at Dalhousie University, and he is a graduate of the Intensive Trial Advocacy Workshop (Osgoode Hall Law School, 2015).

Tal Goldsmith is a partner with Stephenson Harwood LLP in London, where she specializes in all aspects of the recovery of assets into insolvent estates by receivers, liquidators, administrators and trustees in bankruptcy. She also advises international corporate and individual clients on how to best use insolvency processes and powers as part of a wider asset-recovery toolkit. Ms. Goldsmith acts in specialist insolvency proceedings and also has significant experience in shareholder disputes and related Companies Act litigation. In addition to her work for officeholders, she provides advice to corporate and individual clients regarding the implications of insolvency for them and members of their supply chain, on the risks associated with acquisitions of businesses and assets from insolvent companies, and on structuring transactions to ensure that they comply with companies and insolvency legislation. This has recently involved a number of significant board advisory and directors' duties engagements. Early in her career, Ms. Goldsmith spent time working in industry for a market-leading asset-recovery team, and also completed a secondment in the recoveries team of a clearing bank, which gave her a unique understanding of how such clients operate and enabled her to better meet their requirements. A nonpracticing barrister, she went on to cross qualify and was admitted to the Roll in 2009. Ms. Goldsmith was listed in *The Legal 500 UK* for 2023. She received her LL.B. with honors in 2001 from the University of Bristol.

Gregory S. Grossman is a founding shareholder at Sequor Law in Miami, where his practice focuses on main-case bankruptcy representation, bankruptcy and cross-border insolvency litigation, creditors' rights, international asset recovery, litigation involving the Uniform Commercial Code, and domestic and international commercial litigation. He has a strong focus on cross-border cases and those involving fraud allegations, and he is board certified by The Florida Bar in International Litigation and Arbitration. Mr. Grossman has particular experience in cross-border insolvency, having filed the first chapter 15 case in the State of Florida when he obtained "foreign main case" recognition for a failed financial institution in Barbados; he has since represented foreign insolvency trustees in more

than 30 additional chapter 15 cases in Florida, New Jersey, New York and Texas, as well as matters arising from insolvencies in Antigua, Austria, Brazil, BVI, Canada, Cayman Islands, Chile, Mexico, Romania and the U.K. His litigation experience spans such industries as material-handling, restaurant and hospitality, real estate development, motor vehicle, aviation, export/import, manufacturing, retailing and wholesaling. In addition, he has handled all aspects of creditors' remedies — attachment, replevin, garnishment, executions, mortgage foreclosure, fraudulent-transfer litigation and proceedings supplementary to execution — and in domestic bankruptcy litigation has represented parties in reorganizations and liquidations involving stay-relief, cash-collateral, avoidance actions, bad-faith dismissal and plan-confirmation disputes. A frequent speaker, Mr. Grossman received his B.A. in finance and his J.D. with honors from the University of Florida, where he was a member of Order of the Coif and the Moot Court Board.

Jordan McErlean is a senior associate in the Cayman Islands Litigation & Restructuring practice at Conyers Dill & Pearman LLP in George Town, Grand Cayman, Cayman Islands. His practice spans the full spectrum of international commercial litigation, including insolvency and restructuring matters, directors' duties and indemnities, shareholder disputes, professional negligence, civil fraud and asset-tracing, cryptocurrency-related litigation, arbitration, employment disputes and property matters. Mr. McErlean has experience with complex cross-border issues, including the enforcement of foreign judgments and arbitral awards, and the coordination of multi-jurisdictional insolvency and restructuring proceedings involving the Cayman Islands. He also advises major institutional clients — particularly in the insurance and reinsurance sector — on contentious and noncontentious employment matters, including high-value executive terminations. Mr. McErlean has played a role in several leading Cayman Islands decisions at both the first-instance and appellate levels, and he has appeared before courts and tribunals numerous times as sole advocate and as part of a wider team. He also has prepared expert evidence on Cayman Islands law for use in foreign courts, particularly in relation to shareholder claims. Since joining Conyers, Mr. Mcerlean has completed secondments in the firm's Bermuda and Hong Kong offices and at Wilberforce Chambers in London, broadening his experience across multiple jurisdictions. He received his LL.B. with First Class Honours in 2013 from Swansea University, his LL.M. in international commercial law from UCL in 2014 and his LPC in 2015 from BPP University.