Jurisdiction and Justiciability

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Lord Mance

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Introduction

1. Jurisdiction can decide cases. Witness the vigour with which jurisdictional issues fight - and the speed with which cases often settle, once such issues are decided. It is not generally differences in substantive law which lead to jurisdictional disputes. It can be a difference in limitation periods. Sometimes it may also be a difference in cost and the availability of legal aid. But most usually it is, I believe, an assessment of the comparative reliability, integrity and speed of the potentially available jurisdictions. One of the great pleasures experienced by every new member of the UK's highest court is the opportunity to sit regularly in the Privy Council. And the Privy Council is an excellent place from which to view the operation of the 25 or more overseas jurisdictions which it serves and to gain information and experience about a wealth of other jurisdictions.

2. The Privy Council retains an unexpectedly active jurisdiction – 30% or more of our total workload. And it offers a great variety of work, which broadens our horizons. Without the Privy Council I would not be here today, and I take this opportunity at the outset to thank you for inviting me, and to say how much I appreciate the chance it gives to meet the Chief Justice and other members of the Bench here, as well as the legal profession more generally.

3. Privy Council work can sometimes of course be quite mundane. The Constitutions of a number of our member states give unrestricted right of appeal in any case involving more than a trivial amount. But it can also involve high constitutional issues, as when we had recently to decide about the proper constituency boundaries for a general election in St Kitts & Nevis. And, most relevantly for the Cayman Islands, it can today involve very heavy commercial disputes, arising from the establishment of fund management or investment companies in offshore centres, or the ownership of companies across the globe through such centres. It is about the last category, heavy commercial disputes, that I am going mainly to talk.

4. As in the case of London itself, so in the case of offshore financial centres, the integrity and reliability are vital factors underpinning their business and fortunes. But financial integrity and reliability ultimately depend on legal security – the knowledge that bargains made will be performed: *pacts sunt servanda*.

5. My talk is in three parts, each drawing heavily on quite recent case law of the Privy Council and UK Supreme Court: (1) Service out the jurisdiction, or "exorbitant" jurisdiction, (2) Insolvency and universality, and (3) Justiciability.

Service out of the jurisdiction

6. For a small but important financial centre like the Cayman Islands, the power to take legal proceedings in respect of defendants outside the jurisdiction is important. In this area, different legal systems adopt different models. Within Europe, we now have a rules-based régime (the *Brussels* Regulation, as from 10 January 2015, No. 1215/2012)) which aims to make both jurisdiction and governing law simple and certain. It is probably useful in small and simple cases, e.g. involving the supply of goods across European frontiers. But rules-based systems are capable of manipulation, and in large commercial cases parties are able and willing to spend large sums doing just that. The traditional common law approach, relevant in the Cayman Islands, is to identify a broad list of potential heads of jurisdiction, but to qualify their application by a structured discretionary judgment as to the appropriateness of actually exercising the jurisdiction. That also remains the approach in England in cases without any relevant European link. The common law approach can be regarded as more principled, but any common lawyer familiar with issues decided under it will know that it can also involve elaborately and expensively explored issues. The highest courts have counselled that such disputes should be decided speedily and economically, with limited oral argument, and so they should ideally be. But as the Supreme Court recently noted in *VTB Bank v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, this remains somewhat of a cry in the wind.

7. Under the common law model a party contemplating proceedings against an overseas defendant needs to direct attention to three stages:

    a. First, is there an available head of jurisdiction within which the case can be brought?

    b. Second, will the court regard the case as an appropriate one for use of this head?

c. And, third, but not least, the pragmatic question: assuming that the first two stages are satisfied, will any judgment in the proceedings be enforceable against the defendants, either because they are in or have assets in the Cayman Islands, or because they will appear and defend the proceedings on the merits, in which case any judgment will be enforceable against assets elsewhere?

8. Lord Bingham of Cornhill put his finger very accurately on the third point when he said in *Société Eram Shipping Co. Ltd. v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, para. 10:

> "As many a claimant has learned to his cost, it is one thing to recover a favourable judgment; it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss."

The Economist only last week contained a full two-page spread headed A Saudi Affair about litigation between Ahman Hamad Algosaibi and Bros Co. Ltd and Mr Al-Sanea, which struck a bell with me. I keep notes of all past permission to appeal applications, and from them recall refusing permission for an appeal by Mr Al-Sanea against (a) the grant of permission to serve him out of the jurisdiction and (b) a refusal by the Cayman Islands Court of Appeal to maintain a case management stay on the Cayman Islands proceedings pending the outcome of a Saudi committee of enquiry and/or a petition by Mr al-Sanea to the Saudi Sharia courts or a Board of Grievances. We refused permission. The Economist tells me that Mr al-Sanea, having thus lost in his challenge to the Cayman Islands jurisdiction, failed to enter a defence, whereupon judgment in default was entered against him – but that this judgment has not been recognised by foreign courts. This highlights the fact that domestic courts take much wider jurisdiction than they are prepared to recognise foreign courts as having internationally. The jurisdiction of foreign courts depends basically on presence, voluntary submission or appearance or prior consent. The heads of domestic jurisdiction, especially those recognised by common law courts, are famously wider.

9. Let me start therefore by looking at the current Cayman Islands heads of domestic jurisdiction. In the UK, the Woolf Reforms led to a new nomenclature. We speak now of PD6. But there is a certain familiar pleasure in coming to a jurisdiction, which still retains the old style wording of O.11, which prevailed throughout my time at the Bar! First, some comments on a few differences which exist between our respective rules. I note that you have recently expanded your rules to enable Mareva or freezing injunctions in aid of foreign

proceedings. I understand that the need for this expansion was only recently revealed by some conflicting case law. In the UK we made the relevant alteration 20 years ago, on worldwide basis, using The Civil Jurisdiction and Judgments Act 1982, designed to help us implement EU requirements. Combined with the power to order ancillary relief, in the form of an obligation to disclose the existence and whereabouts of assets, it has proved a most useful tool, and one that I have no doubt will be important in a Cayman Islands context. It offers litigants some advantages that they do not have in civil law countries, where relief may be limited to assets within the jurisdiction or shown to exist.

10. In some other respects, again reflecting Cayman Islands needs, you are ahead of us:

    a. You have expanded the tort head to cover "fraud or breach of duty whether statutory at law or in equity" – an excellent move. The growth in equitable claims and remedies is something we are only just hoping to address in the UK by rule changes.

    b. You have expanded the trust head to cover any trust "express, implied or constructive" governed or to be executed according to CI laws "or in respect of the status, rights or duties of any trustee therefore in relation thereto"; we have current, but less far-reaching, proposals in this area

        i. to cover trusts created or evidence in writing, which are either governed by English law or confer jurisdiction on English courts;

        ii. to cover restitutionary claims

        iii. to cover claims against a defendant as constructive or resulting trustee arising out of acts committed or events occurring within the jurisdiction or relating to assets within the jurisdiction

    c. In England, we are considering a general extension to cover claims arising out of the same or closely connected facts to those supporting an application to serve out under any other head. You do not appear to have this, and it could be worth considering.

    d. Curiously perhaps, you also do not appear to have a head covering a negative declaration that no contract existed: *Finnish Marine v Protective National* [1989] 2 AER 929.

11. The overall picture here is however of broad and expanding grounds - symptomatic of a complex international environment, in which there are ever more disputes with an

international element and claimants and lawyers strive to find and make available an appropriate, or from their viewpoint the most appropriate forum, to establish their rights.

12. All the formal heads of jurisdiction are subject to overriding consideration that the case must be a proper one for service out. What factors determine a proper case for service out? There are three steps, set out most recently in *Altimo Holdings v Kyrgyz Mobil* [2012] UKPC 7, [2012] 1 WLR 1804, para 71:

    a. The claim must have a real as opposed to fanciful prospect of success.

    b. There must be a good arguable case that the claim falls within one of the heads in O.11.

    c. The plaintiff must establish that, in all the circumstances, the Cayman Islands is clearly or distinctly the appropriate forum for the trial of the dispute and that the court ought to exercise its jurisdiction to permit service out of the jurisdiction.

13. Head (b) – good arguable case - requires some elaboration: the classic analysis is by Waller LJ in the CA in *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-557. This makes several points:

    a. Whether a claim falls within a head of jurisdiction is normally to be determined like any other interlocutory issue. In other words, it will be determined not by ordering a preliminary issue, but on the usual interlocutory basis of affidavit or witness statement evidence. This is particularly important when it may sometimes involve consideration of an issue which will later also become a substantive issue at trial, e.g. whether there was a contract at all, where it was made or what its governing law was.

        i. There can of course be exceptions. In *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, Fish & Fish Ltd sued the UK subsidiary of an American conservation NGO, and sought to join the American Sea Shepherd parent as a necessary or proper party. The aim was however to recover damages for an alleged tort actually committed by the US parent in the Mediterranean. The US parent was there conducting a campaign against what it saw as illegal tuna fishing. In the course of this campaign, it damaged Fish & Fish's nets. The UK subsidiary of Sea Shepherd had only a walk on part. It was said to have made itself liable as an accessory to its parent's tort, by lending it some assistance. The judge at first instanced ordered the trial of a preliminary issue

to determine whether it could be said to have done enough. He found that Sea Shepherd UK had in fact done very little, beyond having its name used to raise some £1730 to fund a very expensive operation. There was therefore no claim against the UK subsidiary, nothing to which the US parent could be a necessary or proper party. By a majority of 3:2, the SC agreed that what the UK subsidiary had done was de minimis.

ii. Had the claim against the UK subsidiary not been de minimis, the head of jurisdiction would have been available in principle, even though the main or predominant aim in suing Sea Shepherd UK was to bring the US parent within the jurisdiction: *AK Altimo*, para 79. The issue would then have shifted to the question whether as a matter of discretion it would have been right to bring the US parent within the UK jurisdiction in this manner.

iii. There must nonetheless under English law be a "real issue" to be tried as between the plaintiff and the anchor defendant before any question can arise as to use of the necessary or proper party head. The parallel Cayman Islands head of jurisdiction refers simply to "a claim brought against a person who has been or will be duly served within or out of the jurisdiction":

1. It must be questionable whether the omission is significant. Without a real issue against the person duly served within or out of the jurisdiction, the case could hardly be a proper one for service out on anyone else.

2. What does a "real issue" mean? We considered this in *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2 in a context likely to be of direct interest in the Cayman Islands. Nilon a BVI company had only one registered shareholder, Mr Varma, a resident of London. Members of the Mahtani family maintained that he had contracted to give them a shareholding interest in Nilon. It is trite law that a company only recognises as its shareholders those "whose name is entered on the register of members": see in the case of the Cayman Islands Companies Act, 2013, s.38.

   So the Mahtani family members brought proceedings against Nilon to rectify the register in the BVI, and applied to join Mr Varma as a

necessary or proper party. Rectification was possible under the BVI Companies Act if the name of any person was without sufficient cause omitted from the register, and the Act specifically provided that:

"On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register".

S.46 of the Cayman Islands Companies Act 2013 is in similar terms. On the face of it, you have to hold the legal title or at least to have had a legal transfer of title to shares from the current registered owner, before you can apply to be entered on the register. But, before that situation existed, did the wording allow a claim for prospective registration against the company, to which a claimant asserting a contractual right could treat a current legal owner as a necessary or proper party?

We held not. One problem was that the Mahtani parties could not even say that they had a contractual right to any particular shares held by Mr Varma, because the 100 shares in issue were not divisible in the proportions in which they claimed to be entitled to shares. In substance their claim was therefore that Mr Varma procure the company to issue fresh shares.

That aside, however, the more fundamental problem for the Mahtani claimants was that, even if Mr Varma's existing shares had been divisible in the claimed proportions, they still only had a contractual claim. We commonly talk of property belonging in equity to a proposed purchaser from the date of the contract to purchase. Nonetheless the recent Supreme Court case of *Rosemary Scott v Mortgage Express* [2014] UKSC 52 indicates that this "applies only as between the parties to the contract, and cannot be extended so as to

affect the interests of others": para 65. On this basis, as against the company Nilon, the Mahtani family members had no more than a contractual right.

The *Rosemary Scott* case was a sad one where home owners agreed to sell their properties on the strength of promises that they would be allowed to live there under low rent tenancies, but the purchasers only acquired the properties with the benefit of and subject to mortgages, which prevailed over the vendors' contractual expectation that they would acquire tenancies.

b. Second, because the issue whether there is a formal head of jurisdiction will normally be interlocutory, it is not right to treat it as one to be determined on the balance of probability, and what amounts to a "good arguable case" will be context specific. Nonetheless, Waller LJ said that "good arguable case" does mean one in relation to which, on the material available, the applicant appears to have a "much better argument" than the other side. This was cited with approval in both *Bols Distillery v Superior Yacht Services* [2007] 1 WLR 1, paras 26-28 and in *AK Altimo*, para 71. I have to say that it leaves me uncertain what would be the position, if there were a straight issue of fact, which could not be resolved either way on an interlocutory basis, i.e.one which left the judge with the conviction that either party might be right.

c. It must however be remembered that we are talking about the plaintiff's need to bring itself within a head of jurisdiction. Provided it can do so, then on the merits of the claim, it need only show a claim that is arguable, or not frivolous.

14. What then of the third limb of the test – the need to show that the Cayman Islands is the appropriate forum?

    a. The facts relied upon to constitute a ground of jurisdiction provide at least a starting point, though they may not carry matters very far by themselves. For example:

        i. The right to reside permanently in the Islands may not be relevant under this limb, if the defendant is in fact residing in London, and the relief sought has nothing to do with the Cayman Islands.

ii. Similarly, a contract made in the Cayman may not help under the third limb, if the issue is whether goods delivered or installed in Australia were up to the contractual quality.

iii. And the necessary or proper party head of jurisdiction has been said to require particular caution, on the ground that it is not, as such, founded on any direct territorial link between the claim and the jurisdiction, but only on a connection with a claim which is properly brought against someone with whom there is such a link: *Tyne Improvements v Armement Ansersois (The Brabo)* [194] AC 326, 338, *AK Altimo*, para 73.

iv. Nevertheless, the necessary and proper party head can be capable of quite ingenious use, where the real aim of the proceedings is to pursue the person out of the jurisdiction. I already described the *Fish & Fish* case, where that aim only narrowly failed.

b. In contrast, a term that the Cayman Islands shall have jurisdiction to hear and determine any action in respect of a contract will normally conclude any argument that the Cayman Islands are not the appropriate forum for such a purpose. It amounts to a contractual agreement that they are appropriate. The court can in an extreme case override that agreement, but that requires strong reason: see *Aratra Potato v Egyptian Navigation (The El Amria)* [1981] 2 Ll R 119, where Lord Brandon said it would be "a potential disaster", if a claim against the shipowner for cargo damage were not tried together with a claim against Mersey Docks, brought on the basis that their delay in unloading might have caused or contributed to the same cargo damage.

c. What however of a similar term in a trust deed?

i. First, it is not apparent that the existence of such a term is a head of jurisdiction under the Cayman Islands rules, though normally one would expect the circumstances to fall within the words "claim … brought for any relief or remedy in respect of any trust …. that is governed by or ought to be executed according to the laws of the islands or in respect of the status, rights or duties of any trustee thereof in relation thereto".

ii. Second, if they are going to rely on this head, then drafters and litigators need to take care to ensure that the clause included on in a trust deed is indeed a

jurisdiction clause. In *Crociani v Crociani; Princess de Bourbon des deux Sicilles* [2014] UKPC 40, reliance was placed on a provision that the trust should be governed by the law of the Bahamas "which shall be the forum for administration thereof". This was coupled with further provisions allowing the substitution of new trustees, and providing that in that event the trust should be subject to and governed by the law of their country of residence and "the rights of all persons and the construction and effect of every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of" the new trustees' residence "which shall become the forum for the administration of the trusts hereunder". New trustees were appointed in Jersey in the Channel Islands, so Jersey law became applicable. Then after proceedings had been begun against them in Jersey by a beneficiary, a second new set of trustees were appointed in Mauritius, and it was argued that the agreed forum for litigation had moved to Mauritius,

iii. We rejected this on several grounds:

1. First, these clauses were not jurisdiction clauses, in the sense of dispute resolution clauses, at all. They were addressing the governing law and forum for administration, not litigation. Exclusive jurisdiction was not even mentioned in the original clause referring to The Bahamas.

2. Second, even if they had been dispute resolution clauses, there is a difference between the force of such a clause in a contract and in a trust. A beneficiary cannot be regarded as having made a bargain for such a clause. The courts' power to supervise the administration of trusts for the benefit of beneficiaries represented a significant difference between trusts and contracts: para 36. The weight to be attached to a jurisdiction clause in a trust was therefore less than the weight of such a clause in a contractual context. The proceedings would not on that basis alone have been stayed in favour of Mauritius.

d. The governing law, the place where the contract was made or broken or the tort committed or damage suffered can also constitute strong links to the Cayman Islands:

    i. It is "generally preferable, other things being equal" if cases are decided in the forum whose law applies, and especially so if there is any difficulty about the law or material difference from that of any alternative forum for which the defendant is arguing: *VTB Bank v Nutritek International Corp*, para 46.

    ii. The place where the contract is said to have made or broken or tort committed or damage suffered may be an appropriate forum, if such matters are in issue and likely to attract evidence from that place. But equally any such consideration "may be dwarfed by other countervailing factors": *VTB*, para 51.

e. The factual focus and the location and languages of witnesses constitute "a factor at the core of the question of appropriate forum": *VRB*, para 62, *AK Altimo*, para 62, *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2, para 14. In practice, this may be the problem in a jurisdiction like the Cayman Islands. Despite the vast number of company registrations here, the substantive affairs of these companies are in reality probably conducted elsewhere, and, even where they are mere holding companies, it may be difficult to establish any close evidential link with the Cayman Islands. But I should perhaps strike a cautionary note at this point. Last week we held in a Privy Council appeal from The Bahamas, *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 that it was no answer to a conclusion that a sole Bahamian director of a mutual fund was in breach of fiduciary duty, that he was paid a nominal sum which could not compensate him for the time and trouble which would have been involved in understanding the fund's affairs, which were in the event simply conducted by him according to the instructions of others.

f. The aim of the alleged breach of contract or duty? In *VTB*:

    i. the claim was that VTB, the London subsidiary of a Russian state-owned bank, had been induced by fraud to lend Russagroprom LLC ("RAP") money to buy six dairy companies from a BVI company, Nutritek Int'l Corp. The fraud was alleged to have been committed by Nutritek and its alleged owner and controller, Mr Malofeev. It consisted in over-valuing the dairy companies

(which were to be the bank's security) and pretending that the purchase was at arm's length purchase, when in fact Mr Malofeev owned not only the buyer RAP but also the seller Nutritek. The whole transaction was really just raising money on the (inadequate) security of his own assets. The facility agreement was subject to English law, and contained a clause providing that the English courts should have non-exclusive jurisdiction and be regarded as the most appropriate and convenient forum for disputes under it.

ii. How relevant it at all were these as pointers to English jurisdiction? We held that the fact that the facility agreement was subject to English law had no relevance to a tort committed by alleged representations made in Russia.

iii. What about the fact that the tort was to induce a facility agreement containing an English jurisdiction clause? This was more difficult. If RAP and VTB had agreed London as a forum for their facility agreement, did that not make London the appropriate forum where Mr Malofeev, as the owner of the buyer RAP, and the seller Nutritek, which he also allegedly owned, should answer to VTB for fraud inducing the facility granted to RAP? The judge saw this as "a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim". I agreed with "this balanced view", but added that "even if it understates the significance of the pointer, it does so only slightly and not in a way which can, in my view, possibly justify this court in interfering with the judges' conclusion" that Russia was the appropriate forum, bearing in mind the preponderance of Russian evidence on the substantive issue of fraud. In other circumstances, I think that such a factor could be a factor which tilted the balance.

iv. Multiplicity of proceedings, particularly where there is a risk of conflicting decisions: This is well-established as a potentially powerful factor (close in its rationale to the concept of necessary or proper party): see *Aratra Potato v Egyptian Navigation (The El Amria)* [1981] 2 Ll R 119, which I have already mentioned, and *Spiliada Maritime v Cansulex Ltd* [1987] AC 460.

v. Availability of expertise: In *The Spiliada* the claim was against cargo-owners for damaging the ship by the composition of the sulphur which they loaded. A similar claim against another of the shipowner's vessels was being litigated in England, though settled by the time the matter reached the Lords.

Nonetheless, the accumulation of professional and technical expertise in English militated decisively in favour of English jurisdiction. This is sometimes called the "*Cambridgeshire*" factor, after the name of the ship involved in the other litigation.

g. Fair trial? In *VTB*, the London subsidiary of a Russian state-owned bank made no suggestion that it would not receive a fair trial of its claim in Russia. But in principle it is open to a claimant to negative the appropriateness of a foreign jurisdiction by showing that a claim could not be tried fairly or properly there. This is intrinsic in the principles governing discretion established in *The Abadin Daver* [1984] AC 398, 411 and *The Spiliada*:

   i. In the former case, Lord Diplock said:

   "The possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained by a foreign litigant in particular kinds of suit whether for ideological or political reasons, or because of inexperience or inefficiency of the judiciary or excessive delay in the conduct of the business of the courts, or the unavailability of appropriate remedies".

   ii. Thus, in *Oppenheimer v Louis Rosenthal* [1937] 1 AER 23, where Dr Francis Mann, later managing partner of Herbert Smith, gave expert evidence, the plaintiff, a Jew, would to pursue his German claim against his German employers in Germany would have had to attend in person, whereupon he would have been at risk of being arrested and put in a concentration camp. English proceedings were allowed.

   iii. So also, in a number of cases, the English court have in the past refused to remit to India, on the basis of evidence that it would take a decade or more to get the matter adjudicated there.

   iv. But a plaintiff who suggests that even handed justice will not be available "must assert this candidly and support his allegations with positive and cogent evidence", and "tenuous innuendos" will not do: *The Abadin Daver*, p.411C-D, where Lord Diplock quoted Alexander Pope to describe the plaintiffs' affidavit: "Willing to wound, and yet afraid to strike, Just hint a fault, and hesitate dislike".

v. In *AK Altimo*, the whole area was further considered, and the Privy Council held that (a) the test was whether it was shown that there was a real risk that justice would not be obtained, (b) cogent evidence of such a risk was required for reasons of comity, but (c) there was no rule that domestic courts would refrain from considering or criticising the probity of courts of another friendly state. *AK Altimo* itself concerned a struggle for control between two Russian groups concerning a Kyrgyz telecommunications business, BITEL:

1. The natural forum for the dispute was clearly Kyrgyzstan, but the practical reality was that, unless the proceedings could be pursued in the IoM, they could be pursued nowhere.

2. AK Altimo had through the Kyrgyz courts already obtained (a) control of BITEL from the other group KFG and (b) a judgment in BITEL's name against KFG, and had in BITEL's name begun IoM proceedings against KFG to recover the outstanding balance of that judgment, US$3.6m.

3. This may have been rash, because it led to a counterclaim and an application to join AK Altimo and others as necessary and proper parties for the whole value of BITEL. There had been concurrent Kyrgyz and English proceedings, during which English injunctions were allegedly flouted, and bogus sales allegedly occurred, and the Privy Council said that the outcome of the Kyrgyz proceedings "can only be regarded as bizarre". The Isle of Man were allowed to continue.

I. Jurisdiction in insolvency

15. I have already mentioned the importance of enforcement. The ascertainment and collection of assets are particularly important in a context of insolvency. A rich seam has in recent years been mined, in the exploration of the scope of domestic court powers in this context.

16. Very often, and especially in the Caribbean, a company's affairs will have international ramifications. Here, we are not concerned with competition between jurisdictions, but with need for effective cross-border mechanisms. In Europe there has been extensive legislative

intervention to assist those handling insolvencies. But the extent to which legislation operates extra-territorially has proved controversial, and has led to what one might describe as a jurisprudence of fine lines.

17. *In re Tucker (RC) (A Bankrupt), Ex p Tucker* [1990] Ch 148, s.25(1) of the Bankruptcy Act 1914 gave the court power, on the application of a trustee in bankruptcy to "summon before it …. any person who the court may deem capable of giving information respecting the debtor, his dealings or property". Did this enable the court to summon for examination the debtor's brother, a British subject resident in Belgium? After examining the history - including the limitations both of RSC O.11 and of the power to subpoena witnesses for trials - Dillon LJ said that he "would not expect s.25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court".

18. But three years later, a different Court of Appeal took a different attitude to the court's power in a liquidation under the more narrowly focused wording of s.133 of the Insolvency Act 1986[1]: *In re Seagull Manufacturing Co. Ltd.* [1993] Ch 345. The application was for an order for the public examination of a former director living in Alderney, and Peter Gibson LJ said that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those who were responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself from the jurisdiction would suffice".

19. *Consolidated Contractors v Masri* [2009] UKHL 43 was not concerned with bankruptcy or insolvency, but with an unpaid judgment against a company. The claimant applied under CPR 71 to examine an officer of the company under a rule of court concerned with obtaining information in aid of the enforcement of such a judgment. The interest in a public

[1] S.133 only authorised the public examination of "any person who - (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager ….; or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company".

investigation, to which Peter Gibson LJ had referred in *In re Seagull* (p 354), was not therefore present. The House of Lords distinguished private civil litigation from insolvency. A fair and efficient legal system is of course a cornerstone of the rule of law. Yet parties to private litigation have no right to ask the court to summon witnesses from abroad. Although a judgment crystallises rights and liabilities, the court is still acting in aid of private rights after judgment. A judgment which is mistaken because of a lack of full information or documentation at trial could be seen as an even greater miscarriage of justice than a judgment which is not enforced because of the same lack. The history and the extreme informality of the process by which officers could be summonsed for examination also pointed towards a purely domestic focus. CPR 71 did not therefore apply to officers of the company outside the jurisdiction.

20. So much for statutory construction. The role of the common law has also been examined. In the only recently rediscovered Transvaal case of *In re African Farms* [1906] TS 373, Sir James Rose Innes recognised an English winding up by ordering what amounted to an ancillary liquidation in the Transvaal of the assets of the company. In *re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, an Australian company was in winding up in Australia and its liquidation was also ordered in England on the basis of English assets here. The House of Lords ordered the remission to Australia of the English assets, although they would there be distributed in accordance with priorities different from those which would apply on an English winding up.

21. The principle of universality of winding up was however carried a step too far in *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508, where a US Federal Bankruptcy Court had decreed that the shares of an Isle of Man company should be vested in a committee of its creditors. The shares were by definition outside the US Court's jurisdiction, as were their holders, Cambridge Gas, who took no part in the US proceedings. On an application was made to the Isle of Man, the Privy Council held that the US Court order should be recognised under the principle of universality. But in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236 the Supreme Court disapproved of this decision. We refused to recognise an order of a US bankruptcy court purporting to set aside (as having been entered into at an undervalue or as preferences) pre-liquidation transactions involving the defendants. The Supreme Court held that, absent in personam jurisdiction, the US bankruptcy judge had no jurisdiction over defendants who had not submitted or appeared before him. Equally, there was no principle that a domestic court, like the Isle of Man Court

in *Cambridge Gas* could assist a foreign bankruptcy court by doing whatever it could do under its own statutory powers in aid of a domestic insolvency. That would be for the courts to extend the scope of the statutory powers given to them. See also the statement to like effect in the Cayman Island appeal of *Al-Sabah v Grupo Torras* [2005] 1 UKPC 1, [2005] 2 AC 333, para 35.

22. The pendulum swung back a little in the recent Privy Council case of *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, where the Bermudan court was asked to order disclosure of PWC's own papers which were wanted by a Cayman Islands liquidator in order to understand the company's affairs. The liquidator could not get the working papers in the Cayman Islands, because s.103(3) of the Cayman Islands Companies Law only entitles a liquidator to seek papers belonging to the company. Auditors – mindful no doubt of the number of professional negligence claims based on close examination of working papers - are notoriously insistent that their working papers are their papers, not the company's. There was no suggestion that PWC had been, even innocently, mixed up in any wrongdoing by the company or its officers. The principle in *Norwich Pharmacal v Commissioners of Customs and Excise* [1973] UKHL 6, [1974] AC 133 did not therefore apply. Could the Bermudan court assist the Cayman liquidator by ordering disclosure of the papers?

23. The majority thought that, even after *Rubin v Eurofinance*, the principle of universality still exists, where a company is in compulsory - though not voluntary - winding up, to the extent of enabling a common law court of one country to assist that of another country by ordering disclosure of relevant information or documentation. The minority (to which I belonged) thought that this was an unprecedented and unprincipled extension of power. But the majority did not actually make the order in *Singularis*, since even they thought it would be contrary to principle to assist the liquidator to obtain material outside the Cayman jurisdiction, which he could not under s.103(3) have obtained had it been within the Cayman jurisdiction. The famous case of *Cuoghi v Credit Suisse* [1998] QB 818 where the English courts granted Marevas and disclosure orders in aid of Swiss proceedings which the Swiss courts could not have granted was distinguished on the ground that the English power was unlimited and the Swiss court's inability to make the order was only because Mr Cuoghi was languishing in prison in England, and was not in Switzerland.

24. The European court has not had the same compunction as the British about recognising universal jurisdiction. In a remarkable decision in Case C-328/12 *Schmid v Hertel*, the Court of Justice has held that the Brussels Regulation on Civil Jurisdiction and Judgments confers

jurisdiction on any court in the European Union where a company is being wound up in respect of any claim to set aside pre-insolvency transaction, even if the other party to the transaction is outside the European Union and does not appear. Under the Regulation, any order will require to be recognised throughout the European Union, which it would not be at common law or very probably outside the European Union.

II. Justiciability

25. As the heads of formal jurisdiction have expanded, so too the areas into which courts will not venture have contracted. The most obvious example is *state immunity*. The traditional international law view, accepted by the common law, was that such immunity was absolute. But international law, reflected in the European Convention on State Immunity 1972, and practice began to favour recognition of an exception for commercial activity. The UK courts rose to the challenge of adapting the common law in two famous cases: *Trendtex v Central Bank of Nigeria* [1977] 1 QB 529, where Lord Denning delivered a famous judgment, which the House of Lords followed in *The Playa Larga and Marble Islands v I Congreso del Partido* [1983] AC 244, holding that to require a state to answer such transactions before the courts "does not involve a challenge to any act of sovereignty or government act of that state".

26. This confines state immunity to a core area of sovereign activity. But there are other areas where domestic courts will still decline to tread. For a domestic court to take jurisdiction, judicial or manageable standards must exist. The phrase comes from *Buttes Gas v Hammer (Nos 2 & 3)* [1982] AC 888. In order to decide a defamation action, the House of Lords would have had to opine upon the rights and wrongs of a boundary dispute and its settlement between Gulf States. It declined to do this. The issues were not justiciable: there were "no judicial or manageable standards by which to judge whether "transactions between four sovereign states, which they had brought to a precarious settlement, after diplomacy and the use of force" had been unlawful under international law. In saying this, the House drew on the US "political act" doctrine.

27. The doctrine still exists in limited circumstances. For example, in *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910, the Divisional Court refused, on this ground, to adjudicate upon a claim that the Foreign Secretary should refuse to continue to recognise as lawful situations created by Israel's activities in Gaza in 2008. Non-justiciability under this principle extend to making of treaties and defence of the realm by the

executive, and domestically to a few situations like the defence of the realm, dissolution of Parliament and appointment of Ministers. But the last 40 years have seen a constant narrowing of the scope of this doctrine of judicial restraint:

28. In *Kuwait Airways v Iraqi Airways (Nos 4 & 5)* [2002] 2 AC 883, the House of Lords held that domestic courts could adjudicate upon transactions involving foreign states, where the effect of international law was clear and there was no concern about disturbing foreign relations. In that case Saddam Hossein had by decree given Iraqi Airways the Kuwait Airways civil aviation fleet, which he had removed from Kuwait to Iraq, and, despite Security Council Resolutions under Chapter VII, Iraqi Airways had retained the fleet. The House held that the legal position was clear, the Iraqi decree was unlawful and could not be recognised, and Iraqi Airways was liable for detaining the aircraft.

29. In a recent case *Shergill v Khaira* [2014] UKSC 33, the Supreme Court was asked to say that there were no "judicial or manageable standards" to decide whether who was a true successor of an Indian holyman, for the purposes of deciding who owned some UK property. We said that the boundaries of the doctrine of restraint were "a good deal less clear than they seemed to be 40 years ago", and that the hallmark of the *Buttes Gas* case was that it involved international political questions, between friendly states. Further, someone must own the property, and it must be possible for the law to decide who, even if involved deciding issues of religious doctrine or observance.

30. In *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2003] UKHRR 76 the Court of Appeal held that, although the Foreign Secretary had a very wide discretion whether to make representations to the US government about the internment in Guantanamo Bay of a British citizen, the courts could intervene to review it if it was exercised irrationally or contrary to legitimate expectations. More recently, in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697, the Supreme Court confirmed this, holding that the Secretary of State's decision to withhold legal aid for a final appeal by a British citizen convicted of drug smuggling and sentenced to death in Indonesia was in principle reviewable on the same basis. On the historical facts in issue no order was actually made, but our judgment added that an urgent review of the policy as it applied to Mrs Sandiford was required in the light of more current information.

31. A closely connected, area where UK courts have traditionally held back is where the claim challenges an act of state committed by a foreign state, particularly within its own jurisdiction. The concept of act of state is a cousin of state immunity. But state immunity

arises only where a state is directly impleaded. Act of state requires a UK court to accept as valid the act of a foreign state, at least within its own jurisdiction, even if the foreign state is not a defendant.

32. Increasingly, however, there are exceptions. The *Kuwait Airways* case is itself clearly one. A second is that, although judicial officers of a foreign state enjoy state immunity, their acts do not fall within the concept of act of state. Thus:

    a. Domestic and constitutional protection of fundamental rights, including protection from torture, inhuman treatment or flagrant breaches of justice, commonly require domestic courts to adjudicate upon the administration of justice in foreign countries.

    b. So too issues as to the appropriate forum, which brings us back to the recent Privy Council decision in the *AK Altimo* case, where we refused to recognize decisions of the courts of Kyrgistan which failed to meet any recognisable standard of justice.

    c. Another example is *Yukos v OJSC Rosneft Oil (No 2)* [2014] QB 458, where the court enforced a Russian arbitration award, despite its setting aside by the Russian courts, because the Russian court decisions had been arrived at in flagrant breach of proper judicial standards.

    d. As a final example, in *Lucasfilm v Ainsworth* [2012] 1 AC 208, we held that a claimant could sue in the English courts for an alleged breach of a US patent relating to the accoutrements worn in the Star Wars films, even though one issue whether the US patent granted by a US official was valid. The US official's act in approving the patent was not a sovereign activity or immune from scrutiny in the domestic courts of other states.

33. Many of these matters came together in a recent decision, which is now before the Supreme Court on appeal, not yet decided: *Belhaj v Straw and others* [2014] EWCA Civ 1394. Mr Belhaj was an opponent of Colonel Gaddafi and is now a minister in the recognised Libyan government. He and his wife are suing our former Foreign Secretary, Mr Jack Straw, the Home Office and Foreign Office, the Security Service and its head for conniving in 2004 with US authorities in their kidnapping in the Far East and their rendition to US authorities, who were allegedly involved in detaining and mistreating them before delivering them to Libya, where they were further detained and mistreated. The allegations were of course unproved, so that the *Kuwait Airways* case could not apply. But they were of grave nature, they were against domestic officials and ministers (and, although they also involved US

officials, the CA did not think that their investigation would seriously damage British-American relations); further there were judicial and manageable standards by which to decide them. If the UK courts refused to consider them, they would never be adjudicated upon in any domestic court would, because state immunity would prevent them in any foreign domestic court. Finally, the CA is accepting jurisdiction, subject to the current appeal, said this:

> "115.First, a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place. (See the observations of Lord Steyn in *Kuwait Airways* at [115].) These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate."

34. Since I cannot tell you what the attitude of the Supreme Court is likely to be, that is a good place for me to stop! I have just one final observation. I understand that there has recently been enacted in the Cayman Islands a bill of rights. I have little doubt that you will find this also influencing your thinking in relation to issues not only of public law, but also much more widely, just as the European Convention on Human Rights has done in the United Kingdom.