[2021 Gib LR 96]

REPUBLIC OF KAZAKHSTAN v. A. STATI, G. STATI, ASCOM GROUP S.A. and TERRA RAF TRANS TRAIDING LIMITED

SUPREME COURT (Yeats, J.): March 29th, 2021

2021/GSC/05

Conflict of Laws—reciprocal enforcement of judgments—costs orders made by English High Court in proceedings concerning enforcement of foreign arbitral award excluded from registration in Gibraltar by Judgments (Reciprocal Enforcement) Act 1935, s.3(2A)(c)

The applicant applied pursuant to s.4 of the Judgments (Reciprocal Enforcement) Act 1935 to register three judgments of the English High Court.

The respondents had obtained an arbitration award against the applicant, the Republic of Kazakhstan, in the sum of US$500m. following an arbitration that took place in Sweden. The respondents subsequently commenced proceedings in England to enforce the arbitration award. They obtained permission to enforce the award following a without notice hearing. The applicant then applied to set aside the order granting permission, claiming the arbitration award had been obtained by fraud. An English judge directed that the applicant's claim that the arbitration award had been obtained by fraud should proceed to trial. The respondents thereafter discontinued their enforcement proceedings. The English High Court made three separate costs orders against the respondents and in favour of the applicant totalling £1,435,000.

The applicant applied without notice to the respondents to register the costs orders under s.4 of the Judgments (Reciprocal Enforcement) Act 1935.

Section 3(2) of the 1935 Act provided:

> "Subject to sub-section (2A), a judgment of a recognised court is within this sub-section if it satisfies the following conditions, namely—
>
> (a) it is either final and conclusive as between the judgment debtor and the judgment creditor or requires the former to make an interim payment of the latter; and

(b) there is payable under it a 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
(c) it is given after the coming into force of the order which made that court a recognised court."

Section 3(2A) provided:

"The following judgments of a recognised court are not within subsection (2) of this section—
(a) a judgment given by that court on appeal from a court which is not a recognised court;
(b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court which was given or made in another country;
(c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment."

Section 11A provided:

"The provisions of this Act, except sections 3(5) and 8 shall apply as they apply to a judgment, in relation to an award in proceedings or an arbitration which has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

The court granted the application (that decision is reported at 2020 Gib LR 152). The court considered there were two possible interpretations of s.3(2A)(c), namely a wider interpretation that the exclusion applied to any judgment given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court), and a narrower interpretation that the exclusion applied to a judgment given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court) only insofar as it related directly to the judgment of the court in the third country. The court determined that the narrower interpretation should be given to s.3(2A)(c), that the costs orders were therefore not excluded and proceeded to register them.

The registration order was served on the fourth respondent in Gibraltar but had not yet been served on the other respondents. The fourth respondent applied to have the registration order set aside. The fourth respondent relied on two grounds: first, that the costs orders were judgments excluded from registration by s.3(2A)(c) and s.11A of the 1935 Act; and, secondly, that registering the costs orders was contrary to public policy in Gibraltar and therefore also excluded by s.6(1)(a)(v) of the 1935 Act (this second ground was first raised in the fourth respondent's written submissions, not in its application notice). It submitted that (a) the court erred in finding in its previous judgment that the exclusion in s.3(2A)(c) did not apply; (b) s.3(2A)(c) served to exclude any judgment arising in the proceedings which were founded on a third country judgment and that the court's wider possible interpretation was correct; and (c) the costs orders were therefore excluded because they arose in proceedings which were founded on a third

country judgment. In respect of the public policy ground, the fourth respondent submitted that the attempted registration of the costs orders was intended to deprive the respondents of assets to prevent them from continuing their enforcement proceedings in other jurisdictions. It was also submitted that the court should not assist the applicant to avoid its obligations to satisfy the Swedish award.

The applicant submitted that (a) s.3(2A)(c) did not apply to the costs orders; (b) the Swedish award was not a judgment of a court and therefore on any reading of s.3(2A)(c) there was no exclusion in this case; and (c) if there were some doubt as to the interpretation of s.3(2A)(c), a purposive approach should be preferred, which would show that it was not the purpose of the 1935 Act to exclude the costs orders.

Held, setting aside the registration of the costs orders:

(1) The court was wrong in its previous judgment to find that there were two possible meanings of s.3(2A)(c). The strict legal meaning was the wider interpretation, namely that the exclusion applied to any judgment given by the recognized court in the course of enforcement proceedings of a judgment of a third country court. It was a plain and unambiguous meaning. Section 3(2A)(c) was caught by the provisions of s.11A so that the exclusion, in the context of this case, should read as followed: "The following judgments of the English High Court are not [capable of registration] . . . (c) a judgment given by the English High Court in proceedings founded on an arbitration award by a tribunal in Sweden [where the English proceedings have] as their object the enforcement of the arbitration award by the tribunal in Sweden" (paras. 23–39).

(2) The application by the respondents for the enforcement of the Swedish award and the costs orders obtained by the applicant were all made in the same proceedings which, when commenced, had as their object the enforcement of the Swedish award. As the costs orders were judgments given in proceedings which were founded on an arbitration award given in a third country, they fell within the exception provided for by s.3(2A)(c) and should not have been registered. That the costs orders could not be registered in Gibraltar was not perverse or absurd. The court's previous order that the costs orders be registered should therefore be set aside (paras. 48–50).

(3) Registration of the costs orders would not have been contrary to public policy in Gibraltar. The court observed first that if the fourth respondent considered that there was a proper basis for making a public policy claim in these proceedings the court would have expected it to have been included in the application notice, and for the evidence in support to refer extensively to the serious allegations. Secondly, and more importantly, the costs orders were orders made by three different judges of the High Court of England and Wales. They had not been appealed and the respondents had accepted that the judgment sums were due and owing (insofar as they had attempted to set them off against amounts said to be owed to them by the applicant).

The attempted registration of orders made by that court could not be said to be contrary to public policy. Although there were costs orders in favour of the respondents that had not been satisfied, and the Swedish award was also unsatisfied, that did not make the registration of the costs orders contrary to public policy in Gibraltar (paras. 56–58).

Cases cited:

(1) *Black-Clawson Intl. Ltd.* v. *Papierwerke Waldhof-Aschaffenburg AG*, [1975] A.C. 591, referred to.

(2) *Clarke* v. *Fennoscandia Ltd.*, [2003] ScotCS 209; 2003 SCLR 894; [2004] SC 197, referred to.

(3) *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH* v. *R'as Al Khaimah National Oil Co*., [1987] 2 Lloyd's Rep. 246, referred to.

(4) *Morgan Stanley* v. *Pilot Lead Invs. Ltd.*, [2006] 4 HKC 93; [2006] 2 HKLRD 731, referred to.

(5) *Oliver Ashworth (Holdings) Ltd.* v. *Ballard (Kent) Ltd*., [1999] 2 All E.R. 791, referred to.

(6) *R.* v. *A*, [2001] UKHL 25; [2002] 1 A.C. 45; [2001] 2 W.L.R. 1546; [2001] 3 All E.R. 1; [2001] HRLR 48; [2001] UKHRR 825, referred to.

(7) *Shahid* v. *Scottish Mins.*, [2015] UKSC 58; [2016] A.C. 429; [2015] 3 W.L.R. 1003; [2016] 4 All E.R. 363; 2015 SLT 707; 2016 SC (UKSC) 1, referred to.

(8) *Strategic Technologies PTE Ltd.* v. *Procurement Bureau of the Republic of China Ministry of National Defence*, [2020] EWCA Civ 1604; [2021] Q.B. 999; [2021] 2 W.L.R. 448; [2021] 4 All E.R. 189, considered.

Legislation construed:

Judgments (Reciprocal Enforcement) Act 1935, s.2(1): The relevant terms of this sub-section are set out at para. 28.

s.3(2A): The relevant terms of this sub-section are set out at para. 9.

s.6(1): The relevant terms of this sub-section are set out at para. 3 and para. 53.

s.11A: The relevant terms of this section are set out at para. 32.

L. Baglietto, *Q.C.* and *M. Levy* (instructed by Hassans) for the applicant;

F. Vasquez, *Q.C.* and *D. Nagrani* (instructed by Triay Lawyers) for the fourth respondent.

1 **YEATS, J.:** By order dated April 29th, 2020 ("the registration order"), I ordered that three judgments of the High Court of Justice, Business and Property Courts of England and Wales be registered as judgments of this court. The judgments of the English High Court are three costs orders ("the costs orders") which had been obtained on May 21st, 2018, May 17th, 2019 and July 2nd, 2019, in proceedings between Anatolie Stati, Gabriel Stati, Ascom Group SA, and Terra Raf Trans Traiding Ltd. ("Terra Raf") as

claimants, and the Republic of Kazakhstan ("Kazakhstan") as defendant. (I shall refer to the claimants in the English proceedings together as "the Stati parties.") The Stati parties were ordered to pay costs to Kazakhstan. The costs orders were registered in this court pursuant to s.4 of the Judgments (Reciprocal Enforcement) Act 1935 ("the 1935 Act").

2 The application for registration was made by Kazakhstan without notice to the Stati parties. The registration order was served on Terra Raf here in Gibraltar on September 1st, 2020. It has not yet been served on Anatolie Stati, Gabriel Stati or Ascom Group S.A. (Service is being attempted on those parties in Moldova under the Hague Service Convention.) The registration order provided that the Stati parties have permission to apply to set it aside, within 28 days of service, under r.74.6 of the Civil Procedure Rules and s.6 of the 1935 Act. (In the event, Terra Raf and Kazakhstan agreed that Terra Raf have until October 20th, 2020 to make its application.) By application notice dated October 20th, 2020, Terra Raf applies to have the registration order set aside.

3 Section 6(1)(a)(i) of the 1935 Act provides that registration of a judgment shall be set aside if the court is satisfied "that the judgment is not a judgment to which this Part applies or was registered in contravention of the foregoing provisions of this Act."

4 Terra Raf relies on two grounds to say that the registration order should be set aside. First, that the costs orders are judgments excluded from registration by s.3(2A)(c) and s.11A of the 1935 Act. Secondly, that registering the costs orders is contrary to public policy in Gibraltar and registration is therefore also excluded by s.6(1)(a)(v) of the 1935 Act. (In its application notice, Terra Raf had raised two further grounds but these were abandoned at the hearing. These were that the costs orders should be deemed to have been "wholly satisfied" by virtue of the fact that there are costs orders in favour of the Stati parties in various related proceedings in other jurisdictions which have not been paid by Kazakhstan. That being so, it was said that arguably the registration of the costs orders is excluded by s.4(1) of the 1935 Act. Freddie Vasquez, Q.C., appearing for Terra Raf, did nevertheless ask the court to consider the question of unsatisfied costs orders when looking at the public policy ground. The other ground which is no longer being pursued is that there had been material non-disclosure by Kazakhstan in the evidence relied on in support of its application for registration.)

5 Terra Raf's application is supported by the witness statement, dated October 20th, 2020, of Egishe Dzhazoyan. Mr. Dzhazoyan is a solicitor at the London offices of King & Spalding International LLP, a firm that acts for Terra Raf. In reply, Kazakhstan filed a third witness statement, dated November 12th, 2020, by Philip Maitland Carrington. Mr. Carrington is a solicitor at the London offices of Herbert Smith Freehills LLP, a firm that

acts for Kazakhstan. He had filed witness statements dated February 20th, 2020 and March 11th, 2020 for the original without notice application.

6 This judgment should be read together with my judgment of April 29th, 2020 (reported at 2020 Gib LR 152).

The costs orders

7 On February 24th, 2014, the Stati parties commenced proceedings in the English High Court against Kazakhstan. The proceedings were for enforcement of an arbitration award in the sum of approximately US$500m. which had been obtained on December 19th, 2013 in an arbitration held in Sweden under the Energy Charter Treaty ("the Swedish award"). (The dispute relates to the operation by the Stati parties of two oil and gas fields in Kazakhstan between 1999 and 2010.) The Stati parties obtained permission to enforce the award in the High Court following a without notice hearing. Kazakhstan then applied to set aside the order granting permission, claiming, amongst other things, that the Swedish award had been obtained by fraud. On June 27th, 2017, Robin Knowles, J. directed that Kazakhstan's claim that the award had been obtained by fraud should proceed to trial. Thereafter, the Stati parties discontinued their enforcement proceedings. The costs orders relate to the following aspects of those proceedings:

(i) An application made by Kazakhstan for permission to use the documents produced in the English proceedings in proceedings in other jurisdictions. The application was determined in Kazakhstan's favour by Knowles, J. At para. 13 of his order dated May 21st, 2018, the Stati parties were ordered to pay the sum of £30,000 in costs to Kazakhstan.

(ii) An application by Kazakhstan for the Stati parties to disclose details of their funding arrangements. Cockerill, J. made the disclosure order. At para. 2 of her order dated May 17th, 2019, the Stati parties were ordered to pay the sum of £25,000 in costs to Kazakhstan.

(iii) The last of the three costs orders is an order relating to the costs of the discontinued proceedings. Paragraphs 3 and 5 of the order of Jacobs, J. dated July 2nd, 2019, ordered that the Stati parties pay to Kazakhstan the sum of £1.3m. on account of the costs of the proceedings and £80,000 on account of the costs incurred in making the application.

The first ground—is registration excluded by s.3(2A)(c) and s.11A of the 1935 Act?

8 The first ground was described by Mr. Vasquez as his principal ground. By the 1935 Act, a judgment of a court which is a "recognised court" can be registered if the judgment satisfies the conditions set out in s.3(2) and is not an excluded judgment under s.3(2A). The High Court of England and

Wales is a recognized court and the conditions in s.3(2) are clearly satisfied, as I explain in my first judgment. It is the exclusion contained in s.3(2A)(c) which is the subject of the disagreement between the parties in this case. Terra Raf says that I erred by finding in my first judgment that the exclusion did not apply.

9 Section 3(2A) of the 1935 Act provides as follows:

> "(2A) The following judgments of a recognised court are not within sub-section (2) of this section—
>
> (a) a judgment given by that court on appeal from a court which is not a recognised court;
>
> (b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court which was given or made in another country;
>
> (c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment."

10 The costs orders are not judgments of the English High Court on appeal from a court which is not recognized. They are orders of the High Court itself. They are not therefore excluded by s.3(2A)(a). Similarly, they are not excluded by s.3(2A)(b). The costs orders are not judgments given or made in a third country which have been registered in the recognized court and which have the same effect as a judgment of the recognized court.

11 As to the exclusion in s.3(2A)(c), I observed in my first judgment that there were two possible interpretations for the provision. The first and wider interpretation being that the exclusion applies to *any judgment* given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court). The second and narrower interpretation was that the exclusion applies to a judgment given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court) *only insofar as it relates directly* to the judgment of the court in the third country. (Lewis Baglietto, Q.C., who appeared for Kazakhstan at both hearings, neatly set out this narrower interpretation as excluding judgments of the recognized court which give legal effect to the obligations contained in the third country judgment.)

12 I found that the purpose of s.3(2A) was to prevent the use of the 1935 Act for the registration of a judgment of a foreign court which could not, of itself, be registered in Gibraltar—commonly referred to as the "laundering" of judgments. In light of that conclusion, I determined that the narrow interpretation should be given to s.3(2A)(c). The costs orders were therefore not excluded and I proceeded to register them.

13 I have now had the benefit of adversarial argument and must consider the matter afresh.

14 Mr. Vasquez's submission is that s.3(2A)(c) serves to exclude any judgment arising in the proceedings which are founded on a third country judgment. That my first and wider possible meaning is the correct one. That being so, the costs orders are excluded because they arise in proceedings which are founded on a third party judgment. As I will expand on below, it is said by Terra Raf that the Swedish award is a "judgment" because s.11A of the 1935 Act in effect provides that the relevant provisions of the Act apply to certain arbitration awards in the same way as they apply to a judgment.

15 Mr. Baglietto on the other hand says that s.3(2A)(c) does not apply to the costs orders. In effect, he advances two submissions. First, that the Swedish award is not a judgment of a court and therefore on any reading of s.3(2A)(c) there is no exclusion in this case. (As to s.11A, he submits that this is simply an enabling provision, enabling arbitration awards to be registered, and that it does not affect the exclusions referred to in s.3(2A)(c).) Secondly, if there were some doubt as to how s.3(2A)(c) should be interpreted, a purposive approach should be preferred, and that would show that it was not the purpose of the legislation to exclude the costs judgments.

The applicable principles of statutory interpretation

16 It is agreed by the parties that the starting point is always to look at the words of the statute to determine its meaning. For an example of judicial authority on this, I was referred to *R.* v. *A* (6). There, the House of Lords was considering whether the exclusion in criminal proceedings of a complainant's sexual history under a particular statutory provision was compatible with the defendant's right to a fair trial. In looking at how s.3 of the UK Human Rights Act 1998 (which requires the UK courts to interpret legislation compatibly with the European Convention of Human Rights) impacted on the interpretation of the statute, Lord Steyn said the following ([2001] UKHL 25, at para. 44):

> "Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it . . . Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so."

17 Mr. Vasquez then followed that starting point with the proposition that, when a literal meaning is plain and unambiguous, the courts only look beyond the literal meaning in very limited circumstances. This was explained in *Shahid* v. *Scottish Mins.* (7), where the Supreme Court was considering the validity of a back-dated approval for the segregation of a prisoner. Lord Reed said ([2015] UKSC 58, at paras. 19–21):

> "19. . . . The Lord Ordinary commented that most people would consider it quite unreal that, if the Ministers decided to go ahead and grant the authority, both it and all subsequent renewals would be rendered unlawful . . .
>
> 20. In the light of considerations of that kind, the courts below concluded that purposive arguments favoured treating a late authorisation as valid, within reasonable limits. No amount of purposive interpretation can however entitle the court to disregard the plain and unambiguous terms of the legislation. The consequence of the failure to obtain authority for continued segregation prior to the expiry of the 72 hour period is ineluctably spelled out by the legislation itself: the prisoner 'shall not be subject to . . . removal for a period in excess of 72 hours from the time of the order'. That consequence cannot be avoided by relying, as the courts below sought to do, upon such authorities as *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340. Those authorities were concerned with situations where the legislation was silent as to the consequences of failure to comply with a time limit, and where the intended consequences therefore had to be inferred from the underlying purpose of the legislation. The present case is fundamentally different.
>
> 21. The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences . . . Indeed, even greater violence can be done to statutory language where it is plain that there has been a drafting mistake . . ."

18 He also relied on two principles set out in *Bennion, Bailey & Norbury on Statutory Interpretation*, 8th ed., paras. 11.3 and 11.4, at 395–400 (2020). First, Parliament is presumed to have drafted statutory provisions reasonably and competently. Secondly, that there is a presumption that the grammatical meaning of a provision is the meaning that was intended by the legislator.

19 As to legislative purpose, Mr. Vasquez submitted that this is only relevant as an aid to interpretation when there is ambiguity. He quoted Lord Reid in *Black-Clawson Intl. Ltd.* v. *Papierwerke Waldhof-Aschaffenburg AG* (1) (coincidentally a case on the interpretation of s.8(1) of the UK

Foreign Judgments (Reciprocal Enforcement) Act 1933) ([1975] A.C. at 613):

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

Further, his Lordship stated (*ibid.*, at 614):

> "But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for."

20 Finally, Mr. Vasquez referred me to a further principle in *Bennion* regarding mistakes in legislation. The following presumption is set out (*op. cit.*, para. 15.1, at 519):

> "It is presumed that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment, where required in order to give effect to the legislative intention."

In the commentary, the learned authors say that to do so, the court must be *abundantly sure* of the following three matters: (1) the intended purpose of the provision; (2) that the drafter and legislature failed to give effect to that purpose; and (3) the substance of the provision the legislature would have made had it noticed the error.

21 Mr. Baglietto, on the other hand, advocated for a purposive approach in situations where the strict legal meaning did not properly address the mischief which the legislation sought to resolve. He referred me to a passage by Laws, L.J. in *Oliver Ashworth (Holdings) Ltd.* v. *Ballard (Kent) Ltd*. (5) ([1999] 2 All E.R. at 805, as set out in *Craies on Legislation*, 11th ed., para. 18.1.3, at 758 (2018)):

> "The difference between purposive and literal construction is in truth one of degree only. On received doctrine we spend our professional lives construing legislation purposively, inasmuch as we are enjoined at every turn to ascertain the intention of Parliament. The real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. Frequently there will be no opposition between the two, and then no difficulty arises. Where there is a potential clash, the conventional English approach has been to give at least very great and often decisive weight to the literal meaning of the enacting words. This is a tradition which I think is weakening, in face of the more purposive approach enjoined for the interpretation of legislative measures of the

European Union and in light of the House of Lords' decision in *Pepper (Inspector of Taxes) v Hart* . . ."

22 It will be necessary to apply these principles in the course of the judgment.

What is the strict legal meaning of s.3(2A)(c)?

23 What then is the strict legal meaning of s.3(2A)(c)? I consider that I was wrong in my first judgment to hold that there were two possible meanings to the provision. Whilst, in the context of this case, it is true to say that consideration needs to be given as to whether the costs orders are or should be caught by the section, there is only one strict literal interpretation which can be arrived at. This is what I referred to as the wider interpretation at para. 11 above—that the exclusion applies to *any judgment* given by the recognized court in the course of enforcement proceedings of a judgment of a third country court. The reasoning for this is the following.

24 Section 3(2A)(c) reads:

"(2A) The following judgments of a recognised court are not within sub-section (2) of this section—

. . .

(c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment."

The only words that I consider require particular analysis are the words "proceedings founded on" and "having as their object." The former must simply mean that the action in which the judgment is given is concerned with and relates directly to a judgment of a third country court. As to the words "having as their object," these must refer to the *proceedings* in the recognized court and not to the recognized court's *judgment*. "Their" is plural. "Proceedings" are in the plural, and "judgment" is in the singular. If the words "having as their object" were intended to refer to the recognized court's judgment, then the drafter could simply have said "having as *its* object."

25 If we were then to insert the relevant courts/countries into the text of the section, it would read as follows:

"The following judgments of the English High Court are not [capable of registration]:

. . .

(c) a judgment given by the English High Court in proceedings founded on a judgment of a court in Sweden [where the

> English proceedings have] as their object the enforcement of the judgment of the court in Sweden."

This therefore means that the exclusion applies to any judgment given in the course of enforcement proceedings of a judgment of a third country court. In my judgment, this is the literal interpretation which is to be given to s.3(2A)(c). Furthermore, I consider that it is a plain and unambiguous meaning.

26 Mr. Baglietto suggested that if the exclusion was to apply to any judgment, then the section would have started with the words "any judgment" rather than with the words "a judgment." I see no distinction between these two formulations, particularly when read with the words "given . . . in proceedings" which follow. There is no practical difference between the phrases "a judgment given in proceedings" and "any judgment given in proceedings."

Is the Swedish award caught by s.3(2A)(c)?

27 In order for the costs orders to be excluded by s.3(2A)(c), the Swedish award has to be considered to be a judgment of a court in Sweden. In that regard, Mr. Vasquez submitted that the words "judgment" and "court" in s.3(2A)(c) include an arbitral award made by a tribunal. He did so on two bases. First, that the word "court" is defined in the 1935 Act as including a "tribunal" and this therefore includes an arbitral tribunal. Secondly, that s.11A of the 1935 Act provides that the relevant parts of the Act apply to this type of arbitration. I shall take these two propositions in turn.

28 Section 2(1) of the 1935 Act defines "court" and "judgment" as follows:

> "'court' except in section 11, includes a tribunal;
>
> 'judgment' means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party . . ."

29 The definition of "court" in s.2 was added as an amendment to the 1935 Act by s.37 of the Civil Jurisdiction and Judgments Ordinance 1993. Section 3(2A) and s.11A were also inserted into the 1935 Act by the same amending legislation. As we shall see, s.11A makes provision for the recognition of arbitration awards. Consequently, Mr. Nagrani submitted that the draftsman must have had arbitration tribunals in mind when extending the definition of "court" to include "tribunals." I agree. Indeed, I observe that without extending the term "court" to include arbitral tribunals, the jurisdiction conferred by s.11A would be of no effect. This is

because s.11A only refers to the provisions of the Act applying to arbitration awards as they apply to judgments. However, to be able to register a judgment, it needs to be a judgment of a court. It was therefore necessary to amend the definition of "court" to include all types of tribunals.

30 Mr. Baglietto pointed to the definition of "judgment" and submitted that this limits judgments to those made in civil proceedings and certain judgments made in criminal proceedings. Arbitrations are private proceedings and are not civil proceedings. Furthermore, had the word "tribunal" included arbitration tribunals, then there would have been no need for s.11A. It seems to me that it is wrong to focus on the definition of the term "judgment" in s.2. It is simply not necessary for arbitration awards to fall within the definition of "judgment." This is because s.11A causes the provisions of the Act that apply to a judgment to also apply to arbitration awards. When introducing arbitration awards to the scheme of the 1935 Act in 1993, the drafter could have either amended the definition of "judgment" or included a separate provision for arbitrations. The latter course was chosen.

Section 11A

31 So what is the effect of s.11A on s.3(2A)(c)? In my first judgment, I did not consider this question because I found that s.3(2A)(c) was capable of two different meanings and I then applied a purposive approach to the interpretation which I said did not exclude the costs orders. Consequently, it was unnecessary to look at the effect of s.11A. I have now determined that there is no such ambiguity in s.3(2A)(c). The relevance of s.11A therefore becomes a key consideration.

32 Section 11A of the 1935 Act provides as follows:

> "11A. The provisions of this Act, except sections 3(5) and 8 shall apply as they apply to a judgment, in relation to an award in proceedings or an arbitration which has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

(There is a clear typographical error in the section and I have no doubt that it should read: "to an award in proceedings *on* an arbitration." This is how the English equivalent provision is phrased.)

33 The Swedish award is an award in proceedings on an arbitration which has become, in accordance with the laws of Sweden, enforceable in the same manner as a judgment given by a court in Sweden. (Although there was no evidence of Swedish law before me at the hearing, Mr. Vasquez's instructions were that the award was enforceable in Sweden under the Swedish Enforcement Code (1981:774). Indeed, in his third witness statement, Mr. Carrington lists a number of enforcement actions in Sweden

which clearly show that the award is being enforced in that country. I am therefore proceeding on the basis that the Swedish award is one to which s.11A applies.)

34 Mr. Vasquez's principal submission is that the effect of s.11A is to include arbitration awards in all aspects of s.3(2A). Therefore, insofar as 3(2A)(c) is concerned, a judgment of a third country includes an arbitration award made in that third country (as long as the award has become enforceable in that third country in the same way as a judgment). As the Swedish award has become enforceable, then the exclusion in s.3(2A)(c) applies to this case. Importantly, it is said that this would be consistent with the purpose behind s.3(2A). The prohibition against the "parasitic registration" (as Mr. Vasquez described it) of a judgment of a third country which would otherwise be non-registrable, must apply in the same manner to arbitration awards. If an arbitration award from a third country would not itself be registrable in Gibraltar, why should a judgment of a recognized court founded on such an award enable the award to be registered in Gibraltar? It was submitted that the same policy considerations must apply. Mr. Nagrani further developed this submission by pointing to the fact that s.11A is restricted to arbitrations which have become enforceable in the same manner as a judgment given by a court and therefore they carry the force of a judgment as a judgment of a court. This is important from a public policy point of view. These arbitration awards carry the force of a judgment and should therefore be treated as a judgment.

35 Mr. Baglietto, on the other hand, argued that the effect of s.11A is limited. That the only effect is to make an applicable arbitration award made in a reciprocating country enforceable in Gibraltar in the same manner as a judgment of that reciprocating country. It is only an *enabling* provision. He then made the opposite submission as regards policy considerations to that made on behalf of Terra Raf. Mr. Baglietto submitted that arbitration awards are governed by international conventions of near universal applicability. In the circumstances it is said that the likelihood of an applicant attempting to "launder" an arbitration award is almost non-existent. Section 3(2A)(c) is therefore irrelevant insofar as arbitration awards are concerned. At most, it is said, s.11A could alter the reading of s.3(2A)(c) so that an arbitration award could slot into the place of a judgment of a recognized court.

36 A flaw in Mr. Baglietto's argument is that s.3(2A)(c) uses the word "judgment" in two different contexts. The judgment of the recognized court and the judgment of the third country. Section 11A provides that the provisions of the Act should apply to an (applicable) arbitration award as they do to a judgment. I do not see why there should be a distinction between the two references to judgment in s.3(2A)(c). An arbitration award could in theory take the place of a judgment in either context. The idea that

it can somehow apply to the part of s.3(2)(c) that relates to the judgment of the recognized court but not to the part that relates to the judgment of the third country court is, in my view, unconvincing.

37 I also note that s.11A specifically provides that it does not apply to s.3(5) or s.8 of the 1935 Act. If it did not also apply to s.3(2A), then it would have been stated in the provision.

38 I was also referred to *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., at para. 16–168 (2012) where the authors were discussing the replacement of the UK Administration of Justice Act 1920 by the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (the latter being the equivalent to the 1935 Act). The 1920 Act included provisions for enforcement of arbitral awards which the 1933 Act, as originally drafted, did not. The text then states:

> "It was found that the replacement of the 1920 Act by the 1933 Act was impeded by various circumstances, one of which was that in the 1920 Act the definition of judgments includes arbitral awards, while in the 1933 Act it did not. The 1933 Act was therefore amended so that it also applies to awards which are made enforceable in the same manner as a judgment by an order of the court of the country in which the award was made.
>
> To be registrable under the 1920 Act or the 1933 Act the award must have become enforceable in the same manner as a judgment according to the law in force in the place where it was made. This requirement would appear to be satisfied if leave to enforce has been given in terms equivalent to those in s.66 of the Arbitration Act 1966. *It would seem that all the provisions of Pt II of the 1920 Act and of Pt I of the 1933 Act as to what judgments are registrable and as to the setting aside of registration apply mutatis mutandis to arbitral awards registrable as judgments under those Acts*." [Emphasis added.]

Part I of the UK 1933 Act includes the equivalent provision to s.3(2A) in the 1935 Act. The learned authors of *Dicey* therefore appear to be saying that s.3(2A)(c) would also apply to exclude judgments of a recognized court founded on applicable arbitration awards of a third country.

39 I conclude that s.3(2A)(c) is caught by the provisions of s.11A so that the exclusion, in the context of our case, should read as follows:

> "The following judgments of the English High Court are not [capable of registration]:
>
> . . .
>
> (c) a judgment given by the English High Court in proceedings founded on an arbitration award by a tribunal in Sweden

> [where the English proceedings have] as their object the enforcement of the arbitration award by the tribunal in Sweden."

Should a purposive approach be applied to s.3(2A)(c) in any event?

40 This then leaves the question of whether, notwithstanding the interpretation which I have given to s.3(2A)(c), I should apply a purposive approach so as to hold that the costs orders do not fall within the exception to registration. This is Mr. Baglietto's alternative submission.

41 In my first judgment, I concluded that the purpose of s.3(2A) is to prevent the use of the 1935 Act for the registration of a judgment of a foreign court which could not, of itself, be registered in Gibraltar. I referred to a number of authorities which supported the proposition including *Clarke* v. *Fennoscandia Ltd.* (2) and *Morgan Stanley* v. *Pilot Lead Invs. Ltd.* (4). It has not been suggested that this conclusion was wrong.

42 Both parties referred me to the English Court of Appeal's decision in *Strategic Technologies PTE Ltd.* v. *Procurement Bureau of the Republic of China Ministry of National Defence* (8). (In my first judgment, I discussed the first instance decision but since then the Court of Appeal has handed down its judgment.) The case involved the registration under the UK Administration of Justice Act 1920 of a judgment obtained in the Cayman Islands founded on a judgment in Singapore. The issue which arose for determination was whether the 1920 Act permits registration of a judgment on a judgment. At first instance, Carr, J. held that it did saying amongst other things that the 1920 Act did not have a provision excluding the registration of judgments on judgments like the UK 1933 Act has. The Court of Appeal allowed the appeal holding that a purposive approach had to be applied to the 1920 statute and concluded ([2020] EWCA Civ 1604, at para. 61) that it permitted registration "of a judgment given by a court which adjudicated on the merits of the underlying claim, but not as extending to permit registration of a judgment on a judgment." Males, L.J. then commented on what the purpose behind the s.3(2A) equivalent was in the UK 1933 Act saying the following (*ibid.*, at para. 68):

> "68 Next, while it is interesting that the 1933 Act was amended in 1982 to make clear that there could be no registration of a judgment on a judgment and that no equivalent amendment was made to the 1920 Act, I do not see that this sheds light on what Parliament intended when passing the 1920 Act. The amendment of the 1933 Act is at least consistent with a desire to clarify what the position was already thought to be and does not necessarily represent a change. It is not at all clear why the 1920 Act was not amended at the same time and it is at least possible that this was simply overlooked. In any event

the absence of a clarifying amendment in 1982 does not tell us much or anything about Parliament's intention in 1920."

43 Mr. Baglietto relies on the purposive approach adopted by the Court of Appeal in that case to reiterate his submission that the purpose of s.3(2A) is to guard against the registration in Gibraltar of a judgment which was originally made in a country which is a non-reciprocating state. As the costs orders are original orders made by the English High Court these do not fall within the mischief that the section sought to regulate. He entreats me to apply the same purposive approach applied in *Strategic Technologies*.

44 The difficulty is that even if, as Males, L.J. observed in *Strategic Technologies*, the amendment brought in by s.3(2A) was unnecessary because it was the law in any event, the fact is that the legislature did actually go on to enact s.3(2A). Insofar as s.3(2A)(c) is concerned, it did so on terms which are clear.

45 In my judgment, a literal interpretation of s.3(2A)(c) which excludes the costs orders is not absurd or perverse. It may go beyond that which was required to remedy the mischief but that does not mean that the court should depart from the starting point which is that primary consideration should be given to the words of the statute. As I observed at para. 24 above, it would have been simple for the legislature to limit the exclusion in s.3(2A)(c) to a judgment which gives legal effect to the obligations contained in the third country judgment. It did not do so.

46 Even if I were wrong on this, the following point made by Mr. Vasquez militates against adopting the approach urged upon the court by Kazakhstan. Had the Swedish arbitral award actually been registered in England, this could not then have been registered in Gibraltar. It would most certainly have been excluded by s.3(2A). Had that been the case, he then suggests that it follows that a costs order in the applicants' favour would similarly not have been registrable in Gibraltar. No literal interpretation or purposive approach would allow that. Why then would an adverse costs order be registrable? Why should there be a different approach to favourable costs orders or adverse costs orders?

47 Mr. Baglietto conceded that a favourable costs order following enforcement would not have been registrable here but submitted that the situation before the court is different because the costs orders are not giving effect to the third country judgment and therefore do not offend the principles of reciprocity which s.3(2A)(c) is protecting. If I do not apply a purposive interpretation to the section, Kazakhstan is left without a remedy. Whilst there is some merit in the argument, I do not consider that it is sufficiently strong to require the court to adopt a purposive approach over the literal interpretation.

Conclusion on the first ground

48 The application by the Stati parties for the enforcement of the Swedish award and the costs orders obtained by Kazakhstan were all made in the same proceedings. They were all made in claim number 2014 Folio 204 (subsequently administratively re-numbered to case number CL-2014-000070). When commenced, the proceedings had as their object the enforcement of the Swedish award. (I observe that, technically, when the second and third costs orders were made, the proceedings had already been discontinued and so no longer had the object of enforcing the Swedish award. Nevertheless, I do not consider that the second and third costs orders thereby necessarily fall outside the scope of the exclusion. That would be straining the words "in proceedings founded." They were the same proceedings. The object of the proceedings was the enforcement of the award. At no stage did they have any other object.) As Mr. Vasquez said, all the costs orders are directly linked to the enforcement of the Swedish award in England and had no freestanding existence separate to that enforcement. Without the attempted enforcement in England of the Swedish award, the costs orders would not have been made. They formed part and parcel of the enforcement proceedings.

49 As the costs orders are judgments given in proceedings which are founded on an arbitration award given in a third country, I conclude that they fall within the exception provided for by s.3(2A)(c) and should not have been registered. My order of April 29th, 2020 should therefore be set aside.

50 I accept that unfairness does arise insofar as the costs orders cannot be registered in Gibraltar in a situation where Kazakhstan successfully defended itself against enforcement action in England. The fact that the costs orders cannot be registered in Gibraltar is not, however, perverse or absurd. What other remedies lie either here or elsewhere is a matter for Kazakhstan and its advisers. Perhaps this case is exceptional. The third country judgment was not enforced in the recognized court but yet the proceedings resulted in a very large amount of costs being payable. Normally, the question of costs is inconsequential in the context of, and in proportion to, an award or judgment of this type.

The second ground—is registration contrary to public policy?

51 Although in light of my findings this is strictly speaking unnecessary, I will briefly comment on the second ground relied on by Terra Raf in its application to set aside the registration of the costs orders, namely that it was contrary to public policy.

52 This ground was first raised in Terra Raf's written submissions in the days prior to the hearing. It did not feature in its application notice. Mr.

Baglietto did not, however, object to the court proceeding to hear this point without requiring an amendment to the application notice. The assertion made on behalf of Terra Raf is that the attempted registration of the costs orders is aimed at depriving the Stati parties of assets to prevent them from continuing with their enforcement proceedings in other jurisdictions. Further, that the court should not be assisting Kazakhstan to avoid its obligations to satisfy the Swedish award. Therefore, it is said, that the registration would be contrary to the public policy in Gibraltar.

53 Section 6(1)(a)(v) of the 1935 Act provides as follows:

> "6.(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment—
>
> (a) shall be set aside in [*sic*] the Supreme Court is satisfied—
>
> . . .
>
> (v) that the enforcement of the judgment would be contrary to public policy in Gibraltar . . ."

54 The brief background with which I opened this judgment does not refer to the protracted accusations being made by the parties against each other. Indeed, Mr. Vasquez dedicated a good part of his submissions to set out Terra Raf's allegations against Kazakhstan and how the state is said to have hounded the Stati parties out of the country and taken over their assets. Mr. Vasquez submitted that the fraud allegations had been dismissed by the superior courts in Sweden and by a court in the United States. (Mr. Baglietto, however, pointed out that this was on what can be described as procedural grounds rather than on an examination of the merits of the fraud claim.) Be that as it may, it is indeed correct to say that the award has been declared to be final and binding but that Kazakhstan has yet failed to make any payment towards it.

55 Mr. Vasquez submitted that the court could derive assistance from the words of Sir John Donaldson, M.R. in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH* v. *R'as Al Khaimah National Oil Co.* (3) as to the scope of public policy considerations in a case where the court is being asked to enforce an arbitration award from another country. The then Master of the Rolls said ([1987] 2 Lloyd's Rep. at 254):

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Mr. Justice Burrough remarked in *Richardson v. Mellish*, (1824) 2 Bing. 229 at p.252 'It is never argued at all, but when other points fail'. It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the

> ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised."

In particular, Mr. Vasquez relied on the third limb: that registration of the costs orders would be wholly offensive to the ordinary reasonable and fully informed observer.

56 I first observe that if Terra Raf thought that there was a proper basis for making a public policy claim in these proceedings then I would have expected this to have been included in the application notice, and for the evidence in support to refer extensively to the allegations. They are serious accusations to make. Secondly, and more importantly, the costs orders are orders made by three different judges of the High Court of England and Wales. They have not been appealed and the Stati parties have accepted that the judgment sums are due and owing (insofar as they have attempted to set them off against amounts said to be owed to them by Kazakhstan). As Mr. Baglietto pointed out, how can the attempted registration of orders made by that court be contrary to public policy? Why would a reasonable and informed observer find that to be wholly offensive?

57 It is a fact that there are costs awards in favour of the Stati parties that have not been satisfied. Indeed, the Swedish award itself is unsatisfied. However, I do not see that this makes the registration of the costs orders contrary to the public policy in Gibraltar. The 1935 Act makes provision for excluding judgments which have been "wholly satisfied"—see s.4(1). In my first judgment (2020 Gib LR 152), I said that the costs orders had not been satisfied because there had been no agreement to set the orders off against other sums due. The Stati parties have not pursued this argument at the *inter partes* hearing. I do not consider that they are now entitled to rely on this in the context of public policy.

58 The registration of the costs orders would not have been contrary to the public policy in Gibraltar.

Conclusion

59 For the reasons set out in this judgment, I now conclude that the registration of the costs orders is excluded by s.3(2A)(c) of the 1935 Act. My order of April 29th, 2020 is accordingly set aside.

Order accordingly.
