

## BERMUDA

### SUPREME COURT

***Dessarollo Inmobiliario y Negocios Industriales De Alto Tecnologia De Hermissillo, S.A. DE CV. -v- Kader Holdings Company Limited [2013] SC (Bda) 54 Com (9 July 2013)***

ENFORCEMENT OF FOREIGN JUDGMENT AT  
COMMON LAW - VOLUNTARY SUBMISSION TO  
JURISDICTION - GOVERNING LAW CLAUSE

By way of background, the Plaintiff issued a Writ of Summons seeking to enforce at common law an *Arizona Superior Court* money judgment entered in favour of the Plaintiff against the Defendant (“the Arizona Judgment”). The Plaintiff, a Mexican real estate development company, based its claim against the Defendant, a Bermudian company, on a guarantee entered into between the parties on 21 October 1992 (“the Guarantee”) under which the Defendant guaranteed the obligations of a Lease entered into between the Plaintiff and a third party on the same date and which was signed by the Defendant as Guarantor (the “Lease”).

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

This Court was required to decide two cross-Summonses. Firstly, the Defendant sought to stay the present action pending the determination in the more advanced Hong Kong Proceedings of the question of whether the Defendant did contractually submit to the Arizona Court (as the Arizona Court determined). The Plaintiff sought to obtain summary judgment in respect of its enforcement claim.

Each side invited the Court to follow the conflicting approach adopted in respect of essentially identical summary judgment

applications made in Hong Kong and London. In Hong Kong, the Plaintiff’s summary judgment application was abandoned after the Hong Kong Court granted leave for expert evidence to be adduced resulting in the Plaintiff feeling bound to concede the threshold for summary judgment could not be met. In England, however, the Plaintiff’s summary judgment application was granted on the grounds that it was no longer open to the Defendant to seek to challenge the Arizona Court’s findings on the jurisdiction issue. The Defendant appealed that decision to the English Court of Appeal.

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

The Plaintiff satisfied the Court that on a balance of probabilities based on underlying facts that are not in dispute, the Defendant voluntarily submitted to the jurisdiction of the Arizona Court and that the Defendant has no real prospects of successfully defending the judgment enforcement claim on jurisdictional grounds.

It followed that the Plaintiff was entitled to summary judgment in respect of its claim to enforce the judgment of the Arizona Court, a court of competent jurisdiction. Although the Defendant

disputed the jurisdiction of the Arizona Court, as a matter of Bermudian common law, the Judge held that it voluntarily submitted to the jurisdiction of the Arizona Court (before which it contested both jurisdiction and merits at the trial and appellate levels seeking no assistance from this or any other supposedly more jurisdictionally competent court). The Defendant was accordingly held to be bound by the Arizona Court's findings on both issues as to which there is no longer any triable issue as a matter of Bermudian law.

The Court usefully outlined that a Bermudian Court, while still likely to take a strong general steer from English conflict of law rules, has a distinctly more flexible scope for recognising and enforcing foreign money judgments than the English court (post-1982 Act England and Wales).

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