

COOKE, YOUNG & KEIDAN

Taking action against Persons Unknown

Practical tips for using this jurisdiction in fraud claims,
including to trace and recover stolen funds

Persons Unknown: context & background /1

- General rule is that you have to name the defendant.
- Not a new concept. Prior to the Common Law Procedure Act 1852 common to constitute actions for trespass against fictional parties, i.e. John or Jane Doe. Practice continues in the US and Canada.
- Practice eventually disappeared. Prior to 1999 the most pertinent authority was Friern Barnet Urban District Council v. Adams [1927] 2 Ch 25. The first instance and appellate Courts refused to permit substituted service against a defendant named as *“the owners of certain lands adjoining Alexandra Road ...*
...whose names and addresses are not known to the plaintiffs” because this deviated from the prescribed form of writ
- Since CPR in 1999: CPR Part 7 prescribes manner in which proceedings should be commenced. CPR 8.2A provides that a PD *“may set out circumstances in which a claim form may be issued under this Part without naming a defendant.”* Envisages permission will be required but that notice of application of permission *“need not be served on any other person.”*

Persons Unknown: context & background /2

- No such PD has ever been made. Only express provision is CPR 55.3(4) which permits a claim for possession of property to be brought against trespassers whose names are unknown.
- Jurisdiction much more widely opened up by Harry Potter case: *Bloomsbury Publishing and JK Rowling v News Group Newspapers Ltd and Others* [2003] EWHC 1087 Ch. Book stolen and offered to press by unknown thief. Injunction granted against *“the person or persons who have offered the publishers of The Sun, the Daily Mail and the Daily Mirror newspapers a copy of the book Harry Potter and the Order of the Phoenix by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants.”*
- Can think of that as a theft case.

Persons Unknown: types of claims so far /1



Abuse of computers/ internet:

- Internet libel: *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69 (Solicitors From Hell website) and *Smith v. Unknown Defendant, Pseudonym "LikeICare" & Ors* [2016] EWHC 1775 (QB).
- Breach of confidence, misuse of private information, infringement of copyright, Data Protection: *Pippa Middleton & Anor v. Persons Unknown* [2016] EWHC 2354 (QB (theft of Ms Middleton's iCloud by hackers)
- *CMOC v. Persons Unknown* [2017] EWHC 3599 Comm (business email compromise, theft, fraud) (adopted in HK and Malaysia)
- Blackmail: *NPV v. QEL & Anor* [2018] EWHC 703 (QB) and *PML* [2018] EWHC 838
- Cyberattack / blackmail case: *Clarksons plc v Persons Unknown* [2018] EWHC 4176 (QB) (Hacking, threat to release information unless ransom paid)

Persons Unknown: types of claims so far /2



Paparazzi:

Harrassment by
paparazzi:

*Lara Stone & David
Williams v. WXY* [2012]
EWHC 3184 (QB)



Trespass / protestors:

- *Hampshire Waste Services Ltd v. Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9
- *Inoes Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch)
- *UK Oil and Gas Investments Plc v. Persons Unknown* [2018] EWHC 2252 (Ch)

Issues /1

- What kind of unnamed defendant are you dealing with?
 - Category 1: anonymous Ds who are identifiable but whose names are unknown?
 - Category 2: anonymous Ds who cannot be identified
- Can only sue the former because the ability to identify means in principle it is possible to locate or communicate with him and to know without further inquiry whether he/she/it is the person (or within the class) defined in the CF: *Cameron v. Liverpool Victoria Insurance Co Ltd* [2017] EWCA Civ 366.
- Therefore becomes possible to serve that defendant. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

Issues /2

- So ... definition is very important
- Harry Potter case. Sir Andrew Morritt VC: *“The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not.”*
- So both a test of inclusion and exclusion.
- Description by class. See also *Canada Goose v Persons Unknown* [2020] EWCA Civ 303 (animal rights protestors protesting outside Regent Street store, injunction):
 - PU must be individuals who have not been identified at the time of commencement of the proceedings but are capable of being identified and served
 - PU must be defined in the originating process by reference to their conduct alleged to be unlawful
 - Prohibited acts must correspond to the threatened tort
 - Terms of injunction must be sufficiently clear and precise and in language D can understand
 - Injunction must have clear geographical and temporal limits and time limits

Issues /3

- Self-identification order. See PML and NPV (where it was successful): *“Of course, a defendant may disobey the Court’s order and not comply with a self-identification order as well as the non-disclosure order. But it cannot be assumed that all defendants will choose defiance. Few defendants can remain confident that they will ultimately manage to evade identification. If they fail, punishment for contempt of court would then loom large.”* (Nicklin J in PML)
- Service:
 - Probably an application for alternative service under CPR 6.15 (method and place of service)
 - Service by email address permitted: Clarkson, PML, Brett Wilson, CMOC
 - Service by text message: NPV
 - Service by advertisement: Trespasser and protestor cases
- As PUs are identified, they have to be brought into the case by name
- Injunctions & damages claims

Issues /4

Litigation against Ds who do not engage:

- Still have to conduct litigation to the highest standard
- Continue to serve materials. Ensure detailed evidence of service is generated
- Notification of trial
- Trial: duty on C of fair presentation less extensive than duty of full and frank disclosure on ex parte application: *Braspetro Oil Services v FPSO Construction Inc* [2007] EWHC 1359 (Comm): “points, factual or legal, that might be to the benefit of [D]” should be drawn to the Court’s attention

Types of payment frauds



Invoice
interception



Cheque fraud



Social
engineering

Types of payment frauds



Phishing



Business email
compromise

Following the funds

A brief look at the tools used in

CMOC Sales & Marketing Ltd -v- Persons Unknown

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UK subsidiary
of a Chinese
mining
company
managed from
the US

Caused 20
fraudulent
payments to be
made from
accounts at
CMOC's bank
in London

Fraud detected
in October
2017 c. 1
month after the
first payment

BEC attack on
director's
emails in the
US

To accounts at
10 different
overseas banks

By that time c.
USD 8m stolen

The IBANs of the receiving accounts



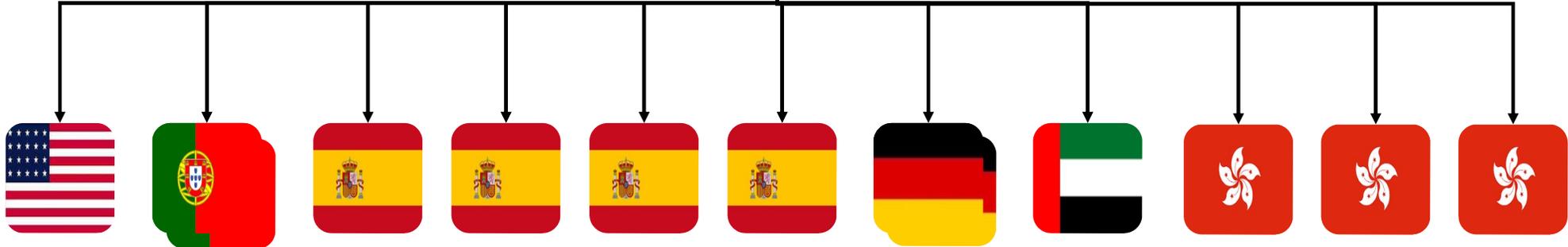
What we knew



2 email addresses with fake CMOC domain names

The banks and branches where our funds had first been sent





Whether the names on the payment instructions matched the names of the account holders (these details aren't checked by the sending bank – see: *Tidal Energy -v- Bank of Scotland*)



Whether the money was still there



The identity and whereabouts of the hacker

Whether the receiving account holders were fraudsters or merely mixed up in the fraud



Whether the hacker was also one of the account holders on the receiving side

What we didn't know

Our Solution

Worldwide freezing injunction against 'Persons Unknown' (PU). Injunctions against PU:

Disclosure orders against 'No Cause of Action Defendant' (NCAD) banks under *Bankers Trust v Shapira* jurisdiction

Iterative approach

1. Get disclosure
2. Use disclosure to expand the assets frozen by the WFO
3. Use expanded WFO to seek further disclosure from (usually) new NCADs for onward transfers

For the first few months we had a hearing every 1 ½ weeks

The definition

- Originally: *“PU being, [in addition to the named Ds below,] the perpetrators of an alleged fraud as described in this Claim Form on the Applicant Claimant and/or the sole or joint legal or beneficial holders of the accounts set out at Schedule 1 to this CF into which monies from the alleged fraud as described in this Claim Form were paid (or were attempted to be paid) and whose identity is currently known”.*

Eventually: *“Persons Unknown (being those perpetrators of the Fraud (as particularised in Section B of the Particulars of Claim) whose identities are currently unknown, including:*

- 1. Any person or entity who carried out and/or assisted and/or participated in the Fraud; and*
- 2. Any person or entity who received any of the monies misappropriated from the Claimant (including the traceable proceeds thereof) other than in the course of a genuine business transaction with either another Defendant or a third party.”*

Service

Alternative service on:

- The fake email accounts used by the fraudsters.
- They continued to use them! They even attempted another fraud using one of them!
- The banks who were recipients of the stolen money transfers, for onwards transmission to their customers
- As the definition changed, necessary to apply to amend the CF, PoC, other documents, etc.
- As Ds were identified, they were brought into the action in their own right and re-service was effected on them (necessary to amend the CF, PoC, other documents, etc. to serve them)
- By trial got to a Re-Re-Re-Re-Re-Re-Re Amended CF.

Disclosure Orders – getting them right

Including these in your draft Orders will reduce opposition to them by NCADs:

- **Costs of the NCADs**
- **Local bank secrecy laws carve-out**
- **Confidentiality ring**
 - Account numbers?
 - Account names?
 - Documents disclosed
- **“Best of its ability” obligation**

What you will want from disclosure:

- **Account opening information**
- **Other accounts**
- **Bank statements**
- **Vouchers**

Disclosure Orders – getting them right

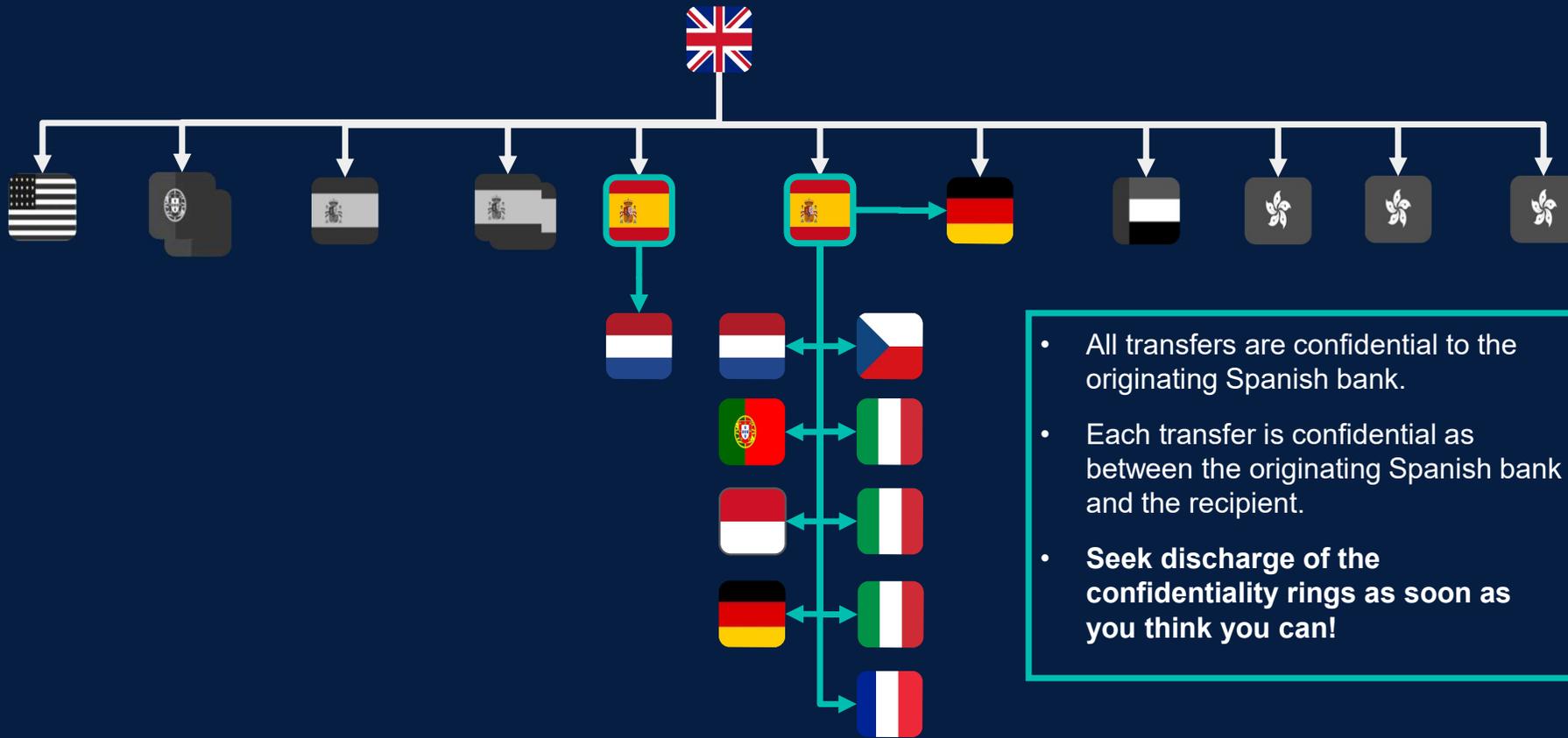
Wide range of responses from NCADs:

| Response from NCAD | Suggested Action |
|---|---|
| No jurisdiction over the account in question | Enforce the DO in that jurisdiction |
| Non-compliance without local enforcement due to local bank secrecy laws | Enforce the DO in that jurisdiction |
| Non-compliance due to on-going criminal investigations | Seek advice on joining or making representations in those proceedings – or be patient |
| Reference to Taking of Evidence Regulations (EC) No. 1206/2001 | Instruct local counsel to explain the DOs to Respondent |
| One sent disclosure to Commercial Court Listing Office | Thank them and move on! |

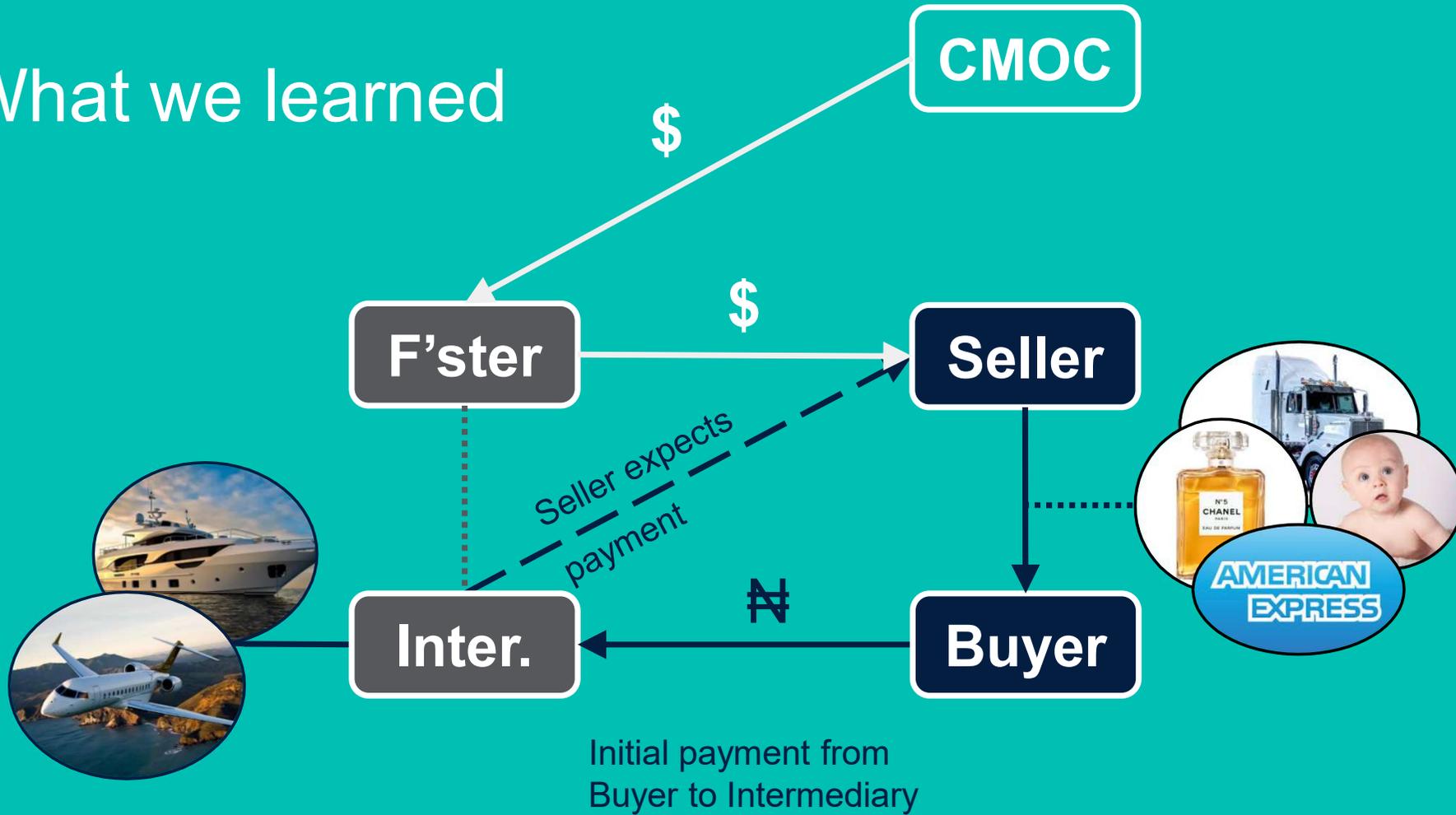
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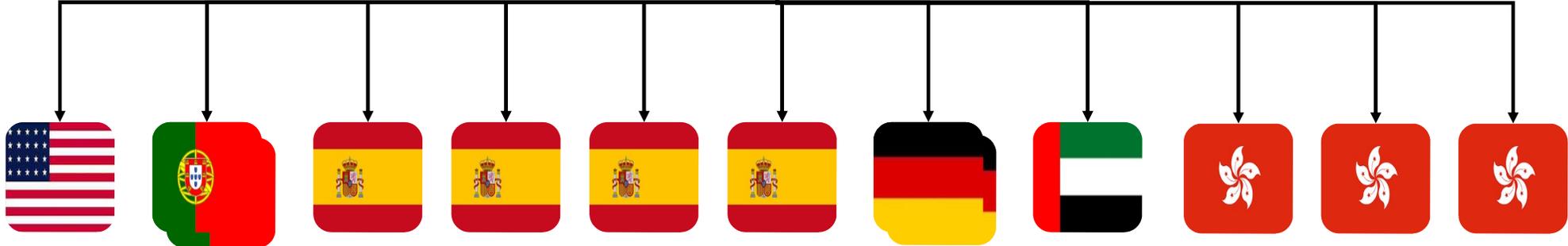
Remember:

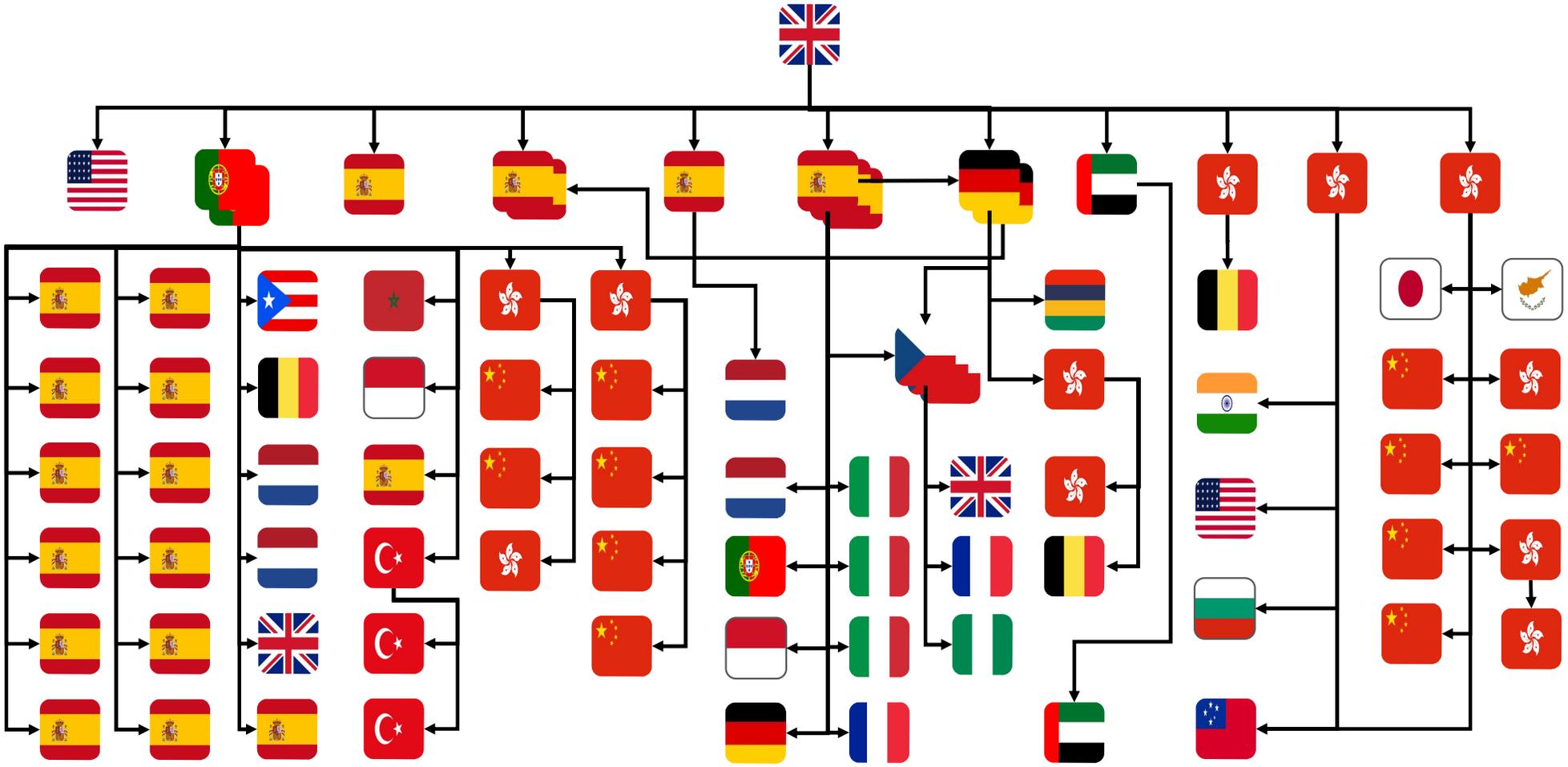
- **Different languages and different legal systems** – consider use of local counsel to explain purpose and effect of DOs to Respondents and advise on joining local criminal proceedings
- **Service under Brussels Recast** – still required on EU NCADs to make enforceable. Now: Lugano?
- **Think about permission for local enforcement from the start** – particularly in other common law jurisdictions
- **Strike the right tone** – the enemy of my enemy is my friend!
- **Consolidate and genericise** – use a single DO with as much set out in Schedules as possible
- **Confidentiality silos** – foresee how you might need to use the information



What we learned







Injunctions and damages

- CMOC involved an interim and then a final proprietary and non-proprietary WFO against PU and against named Ds
- Also, damages awards against the named Ds
- AND a damages award against the PU. Ambulatory.
- Issues with the ambulatory award:
 - Application to set aside trial in absence of Defendant: CPR 39.3(5). Applicant has to show they acted promptly, had good reason for not attending and had reasonable prospects of success
 - Enforcement, especially overseas

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