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Forum non conveniens - an important clarification by the BVI Court of Appeal

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The BVI Court of Appeal has issued an interesting and timely judgment clarifying the principles applicable on a *forum non conveniens* challenge, in relation to claims alleging a multi-million dollar fraud purportedly involving a number of BVI incorporated companies and other foreign defendants. Carey Olsen acted for some of the successful appellants.

The Claimants in the proceedings were JSC MCC Eurochem ("**Eurochem**"), a company incorporated in Russia, and its Swiss affiliate Eurochem Trading GmbH. Eurochem is Russia's largest mineral fertiliser trader with a turnover of approximately US$7 billion in annual sales and operations worldwide.

Eurochem's case was that in 2014 it had discovered that certain senior members of its sales team had set up a web of companies in the BVI, Panama, Cyprus and Scotland, for the sole purpose of receiving, concealing and laundering the proceeds of over US$45 million in secret commission payments from Eurochem's trading partners. Shortly after making that discovery, Eurochem terminated those individuals' employment.

Eurochem issued proceedings in the BVI in August 2015. The defendants in those proceedings were the (now former) senior members of its sale team (who were Russian nationals), the alleged bribe payers, and the companies which were alleged to have received the secret commissions. A number of those companies were incorporated in the BVI (the "**BVI Companies**"). In this summary, the other defendants are referred to as the "**Foreign Defendants**".

Eurochem sought a broad range of relief, including declarations that the defendants who allegedly received payments of the secret commissions received such payments on a constructive trust for the claimants; liability to account as constructive trustees for all payments received and/or profits made from the receipt of such payments, liability to account for profits received; tracing of assets and monies held by or on behalf of certain of the Foreign Defendants derived from the secret commissions; and damages and interest.

In November 2015, Eurochem obtained permission to serve the proceedings out of the jurisdiction. Following service, certain of the Foreign Defendants applied for (amongst other things) a declaration that the Court did not have jurisdiction to try the claim and that the claim be struck out (the "**Service Out Application**"). Around the same time, certain of the BVI Companies applied for (amongst other things) a declaration that the claim should not exercise jurisdiction to try the claim and an order that the claims be stayed on *forum non conveniens* grounds (the "**Forum Application**"). The BVI Companies argued that the Russian Court was a more appropriate forum to hear the proceedings.

The Judge at first instance rejected the Service Out Application and Forum Application. The BVI Companies and Foreign Defendants appealed.

In his appeal judgment, Webster JA noted that the essence of the defendants' appeals was that the Judge at first instance had erred in his consideration and application of the principles relating to the determination of the appropriate forum for the

trial of the claim to the extent that his decision exceeded the generous ambit within which reasonable disagreement is possible, and that the Court of Appeal should therefore set aside that decision and substitute its own discretion. Ultimately, the Court of Appeal agreed with that argument.

In respect of the appeal of the Forum Application, Webster JA affirmed that the Court is required to conduct a three stage enquiry to determine the most appropriate forum, per Lord Goff in the *Spiliada* case (adopted by the BVI Court in *IPOC International Growth Fund*). In essence, the Court should determine whether there is another available forum (stage 1), and whether that forum is more appropriate for the trial of the case (stage 2). If there is another forum that is more appropriate, a stay should be granted unless there is a risk that the claimant will not receive justice in that forum (stage 3).

The first instance Judge, having heard conflicting expert evidence, found that there were circumstances in which the Russian Court could hear the claims (perhaps involving some combination of proceedings) – thus satisfying stage 1. The Court of Appeal similarly found that Russia was an available forum with competent jurisdiction that was available for trial of the action.

As to stage 2, the Judge at first instance found that the BVI was the most appropriate forum for the trial of the case. The Court of Appeal found that he had erred in that conclusion. In particular, the Court of Appeal found that the Judge had:

1. Failed to make a specific finding of the governing law of the claim and should have examined the evidence to determine the law with which the action has its closest connection. Had he done so he would have found that the claims had their closest connection with Russian law and the claims would be governed by Russian law, applying the exception to the "double-actionability" rule. This was an important factor weighing in favour of the claim being heard by the Russian Court;
2. Incorrectly found that because Eurochem had not pleaded evidence of foreign law, BVI law should apply in respect of the claims. The Court of Appeal determined that this was not the proper approach as a) there was ample evidence of Russian law by the parties' experts; and b) Eurochem could not seek to benefit from their own default in not pleading and proving the governing law of the claims and then relying on that failure to try and take advantage of the more generous remedies available in the BVI. Contrary to the Judge's findings, the claims were governed by Russian law; and
3. Attached too much weight to the use of BVI incorporated companies in the alleged scheme and to the fact that the claimants chose to sue in the BVI. These are neutral considerations in a forum application.

The Court of Appeal further found that although the remedies available in the Russian Court were more limited than those of the BVI Court, a party must take a forum as it finds it, and the lack of such advantages did not represent a risk that Eurochem would not receive justice in Russia. Accordingly, stage 3 of the *Spiliada* test was satisfied.

As a result the Court of Appeal set aside the exercise of the Judge's discretion and determined that Russia, not the BVI, was the most appropriate forum to hear the proceedings.

It followed that the claimants failed to satisfy an essential limb of the test for permission to serve out - whether in all circumstances the forum which has been seised is clearly or distinctly the appropriate forum for the trial of the dispute. As such, the order permitting Eurochem to serve the proceedings out of the jurisdiction on the Foreign Defendants was set aside.

This decision provides a very helpful summary of the issues the BVI Court must take into consideration when determining applications concerning *forum non conveniens* and the service of proceedings out of the jurisdiction. Amongst other matters it emphasises that the mere existence of a BVI incorporated company as a respondent to a claim which (as Webster JA put it) "*has nothing to do with this jurisdiction*" is not, in itself, a determining factor of whether the BVI Court will accept jurisdiction.

Carey Olsen successfully acted for five of the BVI Companies and one of the Foreign Defendants.

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