

# FORUM NON CONVENIENS

By

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Workshop

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## Introductory

- [1] The British Virgin Islands is the seat of incorporation to about 700,000 International Business Companies. This “world” of global commerce brings with it increasing cross-border activity and as a natural consequence, legal disputes that also transcend national boundaries. Where parties to such disputes find themselves before the Court, one of the first questions asked: where should the case be heard or put differently, the courts of which country have jurisdiction to hear the case?
- [2] Jurisdiction disputes are like an opening verse for much of the inter-jurisdictional litigation that comes before the BVI Court. Applications challenging the court’s jurisdiction to hear the substantive matter are very recurrent. They are referred to as “*forum non conveniens*” applications. Forum non conveniens is latin for “inconvenient forum” or “inappropriate forum”.

## The origin and subsequent development

- [3] The doctrine of *forum non conveniens* originated in Scotland in the 19<sup>th</sup> century but largely developed in the United States. In the US, a court, in order to stay an action, must take into consideration both the private interest of parties and the public interest of the forum state.

- [4] In England, *forum conveniens* has always been a relevant factor in the exercise of the discretion to grant permission to serve out of the jurisdiction under their Order 11 r (1) (1) i.e. Rule 27, but until 1984, the English courts refused to accept that the jurisdiction to stay actions commenced against defendants who are sued in England as of right could be based on *forum non conveniens* grounds.
- [5] In England, the idea of *forum non conveniens* was largely limited until the decision of the House of Lords in 1973 in **The Atlantic Star**<sup>1</sup> which radically changed its position. A defendant who sought a stay of English proceedings had a very heavy burden. The case concerned 2 vessels from Holland that collided in Belgian waters. Due to the fact that before 1973 the only way for a court to stay actions was in case of vexatious or oppressive litigation or abuse of process, the Court of Appeal refused the stay finding that none of these situations arose. Surprisingly, the House of Lords redefined the concept of vexatious or oppressive litigation and abuse of process in order to widen the possibility to stay actions in a greater number of cases. Lord Reid blamed the Court of Appeal of parochialism and chauvinism and the rest of the House of Lords agreed with such a change in order to achieve the desired outcome.
- [6] Later on, the English doctrine of *forum non conveniens* had been unclear for a relatively short period of time, because **The Atlantic Star** had created a brand-new philosophy using old vocabulary and conceptual apparatus.
- [7] In the process of development of modern English private international law, the year 1978 stands out as a particularly significant milestone. In

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<sup>1</sup> [1974] A.C. 436

January of that year, a differently constituted House of Lords decided the case of **MacShannon v Rockware Glass Ltd**<sup>2</sup> just 4 years after unanimously rejecting an invitation to import the Scottish legal doctrine of *forum non conveniens* into English law in **The Atlantic Star**. The House of Lords went considerably further when all, except Lord Keith of Kinkel, were in favour of discontinuing the use of the words “oppressive and vexatious” altogether. Lord Diplock restated that governing principle as being that, in order to justify a stay, two conditions had to be satisfied, one positive and one negative (a) the defendant had to satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice could be done between the parties at substantially less inconvenience or expense, and (b) the stay was not to deprive the claimant of a legitimate or juridical advantage which would be available to him if he invoked the jurisdiction of the English Court.

[8] In **The Atlantic Star** and **MacShannon**, the House of Lords declined to adopt the doctrine of *forum non conveniens* as part of English law preferring a more open-minded interpretation of the concept of oppression, vexation and abuse. In fact, in the words of Lord Salmon, he said “*the real test of [whether to grant a stay] depends upon what the court in its discretion considers that justice demands*”.

[9] But by 1984, when **The Abidin Daver**<sup>3</sup> was decided, Lord Diplock was able to say forcefully that the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years as a result of the successive decisions of the House of Lords commencing with **The Atlantic Star** “*judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly is,*

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<sup>2</sup> [1978] A.C. 795.

<sup>3</sup> [1984] A.C. 398.

*in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens.”*

- [10] Ultimately, in **Spiliada Maritime Corp v Consulex Ltd**<sup>4</sup>, the House of Lords summarized the English approach to the doctrine of *forum non conveniens* stating that “the basic principle is that a stay will only be granted on the grounds of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”<sup>5</sup>
- [11] In **Connelly v RTZ Corp, plc**<sup>6</sup>, the House of Lords had to resolve a motion for a stay in favour of Namibia. The claimant, a former worker injured at a Namibian uranium mine, responded with the submission that, unless the case could be brought in England on legal aid, it could not be brought at all. The majority of the House of Lords (reversing the court below) found that, although all other factors pointed to Namibia as the appropriate forum, the availability of legal aid could be a relevant factor in an exceptional case justifying deciding a stay.
- [12] In the meantime, a much larger and potentially more significant set of proceedings had been begun in England in the case of **Cape Plc v The Lubbe**. The litigation was concerned with redress for asbestosis contracted during the operations of the Cape Group in mining asbestos in South Africa during the apartheid era. The case therefore had a fundamentally different complexion to **Connelly**. It has been common ground in **Connelly** that Namibia was an available forum to the plaintiff since the company which had employed him was incorporated there and

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<sup>4</sup> [1987] A.C. 460.

<sup>5</sup> At p. 476.

<sup>6</sup> [1998] A.C. 854 at 873.

continued to operate. In **Lubbe**, however, this was not so. Thus, the availability of an alternative forum depended solely upon the facts that, after writs had been issued in England, **Cape** had given undertakings that it would submit to the jurisdiction of the South African courts. Indeed, **Cape** practically explored whether a public interest law centre in Johannesburg might be prepared to take up the case on behalf of the claimants. The approach was rejected.

[13] The first English writ was issued on behalf of Mrs Lubbe and four other claimants only. The case was stayed at first instance. But the Court of Appeal allowed the appeal emphasizing that the South African forum was only available as a result of Cape's undertakings. Leave to appeal to the House of Lords was refused.

[14] Then, in December 1998, writs were issued by some 3,000 claimants on the same legal theory. Cape then commenced a second round of *forum non conveniens* objections. This time, both at first instance and in the Court of Appeal, it was decided that South Africa was the more appropriate forum and that a stay should be granted. The Court of Appeal found no exceptional circumstances of the kind required by the House of Lords in **Connelly** were present in **Lubbe**.

[15] The claimants appealed to the House of Lords. On the appeal, the Republic of South Africa itself intervened. It did so in favour of the claimants, arguing that it saw no "public interest in requiring its courts to adjudicate in a dispute which arises from the alleged acts of an English company with the laws of the old South Africa.

[16] The House of Lords decided the forum issue in favour of the claimants. Lord Bingham of Cornhill held:

"In the special and unusual circumstances of these proceedings, lack of the means in South Africa, to prosecute these claims to a

conclusion, provides compelling grounds, at the second stage of the **Spiliada** test for refusing to stay the proceedings here.”

[17] A trial date was fixed in England for April 2002. On 21 December 2001, the (by now) 7,500 claimants agreed a settlement with Cape. After protracted further negotiations, the total amount of the settlement was revised in March 2003 to £10.7 million.

### **Acceptance of the principle of *forum non conveniens* in other jurisdictions**

[18] The doctrine of *forum non conveniens* has, to a greater or lesser extent, been adopted in several common law countries, for example, New Zealand<sup>7</sup>, Hong Kong<sup>8</sup>, Singapore<sup>9</sup> and India<sup>10</sup>. In 1990, in Australia, the High Court in the case of **Voth v Manildra Flour Mills Pty Ltd**<sup>11</sup> propounded a new principle governing the stay of Australian proceedings in transnational cases. Henceforth, an Australian court would only a stay of its proceedings where the court considered itself a “clearly inappropriate forum.” In proposing this test, the High Court consciously departed from the principles established in England by the House of Lords in **Spiliada**. Briefly stated, this test requires that local proceedings be stayed where there exists a “more appropriate” court for trial. Although the High Court claimed in **Voth** that the difference between the “clearly inappropriate” and the “more appropriate” tests was slight, critics warned that the effect of the High Court decision may be to encourage Australian courts to exercise jurisdiction over matters which have very little connection with Australia.

### **The approach of the Brussels Convention to determination of jurisdiction**

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<sup>7</sup> *McConnell Dowell Construction Ltd v Lloyd’s Syndicate* 396 [1988] 2 N.Z. L.R. 257.

<sup>8</sup> *The Adhigina Meranti* [1988] 1 Lloyd’s Rep. 384 (H.K.C.A.).

<sup>9</sup> *Oriental Insurance Co. Ltd. V Bhavani Stores Pte. Ltd.* [1998] 1 Sing. L.R. 253, C.A.

<sup>10</sup> *Airbus Industrie G.I.E. v Patel* [1999] 1 A.C. 119.

<sup>11</sup> (1990) 171 CLP 538

[19] In passing, I refer to the Brussels Convention because of the link of the BVI with England and it is a convention which England has acceded to this convention.

[20] The Brussels Convention was created for the purpose of addressing questions of jurisdiction arising among member states of the European Union by providing mandatory rules for determining jurisdiction in matters that come within the scope of the Convention. The Brussels Convention provides that as a general rule the courts of the defendant's domicile are to have jurisdiction. This rule is based on the maxim *actor sequitur forum rei*, the rationale being that it is easier in principle, for a defendant to defend themselves in courts of their own location. This rule is subject to limited specific exceptions.

[21] The Brussels Convention has its pitfalls which this presentation cannot address.

### **The UK approach to jurisdiction**

[22] Standing in stark contrast to the Brussels Convention regime, the UK Courts have traditionally enjoyed wide jurisdictional powers based on service of process. Thus, where a defendant is validly served within the UK with notice of proceedings, the UK Courts have *in personam* jurisdiction as of right. Alternatively, the court may grant leave to serve proceedings on a defendant outside of the jurisdiction of the court provided the court is satisfied that the case is a proper one for service outside its jurisdiction. This "exorbitant" jurisdiction is counterbalanced by the doctrine of *forum non conveniens*, a common law power of the courts to grant a stay of proceedings where in the court's view there is an alternative forum in another jurisdiction which is competent to hear the case and which is an appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all

parties and the ends of justice. Once the court is satisfied of the existence of an alternative competent forum, a stay will be granted unless the claimant can show that, even though there are factors connecting the proceedings with the foreign forum, substantial justice will not be obtained in the foreign jurisdiction.<sup>12</sup> This regime provides a mechanism for determining which court has jurisdiction to hear proceedings that have a cross-border element to them in respect of which more than one court is competent to hear the case.

[23] The doctrine of *forum non conveniens* enjoys powerful judicial support. It is not an understatement to say that the UK Courts are quite attached to the doctrine. Lord Goff in the **Airbus v Patel** case could hardly contain his delight when he observed, in a postscript to his judgment, that several overseas jurisdictions have already adopted the doctrine, and further expressed his hope that it would continue to spread. Indeed, his Lordship described the principle as one of the most civilized of legal principles.

### **The ECSC approach to forum non conveniens cases**

[24] The legal principles to be applied on an application to stay proceedings on the ground of *forum non conveniens* are clearly stated by Lord Goff in the seminal case of **Spiliada Maritime Corporation v Cansulex Limited**<sup>13</sup>. In the recent judgment in **IPOC International Growth Fund Limited v LV Finance Group Limited et al**<sup>14</sup>, Gordon J.A. at paragraph 27 took the liberty of paraphrasing the principles of law espoused by Lord Goff of Chieveley:

1. "The starting point, or basic principle, is that a stay on the ground of *forum non conveniens* will only be granted where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum, for the trial of the action.

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<sup>12</sup> Lord Goff in *Spiliada* at pages 476-482.

<sup>13</sup> [1987] 1 AC 460

<sup>14</sup> BVI Civil Appeal Nos. 20 of 2003 & 1 of 2004 [unreported] delivered on 19 September 2005

In this context, appropriate means more suitable for the interests of all the parties and the ends of justice.

2. The burden of proof is on the defendant who seeks the stay to persuade the Court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no such presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that “where there can be pointers to a number of different jurisdictions” there is no reason why a Court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and secondly, to show that the alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.
3. When considering whether to grant a stay or not, the Court will look to what is the “natural forum” as was described by Lord Keith of Kinkel in **The Abidin Daver**<sup>15</sup>, “that with which the action has the most real and substantial connection.” In this connection the Court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of consideration a Court should have in exercising its discretion.
4. If the Court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in **The Abidin Daver** made it clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.”

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<sup>15</sup> [1984] AC 398

[25] In effect, our ECSC has restated and adopted the Spiliada principles. The following cases bear testimony to that:

- 1) **IPOC International Growth Fund Limited v LV Finance Group Limited et al** (Court of Appeal of the ECSC);
- 2) **David Hague v Nai Tai Electronics**<sup>16</sup> (Court of Appeal of the ECSC)
- 3) **Bitech Downstream Limited v Rinex Capital Inc**<sup>17</sup>;
- 4) **Trans-World Metals and others v Bluzwed Metals Limited**<sup>18</sup>
- 5) **Sibir Energy PLC v Roman Abramovich et al**<sup>19</sup>;
- 6) **Pacific Electric Wire & Cable Company Limited v Texan Management Limited et al**<sup>20</sup>;
- 7) **Cukurova Holdings AS v Imanagement Services Ltd**<sup>21</sup>;
- 8) **Raishauna Wheatley v Lawrence Wheatley**<sup>22</sup> -matrimonial case – petitioner’s application for ancillary relief and custody of infants ongoing when children were taken to Florida – application by father to return children to the BVI – jurisdiction to order return –forum non conveniens.
- 9) **Marble Point Energy Ltd v Multiperils International Inc**<sup>23</sup>
- 10) **Ansis Sormulis v Hinch Invest and Finance SA and Rudolf Meroni**<sup>24</sup> – matter recently heard - judgment reserved. (interesting

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<sup>16</sup> Civil Appeal No. 20 of 2004 and No. 10 of 2005 –British Virgin Islands – Judgment of the Court of Appeal, Gordon J.A. delivering the judgment of the Court.

<sup>17</sup> Claim No. BVIHCV2002/0233 (High Court, BVI)-Judgment delivered on 12 June 2003 –per Rawlins J [as he then was].

<sup>18</sup> Claim No. BVIHCV2003/0179 (High Court, BVI) – Judgment delivered on 22 March 2005 –per Barrow J [as he then was].

<sup>19</sup> Claim No. BVIHCV2005/0174 (High Court, BVI) –Judgment delivered on 29 November 2005 –per Hariprashad-Charles J. On appeal to the Court of Appeal, the claim was struck out. Forum non conveniens was a non-issue at that stage.

<sup>20</sup> Claim No. BVIHCV2005/0140 (High Court of Justice, BVI- Judgment delivered on 12 May 2006 –per Hariprashad-Charles J. – (leave to appeal to the Privy Council).

<sup>21</sup> Claim No. BVIHCV2006/0305 (High Court, BVI) –Judgment delivered on 17 July 2007 –per Hariprashad-Charles J – Judgment is under appeal.

<sup>22</sup> Claim No. BVIHCV2006/0014 – High Court, BVI –Judgment delivered on 8 February 2007 –per Joseph- Olivetti J.

<sup>23</sup> Claim No. BVIHCV2006/0238 –High Court, BVI) –Judgment of Joseph-Olivetti J – Judgment delivered on 12 December 2006.

<sup>24</sup> Claim No. BVIHCV2006/0201 – High Court, BVI)- Judgment reserved by Joseph-Olivetti J.

case because the issue of service out of the jurisdiction arose—Hague Convention as well as a challenge to the BVI being the forum conveniens].

**11) National Iranian Oil Company v Ashland Overseas Trading Limited<sup>25</sup>**

**12) Bacardi International Ltd v Pendragon International Ltd<sup>26</sup>**—George-Creque referred to the plethora of BVI cases including **Sibir, Bitech, Addari v Addari**.

**13) Bacardi International Limited v Pendragon International Limited, Gi-Gi Osco-Bingemann, Vadi Fridman** (application made by 2<sup>nd</sup> and 3<sup>rd</sup> defendants).<sup>27</sup>

**14) Norman Lee and Authentic Development International Inc v Scott Brett et al [Commonwealth of Dominica].<sup>28</sup>**—Dominica being not the forum conveniens to hear the dispute.

[26] Gordon JA in **IPOC** adopting the judgment of the House of Lords in **Spiliada** identified some of the factors to be taken into account in determining whether to grant a stay or not. These include:<sup>29</sup>

1. The places where the parties live and carry on business;
2. The law governing the relevant transactions or to which the fructification of the transactions might be subject;
3. The availability of witnesses and the likely language which they speak.<sup>30</sup>

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<sup>25</sup> Civil Appeal No. 15 of 1987 (In the Court of Appeal of Bermuda) –Court of Appeal overturned the trial judge’s decision and held that Bermuda and not Mississippi was the forum conveniens to hear the dispute.

<sup>26</sup> Claim No. AXAHCV2007/0002 –High Court, Anguilla –per George-Creque J. Judgment delivered on 24 May 2007.

<sup>27</sup> Claim No. AXAHCV2007/0002 –High Court, Anguilla –per Redhead, J (ag)- Judgment delivered on 14 January 2008.

<sup>28</sup> Claim No. 480 of 2000 (Commonwealth of Dominica ) – Judgment delivered on 5 October 2001 –per Master Pemberton.

<sup>29</sup> See also Rawlins J (as he then was) in **Bitech Downstream Ltd v Rinex Capital Inc et al** (BVIHCV2002/0233) at para. 13, **Spiliada** at 477. There is no dispute that Russia is an available forum. Indeed, this can hardly be doubted given that similar claims are already progressing in the Russian Courts.

[27] His Lordship alluded that the list of factors is by no means an exhaustive one but rather an indication of the kinds of consideration a Court should have in exercising its discretion. Other cases have identified additional factors:

1. “multiplicity of proceedings”<sup>31</sup> and
2. the anticipated length of the proceedings.<sup>32</sup>

[28] Clearly, each case must be determined based on its own peculiar facts and circumstances.

#### **Availability of another forum having competent jurisdiction**

[29] First of all, if the defendant says that another forum is available, then the burden of proof rests on the defendant to persuade the Court to exercise its discretion to grant the stay. For that purpose, the defendant has to establish that there is another available forum which is clearly or distinctly more appropriate than the forum in which jurisdiction has been founded as of right. In considering that question, the court will look first to see what factors there are which point in the direction of another forum, i.e. connecting factors which indicate that it is with the other forum that the action has its most real and substantial connection. In this connection, the Court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions and the place where the parties reside and carry on business. This is the first stage.

[30] Even at this stage, if the court concludes that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless

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<sup>30</sup> See *Trans-World Metals and others v Bluzwed Metals Limited and others* (BVIHCV2003/0179) [“**Bluzwed**”] – Per Barrow J (as he then was) at paragraph 92 – Judgment delivered on 22 March 2005

<sup>31</sup> *Spiliada* at 485; *The Abidin Daver* [supra] at 410-411

<sup>32</sup> *Astian Group Limited and others v TNK*

decline to grant a stay if persuaded by Claimant, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage.

- [31] If the Court determines that there is some other available and prima facie more appropriate forum than ordinarily, it will grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the Court will consider all the circumstances of the case, including circumstances which transcend those taken into account when considering connecting factors with other jurisdictions.
- [32] A stay will not be refused simply because a claimant will be deprived of “a legitimate personal or juridical advantage” provided the Court is satisfied that substantive justice will be done in the available forum.
- [33] In **Bacardi v Pentdragon**, it was not disputed that the superior courts of California provide another available and competent forum. However, George-Creque J held that the defendant, **Pentdragon** was unable to show that California was clearly or distinctly a more appropriate than Anguilla for the determination of the issues having regard to the interest of all the parties and the ends of justice. The application for stay was thus refused.
- [34] In **Sibir Energy**, Russia was found not only to be an appropriate forum but a clearly or distinctly available forum. The Court held that the claim had no real and substantial connection to the BVI. It was overwhelmingly concerned with Russia. Quite distinct from the question of the governing law of the issues in dispute, it is clear that the dispute concerns actions carried out in Russia by Russian individuals employed by Russian companies doing business in Russia. The case concerns issues not only

of Russian law but also of Russian business, lending and accounting practices with which a Russian Court would be likely to be more familiar. 31 witnesses were likely to be required. They were all resident in Russia and most, if not all, spoke the Russian language. All of the relevant documentation was to be found in Russia and would have to be translated into English thereby increasing costs and delays. There was also the risk of meanings being “lost in translation.” The essence of these disputes had already been the subject of a number of proceedings in Russia.

[35] As against this, the only connecting factor with the BVI was that four of the eight Defendants alleged to be ‘recipients’ of the diluted share value, were domiciled here but they did not carry on business in this Territory. Rather, they carried out all of their business in Russia and had Russian directors. The Court also held that the proceedings were commenced in the BVI merely to gain a juridical advantage because **Sibir Energy** may not have an actionable claim in Russia. Consequently, the stay was granted.

[36] Joseph-Olivetti J in **Marble Point** held that Quebec is the place with which the action had its closest and most substantial connection and is thus the more appropriate forum. She further held that Quebec is the most appropriate forum, that although Marble Point would enjoy certain juridical advantages here it would not be unjust to deprive it of those juridical advantages as she was satisfied that justice would be done in the Quebec courts. The forum challenge was upheld and the action was stayed until the Quebec proceedings were finally determined.

### **Connecting Factors**

[37] I will now briefly deal with some of the factors which a Court dealing with a forum challenge needs to consider.

## Domicile

[38] In a *forum non conveniens* challenge, a good starting point is that of the domicile. The fact that the defendant is domiciled in a jurisdiction founds jurisdiction in that Court. The burden of proof is therefore on the defendant to show why there should be a refusal to exercise that jurisdiction which is founded as of right. Such is a heavy burden. In **Banco Atlantico S.A. v The British Bank of the Middle East**<sup>33</sup>, Bingham LJ (as he then was) said at page 510:

“It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this Court refuse jurisdiction in such a case.... very clear and weighty grounds for doing so were not shown.”

[39] In **Bitech Downstream Ltd v Rinex Capital Inc. et al**<sup>34</sup>, Rawlins J. [as he then was] held at [para. 28] that “the fact that the defendants were incorporated in this Territory (BVI) is a factor that clearly militates against their application for a stay on the ground of *forum non conveniens*.”

[40] More judicial support for this point is to be found in the Bermudan case of **Arabian American Insurance Company (Bahrain) E.C. v Al Amana Insurance and Reinsurance Company Ltd**<sup>35</sup> as well as the BVI case of **Hagstromer et al v Sibneft Oil Trade Company Limited**<sup>36</sup>. In the latter case, Barrow J [as he then was] cited with approval the judgment of Rawlins J. in **Bitech** and confirmed the heavy burden upon parties who choose to incorporate in the BVI in asking the BVI Courts to decline to exercise jurisdiction. He said (at para. 16):

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<sup>33</sup> [1990] 2 Lloyd’s Rep 504 at 508, 510

<sup>34</sup> BVIHCV2002/0233 (Rawlins J –as he then was)

<sup>35</sup> Civil case No. 38 of 1993 (Supreme Court of Bermuda) Judgment of Ground J, delivered on 4 January 1994

<sup>36</sup> High Court Case No.BVIHCV2004/0055 – Judgment delivered on 20 October 2004.

“In this forum *conveniens* challenge the proper starting point is that the domicile of the defendant in the British Virgin Islands founds jurisdiction in the BVI Courts. It is, of course, agreed that the onus is on the defendant to show why there should be a refusal to exercise jurisdiction which is founded as of right. Mr Philipps submitted that the incorporation of the defendant in this jurisdiction placed a particularly heavy burden on the defendant in asking the court to decline to exercise jurisdiction. In support, he referred to a statement of Bingham LJ (as he then was) in *Banco Atlantico S.A. v The British Bank of the Middle East* [1990] 2 Lloyd’s Rep. 504, 510 that “It must be rare that a corporation resists suit in its domiciliary forum. Rarely would this Court refuse jurisdiction in such a case. Counsel also relied on the observation of Rawlins J in the BVI case *Bitech Downstream Ltd v Rinex Capital Inc.* at [26] to[28] that “the fact that the defendant were incorporated in the Territory is a factor that clearly militates against their application for a stay on the ground of *forum non conveniens*.”

[41] So, it is clear from the above judgments, that the burden on the defendants is very heavy, as it is a strong thing for a defendant to persuade the forum court of the jurisdiction of its incorporation that it is not the jurisdiction in which it should be sued.

#### **Where the parties reside or carry on business**

[42] Another important consideration is where the parties reside or carry on business: see **Bitech, Sibir Energy, Marble Point**.

#### **The Governing Law**

[43] The issues in dispute between the parties must be determined before the Court proceeds to deal with the governing law. In **Bitech** Rawlins J [as he then was] stated that in determining the forum connections from the perspective of the governing law, the inquiry is not merely whether the parties to the 1999 Assignment chose English law, which is therefore that proper law. Rather, the question is whether English law governs the issues that are likely to be tried on the claim. Rawlins J. found that the issues that were likely to arise on the claim, as well as the possible defences, are likely to be governed by Irish and English law but held that

this in itself did not make England clearly and distinctly the appropriate or convenient forum and added that the other connecting factors must be considered, including residence or domicile.

- [44] In **Sibir Energy**, the claim was a restitutionary claim for alleged breach of fiduciary duty founded upon an alleged JV Agreement. The proper law of such a cause of action is governed by the proper law of the obligation and “if the obligation arises in connection with a contract, its proper law is the law applicable to the contract.” The proper law of the claim against Sibneft depends, therefore, upon the proper law of the JV Agreement. Sibir conceded that the JV Agreement is not governed by BVI law.<sup>37</sup>
- [45] The claims against the other Defendants are for knowing receipt and dishonest assistance. The claims against the first six Defendants are for “knowing receipt” and are governed by Russian law. With respect to the dishonest assistance claim against Roman Abramovich, any relevant assistance could only have been rendered in Russia.
- [46] All of the claims will be governed by Russian law. It is also obvious that the claims will give rise to complex and difficult issues of Russian law.
- [47] In **Bacardi v Pendragon**, George- Creque J. found that the action was essentially based on contract, namely the Share Purchase Agreement and turns on its construction. She recognized that the SPA is expressed to be governed by New York law.
- [48] If the governing law is not that of the Court hearing the forum challenge then it has to determine whether it can decide questions of foreign law on receiving expert evidence or whether it is best for the foreign court to

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<sup>37</sup> See para. 7 of claimant’s skeleton argument of 7 July 2005

hear the claim. Brandon J [as he then was] in the **The Eleftheria**.<sup>38</sup> at page 246 had this to say:

“I recognize that an English Court can, and often does, decide questions of foreign law on the basis of expert evidence from foreign lawyers. Nor do I regard such legal concepts as contractual good faith and morality as being so strange as to be beyond the capacity of an English Court to grasp and apply. It seems to be clear, however that, in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the Courts of that country. That would be my view, as a matter of common sense, apart from authority. “

[49] In **Sibir Energy**, the Court held that it is clear that the parties have conflicting views on both the facts and the Russian legal principles applicable to those facts and that the experts continue to hold conflicting positions on many fundamental aspects of the case. The Court further held that the dispute will obviously raise many issues of Russian company law as to whether the JV Agreement is binding on the parties and that the judges of Russia are better equipped to resolve the many competing argument under Russian law.

[50] In **Pendragon**, it was contended before George -Creque J. that the California courts may apply New York law without the need for an expert in New York law while the Anguillian court would require expert evidence. She held that the governing law of the contract carries little significance since whether by way of expert evidence or on its own application, the California court as well as the Anguillian court will be required to apply canons or principles applicable to the interpretation of contract under New York law. In addition, she noted that a considerable amount of expert evidence has already been placed before the court by both sides.

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<sup>38</sup> [1969] 1 Lloyd's Rep 237.

[51] There is an obvious distinction between the 2 cases. In **Sibir Energy** the JV Agreement was in Russian with the risk that nuances of meaning may be lost in translation while the Share Purchase Agreement in **Bacardi v Pendragon** was in English.

### **The availability of witnesses and documents and their language**

[52] In **Bacardi v Pendragon**, George-Creque did not have to deal with a language issue as the parties and their representatives were all English-speaking.

[53] In **Sibir Energy**, the list of *dramatis personae* who were likely to testify in the dispute totaled 31. None of them live in the BVI. The vast majority, if not all of them reside in Russia and speak Russian. Even if some do speak English, they may very likely prefer to testify in their mother tongue. To translate the evidence of at least 31 individuals is indeed a monumental task. Translation of one language into another creates the risk that nuances of meaning may be lost.

[54] In **Cukurova Holding AS v Imanagement Services Ltd and Another**, the Defendants contended that Russia was an available and more appropriate forum for the trial of the claim. In with respect to the availability of witnesses and documents and their language, the Court held that the volume of documents and number of witnesses which would be required upon Cukurova's claim proceeding to trial in the BVI are not particularly substantial, the relevant documents are written in English and to the extent that they are not, they have already been translated into English, the witnesses are English speakers with the exception of 2 who speak Russian. In addition all the witnesses except one all reside outside Russia.

### **Multiplicity of proceedings**

[55] Multiplicity of proceedings is also significant factor. In **the Abidin Daver** (supra), Lord Brandon said at 423-4:

“Similarly, the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales; but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so. In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if stay is refused in the present case, one or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two Courts concerned: or secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of *res judicata* or *issue estoppel* in the latter.”

[56] Lord Diplock also expressed similar views that allowing two actions to continue with the possibility of conflicting decisions was a ‘recipe for confusion and injustice.’ He declared at page 412: “comity demands that such a situation should not be permitted to occur as between Courts of two civilized and friendly states.”

[57] In **Pacific Electric Wire & cable Company Limited v Texan Management Limited**<sup>39</sup> (this decision was appealed but the Court of Appeal did not deal with the forum issue) the Court held that although the claims in Hong Kong and BVI were framed differently the issues were identical. The Court emphasized that in this case there was a risk of contradictory results in different jurisdiction.

### **The length of proceedings**

[58] Another consideration is the length of proceedings.

### **Public policy**

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<sup>39</sup> BVIHCV2005/0140 Judgment delivered on 12 May 2006

[59] Public policy reasons were cogently set out by the Court of Appeal of the Cayman Islands in **Telesystem International Wireless Inc. v CVC Opportunity Equity Partners et al**<sup>40</sup>. At page 23, Rowe JA said:

“We are in entire agreement with the submissions of [Counsel for the plaintiffs] that for public policy reasons (a) the status of the Cayman Islands as an advanced and reputable financial centre and (b) as a jurisdiction which can and does deal with international business disputes between parties who use the Cayman Islands companies in their structure, are factors that can be taken into consideration in an appropriate case when deciding *forum non conveniens* issue...”

[60] The House of Lords in **Lubbe v Cape plc**<sup>41</sup> held that public policy considerations should not be taken into account in deciding questions of *forum non conveniens*.

### Forum shopping

[61] A concern often raised in applications of the doctrine of *forum non conveniens* is forum shopping, or picking a court merely to gain an advantage in the proceeding. In **Connelly**, Lord Hoffman while sympathizing with the plaintiff who has contracted a serious disease, preferred the eminently rational principle stated by Sopinka J. in **Amchem Products Inc. v (British Columbia) Workers' Compensation Board**.<sup>42</sup>

“If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to that jurisdiction, that is ordinarily condemned as ‘forum shopping. On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides.”

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<sup>40</sup> Civil Appeal Nos. 15,17 and 18 of 2001 –Cayman Islands. Judgment delivered on 1 August 2002

<sup>41</sup> [2000] 1 WLR 1545, 1561, 1566-67 (H.L.)

<sup>42</sup> (1993) 102 D.L.R. (4<sup>th</sup>) 96, 110-11

[62] Undoubtedly, the doctrine of *forum non conveniens* is here to stay. Our courts have supported the doctrine and in the Civil Procedure Rules set out the procedure by which a person could dispute the court's jurisdiction.

### **The Civil Procedure Rules for disputing jurisdiction**

[63] The Civil Procedure Rules 2000 ("CPR 2000") provides that a person could dispute the Court's jurisdiction under CPR 7.7 and CPR 9.3. CPR 7 deals specifically with service of process out of the jurisdiction –similar to the English Rules.

[64] CPR 7.7 (1) provides:

"Any person on whom a claim form has been served out of the jurisdiction under rule 7.3 may apply to set aside service of the claim form."

[65] CPR 7.7 (2) (c) provides:

"The Court may set aside service under this rule if the case is not a proper one for the court's jurisdiction."

[66] CPR 7.7 (3) expressly states that "this rule does not limit the court's power to make an order under rule 9.7 (which sets out the procedure for disputing the court's jurisdiction).

[67] Time does not permit me to delve extensively with service out of the jurisdiction under CPR 7.3. But, in passing, I should say that when such a situation arises, the onus is on the Claimant to satisfy the Court that the case is a proper one for service outside the jurisdiction.

### **CPR 9.7**

[68] CPR 9.7 sets out the procedure for disputing the court's jurisdiction. CPR 9.7 reads:

- 1) A defendant who-
  - a) disputes the court's jurisdiction to try the claim; or
  - b) argues that the court should not exercise its jurisdiction;may apply to the court for a declaration to that effect.
  
- 2) A defendant who wishes to make an application under paragraph [1] MUST first file an acknowledgement of service.
  
- 3) An application under this rule MUST be made within the time period for filing a defence.
  - Rule 10.3 sets out the period for filing a defence.
  
- 4) An application under the rule MUST be supported by evidence on affidavit.
  
- 5) A defendant who –
  - a) Files an acknowledgement of service and
  - b) Does not make an application under this rule within the time period for filing a defence –is treated as having accepted that the court has jurisdiction to try the claim.

### **Inherent jurisdiction of the Court**

[69] Often times, the Court is faced with procedural challenges seeking to dispute the jurisdiction of the Court. Suppose, a defendant does not file his application to dispute the jurisdiction of the Court within the time specified by 9.7. Can that defendant subsequently apply under the Court's inherent jurisdiction?

[70] In the judgment of the Court of Appeal in **Enzo Addari v Edy Gay Addari**<sup>43</sup>. At paragraph 13, Rawlins J.A. delivering the judgment of the Court of Appeal said:

“As far as a stay is concerned, the court has always had an inherent jurisdiction to grant a stay of proceedings on grounds of *forum non conveniens* or while an appeal is pursued. The court also has an inherent jurisdiction to dismiss a claim on the grounds of *forum non conveniens*. The jurisdiction is discretionary. It is exercisable where the court thinks that it is just and convenient to make such an Order, in order to prevent undue prejudice to the parties or is an abuse of the process of the court. The court is entitled to exercise the power upon such terms as it determines.”

[71] So, **Addari v Addari** confirms that the Court has an inherent jurisdiction to grant a stay of proceedings on the grounds of *forum non conveniens*. In the High Court, I had previously refused to grant a stay under the Rules since the Defendant applied for such stay two weeks before the 15-day trial of the substantive action was scheduled to take place and on previous hearings, more or less submitting to the jurisdiction of the BVI Courts.

[72] In **Pacific Electric Wire & Electric**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought an order for the court not to exercise jurisdiction under CPR 9.7(1) (b) whilst the 3<sup>rd</sup> and 4<sup>th</sup> Defendants sought an order to stay proceedings based on *forum non conveniens* based solely on the inherent jurisdiction of the Court.

[73] The facts are interesting because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their application within the specified time under the Rules but it was not supported by an affidavit which came subsequently. In short, Mr Farara challenged the application under the Rules for procedural defects and asserts that the Court must not countenance bad practice. Of course,

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<sup>43</sup> Civil Appeal No. 21 of 2005 (in the Court of Appeal of the British Virgin Islands) –unreported – judgment delivered on 19, 23 September 2005.

like the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the first and second defendants had asserted that even though the application is made pursuant to the Rules, the Court always retains that inherent jurisdiction to stay a stay and any procedural irregularity cannot be fatal to the application. Unquestionably, **Addari v Addari** was referred to.

[74] This Court accepted the defendants' arguments on procedural defects and heard the forum challenge staying the applications of the Defendants in favour of the Hong Kong Courts. Pacific Electric appealed. Pacific's appeal was based on 1 procedural ground and two substantive grounds. There were 2 aspects to the procedural challenge. One aspect challenges the failure of the judge to dismiss the application by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under Rule 9.7 because they did not file the application and the evidence in support contemporaneously. The second procedural challenge was taken against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Pacific insisted that the judge erred when she failed to properly consider whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had waived their right to move the court to decline to exercise its jurisdiction because the parties have already submitted to the jurisdiction of the court. Pacific argued that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had already submitted to the jurisdiction of the court. To support this contention, Pacific says that the 3<sup>rd</sup> and 4<sup>th</sup> defendants (a) failed to apply for a stay of proceedings before the expiration of the time for filing their defence and (b) took a step in the proceedings by making an application for an order extending the time for filing their defence.

[75] The Court of Appeal in a judgment delivered on 15 October 2007 upheld the appeal on the procedural points accepting Pacific's arguments that the rules were mandatory and the judge had no discretion to waive such mandatory requirements in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Court held that the judge did not have the discretion she purported to

exercise when she dismissed the procedural challenge by Pacific against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

[76] Now for the 3<sup>rd</sup> and 4<sup>th</sup> defendants- they applied under the inherent jurisdiction of the Court. The facts are different to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants – Pacific has informed the court by letter dated 12 July 2007, both of these defendants sought Pacific’s consent to extend time for filing their defence. In that letter, the solicitors for the 3<sup>rd</sup> and 4<sup>th</sup> defendants (Mr Webster QC) wrote: “we anticipate that we will be in a position to file a defence within 21 days.” On the same day, Webster’s defendants filed an application seeking extension of time. The court granted the extension *inter partes*. It extended the time by 21 days. This meant that the time for filing the defence was 27 September 2005 given the intervening long vacation. This is not in dispute. On 21 September 2005, 6 days before the expiration of the extended time for filing the defence, Webster’s defendants filed their application disputing jurisdiction.

[77] Mr Webster relied heavily on **Addari v Addari**. In brief, the Court of Appeal ruled against Mr Webster’s clients on the procedural aspect of the case and did not rule on the forum challenge.

[78] The Defendants have since applied for leave to appeal to the Privy Council. That application is still pending.

### **Pacific Electric and its implications**

[79] Some interesting issues have arisen since the Court of Appeal decision in Pacific Electric namely:

- Does the Court have an inherent jurisdiction to stay proceedings on the ground of *forum non conveniens*?

- Further, when an extension of time is granted to file defence, does that extension equally apply to an application to dispute the jurisdiction of the Court because as it is, Mr Webster's application was filed before the expiration of the time for filing a defence.

### **CPR 9.7 AND THE ACKNOWLEDGEMENT OF SERVICE FORMS**

- ❖ In Form 4 – Acknowledgement of service of claim form – it reads:

6. Do you intend to defend the claim?

7. Do you admit any part of the claim?

Maybe, a third category: like the UK – you do intend to dispute the court's jurisdiction to try the claim?

- ❖ An application under this rule **MUST** be made within the period for filing a defence **AND/OR SUCH EXTENSION OF TIME AS IS GRANTED.**

**Thank you for your patience.**

**Indra Hariprashad-Charles**  
High Court Judge  
British Virgin Islands