

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0022

BETWEEN:

GRAIN-TRANS LIMITED

Appellant

and

AMPLE SPEED LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Gerard St.C Farara, QC

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Robert Nader for the Appellant
Mr. Andrew Gilliland for the Respondent

2019: July 20;
2020: September 16.

Interlocutory appeal — Forum non conveniens — Application for stay of proceedings pursuant to CPR 9.7 — Whether learned judge erred in exercise of discretion to refuse stay on grounds of forum non conveniens — Whether learned judge failed to give sufficient weight to relevant connecting factors — Whether learned judge erred in concluding that BVI was the more appropriate forum

The appellant, Grain-Trans Limited, is a company incorporated in the Territory of the Virgin Islands (“the BVI”). The respondent, Ample Seed Limited, is a company domiciled in Hong Kong SAR (“Hong Kong”). The respondent filed a claim (“the Claim”) in the BVI Commercial Court for repayment of a loan of EUR 1,700,000.00 (USD 1,873,400.00) and contractual interest pursuant to the terms of a loan agreement between the respondent, as lender, and the appellant, as borrower (“the Loan Agreement”). The loan was to be repaid within 7 days and the loan sum was to be transferred by the respondent from its bank account in Latvia to

the bank account of the appellant also in Latvia. Repayment of the loan and interest was to be made by crediting the said sums to the respondent's said bank account in Latvia.

The appellant applied pursuant to CPR 9.7 to have the Claim stayed on grounds of *forum non conveniens*. The appellant's central contentions were that Ukraine is not only an available forum but is the most appropriate forum for the trial of the Claim. The appellant relied on the following factors to ground its central contentions: (a) the likely governing law of the agreement in respect of the loan is Ukrainian law; (b) Ukraine is the center of business of the parties to the Loan Agreement or their beneficial owners; (c) the Loan Agreement was executed by the respondent's Ukrainian director presumably in Ukraine; (d) the documentary evidence in support of the Claim was likely to be in Russian or Ukrainian; (e) the purpose of the Loan was to provide funding to a Ukrainian business; and (f) the witnesses in the matter were located either in or near to Ukraine. The appellant's application was supported by affidavit evidence, and by an expert on Ukrainian law who, in her report, reached several conclusions as to the availability and appropriateness of Ukraine as the forum for the trial and determination of the Claim.

The application for a stay was heard and determined by a judge of the Commercial Court who on 24th July 2019 dismissed the application, with costs to the respondent. The learned judge found that the Loan Agreement was a simple agreement for a short-term loan between two non-Ukrainian companies; that it had no connection with Ukraine; was not governed by the laws of Ukraine; and Ukraine was not the appropriate forum for the determination of the dispute concerning the alleged non-payment of the loan by the appellant. Being dissatisfied with the judge's refusal of the application, the appellant appealed.

The Court of Appeal considered: (i) whether the judge erred by failing to apply the correct test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 by failing to consider fully the expert evidence in support of the application for a stay and whether Ukraine was an available forum for the hearing of the Claim; and (ii) whether the learned judge erred in his determination that Ukraine was not the appropriate forum for the hearing of the Claim in failing to consider or to give sufficient weight to the connecting factors with Ukraine.

Held: dismissing the appeal, confirming the orders made by the learned judge, ordering that the respondent shall have its costs of the appeal to be assessed by a judge of the Commercial Court at not more than two-thirds of the costs below, if not agreed within 21 days, that:

1. When a defendant seeks a stay on grounds of *forum non conveniens*, the court must determine whether there is another available forum and whether that forum is more appropriate for the trial of the case. While the learned judge did not deal extensively with the expert evidence as to Ukrainian law and did not state, in precise language, that the appellant had failed to establish that Ukraine was an available forum, it is clear from the transcript that the judge considered matters relevant to and did, in essence, arrive at such a conclusion. The judge considered the nature of the Claim; that the Loan Agreement on its face had no discernable connection with Ukraine nor was it governed by the laws of Ukraine; that neither of the parties to the Loan Agreement were incorporated in Ukraine and, that the appellant did not conduct any

business or have a presence in Ukraine. These are all matters which go to the question of whether the appellant had shown that Ukraine was an available forum.

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460 applied; **Livingston Properties Equities Inc et al v JSC MCC Eurochem Livingston Properties Equities Inc et al v JSC MCC Eurochem** [2018] ECSCJ No. 245, BVIHCMAP2016/0042-0046 (delivered 18th September 2019) applied.

2. The conclusions reached in the expert report filed in support of the stay application were without any proper factual or legal basis, and lacking in cogency, and must therefore be rejected. It is clear that the Claim does not fall within any of the accepted categories of claims or cases under Ukrainian private international law for which Ukrainian courts would accept jurisdiction in proceedings involving a foreign element. In circumstances where there is no evidence that the Loan Agreement was executed, performed or breached in Ukraine, or that the appellant has a presence, office, business or representative in Ukraine or is registered to do business there, the appellant had failed to establish that Ukraine is an available forum for the trial and determination of the Claim, and the learned judge was correct in arriving at such a conclusion.
3. The connecting factors relied on by the appellant do not support the conclusion that the Claim has its closest connection to Ukraine. The appellant's reliance on these connecting factors was either misplaced or unsupported by the evidence before the court. The learned judge was therefore correct in finding that the Claim had no real connection to Ukraine, that Ukraine was not the appropriate forum, and that the BVI, as the place of incorporation of the appellant, the borrower under the Loan Agreement, was the appropriate forum. Accordingly, even if the appellant had established that Ukraine was an available forum for the trial of the dispute under the Loan Agreement, the BVI, as the forum with jurisdiction as of right over the appellant, was the jurisdiction with which the dispute has its closest connection.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal made pursuant to Rule 62.10 of the **Civil Procedure Rules 2000**, as amended, ("the CPR") from the decision and order of Adderley J [Ag.], a judge of the Commercial Division of the High Court in the Territory of the Virgin Islands ("the BVI"), handed-down on 24th July 2019. By this decision the learned judge dismissed the appellant's application dated 30th May 2019 for a stay, on grounds of *forum non conveniens*, of claim no. BVIHC(COM)2019/0055. The claim was commenced by the respondent against the appellant on 16th April 2019 ("the Claim").

- [2] The Claim is for repayment of a loan and contractual interest pursuant to the terms of a loan agreement dated 6th July 2015 between the respondent, as lender, and the appellant, as borrower (“the Loan Agreement”). In its application for a stay, the appellant contended that the Claim had its closest connection with Ukraine, and the BVI court ought to stay the Claim in favour of the courts of Ukraine. This was rejected by the learned judge who dismissed the application with costs. Leave to appeal the order of dismissal was granted by a judge of this Court on 22nd October 2019. Prior to commencing the Claim, the appellant had been successful in an application to the Commercial Court to set aside a statutory demand issued by the respondent on 12th June 2018 in relation to the alleged debt under the Loan Agreement.

The Parties and the Documents

- [3] The appellant company is incorporated in the BVI and is beneficially owned by Mr. Alekszej Fedoricsev, a Hungarian national living in Monaco. Its director, Sergey Annikov, executed the Loan Agreement, which was in English, on its behalf. Mr. Fedoricsev has extensive business interest in the grain industry in Ukraine, including the storage and transshipment of grain, and owns certain transshipment terminals at the port of Yuzhne in Ukraine.
- [4] The respondent is a company domiciled in Hong Kong SAR (“Hong Kong”) and, at the material time, operated a business trading grain internationally, with its focus of operations in Ukraine.¹ At the time of entering into the Loan Agreement the respondent was beneficially owned by Mr. Oleg Shchurin, a Ukrainian national. Mr. Shchurin purchased the respondent company ‘to use as a trading company for the international grain market’ approximately one week before the respondent entered into the Loan Agreement with the appellant.² Mr. Vitalii Shevchenko, who executed the Loan Agreement on behalf of the respondent, was at the time an employee of

¹ See paragraph 2 of the statement of claim.

² See paragraph 7 of the Affidavit of Oleg Shchurin sworn on 19th September 2018.

the respondent with executive authority to bind the respondent.³ On 26th April 2016, after the Loan Agreement had been entered into and after the principal sum and interest had become due and payable thereunder, Mr. Robert Brovdi became a beneficial owner in the respondent along with Mr. Shchurin. On 24th October 2017, Mr. Shchurin transferred his interest in the respondent, having made the decision to pursue his business interests in another industry.⁴

[5] There is no suggestion that the Loan Agreement was drafted or executed in the BVI or that the loan sum was transferred to an account of the appellant held in the BVI. Accordingly, the only connection which this matter has with the BVI is that the appellant, the borrower under the Loan Agreement, is a BVI company.

[6] Furthermore, by an Agreement of Intent dated 24th April 2015, Mr. Shchurin and his partner Mr. Robert Brovdi on the one hand, and Mr. Fedoricsev on the other, agreed to establish a joint business project described as ‘a holding-type trade and logistic business’ (“the Project”). This was to be effected through the structuring and integration of a group of companies (assets) owned by the parties to the Agreement of Intent, into a non-formalized holding type scheme to be called ‘TIS GRAIN HOLDING’, and led by the company TIS Capital Management, which was to do what is described in the Agreement of Intent as ‘performing coordination functions’. The Agreement of Intent also provided that to implement the Project the parties were to agree, within one month, a memorandum which would ‘describe all the legal and financial parameters of the Project and time of their final realization’. No such memorandum was produced in evidence by either party. However, it is clear from the evidence that the Project or joint project to be implemented by the parties to the Agreement of Intent was short-lived and came to an end in 2016. Later in this judgment, I deal more fully with both the Loan Agreement and Agreement of Intent.

The Claim

³ See paragraph 7 of the Affidavit of Oleg Shchurin.

⁴ See paragraphs 6 and 7 of the Affidavit of Oleg Shchurin.

- [7] In the Claim, the respondent claims the sum of USD \$1,873,400.00 together with contractual interest at the rate of 1 percent per annum pursuant to the terms of the Loan Agreement. The stated purpose for the loan, as pleaded, was to assist Mr. Fedoricsev to cover 'a gap in cash flow affecting his grain terminals' in Ukraine. This request is said to have been made during several telephone calls in the first week of July 2015 from Mr. Fedoricsev and Mr. Annikov to Mr. Shchurin. Mr. Fedoricsev had requested prepayment for transshipment services to be provided, in the future, to companies beneficially owned by Mr. Shchurin, by one or both of Mr. Fedoricsev's grain terminals in Yuzhne, Ukraine. However, Mr. Shchurin was not prepared to agree to a prepayment, but offered instead a short-term loan to Mr. Fedoricsev. This was accepted by Mr. Annikov on behalf of Mr. Fedoricsev. On 6th July 2015, the Loan Agreement was entered into with Mr. Fedoricsev electing to use the appellant, a company incorporated in the BVI and beneficially owned by him, as borrower. On the same day, the sum of USD \$1,873,400.00 was transferred by the respondent from its bank account in Riga, Latvia to the appellant's bank account, also in Riga, Latvia. The respondent's case is that, in breach of the terms of the Loan Agreement, the appellant failed to repay the principal sum, either within the stated 7-day period under the Loan Agreement, or at all.

Stay Application

- [8] On 30th May 2019, the appellant applied pursuant to CPR 9.7 for a declaration that the Commercial Court should decline to exercise jurisdiction to try the Claim and for an order staying the Claim on grounds of *forum non conveniens*. The appellant relied on the Agreement of Intent dated 24th April 2015 entered into between Mr. Brovdi and Mr. Shchurin, on the one hand, and Mr. Fedoricsev, on the other, whereby these parties had 'agreed to jointly engage in international grain trading and transshipment business in Ukraine'. They contended that while the Loan Agreement did not contain either a jurisdiction clause or a choice of law clause, '[i]t may have been intended that the Loan Agreement be governed by the laws of the Ukraine'.

[9] The appellant also asserted that the likely key witnesses are Ukrainian, Russian and Hungarian and are primarily located in those jurisdictions, as well as in Monaco with respect to Mr. Fedoricsev; and that they speak either Russian, Ukrainian and or French. The appellant also argued that the bulk of the documents in this matter would have to be translated either to or from English if the matter was heard in the BVI. However, it is to be noted that the version of the Loan Agreement executed by the respondent was in the English language. The appellant further submitted that the only connection which this Claim has with the BVI is as the place of incorporation of the appellant and, by contrast, there are very substantial connections with Ukraine 'including applicable law, the location of witnesses, the location of the [respondent] and [appellant's] business, the location of witnesses' business and transshipment facilities, and the location of the documentary evidence'. The appellant therefore concluded that Ukraine is clearly and distinctly the more appropriate forum to hear and determine the dispute, and the Ukrainian courts have competent jurisdiction. Furthermore, the appellant stated categorically that it will submit to the jurisdiction of the Ukrainian courts for the purposes of determining the dispute between the parties.

[10] The stay application was supported by the affidavit of Sophie Christodoulou ("Christodoulou 1"), a lawyer in the firm in the BVI representing the appellant. This affidavit, to a great extent, regurgitates the grounds set out in the notice of application, and exhibited a copy of the Loan Agreement written in English, as well as the Ukrainian original and English language translation of the Agreement of Intent. In addition, it is averred at paragraph 5, that the respondent's prior attempt to recover the sums under the Loan Agreement by way of a statutory demand issued on 12th June 2018 was unsuccessful, as the statutory demand had been set aside by a judge of the Commercial Court on application by the appellant, 'on the basis that there was a substantial dispute that the alleged debt was not owing or due'. As to the debt being disputed, Ms. Christodoulou averred at paragraphs 7, 8 and 9 as follows:

"7. In summary, the Defendant's position is that the Loan Agreement cannot be considered in isolation and is in fact part of a much wider set of

transactions between the parties, arising out of an international grain trading and transshipment project entered into between the ultimate owners and controllers of the Claimant, Mr. Robert Brovdi and Mr. Oleg Shchurin, and the ultimate owner and controller of the Defendant, Mr Alekszej Fedoricsev (the "Joint Project"). The business was also run through a Swiss company jointly owned by Mr. Brovdi, Mr. Shchurin and Mr. Fedoricsev, TIS-Trade AG.

8. Mr. Brovdi, Mr Shchurin on the one hand and Mr. Fedoricsev on the other hand entered into a number of agreements, which include the Loan Agreement, relating to the Joint Project. These include an agreement dated 16th October 2014 [3-8] and an agreement of intent dated 24th April 2015 (the "Agreement of Intent") [9-13].

9. The sums advanced by the Claimant pursuant to the Loan Agreement have in fact been settled as Mr. Brovdi and Mr Shchurin's profit share of the profits arising out of the Joint Project was increased (and Mr. Fedoricsev's profit share accordingly reduced) in a sum equal to the amount in dispute, that being USD 1,873,400.00."

[11] In response to the application for a stay and to Christodoulou 1, the respondent filed the Affidavit of Jamie James, a lawyer in the firm in the BVI representing the respondent. He asserts, *inter alia*, that Ukraine is not a better forum than the BVI for the trial of the Claim. Exhibited to his affidavit is an affidavit of Mr. Oleg Shchurin sworn on 19th September 2018 which had been filed in opposition to the prior application by the appellant to set aside the statutory demand. At paragraphs 24 to 31 of this affidavit, Mr. Shchurin sets out the circumstances under which the Loan Agreement was entered into between the appellant and the respondent, and the short-term loan of USD \$1,873,4000.00 made to the appellant. He averred that the loan was not made as an investment in the Project. It was not made to the joint venture vehicle, but to a company owned solely by Mr. Fedoricsev. He contended that the suggestion that such a short-term loan (repayable within 7 days) would be used to invest as capital in a joint project does not make commercial sense. Furthermore, the loan was accounted for and reported by the respondent's auditor to the tax authorities of Hong Kong, where the respondent-company is domiciled. Accordingly, the loan was a 'stand-alone agreement which had nothing to do with the project', and there is no reference in the Loan Agreement to it being part of a larger transaction. It was made by the respondent, a company owned solely by Mr.

Fedoricsev and not with Mr. Brovdi, who is his partner in the joint venture with Mr. Fedoricsev, and for the sole purpose of providing short-term assistance to Mr. Fedoricsev.

- [12] The respondent also filed an affidavit sworn on 26th June 2019 by Igor Derus, a Ukrainian lawyer acting as Ukrainian counsel to the respondent, in response to the issue raised in Christodoulou 1 regarding the Ukrainian court having jurisdiction to hear the dispute (“the Derus Affidavit”).
- [13] This was followed by a second and third affidavit of Ms. Christadoulou, both filed on 12th July 2019. The appellant also filed expert evidence of Ukrainian law by the report of Dr. Anna Gnizdovska dated 12th July 2019 (“the Gnizdovska Report”). I return below to the expert evidence of Ukrainian law from Mr. Derus, on behalf of the respondent, and Dr. Gnizdovska, on behalf of the appellant, which were before the learned judge on the hearing of the stay application.

The Loan Agreement

- [14] The Claim in this matter is for payment of a purported debt of USD \$1,873,400.00 plus interest (“the Debt”). The Debt is said to arise under the terms of a loan agreement dated 6th July 2015 between the respondent, as lender, and the appellant, as borrower. The Loan Agreement relates to a short-term facility of EUR 1,700,000.00 (the equivalent of USD \$1,873,400.00) repayable on 13th July 2015 (within 7 days) at 1 percent interest per annum. It is common ground that the principal sum and interest was not repaid by the appellant within the said period. However, the appellant contends that the loan was, in essence, a capital investment in the Project established or to be established under the terms of the Agreement of Intent.
- [15] The Loan Agreement does not contain a jurisdiction or choice of law clause. However, it recites that it is ‘entered into under the provisions of articles 497 and following of the Commercial Code’. It is common ground that this could not have

been a reference to the Commercial Code of Ukraine, as the numbering of the articles or sections of that Code do not go as high as number 497. Furthermore, the Loan Agreement makes no reference whatsoever to the Agreement of Intent or to the Project or joint venture between Mr. Brovdi and Mr. Shchurin on the one hand and Mr. Fedoricsev on the other. It does not in any way purport to treat the loan sum of USD \$1,873,400.00 as an investment by Mr. Shchurin in the Project or joint venture or in any other investment. It is a straightforward loan agreement on a very short-term repayment basis, akin to a 'bridge loan'. It provides for the payment of interest and default interest for every day of delay in repayment beyond the due date of 13th July 2015. There is no provision for deferment of payment of the principal sum in certain circumstances or for the said sum to be converted to an investment. There is absolutely no reference to the laws of Ukraine or to any matter concerning Ukraine or the Project or Mr. Shchurin's investment or interest in the Project. Importantly, the parties to the Loan Agreement are not the parties to the Agreement of Intent, albeit the beneficial owner of each of the two companies under the Loan Agreement are two of the three parties to the Agreement of Intent.

The Agreement of Intent

- [16] The Agreement of Intent is dated 24th April 2015, prior to the execution of the Loan Agreement. It is between Messrs. Brovdi and Shchurin as 'Ukrainian Investors', on the one hand, and Mr. Fedoricsev as 'Foreign Investor' on the other. It states that each such expression includes not just the individual party but 'all affiliated companies' owned by each of them and, in the case of Messrs. Brovdi and Shchurin only, the expression 'Ukrainian Investors' also includes 'foreign companies'. I pause to observe that there is no evidence that Mr. Brovdi is an owner or beneficially owner with Mr. Shchurin of the respondent company.
- [17] The express purpose of the Agreement of Intent is 'to establish a Holding-Type and Logistic Business' referred to therein as "the Project" which is to be:
- "...implemented through structuring and integration of a group of companies (assets) owned by the Parties into a non-formalized holding-

type scheme (TIS GRAIN HOLDING) led by the company TIS CAPITAL MANAGEMENT, performing coordination functions.”

By clause 11, the said agreement is to be ‘regulated and interpreted with Ukrainian legislation’. Clause 4 of the Agreement of Intent provides:

“To implement the Project, the Parties take up to agree the text of Memorandum within one month after signing of this Agreement; the Memorandum shall describe all the legal and financial parameters of the Project and time of their final realization.”

- [18] Essentially, the Agreement of Intent is an agreement to agree on a memorandum which would provide for the legal and financial parameters for the Project and its implementation. No such signed memorandum was provided in evidence before the court below by either party. Accordingly, the full terms, implementation and legal efficacy of the intended joint venture project between the parties to the Agreement of Intent was not known to the judge below and cannot be a matter of speculation or conjecture.

Decision on Stay Application

- [19] The decision of the learned judge, the subject of this appeal, was rendered *viva voce* at the conclusion of the hearing on 24th July 2019. He dismissed the appellant/defendant’s application for a stay the Claim. The learned judge concludes his decision in these terms:

“I don’t think there is any basis after you review the Statement of Claim, and the general principles is (sic) set out in Eurochem. I just had a case on it and Jitendra, number 83 of 2017. There isn’t any basis, in my view, that Ukraine could be considered to be the appropriate forum, so I am going to dismiss the application.”⁵

- [20] The judge’s decision and reasons therefor are to be assessed from the totality of the proceedings as memorialized in the transcript.⁶

⁵ See lines 2 to 8 at page 42 of the Transcript of Proceedings, at page 48 of the Record of Appeal.

⁶ See *SFC Swiss Forfaiting Company Ltd. v Swiss Fotfating Ltd* [2016] ECSCJ No. 123, BVIHCMAP2015/0012 (delivered 4th July 2016).

Issues on Appeal

- [21] The appellant relies on two grounds in its notice of appeal (filed 13th November 2019) as fleshed out in their written submissions. These are: (i) the learned judge applied the wrong test in determining the stay application, in that his focus was on where the performance of the Loan Agreement took place and, in doing so, he failed to examine the several matters that connect the Claim to Ukraine and erred in finding that the BVI was the more appropriate forum; and (ii) to the extent that the judge applied the correct test he erred in applying the test in **Spiliada Maritime Corporation v Cansulex Ltd**⁷ in that he failed to consider or to give sufficient weight to factors which, if properly considered, ought to have resulted in him granting the stay in favour of Ukraine, as the country where the Claim has its closest connection.⁸

The Applicable Law

- [22] There is no discernible difference or disagreement between counsel for the parties on the applicable principles of law. It is accepted that the applicable test is the test formulated by Lord Goff in **Spiliada**. This test has been endorsed and further elucidated in the decisions of this Court in **SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd**⁹ and **Livingston Properties Equities Inc et al v JSC MCC Eurochem**¹⁰ ("**Eurochem**"). In **Eurochem**, Webster JA [Ag.] distilled the test and applicable principles in the following way:

"When a defendant seeks a stay of an action on ground of forum non conveniens 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 the more appropriate forum (stage 3). The burden of proof in the first two stages is on the defendant seeking the stay, and on the claimant at the third stage."

⁷ [1987] AC 460.

⁸ See notice of appeal and paragraph 11b of the appellant's written submissions in support of the appeal.

⁹ See n.6.

¹⁰ [2018] ECSCJ No. 245, BVIHMAP2016/0042-0046 (delivered 18th September 2019) at paragraph 26.

- [23] In this matter, it is common ground that stages 1 and 2 of the **Spiliada** test were relevant and are to be considered sequentially. Accordingly, should the appellant fail to satisfy stage 1, the court cannot proceed to a consideration of stage 2 of the test. As to stage 3, it is accepted that were Ukraine to be found to be both an available and the more appropriate forum, there is no evidential or other basis in this matter, upon which to ground a contention that the respondent would be unable to obtain substantial justice there in the trial of the dispute between the parties.
- [24] As to stage 2 of the test, a court is required to determine, between the other available forum and the forum which is being asked to decline jurisdiction (the BVI), which of them is distinctly the more appropriate for the trial of the claim. This assessment involves an examination of the connecting factors as borne out by the evidence, including expert evidence, to determine the place where the claim has its most real and substantial connection. This exercise is at times characterized as determining which forum comprises ‘the centre of gravity’ of the dispute.¹¹ In doing so, the place of incorporation of the defendant/appellant, as a connecting factor, is not be accorded too much weight. It is but one of the relevant connecting factors and very little weight should be attached to it in the balancing exercise between two competing forums.¹²

Principles applicable to Review of Judge’s Discretion

- [25] In a matter such as this, where the Claim is brought as of right in the BVI as the country where the appellant/defendant company was incorporated and is domiciled, an application by a defendant pursuant to CPR 9.7 for the court to decline jurisdiction in favour of some other country on grounds of *forum non conveniens*, invokes the court’s discretionary powers. This undoubted discretion must be exercised judicially in accordance with established principles.¹³

¹¹ See SFC Swiss Forfaiting Company Ltd v Swiss Forfaiting Ltd per Blenman JA at paragraph 79.

¹² See Nilon Limited and others v Royal Westminster Investments SA [2015] UKPC 2, per Lord Collins; and, Eurochem per Webster JA [Ag.] at paragraph 68.

¹³ See for example SFC Swiss Forfaiting Company Ltd v Swiss Forfaiting Ltd.

[26] The parameters within which an appellate court is to review the exercise of discretion by a lower court have been authoritatively stated and restated in a number of decisions of this Court. The most oft cited case for these principles is **Dufour v Helenair Corporation and Others**.¹⁴ The two-stage test which must be followed and adopted by an appellate court upon a review of the exercise of judicial discretion by a lower court, was reformulated by Floissac CJ in these terms:

“Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision **exceeded the generous ambit within which reasonable disagreement is possible** and may therefore be said to be clearly or blatantly wrong.” (Emphasis added)

[27] Fundamentally, it is not permissible for the appellate court to substitute its decision for that of the lower court simply because on the same evidence and facts it would have come to a different conclusion. It is only in circumstances where the decision of the lower court can be said to have exceeded ‘the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong, that the appellate [court] is entitled to interfere’.¹⁵

[28] Accordingly, with these principles at the fore, I now embark upon a review of the decision of the learned judge the subject of this appeal by which he dismissed the appellant’s stay application.

Stage 1 – Is Ukraine an available forum?

[29] The appellant submits that the learned judge failed to embark upon a proper consideration of stage 1 of the **Spiliada** test, that is, whether Ukraine was an available forum and, instead, his focus was on the nature of the Claim and the underlying cause of action. It is the case for the appellant in relation to this stage of

¹⁴ (1996) 52 WIR 188. See also *Charles Osenton & Co. v Johnson* (1941) 2 All ER 245; and *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 345).

¹⁵ Per Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* supra at n.14.

the test, that Ukraine was an available forum for the trial of the Claim and the judge ought to have found, based upon the Gnizdovska Report as to Ukrainian law, that the Ukrainian courts would accept jurisdiction over proceedings brought by the respondent to recover the loan proceeds pursuant to the Loan Agreement. This they contend was especially so since Dr. Gnizdovska's report was the only evidence of Ukrainian law before the judge, the respondent having expressly decided, at the hearing, not to rely on the aspect of the Derus Affidavit addressing Ukrainian law. Specifically, the appellant submits, that the learned judge erred in not embarking upon a consideration of the expert report of Dr. Gnizdovska as to the applicable principles of Ukrainian private international law relating to the categories of cases where the Ukrainian court would accept jurisdiction over a dispute involving a foreign element. Furthermore, had he done so, he ought to have accepted the conclusions and opinions reached by Dr. Gnizdovska that the Ukrainian courts would accept jurisdiction over this dispute.¹⁶

[30] The respondent submits that the learned judge applied the correct test and principles set out in **Spiliada** and in **Eurochem** and concluded, correctly, that Ukraine was not an available or appropriate forum for the determination of this dispute. The effect of the judge's decision was that the appellant, as the applicant for a stay, had failed at stage 1 of the test. In this regard, they rely on the passage from the decision of the learned judge at page 41 of the transcript cited at paragraph 19 of this judgment.

[31] Mr. Nader, learned counsel for the appellant, in his consideration of stage 1 of the **Spiliada** test, took the learned judge to several passages from the Dr. Gnizdovska Report, including her conclusion that the Ukrainian courts would accept jurisdiction over this dispute.¹⁷ Mr. Gilliland, learned counsel for the respondent, in his submissions before the judge disputed the conclusions of law reached by Dr. Gnizdovska in her report. He did so on the basis that they were not underpinned or

¹⁶ See paragraphs 14 to 18 of the appellant's written submissions.

¹⁷ See lines 23 onward at page 9 to page 20 of the Transcript of Proceedings, at page 15 of the Record of Appeal.

supported by any of the objective facts in this case, and that several of her opinions were expressed in qualified terms, not leading to any conclusions which were definitive, making them wholly unreliable for the purpose of factual evidence of Ukrainian law.¹⁸ At page 34 of the transcript, Mr. Gilliland submitted that the appellant 'had failed stage one of the test. And it's my submission having failed stage one of the test, we should go no further'.

- [32] In my considered view, while it may be a fair criticism that the learned judge did not deal extensively with the expert evidence as to Ukrainian law in the Gnizdovska Report, and did not state in precise language that the appellant had failed to satisfy stage 1 of the **Spiliada** test, it is clear from a full reading of the transcript that the learned judge had certain reservations about the Gnizdovska Report, and the tenure and reliability of the conclusions she reached, similar to those pointed to by counsel for the respondent in his submissions to the judge. This much is clear, for example, from pages 32 to 33 of the transcript in this exchange with Mr. Gilliland:

"MR. GILLILAND: Now, in the report, 'Dr G' does refer to warehouses and so forth, but there is no evidence to show this. She just assume (sic), she was giving us a set of her facts that they have this. There is no actual evidence to demonstrate this. So she used what she was told to say...

THE COURT: There is no evidence to support the fact upon which she rely (sic) in her expert --

MR. GILLILAND: Yes, yes."¹⁹

- [33] It is clear from a full reading of the transcript, in particular at pages 40 and 41, that the learned judge considered that the starting point was the Claim itself, which he characterised as a simple claim in contract under a Loan Agreement for money lent on a short-term basis. The judge was also of the view that the Loan Agreement, on its face, had no connection or no discernable connection with Ukraine; neither of the parties to the Loan Agreement were incorporated in or conducted business from

¹⁸ See line 22 of page 32 to lines 1 to 5 of page 34 of the Transcript of Proceedings, at pages 38 to 40 of the Record of Appeal.

¹⁹ See lines 22 to 25 of page 32, and lines 1 to 6 of page 33 of the Transcript of Proceedings, at pages 38 and 39 of the Record of Appeal.

Ukraine; and that the appellant, the borrower, is a BVI company, while the respondent, the lender, is a Hong Kong, and not a Ukrainian, company. These matters and considerations to which the learned judge averted, in my opinion, go to the question of whether the appellant had satisfied stage 1 of the test (whether Ukraine was an available forum). They are borne out in the following passages and exchanges in the transcript:

“THE COURT: It doesn’t appear to be - - and I am not certain whether - - it doesn’t appear on the face of it that any country where the party is, is going to play much into it the operations in Ukraine, doesn’t seem to me it’s going to feature very much in the Loan Agreement. And then, you know, the parties to the Loan Agreement are Ample Speed Limited, which is the Claimant, and the defendant is Grain-Trans Limited.

...

THE COURT: And I don’t see where the party - - it’s either going to be where the Grain-Trans Limited is registered or Ample Speed is registered. Grain-Trans Limited is obviously not registered in the Ukraine, at least according to the evidence that is before the Court. So really the only party that has any relation with the Agreement is in the BVI. All this stuff about where they are operating and where the joint venture is, that’s irrelevant, isn’t it?

....

THE COURT: But you can’t just go on a test, you have to look at the statement of claim. The first thing you have to do, and I think that came out very clearly in, I can’t remember which judgment I did, and the Court of Appeal agreed. The first thing you have to do is look to see what is being claimed to determine which countries are of importance. I don’t see anything in the Statement of Claim, it’s a very short Statement of Claim, that’s tied into any - - certainly not Ukraine. I could see if you are arguing - - I could see that you would have a point if Grain-Trans Limited was registered in the Ukraine. That would be a strong point because then it would be between the two. The only party to this particular Loan Agreement is registered in the BVI.”²⁰

- [34] It is therefore necessary to examine the expert evidence as to Ukrainian law which was before the learned judge in order to determine whether the conclusions reached in the Gnizdovska Report, as evidence of fact of Ukrainian law, are compelling or reliable or ought to have been accepted by the learned judge.

²⁰ See pages 41 and 42 of the Transcript of Proceedings, at pages 46 and 47 of the Record of Appeal.

Expert Evidence of Ukrainian Law

- [35] As mentioned, the respondent filed an affidavit of Mr. Igor Derus in which he addressed, *inter alia*, various principles of Ukrainian private international law applicable to the circumstances in which the courts of Ukraine would accept jurisdiction in relation to a dispute involving a foreign element, as is the case in the instant matter. Mr. Derus is the Ukrainian counsel to the respondent, and accordingly, he is not an independent expert. It is indisputable that his affidavit was filed without the permission of the court as an expert on Ukrainian law, and was not in compliance or conformity with the applicable rules of CPR. At the hearing before the learned judge, learned counsel for the respondent, when pressed about these deficiencies, informed the court that the respondent will not be relying on those parts of the Derus Affidavit dealing with or expressing an opinion on Ukrainian law.
- [36] I merely observe that Mr. Derus' citation and reliance in his affidavit upon article 76 of the Law of Ukraine 'On Private International Law' in determining whether the Ukrainian courts would accept jurisdiction over a case involving a foreign element, is uncontroversial as this is the same provision cited and relied upon, in the main, by the appellant's expert witness, Dr. Gnizdovska, in her report. The important points of departure between them are two-fold. Firstly, Dr. Gnizdovska relies not only on the provisions or categories of claims under article 76, but on certain other statutory provisions, as relevant to answering the main jurisdictional question under Ukrainian law. Secondly, she reaches the opposite conclusion to Mr. Derus on the main question of whether the Ukrainian courts would accept jurisdiction in relation to this claim arising under the Loan Agreement. That said, it is accepted that the only expert evidence as to Ukrainian law before the learned judge was that of Dr. Gnizdovska.
- [37] The appellant's expert, Dr. Gnizdovska, is a qualified lawyer admitted to practice in Ukraine. She holds a PhD in law and has been in the practice of law for over 10 years, seven of which have been in Ukraine in the fields of dispute resolution, corporate law, financial law, and foreign economic activity. She is also the head of

the JURIS FERRUM attorney's association, and the author of several scientific publications.²¹ She opines that article 76 of the law of Ukraine 'On Private International Law' sets out the categories of cases with a foreign element over which the Ukrainian court can accept jurisdiction, albeit she does not regard such cases as limited only to cases fitting strictly within one of those categories.

- [38] Specifically, with regard to this Claim, Dr. Gnizdovska focused on two of the twelve listed categories in article 76. As to category no.2 – if in the territory of Ukraine the defendant in the case has a place of residence or location, or moveable or real property, which can be levied, or there is a branch or representative office of a foreign legal entity-the defendant – she defines 'representative office of a foreign business entity' as 'an institution or a person that represents the interests of a foreign business entity in Ukraine and has duly executed relevant powers'.²² In relation to this category, Dr. Gnizdovska opines in her report as follows:

“If the services of grain transshipment facilitation provided by the defendant in the port of Pivdenny (former name – Yuzhny) in Ukraine are provided with the use of facilities and warehouses in the port of Pivdenny, via certain personnel or persons that represent the defendant's interests in Ukraine and such activities of a non-resident (the Defendant in this case) lead to the emergence of his civil rights and obligations, the place of this activity can be considered as a permanent representative office of the Defendant. Thus given the presence of the Defendant's company's representation office in Ukraine, as it is defined in the above-mentioned normative legal acts, the court can accept to its proceedings the claim against such foreign company.”²³ (Emphasis added)

- [39] With respect, on the indisputable facts of this case, this opinion is incorrect and cannot be accepted. The defendant/appellant in these proceedings, Grain-Trans Limited, is a company incorporated and domiciled in the BVI. There is no suggestion and no evidence to support a finding that the defendant/appellant has a 'representative office in Ukraine', or any facilities or warehouses at the port of Pivdenny in Ukraine, or has done business or has any business operations in

²¹ See paragraph 12 of the report.

²² See paragraph 12 on page 12 of the report.

²³ See page 12 to 13 of the report.

Ukraine, or has any person or persons or agents who represent its interest in Ukraine. Accordingly, there does not exist any factual basis, whatsoever, upon which to ground this opinion or legal conclusion on this second limb of article 76. This is a claim for breach of an agreement whereby the respondent/claimant, a Hong Kong company, lent money on short-term repayment terms to the appellant, a BVI company, where the loan proceeds were to be transferred from the respondent's bank account in Latvia to the appellant's bank account in Latvia. The grain transshipment business at the port of Pivdenny in Ukraine referred to by Dr. Gnizdovska in the passage above, is in fact not owned or operated by the appellant, but by its beneficial owner Mr. Fedoricsev, by and through a different company or companies. And while the respondent does have business interests in Ukraine, it operates similar businesses in other parts of the world.²⁴

- [40] As to the seventh limb of article 76 – if the action or event that became the basis for filing a claim took place on the territory of Ukraine – Dr. Gnizdovska opines at page 14 of her report in these terms:
- “If the conclusion, performance, non-performance or improper performance of the agreement takes place on the territory of Ukraine, it can be concluded that the dispute regarding the non-performance or improper performance of the agreement can be accepted for proceedings by the Ukrainian court.”
(Emphasis added)

- [41] Likewise, there is no reliable or conclusive evidence that the Loan Agreement, the subject of the Claim, was executed or concluded in Ukraine. There is a mere suggestion by the appellant in submissions that Mr. Schevchenko, who signed the Loan Agreement on behalf of the respondent, is Ukrainian and therefore may have done so in Ukraine. This is not accepted by the respondent, who countered, in their submissions, that Mr. Annikov who signed the Loan Agreement on behalf of the appellant is Russian and that it is more likely that the said agreement was signed by him in Russia. Needless to say, it is passing strange that the appellant, which sought a stay of the Claim on the basis that the Loan Agreement, or the dispute

²⁴ See paragraph 2 of the statement of claim.

over repayment of the loan proceeds, has its closest connection with Ukraine and is likely to be governed by the laws of Ukraine, has not been able to conclusively demonstrate where the Loan Agreement was drafted and where it was executed by the parties.

[42] What is uncontroversial however, is that the performance of the Loan Agreement did not take place in Ukraine. The loan proceeds were, by the express terms of the Loan Agreement itself, to be transferred from the respondent's bank account in Latvia to the appellant's bank account in Latvia, and the repayment of this short-term loan was to be effected by transfer to the respondent's said Latvian bank account. It follows, therefore, that the alleged breach of the Loan Agreement by non-payment may reasonably be inferred to have occurred in Latvia and not Ukraine. Accordingly, there is no basis upon which Dr. Gnizdovska's opinion on this seventh category can be substantiated or accepted as authoritative or persuasive. In this regard, I observe that her opinion on these critical issues at both pages 12 and 14 of her report (as cited above) are qualified by the conjunctive 'if'.

[43] Also, Dr. Gnizdovska's opinion at page 15 of her report is similarly qualified. There, addressing the contention by the appellant that the Loan Agreement was part of the Project, she states:

"Based upon the analysis of the documents provided to me along with the instructions, particularly pages 3-13 of the Exhibit SC-1 it can be **argued** that the owners of the companies – the parties to the loan agreement had a relationship on the implementation of joint projects in Ukraine, in particular on grain trade and transshipment of grain in Ukraine. Accordingly, **if** the loan provided was a part of the relationship of the parties to conduct business in Ukraine and was provided for the purposes of this business, the fact of alleged non-repayment of the loan under the agreement is also directly related to Ukraine.

Thus, **if** the conclusion and performance or non-performance of the agreement was carried out in Ukraine, a claim in a dispute arising from such an agreement may be brought at the place of performance of this agreement as an event that became the basis for filing of a claim."
(Emphasis added)

- [44] The difficulty with this opinion, apart from it being presented as merely 'arguable' and it being stated in conjunctive or qualified terms, is that the Loan Agreement was not entered into by the individuals who were parties to the Agreement of Intent, and that the Project or joint venture in Ukraine was entered into, not just by two individuals, Mr. Shchurin and Mr. Fedoricsev (and their respective companies), but also by Mr. Brovdi as well, who was not a shareholder of the respondent company. Moreover, there is, at this point in the proceedings, absolutely no evidence that the Loan Agreement was concluded or performed in Ukraine. These issues raised by the appellant will be matters for the defence to be filed by the appellant against the Claim. They were relied on by the appellant in its successful application to set aside the statutory.
- [45] The evidence led thus far suggests that this was a loan made by a Hong Kong company to a BVI company, whereby the principal sum was to be transferred from the bank account of the respondent in Latvia to the bank account of the appellant in Latvia.²⁵ Likewise, its repayment was to be effected by the due amount being credited to the bank account of the respondent in Latvia.²⁶ The short answer is that there was no performance of the terms of the Loan Agreement to take place in Ukraine, as can be seen from the terms of the agreement itself. Accordingly, there is no factual or evidential basis for Dr. Gnizdovska's opinion at page 15 of her report, which, with respect, must be rejected.
- [46] Dr. Gnizdovska also referred in her report to article 44 of the Law of Ukraine 'On Private International Law', which provides that, in the absence of consent of the parties on the choice of law applicable to an agreement, the law according to Part 2 and Part 3 of article 32 shall apply. As mentioned above, the Loan Agreement does not contain a choice of law or jurisdiction clause. Part 2 of article 32 provides that, in such circumstances, 'the law that has the closest relationship with the transaction' would apply. By Part 3, this means 'the law of the state in which the party, whose

²⁵ See Part IV of the Loan Agreement.

²⁶ See Part III at paragraph 2 of the Loan Agreement.

performance is crucial to the content of the transaction, has its place of residence or location'. Dr. Gnizdovska opines that, in this matter, that party would be the lender, the respondent.²⁷ The gravamen and effect of this opinion is that, under Ukrainian private international law rules, the law of Hong Kong, where the respondent is domiciled, and not the law of Ukraine, would apply. This clearly does not assist the appellant who contends for the law of Ukraine. It is therefore passing strange that, nevertheless, Dr. Gnizdovska goes on to opine at page 16 of her report: '[t]hus, the law of Ukraine can be applied to the loan agreement if the court finds that in all the circumstances the legal relations under the loan agreement have a closer relationship with the law of the Ukraine'. This opinion is wholly unsupported by the accepted facts and, indeed, by the very statutory provisions under Ukrainian law relied on by Dr. Gnizdovska in her report. Accordingly, I do not accept this conclusion reached by her as cogent evidence of Ukrainian law in this matter involving, as it does, a Loan Agreement entered into by two non-Ukrainian companies, the performance and the alleged breach of which, did not take place in Ukraine.

[47] For the reasons set out above, I also do not accept as cogent and reject, with respect, the summary of conclusions at pages 16 to 17 of the Gnizdovska Report to the effect that there are two grounds upon which the Ukrainian courts would accept the Claim for consideration. These are: (i) given that the defendant (appellant) has a branch or representative office in the territory of Ukraine; and (ii) given that the actions or events that formed the basis for the claim took place on the territory of Ukraine. As already stated, these grounds and opinions are unsupported by the evidence surrounding the entering into of the Loan Agreement, the express terms of the agreement itself, and the fact that it makes absolutely no reference to the Project, nor does it provide for the loan sum to be converted into a capital investment in the Project by the respondent or its beneficial owner Mr. Shchurin.

[48] Finally, Dr. Gnizdovska opines, at page 19 of her report:

²⁷ See page 16.

“it can be **argued** that the Ukrainian court will have grounds for the opening of proceedings and for hearing the case ...regarding the alleged non-performance of the loan agreement, taking into account the defendant's voluntary submission to Ukrainian jurisdiction.” (Emphasis added)

This opinion was reached notwithstanding her citation of article 29 of the Commercial Proceedings Code (“CPC”) of Ukraine, which expressly stipulates that ‘the right to choose between the commercial courts that have jurisdiction over the case belongs to the claimant, except for the exclusive jurisdiction established by article 30 of this Code’. She opines that the question of whether the Ukrainian courts will accept jurisdiction over claims where a foreign element is involved if the defendant to the claim agrees to the jurisdiction, ‘will depend on the existence of grounds for filing such a claim to the Ukrainian court’.

[49] This brings the matter back squarely to the main question: whether this Claim falls within any of the listed categories of claims or cases under Article 76 of the Law of Ukraine ‘On Private International Law’, as a basis for concluding that the Ukrainian courts would accept jurisdiction in these proceedings involving, as they do, a foreign element. If not, then the question of whether the defendant/appellant in this matter agrees to submit to the jurisdiction of the Ukrainian court is clearly irrelevant. In my judgment, the answer to this question, notwithstanding the opinion of Dr. Gnizdovska, is clearly no.

[50] The effect of these findings is that the appellant has failed to establish that Ukraine is an available forum for the trial and determination of this dispute concerning the recovery of a loan made between two non-Ukrainian companies, in circumstances where there is no evidence that the Loan Agreement was executed in Ukraine, or was performed in Ukraine, or that any breach of the Loan Agreement occurred in Ukraine, or that the appellant has a presence, office, business or representative in Ukraine or is registered to do business there. It follows that the learned judge was

correct in his finding that Ukraine does not have anything to do with the Loan Agreement, and the party which does, the lender, is in the BVI.²⁸

[51] In my view, the learned judge was correct in approaching his assessment of this matter in the way he did by first considering the nature of the claim, bearing in mind, as he did, stage 1 of the **Spiliada** test. The starting point in a matter such as this must be the nature of the dispute between the parties and the type of claim upon which the court will have to adjudicate. This must be looked at in the context of stage 1 of the test in determining whether there is any alternative available forum. On the statement of claim, this is a claim for money lent under a straightforward and simple Loan Agreement, by a Hong Kong company to a BVI company, on short-repayment terms, without any reference to or connection with Ukraine, its laws, or the Project or joint venture provided for under the Agreement of Intent.

[52] Accordingly, the appellant has not satisfied stage 1 of the **Spiliada** test and the learned judge was correct in reaching this conclusion. At page 41 of the transcript, the learned judge put it this way:

“THE COURT: But you can’t just go on a test, you have to look at the statement of claim...

The first thing you have to do is look to see what is being claimed to determine which countries are of importance. I do not see anything in the Statement of Claim... that’s tied into any - - certainly not Ukraine.”²⁹

This was, in essence, a finding by the learned judge, albeit not expressed in the most forensic language, that the appellant/applicant had failed to satisfy stage 1 of the **Spiliada** test. This conclusion was reached notwithstanding the opinions and conclusions by the appellant’s expert in her report. That finding would be the end of the matter and the appeal dismissed. However, for completeness, and because it was fully argued before this Court by learned counsel for the parties, I will go on

²⁸ See page 40 of the Transcript of Proceedings at page 46 of the Record of Appeal.

²⁹ See lines 3 to 12, at page 40 of the Transcript of Proceedings.

to consider stage 2 of the **Spiliada** test: whether Ukraine is a more appropriate forum than BVI for the trial of the dispute.

Stage 2 – Is Ukraine the more appropriate forum?

[53] The appellant relies on some six connecting factors to establish that the Claim has its closest connection with Ukraine and, accordingly, that the learned judge erred when he found that the matter had its closest (or only) connection with the BVI. These factors (listed at paragraph 23 of the appellant's written submissions) are:

- (a) As concluded by the appellant's foreign law expert and unchallenged by the respondent, the likely governing law of the agreement, in respect of the loan is Ukrainian law;
- (b) The fact of the parties both having their center of business in Ukraine, as confirmed in the Affidavit of S. Christodoulou and as pleaded by the respondent in its Statement of Claim;
- (c) The agreed fact of the Loan Agreement having been executed by the respondent's Ukrainian director having executed the agreement presumably in Ukraine;
- (d) The fact that documentary evidence is likely to be in Russian or Ukrainian in the original;
- (e) The fact that the purpose of the Loan was on either case to provide funding to a Ukrainian business; and
- (f) The fact of the location of witnesses being either in or near to Ukraine.

(a) The Governing Law

[54] The learned judge did not, in a direct way, formulate a conclusion as to the governing law of the Claim. However, it would be going too far to assume or to conclude that the judge did not address this matter at all. In finding, as he did, that

the Loan Agreement, the subject of the Claim, had no connection whatsoever with Ukraine, the learned judge found, implicitly, that Ukrainian law did not apply. This must be viewed in the context of the totality of the judge's reasoning and conclusions during the hearing, and the fact that the appellant, who was contending for Ukraine, was unable to demonstrate clearly that Ukrainian law would apply. The highest the appellant was able to put this, was to say or to assume that 'the likely governing law of the [Loan] Agreement is Ukrainian law'.³⁰

- [55] There is no evidence as to the governing law of the Loan Agreement, either in the agreement itself or otherwise. It is completely silent on this issue as it contains no choice of law or jurisdiction clause. The statement in the document just under the heading 'Loan Agreement', that it was 'entered into under provisions of articles 497 and following of the Commercial Code', is of no assistance to the appellant, as it is accepted that there is no such 'article 497' in the Commercial Code of Ukraine, and there are no references whatsoever in the agreement to Ukraine or its laws.
- [56] In addressing this aspect, Dr. Gnizdovska, at pages 15 and 16 of her report, opined that, pursuant to article 44 of the private international law of Ukraine, where the parties did not chose the applicable law of an agreement, the question of which law applies falls to be determined in accordance with parts 2 and 3 of Article 32. Part 2 provides for 'the law that has the closest relationship with the transaction'. By Part 3, that would be the location of 'the party whose performance is crucial to the content of the transaction', which in this matter is the respondent, as the lender and party providing the loan funds and who is entitled, under the Loan Agreement, to its repayment with interest. It is where it is impossible to define that law, that one looks to the place in which the agreement is most closely connected, which is where the activities provided for under the agreement 'are carried out or the results provided for in the agreement are created'.
- [57] It is not correct to say that the respondent accepted or did not contest the appellant's assertion that the 'likely governing law' of the Loan Agreement is Ukraine. The

³⁰ See paragraph 23(a) of the appellant's written submissions.

record shows that this supposition was challenged by the respondent, both before the learned judge and in submissions to this Court. Moreover, the opinion of the appellant's expert is, in my view, definitive of the position under Ukrainian law. Where, as here, there is no choice of law by the parties under the Loan Agreement, the courts of Ukraine would conclude that the law of the place of incorporation and domicile of the respondent, as the party whose performance is most crucial under the Loan Agreement, would apply, that is, the law of Hong Kong and not of Ukraine. Accordingly, the appellant's reliance upon this as a connecting factor to Ukraine is unfounded and without merit.

(b) The Center of Business of the Parties

[58] Likewise, the centre of business of the parties cannot be properly relied on by the appellant as a connecting factor to Ukraine. While it is correct that the respondent did plead in the statement of claim that the focus of its business is Ukraine, it also conducts business in other parts of the world. However, it is indisputable that the appellant has no business or presence and has never conducted any business or had a presence, in Ukraine. It is a BVI company which was used by Mr. Fedoricsev to borrow money from the respondent under a Loan Agreement, the performance of which was to take place and be concluded entirely in Latvia.

(c) The Loan Agreement was signed by the Respondent's Ukrainian Director

[59] It is difficult for this, even if true, to be viewed as a connecting factor with Ukraine. Firstly, there is no cogent or conclusive evidence as to the nationality of Mr. Schevchenko. Assuming that he is a Ukrainian national, there is absolutely no evidence establishing that he signed the Loan Agreement on behalf of the respondent in Ukraine or that it was drafted by lawyers in Ukraine. Exactly where he signed the Loan Agreement, as is the case with Mr. Annikov who signed it on behalf of the appellant, is unknown. What is clear from the evidence is that the Loan Agreement was drafted in English, the parties thereto are non-Ukrainian companies, it makes no reference to Ukraine, and it was to be performed in Latvia. Accordingly, the appellant's reliance on this as a connecting factor with Ukraine is devoid of merit

and does not advance the appellant's contention that the loan and Loan Agreement has its closest connection with Ukraine.

(d) Documents likely to be in the Russian and Ukrainian Language

[60] It is apparent that most of the documents relating to this matter are in the Russian language and not Ukrainian. The most crucial document in this matter is the Loan Agreement which was executed in English. In any event, English versions of both the Loan Agreement and the Agreement of Intent have been produced as exhibits in this matter, as have been the other documents relied upon by the appellant in foreshowing its defence to the Claim. Furthermore, the appellant has not pointed to any other documents as being relevant for consideration by the trial court. Therefore, this factor would, at best, be a neutral one, if a real connecting factor at all.

(e) The Purpose of the Loan was to fund a Ukrainian Business

[61] The stated reason by the respondent for the loan was to assist Mr. Fedoricsev in providing bridging finance for his transshipment business in Ukraine. Mr. Fedoricsev in his affidavit (filed 4th September 2018) paints a different picture. He says the Loan Agreement 'was executed as part of the investment planning in order to form a ground for transfer of USD 1,873,400 from [the respondent] to [the appellant]'; and the loan was part of a 'greater scheme of investments, and did not constitute a pure loan transaction'. This characterization of the loan was also given in Christodoulou 1. The real problem with this is that there was little, if any, evidence to support it before the judge. This was conceded before us by Mr. Nader, who stated that the appellant did not have any document before the court to make it clear that the Loan Agreement was part of the joint venture transaction and an investment in the joint venture Project. While it is not for this Court (or the judge below) to prejudge factual issues which are yet to be fully ventilated at a trial, it was necessary for the appellant to be able to point to some evidential basis supportive

of its version of the purpose of the loan, casting it as an integral part of a greater transaction or joint business investment in Ukraine, involving the appellant and the respondent, and or their respective beneficial owners. This the appellant has failed satisfactorily, at this stage, to do.

(f) Location of Witnesses

[62] Again, this does not advance much the appellant's contention for Ukraine as the place where this dispute has its closest connection. In fact, Mr. Nader, quite correctly, did not place much emphasis on this as a connecting factor during the hearing of this appeal. From the submissions of learned counsel on both sides, it is apparent that only some of the potential witnesses may be residing in Ukraine. However, the main witnesses, Mr. Fedoricsev for the appellant, is apparently living in Russia (and may be the subject of a warrant issued by the authorities in Ukraine), and Mr. Shchurin, for the respondent, resides in Monaco.

[63] Based upon the above analysis, in my view, the learned judge was correct in finding that this disputer has no real connection with Ukraine and Ukraine could not be 'considered... the appropriate forum',³¹ and that it had to be BVI, since the appellant/applicant was not contending for Hong Kong, the place of domicile of the respondent.³² The reliance by the appellant before the learned judge on the above-stated factors to connect the Claim with Ukraine, was misplaced and unsupported by the evidence before the court. Accordingly, even if the appellant were to have established that Ukraine was an available forum for the trial of this dispute under the Loan Agreement, which in my judgment they have not, it is my opinion that there are no real connecting factors with Ukraine relating to the Loan Agreement, its parties, and its performance, as the judge held. In those circumstances, the BVI, as the country or forum with jurisdiction as of right over the appellant, is the jurisdiction with which the said dispute therefore has its closest connection.

³¹ See page 42 of the Transcript of Proceedings at page 48 of the Record of Appeal.

³² See page 41 of the Transcript of Proceedings at page 47 of the Record of Appeal.

Conclusion

[64] In my judgment, there is no basis for setting aside the decision and order of the learned judge. He committed no error of law or of principle. He applied the correct test in finding that Ukraine was not an available forum for the trial of this Claim as the Loan Agreement had no connection with Ukraine and was not governed by the laws of Ukraine. Further, even if Ukraine was available, the appellant has failed to show that Ukraine is distinctly the more appropriate forum for the trial of the dispute between the parties and for the ends of justice.

[65] Accordingly, I would dismiss this appeal, and confirm the orders made by the learned judge. I would also order that the respondent have its costs of this appeal to be assessed by a judge of the Commercial Court at not more than two-thirds of the costs below, if not agreed within 21 days.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar