

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2006/0305

BETWEEN:

CUKUROVA HOLDING A.S.

Claimant/Applicant

-and-

**IMANAGEMENT SERVICES LTD
CUKUROVA (BVI) LIMITED**

Defendants/Respondents

Appearances:

Mr John Higham QC of White & Case, London and Mr Christopher Young of Harney Westwood & Riegels for the Claimant

Mr Guy Philipps QC of Fountain Court Chambers, London and Mr Michael Fay of Ogier for the First Defendant

Mrs Benedicta Samuels-Richardson of Samuels Richardson for the Second Defendant

2007: April 16

2007: July 17

JUDGMENT

- [1] **HARIPRASHAD-CHARLES J:** The single issue arising out of the two applications which are before me is whether these proceedings should be stayed on the grounds of *forum non conveniens*.

The parties

- [2] The Claimant, Cukurova Holding SA ("Cukurova") is a company incorporated under the laws of Turkey. The First Defendant, Imanagement Services Ltd ("Imanagement") is a company incorporated under the laws of the British Virgin Islands (the "BVI") with its registered office at Drake Chambers, Tortola, British Virgin Islands. The Second

supervises arbitrations) claiming damages for breach of an alleged contract in the amount of US\$162,352,941(the "First Arbitration").

- [8] On 14 June 2006, the Tribunal in the First Arbitration made an award dismissing Imanagement's claim against CBVI. However, it held and ordered that (a) it had no jurisdiction to consider the dispute between Imanagement and CBVI on the ground that the Guarantee's alleged arbitration clause did not in fact require the resolution of all disputes arising thereunder before it, (ii) it had jurisdiction over the dispute between Imanagement and Cukurova under the terms of the Lyustiger-Karamehmet Exchange and (c) Cukurova shall pay US\$81 million to Imanagement as damages ("the First Award").³ The Tribunal rejected Cukurova's contention that the agreement to arbitrate was forged.⁴
- [9] On or about 26 June 2006, Imanagement filed a second arbitration claim against Cukurova in the Arbitral Court making basically the same allegations as in the First Arbitration but seeking an increased sum by way of damages in the amount of US\$221,774,176.53 (the "Second Arbitration").
- [10] On 7 July 2006, Imanagement petitioned to the Moscow Commercial (Arbitrazh) Court ("Moscow Commercial Court") seeking, among other things, to have the First Award modified in order that it might recover the full amount of damages it had been pursuing in the First Arbitration.
- [11] On 14 August 2006, Cukurova filed an annulment proceeding with the Moscow Commercial Court for an order setting aside the First Award. Cukurova relied on the alleged forgery of the Lyustiger-Karamehmet Exchange and the numerous gross violations of due process in the First Arbitration as the basis in bringing this proceeding. Cukurova also applied to consolidate both its and Imanagement's petitions into one hearing. That application was granted and a hearing date was set for September 2006, but subsequently adjourned initially to 15 March 2007 and thereafter to 22 March 2007.⁵

³ See Exhibit PB 1 –affidavit of Pavel Boulatev, pages 89-105.

⁴ See Exhibit "PB 1" – affidavit of Pavel Boulatov, page 91.

⁵ It appears that the adjournment was granted at the request of Imanagement which claimed that it had not been properly notified of Cukurova's petition to annul the First Award, despite the fact that Mr Klyukvin, who held a power of attorney on behalf of Imanagement, had attended a procedural hearing on 16 August

- [16] On 22 March 2007, the Moscow Commercial Court decreed that the First Award would be set aside. On 27 March 2007, the Court delivered the reasons for its decision stating that it had annulled the First Award on the basis that:

"The documents made available, however, fail to confirm that the parties have agreed to submit their dispute to commercial arbitration, as required by Article 7 of the Federal Law "On Arbitral Tribunals in the Russian Federation" and by similar legal provisions in Articles 1 and 7 of Federal Law No.5338-1 "On International Commercial Arbitration" dated 7 July 1993. According to Article 1.3 of the Federal Law "On Arbitral Tribunals in the Russian Federation", any dispute arising out of a civil relationship may be referred to an arbitral tribunal by the parties' agreement, unless otherwise is stipulated by a federal law; provisions to the same effect are also found in Articles 1 and 7 of the Federal Law "On International Commercial Arbitration". Imanagement Services LTD insists that the parties have made such arbitration agreement to refer their dispute to an arbitral tribunal by an exchange of the fax message dated June 29-30, 2004.

However, the court has received no single document to such effect that would be executed in writing and signed by the parties, nor has it received the text of an agreement that would define the parties' mutual obligations and identify the governing law. The court may not accept the argument by Imanagement Services LTD about the existence of the fax messages of Jun 29-30, 2004 because these letters are not admissible within the meaning of Article 75 of RF APC. Under Articles 71.2, 71.3, and 71.6 of the RF APC, an arbitrazh court is to evaluate the relevance, admissibility, and reliability of each piece of evidence separately, as well as the sufficiency and interrelationship of all of the evidence in its entirety. The arbitrazh court finds evidence to be reliable if its examination and verification of the proof shows the latter to be true. However, the documents presented to the court fail to demonstrate that the parties have executed an agreement in the proper form to refer their dispute to commercial arbitration....

The arbitrazh court finds there exists no arbitration agreement within the meaning of Article 5 and 7 of the Federal Law "on Arbitral Tribunals in the Russian Federation" and Articles 1 and 7 of the Federal Law "On International Commercial Arbitration" that would provide for the dispute to be submitted to the Arbitral Court of the Moscow Region Chamber of Commerce and Industry and that the resulting award has thus been delivered on a dispute that was neither contemplated by an arbitration agreement nor fell within its terms and conditions."⁸

- [17] It appears to be common ground that the above judgment of the Moscow Commercial Court did not resolve the issue of whether the arbitration agreement was a forgery.

⁸ See pp. 13-15 of the Annexures to Mr Yury Monastyrsky's Second Expert Report at Tab. 16 of the Core Bundle.

fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

- [22] Cukurova asserts that its claims are claims in tort against Imanagement and CBVI for conspiracy to defraud, abuse of civil process and malicious falsehood. In my opinion, these are not claims which arise out of the alleged arbitration agreement between Cukurova and Imanagement and do not fall within the ambit of the alleged agreement to arbitrate, which, on Imanagement's own case, referred only to contractual claims and, even then, did not apply to claims against CBVI. In the facsimile allegedly crafted by Mr Karamehmet¹⁰, it states:

"We accept your offer to amend our Agreement under which any potential disputes arising out of the said Agreement made between our parties [Imanagement and Cukurova] should be resolved by the Arbitral Tribunal of the Chamber of Commerce and Industry of the Moscow Region in accordance with the rules of such Court...."

- [23] It follows therefore, that section 6 (2) of the Arbitration Ordinance does not apply because Cukurova's tortious claims are not a "matter agreed to be referred" to the Arbitral Tribunal. By the same token, it follows that the litigation of such claims before this Court does not constitute a breach of the alleged agreement to arbitrate so as to invoke the Court's inherent jurisdiction.

- [24] Learned Queen's Counsel, Mr Higham appearing as Counsel for Cukurova submitted that Cukurova cannot be found to be in breach of an agreement to arbitrate which does not exist. He submitted, firstly, that on an application for a stay under section 6 (2) of the Arbitration Ordinance, the onus rests solely on Imanagement to prove that an arbitration agreement was concluded between itself and Cukurova.¹¹ Secondly, section 6 (2) expressly states that a stay will not be granted where the Court "is satisfied that the arbitration agreement is null and void."

- [25] According to Mr Higham QC, Cukurova has placed convincing and overwhelming evidence demonstrating that the alleged agreement to arbitrate was forged and even if it had not,

¹⁰ See Exhibit "MEK 1" pp 1 – 3 of Bundle 2 –Exhibits and Annexures.

¹¹ See Lightman J in *Albon v Naza Motor Trading Sdn. Bhd.* (No. 3) [2007] EWHC 665 at paragraphs 14 and 23.

satisfied for an issue estoppel to arise are succinctly summarised by Lord Brandon of Oakbrook in **The Sennar (No. 2)**¹⁴:

"...in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue, in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

- [30] Mr Higham submitted that it was explained in the Second Expert Report of Mr Monastyrsky¹⁵ that the ruling of the Moscow Commercial Court was binding on the parties from the date it was rendered and that, although appealable to the Federal Arbitrazh Court of the Moscow Circuit, the ruling is final and conclusive in the required sense that it cannot be varied, re-opened or set aside by the court that delivered it or any court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.¹⁶
- [31] Cukurova has rightly submitted that the Defendants have not contested that the Moscow Commercial Court is of competent jurisdiction and, given the identity of the parties, it follows that the fact that no binding agreement to arbitrate exists between Imanagement and Cukurova is now *res judicata* before this Court and Imanagement is now estopped from asserting in this Court or elsewhere that there is or was such an agreement.
- [32] Moreover, the Tribunal in the Second Arbitration and the Court of Justice of Geneva have both ruled that no binding agreement to arbitrate exists between the parties.¹⁷
- [33] Accordingly, I find that there is no jurisdiction to grant a stay under section 6 of the Arbitration Ordinance nor is there any basis to do so under the inherent jurisdiction of the Court which, in any event, would require exceptional circumstances.¹⁸

¹⁴ [1985] 1 W.L.R. 490 at 499 A-B.

¹⁵ See paragraphs 11 to 17.

¹⁶ See Lord Diplock in the Sennar at page 494 A-B.

¹⁷ See pp. 80-82 and 148-149 of Mr Karamehmet's affidavit.

that whatever may be the position under domestic Russian Law, as a matter of BVI law, the Courts in the BVI are entitled to enquire into the questions whether an award constitutes a Convention award within the meaning of the Arbitration Ordinance and whether the reasons for refusal of recognition or enforcement of the Convention Award are made out. It seems to me that neither under BVI law nor the New York Convention is there any basis for contending that that the Courts of the country where the award was made have exclusive jurisdiction to determine matters going to the arbitral tribunal's jurisdiction.

- [39] Suffice it to say, given that the Moscow Commercial Court has now decided that there was no agreement to arbitrate²⁰ the exercise by this Court of jurisdiction over Cukurova's claim is not at variance with any jurisdiction exercisable by the Russian courts.
- [40] The issue estoppel which arises from the ruling of the Moscow Commercial Court is that there exists no binding arbitration agreement between Imanagement and Cukurova. As it relates to the question of forgery, Imanagement argued that it is not clear from the judgment whether the Moscow Commercial Court has decided the question of whether the arbitration agreement was forged and argued further, that whether or not the Court decided the question of forgery, that question is in any event, *res judicata*. Imanagement contended that that question has been decided on its merits by a court of competent jurisdiction –either the Arbitral Tribunal or the Moscow Commercial Court – in proceedings between the same parties. As such, it is *res judicata* and it is an abuse of the court's process for either party to seek to re-litigate the question in the BVI.
- [41] Perusing the judgment delivered on 29 March 2007, it seems to me that the Moscow Commercial Court did not find it necessary to determine whether the agreement to arbitrate was forged and the contention by Imanagement that Cukurova is trying to re-litigate before this Court an issue which has already been determined by the Russian Courts is tenuous. Furthermore, it does not follow from the fact that Cukurova was effectively compelled to seek annulment of the fraudulently obtained Award from the

²⁰ See Judgment delivered on 29 March 2007 where the Arbitrazh court found that there exists no arbitration agreement.

process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the disputes between the parties."

- [45] It is plain from the above authorities that the existence of concurrent foreign proceedings is just one of the factors that the court may take into consideration in the exercise of its discretion to grant a stay of proceedings on the principle of *forum non conveniens*.

The applicable principles

- [46] It is accepted by all parties that the governing principles to be applied on an application to stay proceedings on the ground of *forum non conveniens* are clearly stated by Lord Goff of Chieveley in the landmark case of **Spiliada Maritime Corporation v Cansulex Limited**²⁵ which were applied in two cases from this jurisdiction: see **IPOC International Growth Fund Limited v LV Finance Group Limited et al** ²⁶ and **Sibir Energy PLC v Gregory Trading SA and others**²⁷. The basic principle is summarised in Dicey & Morris, *The Conflict of Laws*²⁸ and is drawn from the judgment of Lord Kinnear in **Sim v Robinow**²⁹ which I take the liberty of repeating:

"a stay will only be granted on the ground 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 parties and the ends of justice."

See also: Lord Goff of Chieveley in **Connelly v RTZ Corporation plc**[1998] A.C. 854 at page 871 (F) and **Lubbe v Cape plc** [2000] 1 WLR 545 –per Lord Bingham of Cornhill at page 1554 D-H.

- [47] The Defendants say that the other forum is Russia. Russia must be an available forum. This Court must be satisfied that Russian Court is the appropriate forum for the trial of the claim in this case.

²⁵ [1987] 1 A.C. 460 at page 476.

²⁶ BVI Civil Appeal Nos. 20 of 2003 & 1 of 2004 [unreported] delivered on 19 September 2005

²⁷ BVI Civil Appeal No. 26 of 2005, paragraphs 21 -23.

²⁸ 13th Edn. Vol. 1 page 390 -12-010.

²⁹ (1892) 19 R.665, 668.

been conclusively determined by the Russian courts, those courts, to which Cukurova has itself referred the question, would obviously, and overwhelmingly, constitute the natural and appropriate forum to determine this dispute, such that this Court is *forum non conveniens*. He urged on this court a number of circumstances as demonstrating that BVI is not the forum *conveniens* and stressed that this dispute has nothing to do with the BVI bar that the Defendants are incorporated here.

Is Russia an available and appropriate forum?

[54] The first question is whether Russia is an available forum for the tortious claims made by Cukurova? At paragraph 41 of his affidavit, Mr Karamehmet expressed substantial doubt over whether a Russian court would take jurisdiction over similar claims brought against the Defendants in Russia and whether the Russian court would grant relief equivalent to that sought in the BVI. In other words, he intimated that Russia is not an available forum.

[55] His position is fortified by the First Expert Report of Mr Monastyrsky who also casts substantial doubt over whether a Russian Court would take jurisdiction over similar claims brought in Russia and whether, even if it did, the Russian Court could or would grant relief equivalent to that sought before this Court. At paragraph 9, he opined:

"The rules regarding jurisdiction of the Russian Courts in cases involving foreign parties are set forth in Chapter 32 of the APC. Article 248 of the APC [Exhibit 4] provides a list of the instances where the competence of the Russian Courts in cases involving foreign parties is exclusive. None of the provisions of the said Article applies to the BVI Case and therefore the Russian Courts will not be able to assert their jurisdiction over the BVI Case under Article 248 of the APC.

Article 249 of the APC allows the Russian Courts to assert jurisdiction in cases where the parties (when at least one of them is a foreign entity) have agreed in writing to submit their dispute to the respective Russian Court. According to the documents I have been provided, there is no written agreement between the Parties to try the BVI Case in any of the Russian Courts.

The rules regarding the non-exclusive competence of the Russian Courts to try cases involving foreign parties (which allow a claimant to seek redress in a Russian or competent foreign court in his discretion) are set forth in Article 247 of the APC. The said Article contains a list of situations where a Russian Court may assert its jurisdiction over a business-related dispute involving foreign parties [Exhibit 5]."

- [61] In passing, Learned Queen's Counsel submitted that if Mr Monastyrsky is uncertain about injury to property, there would be no cause of action under Russian law anyway and the action is going to fail the next hurdle which, according to Mr Philipps, Mr Monastyrsky did not address, is the alternative he mentioned in paragraph 14 i.e. the Russian Courts will have jurisdiction if the injury occurred on the Territory of the Russian Federation. Mr Philipps contended that it is rather surprising that Cukurova should suggest that Russia is not an available forum inasmuch as the parties are already parties to proceedings in that country in which this very issue has been raised. Learned Queen's Counsel reinforced his submission by alluding to what he says is as plain as a pikestaff that the injury occurred on the Territory of the Russian Federation and it is simply not open to Cukurova to argue otherwise because that is their own pleaded case.
- [62] In my judgment, on the evidence before the Court which remains wholly uncontroverted, Russia would not be an available forum for Cukurova's tortious claims against Imanagement and CBVI. It is to be observed that in paragraph 15, Mr Monastyrsky went on to say "There also appears to be no "property" in Russia that could suffer "injury" within the meaning of the same Article."
- [63] Besides, there is no agreement in writing between the parties to refer Cukurova's claims and damages in tort against these two BVI Companies to the jurisdiction of the Russian Court. There appears to be an offer on the part of CBVI and Mr Philipps has submitted that the Russian Courts will have jurisdiction if the parties agree in writing that they will. He submitted that Imanagement is prepared to submit to the Russian Courts and are prepared to do so in writing. Nevertheless, it is clear that undertakings would be insufficient to confer jurisdiction on the Russian Courts.
- [64] In addition, to say that the parties are already parties to proceedings in Russia, though accurate must be considered against the backdrop that Cukurova was sued in Russia and had to defend itself in order to resist the enforcement of the First Award. Although nominally a claimant before the Moscow Commercial Court, Cukurova was forced to take such action to resist enforcement of the First Award which it alleged, had been obtained as a result of a forgery of an agreement to arbitrate in Russia.

[70] In *Banco Atlantico S.A. v The British Bank of the Middle East*³⁰, 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."

[71] In *Bitech Downstream Ltd v Rinex Capital Inc. et al*³¹, Rawlins J [as he then was] considered the relevance of choosing to incorporate in the BVI to a challenge of the Court's jurisdiction. He said:³²

"Mr Philipps QC insisted that Bitech is entitled to proceed in this forum on its claim as a matter of public policy, because the defendant companies were incorporated here. The advantages, he said, are that they can be served without permission and without the court having to exercise jurisdiction. He said that generally, the natural and appropriate forum for any litigation is the forum in which the defendants are incorporated. He submitted further, that this is because the defendants will have all of the advantages of fighting on their own turf and in their own language. He submitted, on the authority of *Konamaneni and other v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269, per Lawrence Collins J at page 1266, para. 56, that this is the main reason why it is very rare that stays are granted on the ground of *forum non conveniens*. Thus, he said, 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. He submitted, further, that those who incorporate companies in this Territory in order to obtain the very considerable benefits that such incorporation brings must accept that this entails acceptance of the jurisdiction of this court.

While I agree with the thrust of these submissions, I do not think that the domicile of the company is necessarily the quintessential connecting factor or that it should be so as a matter of public policy. It is, like the law that governs the transaction or the issues for trial, a strong pointer or connecting factor. Like these, it is to be considered with other connecting factors."

[72] At paragraph 28, Rawlins J held that "the fact that the defendants were incorporated in this Territory is a factor that clearly militates against their application for a stay on the ground of *forum non conveniens*."

³⁰ [1990] 2 Lloyd's Rep 504 at 508, 510

³¹ BVIHCV2002/0233 (Rawlins J –as he then was)

³² See paragraph 26-27.

1. There are concurrent proceedings before the Moscow Courts addressing the issue whether the agreement was forged and that proceeding raising the same issue as is sought to be determined in the BVI are pending, and well advanced in Russia: *The Abidin Daver* [supra]; *The Varna* (No. 2) [1994] 2 Lloyd's Rep 41.
2. The place where the tort is committed will usually be the appropriate forum for the determination of proceedings arising out of the tort: *The Albaforth* [1984] 2 Lloyd's Rep 91, 94 (CA); *Berezovsky v Michaels* [2000] 1 WLR 1004.
3. As a general rule, issues of foreign law are most appropriately determined by the foreign court, which will be likely to apply its own law more reliably than the BVI Court and in which the issue can be appealed as an issue of law rather than of fact: *The Eleftheria* [1969] 1 Lloyd's Rep 237, 246.

Concurrent proceedings

- [76] The Defendants' principal contention is that this dispute has been fully argued before the Moscow Commercial Court and is going to be argued again before the Cassation Court of Appeal. They argued that there are concurrent proceedings before the Moscow Commercial Court addressing the issue whether the agreement to arbitrate was forged.
- [77] Mr. Higham countered by making three submissions. First, he says, there are no pending proceedings in Russia between Cukurova and Imanagement. Second, subject to an appeal, the proceedings are at an end as the Moscow Commercial Court delivered its ruling on 29 March 2007. Third, the Moscow Commercial Court has not determined the question of whether the agreement to arbitrate was forged. Therefore, there is no *lis alibi pendens* in Russia – no issue estoppel preventing this Court from addressing the question of forgery and certainly, no cause of action estoppel preventing Cukurova from bringing its claim for damages in tort in the BVI.
- [78] In the *Abidin Daver* (supra), Lord Brandon said at 423-4:
- "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

is indeed correct. It seems to me that the charge of forum shopping lies ill in the mouth of the Defendants because the uncontradicted evidence to date, is that Imanagement forged an arbitration agreement purportedly conferring jurisdiction on a Russian Arbitral Tribunal to determine alleged contractual dispute between a BVI company and a Turkish petroleum company where the agreement was allegedly negotiated, including orally in English in New York and where the agreement was allegedly governed by New York law.

[83] In regard to the issue of fragmentation, Cukurova submitted that the arguments put forward by the Defendants³⁵ are misconceived. It maintained that its position in the Russian proceedings were purely defensive. Those proceedings are over with the forgery issue still unresolved. According to Cukurova, there would be no fragmentation where it would now pursue its forgery allegation in the BVI in support of its claim for damages.

[84] Cukurova claims for damages the loss sustained by it as a result of the Defendants' tortious conduct are in addition to any entitlement by Cukurova for costs which it may have incurred to various jurisdictions. Cukurova alleges that it would be impractical to bring those claims in those jurisdictions where Imanagement has sought to proceed against Cukurova.

[85] At first blush, the fragmentation argument advanced by Mr Philipps appears attractive but on closer scrutiny, it is not realistic. To require Cukurova to bring tort claims in the diverse jurisdictions would lead to the very fragmentations of claims which the Defendants purport to object. To add, Imanagement alleged co-conspirator, CBVI, is not a party to any claims for costs made by Cukurova in any of the jurisdictions. And the position on the evidence is that Cukurova has received no costs of the arbitration proceedings. In those circumstances, the appropriate course for Cukurova to take is to bring these proceedings in the BVI where it will be able to proceed with its claim against Imanagement as well as CBVI.

³⁵ See paragraphs 18 -20 of skeleton argument of the First Defendant –Imanagement Services Limited for hearing of application for a stay, 16 April 2007.

also says that the economic effects of the Defendants' fraud meant that it will have been suffered in Turkey where it is incorporated.

- [91] The current position is that it remains to be seen where the allegedly forged documents were created and where the Defendants' alleged conspiracy took place. Indeed, there is no evidence to show that the alleged forged document to arbitrate was created in Russia. In the case brought by Imanagement against Mr Karamehmet in the Supreme Court of the State of New York, Diamond J said:

"The plaintiff also contends that the case has substantial connection to New York because of its principal, Nick Lyustiger, negotiated the oral agreement while he was in New York. Plaintiff, however, has not offered any proof which indicates that New York was the primary location where any such agreement was negotiated. On the contrary, the plaintiff itself has submitted numerous e-mails which show that Mr Lyustiger, who appears to be a California resident, was in fact present in several different locations, including California, Moscow, London and Turkey, when he negotiated the alleged oral agreement with the defendant."

- [92] Indeed, the affidavit filed by Mr Lyustiger before the New York Supreme Court contended that no other forum was more "convenient" than New York. So, it seems to me that whilst Imanagement's argument is now that Russia is the more appropriate forum, the comments made in Mr Lyustiger's affidavit support the fact that the evidence concerning the alleged agreement between Cukurova and Imanagement is limited and is not located in one place. Mr Lyustiger deposed that *"with respect to potential relevant documents in this action, there is limited documentation that may be relevant to the claims herein. In any event, the documents, like the witnesses, may be located in different countries."*

- [93] Now to CBVI's part in the alleged conspiracy. First, it is significant to observe that CBVI was held out in the Russian arbitration proceedings to be a subsidiary of Cukurova. Then, we come to the alleged fraudulent guarantee executed on behalf of CBVI by Edward Mears and Stanley Williams³⁷. Looking at it –Contract of Guarantee made on February 26th, 2004, Road Town, Tortola, BVI. On the face of it, the guarantee purports to have been executed in the BVI by individuals whose primary base might be the BVI itself and it appears, might have no connection whatsoever with Russia.

³⁷ See Exhibit "MEK 1" pp. 167 -170.

there can be no criticism of the approach of the Court of Appeal. But counsel submitted that Hirst L.J. fell into error by relying on a line of authority which holds that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute."

- [98] Mr Philipps submitted that the authority of the House of Lords is that, where a tort, as in this case, is being committed in Russia - misleading the Russian courts about the existence of an arbitration award – the Russian courts are the natural forum for the determination of proceedings arising out of the tort.

The governing law

- [99] In Mr Karamehmet's affidavit, he deposed that he is informed that the law of the BVI may govern Cukurova's claims because of the connections between the BVI and the facts underlying the claims.⁴² Mr Phillips emphatically stated that this proposition is simply nonsense. According to him, these are claims in tort, the torts were committed in Russia and if they are to be actionable in the BVI, they must be actionable under Russian law as well as under BVI law. This he said is the double actionability rule. This rule was considered by me in **Sibir Energy v Gregory Trading Ltd**⁴³ and needs no elucidation.
- [100] He submitted that it follows that if the BVI Court is to try these claims, it will inevitably have to consider issues of Russian law concerning the torts of conspiracy, malicious instigation of civil proceedings and malicious falsehood. He further submitted that the necessity to consider Russian law will render the continuance of these proceedings in the BVI more burdensome than if they were prosecuted in the natural forum which is Russia. He argued that the Russian Court will be better placed than the BVI Court to consider and determine issues that arise under Russian law and a Russian Court will not have to consider any issues of a law that is foreign to it. He referred the Court to the case of **The Eleftheria**.⁴⁴ Brandon J (as he then was) 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

⁴² See paragraphs 41 et seq of Mr Karamehmet's affidavit.

⁴³ BVI Claim No. BVIHCV2005/0174 at paragraphs 107 et al.

⁴⁴ [1969] 1 Lloyd's Rep 237.

- [104] Mr Phillips eloquently submitted that the Moscow Court which is already seized of the issue and it cannot be right that this Court should be used to rerun the evidence and arguments about a tort that was committed in Russia and the damages flowing from that tort are predominantly felt in Russia.
- [105] Attractive though these arguments are, I cannot say conclusively that these tortious acts were committed solely in Russia, if at all in Russia. Even if, as the Defendants alleged the tort was committed in Russia (which Cukurova vociferously denies), that is a starting point in the enquiry. The other starting point is that Cukurova has found jurisdiction in the BVI against the Defendants as of right. Now, the Court must proceed to conduct a balancing exercise, weighing the factors which tell in favour of a trial in Russia against the factors which tell in favour of a trial in the BVI.
- [106] In my opinion, 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 have not, have already been translated into English and the likely witnesses are all English speakers, with one exception resident outside Russia. (conceded by the Defendants). By contrast, only one or possibly, two of the witnesses are Russian speakers and it would be burdensome for all parties were the trial of Cukurova's claims to be conducted in the Russian language. In fact, most, if not all, of the documents with regard to the alleged forgery are in English and a trial in this Court would avoid the risk for nuances of meaning when translating from one language to another. It would no doubt be an inconvenience and expense for the Defendants to bring their foreign witnesses to the BVI. But, in any event, they will still have to travel to Russia, if the trial is to take place there. Bearing these factors in mind, I cannot regard the inconvenience and expense which the Defendants would suffer through having their witnesses to the BVI as being in any way overwhelming or insuperable.
- [107] In short, it is crystal clear that a trial in the BVI would be less disruptive and would be less burdensome for the parties than a trial in Russia and the Defendants have not adduced any evidence to show otherwise. Indeed, the Defendants' own connections with Russia appear to be questionable.

[114] In the premises, the applications by the Defendants for a stay of proceedings on the grounds of *forum non conveniens* are dismissed. Costs reserved pending the trial and determination of the claim, or until further order.

[115] I gratefully acknowledge the contribution of counsel to this judgment.

Indra Hariprashad-Charles
High Court Judge