BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2007/025

BETWEEN:

IMANAGEMENT SERVICES LIMITED

Appellant

and

[1] CUKUROVA HOLDINGS A.S.
[2] CUKUROVA (BVI) LIMITED

Respondents

The Hon. Mr. Justice Denys Barrow, SC	Justice of Appeal
The Hon. Mde. Justice Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mr. Justice Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Michael Fay and Ms. Claire-Louise Whiley for the Appellant
Mr. John Higham QC and Mr. Christopher Young for the First Respondent.

2008: January 29;
October 6.

Stay of proceedings – forum non conveniens – allocation of jurisdiction - BVI claim for tortious acts committed in Russia and elsewhere - jurisdiction established in BVI forum where defendants incorporated - arbitration proceedings brought in Russia under alleged arbitration agreement – jurisdiction of Russia over BVI claim – effect of defendants' undertakings to submit to jurisdiction of Russian courts – proof of whether Russia is a more appropriate forum - burden and standard of proof - the governing law for the tortious acts and double - actionability rule - nature of proceedings pending elsewhere in Russia – the discretion of the judge.

(1) Cukurova Holdings A.S. (Cukurova) a company incorporated in Turkey brought a claim in tort in the British Virgin Islands (BVI) against 2 BVI companies - Imanagement Services Limited (Imanagement) and Cukurova (BVI) Limited (CBVI) - for conspiracy, abuse of civil process, and malicious falsehood. This claim has its genesis in an alleged forged arbitration agreement between Imanagement and Cukurova pursuant to which

Imanagement obtained an award in Russia that became the subject of proceedings before courts in Russia, both before and after Cukorova filed its claim in the BVI High Court. Cukurova is seeking damages, an injunction and 3 declarations: (a) that Imanagement and CBVI fraudulently represented that there was an agreement to arbitrate between Cukurova and Imanagement; (b) that the Arbitral Tribunal's award in Russia was procured by fraud and as such is not binding on Cukurova; (c) that Imanagement and CBVI are stopped, restrained or prohibited from seeking to enforce or obtain any benefit from this Arbitral award.

(2) Cukurova filed its BVI claim against Imanagement and CBVI on the 14th December 2006. The defendant companies on the 24th January 2007 filed their applications for a stay of proceedings on the grounds that a suit is pending elsewhere in Russia (*lis alibi pendens), and*/or that the British Virgin Islands was not the most appropriate forum to determine the action (*forum non conveniens).* In the High Court Hariprashad–Charles J dismissed the applications, and reserved costs pending the trial and determination of the claim or until further order.

(3) The appellant in this appeal has challenged the learned judge's finding that Russia is not an available forum for the resolution of the dispute between the parties. Imanagement alleges that the learned judge erred in holding that the fact that the defendants are incorporated in the BVI imposes a "very heavy" burden upon the defendants to establish that the BVI is not the "jurisdiction in which it should be sued" and that the BVI "is certainly the more appropriate forum to try the issues which are before the Court". Imanagement's grounds of appeal also question the judge's findings that the offered undertakings of Imanagement and CBVI to submit to the jurisdiction of the Russian courts were insufficient to confer jurisdiction on those courts, and that the governing law for the BVI claim is BVI law.

(4) Cukurova has contended in its cross–appeal that the learned judge failed to take into account that to the extent, if any, that the substantive law of Russia was relevant to the claims made by Cukurova against Imanagement and CBVI in this action, there was no evidence before the court that any complex or difficult issues of Russian law were likely to arise or that Russian law was any different from the law of the British Virgin Islands. Cukurova urged that since CBVI has not sought to appeal, then Cukurova's action against CBVI will continue in the BVI, thereby making it unjust and oppressive to stay the proceedings herein against Imanagement only upon its application, thereby effectively requiring Cukurova to proceed against each co-conspirator in two separate jurisdictions.

Held: dismissing the appeal with prescribed costs to Cukurova under CPR 65.13(b) which will await the determination of costs below under CPR 65.5 (2) unless the parties to the appeal agree otherwise.

(1) The role of the appellate court in forum non conveniens matters is restricted to

ensuring a correct approach in principle in the judge's exercise of discretion. The circumstances in which this court will interfere with the judge's exercise of discretion were stated by Lord Brandon in Abidin Daver[1] to be : (i) where the judge has misdirected himself/herself with regard to principles in accordance with which his/her discretion had to be exercised; (ii) where the judge in exercising his/her discretion had taken into account matters which he/she ought not to have taken into account or failed to take into account matters which he/she ought to have taken into account; (iii) where the judge's decision is plainly wrong.

Case applied: Abidin Daver [1984] 1A.C. 398 at page 420 paras A to C.

(2) Even if the learned judge was inconsistent in her findings concerning the jurisdiction of the Russian courts over the BVI claim and undecided as to where the action for fraud was committed, in relation to the alleged conspiracy and the guarantee agreement, it seems arguable on the pleadings that the injury took place in Turkey where Cukurova is incorporated; and pecuniary damage was suffered in Russia, Switzerland and the Dutch Antilles in defending the arbtration claim and enforcement proceedings. Although the most significant elements of the other tortious acts may have occurred in Russia it was not of much significance that the judge left undecided the matter as to whether the Russian courts would have jurisdiction if the injury occurred on the territory of the Russian Federation as she did go on to consider all the other circumstances of the case and apply the other forum non conveniens principles.

(3) The learned judge did not err in concluding that the defendants' undertakings were not sufficient to confer jurisdiction upon the Russian courts, as the Russian law required the agreement of Cukurova also.

(4) In determining whether or not there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action the authorities establish with clarity a burden of proof on the defendant and the nature and quality of what is to be proved; and it is doubtful that they have established any formulated standard of proof or any legal principle as to the degree of the standard of proof or the extent of the burden of proof. The learned judge's use of the words "very heavy" to describe the burden of proof when considering that Cukurova had established jurisdiction in the forum of Imanagement's incorporation may be perceived as giving impermissible weight to Cukurova's right to sue in the BVI.

Cases applied: Spiliada Maritime Corporation v Cansulex Limited [1987] 1 A.C. 460; IPOC International Growth Fund Limited v L V Finance Group Limited others: BVI Civil Appeal Nos. 20 of 2003 and 1 of 2004 (unreported) delivered 19/9/05, para 27 Per Gordon J.A.

[1] [1984] 1 AC 398 at page 420 paras. A to C

Cases considered: Banco Atlantico S.A. v The British Bank of the Middle East [1990] 2 Lloyd's Rep (C.A. 504, 510; Bitech Downstream Ltd v Rinex Capital Inc. and another BVHC 2002/0233: paras 26 – 27 Per Rawlins J (as he then was).

(5) The burden of proof rests on the party asserting that foreign law differs from BVI law, or that the foreign law is complex or presents difficult issues, and in the absence of such proof there is a presumption that foreign law and BVI law are the same. The learned judge inaccurately stated that the governing law for these tortious acts is BVI law although she was entitled to conclude that any governing Russian law was no different from BVI law.

(6) In weighing the factors which fell in favour of a trial in Russia against the factors which fell in favour of a trial in the BVI the learned judge did not explicitly mention the factors concerning the familiarity of the Russian courts with the arbitration dispute but she implicitly took these factors into account at paragraphs 107 and 108 of her judgment. The main issues before the Arbitral Tribunal in Russia were whether there was an arbitration agreement and whether there was a breach of the agreement which is clearly different from the issues in the BVI claim. The learned judge cannot be faulted for concluding that the Moscow court had not ruled on the question of forgery after considering whether concurrent proceedings existed at the material time, and whether refusal of a stay would produce the undesirable consequences of two conflicting judgments of the Russian and BVI courts or create a situation of res judicata or issue estoppel in the latter case. Although the alleged tortious acts were committed in the course of alleged contractual relations the acts have a separate legal existence from the contractual obligations and breaches thereof. Accordingly there is no error of principle that would serve to vitiate the learned judge's ultimate conclusion that the BVI is the most natural and appropriate forum to try this claim in tort.

JUDGMENT

[1] EDWARDS, J.A. [AG.]: The defendants filed applications for a stay of the action for conspiracy and fraud brought by the claimant against them. The grounds of their applications were that a suit is pending elsewhere in Russia (*lis alibi pendens), and* / or that the British Virgin Islands (BVI) was not the most appropriate forum to determine the action (*forum non conveniens).* The learned trial judge Hariprashad–Charles J dismissed the applications, and reserved costs pending the trial and determination of the claim or until further order. This decision of Hariprashad–Charles J is the subject of the appeal by the appellant

Imanagement Services Ltd. ("Imanagement"); and a counter–appeal by the first respondent Cukurova Holding A.S. ("Cukurova"). The second respondent Cukurova (BVI) Limited ("CBVI") has not appealed.

[2] The findings of fact and law which are challenged by the appellant are: (1) that Russia is not an available forum for the resolution of the dispute between the parties; (2) that the fact that the defendants are incorporated in the BVI imposes a "very heavy" burden upon the defendants to establish that the BVI is not the "jurisdiction in which it should be sued"; (3) that the BVI "is certainly the more appropriate forum to try the issues which are before the Court".

[3] Cukurova contends in its cross – appeal that the learned judge failed to take the following matters into account: (1) That to the extent, if any, that the substantive law of Russia was relevant to the claims made by Cukurova against Imanagement and CBVI in this action, there was no evidence before the court that any complex or difficult issues of Russian law were likely to arise or that Russian law was any different from the law of the British Virgin Islands; (2) Since CBVI has not sought to appeal, then Cukurova's action against CBVI will continue in the BVI, thereby making it unjust and oppressive to stay the proceedings herein against Imanagement only upon its application, while effectively requiring Cukurova to proceed against each co-conspirator in two separate jurisdictions.

Background facts

[4] Cukurova is a company incorporated under the laws of Turkey. Imanagement and CBVI are companies incorporated under the laws of the BVI, and each company has its registered office at Drake Chambers, Tortola, BVI. According to Cukurova, it is not related to CBVI despite their names.

[5] Documentary exhibits and affidavit evidence disclose that Imanagement made the following allegations in a statement of claim filed in April 2006 against Cukurova

[6] Cukurova's representative contended before the arbitration tribunal in Russia that the translation of the arbitration clause 4.1 in the guarantee contract which Imanagement provided was incorrect. Imanagement's representative told the tribunal that "The Claimant concluded the arbitration agreement about the referral of this dispute to Arbitration Tribunal of the Chamber of Commerce and Industry of the Moscow Region with the 1st defendant in the process of performance of the

agreement between the parties in June 2004. At first, there was a verbal understanding between the authorized representatives of the parties (Nikolay Lustiger and Melmet Karamehmet), later, this understanding was confirmed by mutual fax messages dated 29th and 30th of June 2004 (Exhibit No. 4 to the statement of claim). These circumstances can also be confirmed by witness M. Galkin – the employee of the company." Imanagement's representative later admitted to the tribunal (at page 143 of Vol. 2) that the documents do not correspond to the reality that there was an arbitration clause agreement to refer the matter to the Arbitral Tribunal of Chamber of Commerce and Industry of Moscow region.

[7] Imanagement's representative also told the tribunal that the law of the BVI governed the question of Imanagement being bound by actions of one person; while the legislative norms and legal system of New York, USA are the substantive rules of law applicable between the parties to this dispute, which also regulate the powers of Mr. Mehmet Karamehmet during the conclusion of the agreement. Mr. Galkin Mazim Vladimirovich, vice president of Imanagement testified before the tribunal, but his evidence was not about the arbitration clause. He said that Imanagement's main activity was in Russia, Turkey, USA and other countries. Cukurova's representative told the tribunal (at page 144 of Vol. 2): "We consider that the substantive provisions of lex personalis of legal person should be applied and that Russian procedural provisions should be applied" when assessing the conclusion of the arbitration agreement between the parties to this dispute.

[8] Finally, at the conclusion of its hearing on the 29th May, 2006 the tribunal ordered the termination of arbitral proceedings in relation to CBVI, declaring that it had no competence to examine this dispute, which is caused by the "defect of arbitration agreement" between Cukurova and Imanagement.

[9] In its decision delivered on the 14th June, 2006, the tribunal awarded US$81 million to Imanagement as damages, after saying the following: " In the course

of the long-lasting relations between the claimant and the defendant Cukurova Holding A.S. which took place since the year 2002, both in connection with the agreement being the subject of the present court proceedings and in connection with other transactions, there was established a practice of reaching verbal agreements between senior executives of the parties, which were subsequently confirmed by electronic and/or facsimile messages (which fact is evidenced by the testimony of M.V. Galkin, witness on the part of the Claimant). The exchange of facsimile and electronic messages in respect of the arbitral clause between the parties is fully consistent with such practice. A printout of the facsimile message received by Nick Lyustiger from Mehmet Karamehmet of June 30, 2004 in respect of the arbitral clause shows that it had been sent from Cukurova Holding A.S. It should be noted that changing the text of a message sent via email after it has been mailed appears to be substantially difficult or at least unlikely, since the message sent is saved in the computer systems of the sender and internet – intermediaries involved in its delivery to the recipient. One of the generally accepted principles of law is the presumption of good faith of the parties. The Court has no basis to consider the presented emails and facsimile messages of the defendant Cukurova Holding A.S., received by the Claimant, to be invalid. Furthermore, the Defendant … which contests their validity did not produce any evidence in support of its claims. In this regard, the Court finds that the requirements of Article 3 of the Rules of the Arbitral Court …have been met."

[10] On a similar arbitration claim by Imanagement against Cukurova, filed on the 26th June 2006, Imanagement sought to have the award increased to US$221,774,176.53; and later to US$280,552,740.73 at an adjourned hearing. On the 7th July 2006, it petitioned the Moscow Commercial (Arbitrazh) Court to increase the tribunal's award to the sum it had originally claimed and reverse the dismissal of CBVI from the case.

[11] Cukurova, on the 14th August, 2006 filed proceedings before the Moscow City Arbitration Court to set aside the tribunal's award on grounds which included that

there were numerous gross violations of due process. In this petition Cukurova contended that the allegations of Imanagement were deliberately false and untrue. "No agreement was made between Cukurova and … [Imanagement] including any agreement on the submission of disputes to the Arbitral Tribunal for settlement. In actual fact, the messages dated 29 and 30 June 2004 do not exist, and the texts submitted by … [Imanagement] have nothing to do with Cukurova." Cukurova never received the message dated 29th June or sent the message dated 30th June. In the submitted legal arguments before the Moscow Commercial Court, Cukurova submitted that the Arbitral Tribunal arrived at its conclusions (set out at paragraph 8 above) without examining the computer systems of the senders and the internet intermediaries, having rejected Cukurova's repeated petitions for such examination; and that the texts of the messages dated 29 and 30 June submitted by Imanagement allegedly sent electronically may not evidence the existence of an arbitration agreement.

[12] While all of these multiple arbitral proceedings were pending, from September to October 2006 Imanagement sought unsuccessfully to enforce the award of the Arbitral Tribunal, in several jurisdictions (including Switzerland and Netherland Antilles) where Cukurova has assets. Cukurova incurred substantial expenses in resisting these enforcement proceedings.

[13] On the 14th November 2006 the second arbitration claim was dismissed by a differently constituted Arbitral Tribunal on grounds which included that Imanagement had not established the existence of a binding agreement to arbitrate between the parties.

[14] On the 14th December 2006 Cukurova filed the action against Imanagement and CBVI in the BVI, which Imanagement's and CBVI's applications have sought to stay.

The nature of the BVI action

[15] The action which is sound in tort, is seeking damages for loss occasioned by conspiracy, abuse of civil process and malicious falsehood; and an injunction along with 3 declarations: (a) that Imanagement and CBVI fraudulently represented that there was an agreement to arbitrate between Cukurova and Imanagement; (b) that the Arbitral Tribunal's award in Russia was procured by fraud and as such is not binding on Cukurova; (c) that Imanagement and CBVI are estopped, restrained or prohibited from seeking to enforce or obtain any benefit from this Arbitral award.

[16] Paragraphs 4 to 19 of the statement of claim narrate the procedural events before the arbitral tribunal that led to the procuration of the award and Cukurova's annulment proceedings in the Moscow Commercial Court to set aside the award. Paragraphs 20 and 21 contend that the alleged email exchange between Mr. Lyustiger and Mr. Karamehmet is a forgery; there was and is no agreement to arbitrate disputes between Cukurova and Imanagement; and the guarantee is a false document insofar as it is based on the false representations of Imanagement and CBVI, particularly CBVI. Notwithstanding that CBVI bears no connection to Cukurova and has no authority to act on Cukurova's behalf, CBVI guaranteed the performance by Cukurova of purported obligations to which Cukurova never agreed. Cukurova only became aware of such purported obligations at the first hearing of the arbitration on the 25th May 2006. The arbitral award was procured by fraud, insofar as it was based on forged documents, false evidence, the guarantee, and the Lyutiger-Karamehmet email exchange to arbitrate in the arbitral court.

[17] Paragraphs 29 to 33 of the statement of case refer to the procedural events relating to Imanagement's second arbitration claim before the Arbitral Tribunal, the dismissal of the claim, and the Arbitral Tribunal's 4 specific findings including that Imanagement failed to produce evidence proving with certainty the making by the

parties of an arbitration agreement. Paragraphs 29 to 31 plead that the defendants unlawfully conspired to injure Cukurova by entering into the guarantee in order to provide documentary evidence so as to bolster Imanagement's false claims. Paragraphs 32 to 33 allege that the arbitral award was an abuse of civil process, obtained in bad faith, maliciously, without reasonable and proper cause, and with the ulterior motive of causing loss and damage to Cukurova rather than furthering any legitimate interest. That the enforcement of the award proceedings brought by Imanagement has resulted in further loss to Cukurova for legal expenses and costs incurred in resisting the enforcement proceedings.

[18] Paragraphs 34 to 36 allege that Imanagement maliciously published certain pleaded falsehood in its document to and statements made before the Arbitral Tribunal, calculated to cause pecuniary damage to Cukurova, which caused the tribunal to make an award in favour of Imanagement, which has caused Cukurova loss and damage.

The events following the applications for stay

[19] On the 24th January, 2007 Imanagement and CBVI filed their applications for Cukurova's claim in the BVI to be stayed. By the time these applications came on for hearing on the 16th April, 2007 the Moscow City Arbitration Court had on the 22nd and 29th March 2007 ruled in favour of Cukurova on its application (14/8/06) to set aside the Arbitral Tribunal's award of $81 million. This court found that there exists no arbitration agreement within the meaning of Articles 5 and 7 of the Federal Law 'On Arbitral Tribunals in Russian Federation' and Articles 1 and 7 of the Federal Law 'On International Commercial Arbitration' that could provide for the dispute to be submitted to the arbitral court at the Moscow Region Chamber of Commerce and Industry; and that the resulting award was delivered on a dispute that neither was contemplated by an arbitration agreement nor fell within its terms and conditions.

[20] On the 29th April, 2007 Imanagement filed an appeal to the Cassation Court seeking to annul this ruling of the Moscow City Arbitration Court, on the ground that it had misinterpreted the law. On the 29th June 2007 the Cassation Court found that the wrong law had been applied by the Moscow City Arbitration Court and it dismissed their decision and remitted the case back to them for reconsideration.

[21] On the 6th September 2007 the Arbitral Tribunal's award of US$81 million was again set aside by the Moscow City Arbitration Court. Imanagement renewed its appeal to the Cassation Court on the 28th September 2007. At the hearing of the appeal before us on the 29th January 2008, we were informed by counsel for the parties that the Cassation court had on the 28th December 2007 allowed Imanagement's appeal and dismissed Cukurova's petition to annul the award.

[22] The judgment of Hariprashad–Charles J was delivered on the 17th July 2007 based on the facts as they existed up to the 16th April 2007. Consequently, the matters arising in Russia that were not before the learned judge when she determined the application for stay ought not to be taken into account for the purposes of this appeal.

The Judgment on the applications

[23] The judgment of Hariprashad–Charles J is long so I will attempt to summarise only the portions of it that are relevant to the 10 grounds of appeal. The judgment reflects painstaking application of the governing principles in forum cases given by Lord Goff of Chieveley in Spiliada Maritime Corporation v Cansulex Limited[2], which have been approved by our Court of Appeal on several occasions. More recently, Gordon J.A. took the liberty to paraphrase those principles in IPOC International Growth Fund Limited v L V Finance Group Limited and others[3]

[2] [1987] 1 A.C. 460
[3] BVI Civil Appeal Nos. 20 of 2003 and 1 of 2004 (unreported) delivered 19th September 2005 at para. 27

which are worth repeating here:

> "(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.
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> (ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that "where there can be pointers to a number of different jurisdictions" there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than of this jurisdiction.
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> (iii) When considering whether to grant a stay or not, the court will look to what is the "natural forum" as was described by Lord Keith of Kinkel in The Abidin Daver,[4] "that with which the action has the most real and substantial connection". In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place… [in] the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.
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> (iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the Abidin Daver made it very clear that the burden of proof to establish such a

[4] [1984] A.C. 398

> circumstance was on the claimant and that cogent and objective evidence is a requirement."

[24] In discharging this burden of proof by showing that Russia is the alternate available forum with competent jurisdiction over the BVI claim, Mr. Vadim Klyukvin, advocate and representative of Imanagement, and Ms Asha Johnson barrister and solicitor instructed by CBVI, did not really address in their affidavits the question as to where the tortious acts pleaded in Cukurova's statement of case occurred, and the legal implications of this. Both deponents stated that they were prepared to give undertakings in respect of their individual clients to submit to the jurisdiction of the Russian courts in order that the proceedings can be determined in Russia.

[25] It was Mr. Yury Monastyrsky, Cukurova's lawyer and expert on Russian law, who deposed as to whether a Russian court could exert jurisdiction over, and grant the relief against Imanagement and CBVI in a Russian action based on the same allegations pleaded in Cukurova's claim; or whether there were any violations of applicable Russian law and rules committed in the arbitration.

[26] He analysed the relevant Russian law and the nature of the BVI claim and the reliefs sought and came to the following conclusions: (1) It is doubtful in the absence of any case law, that Russian courts would assert jurisdiction in a case based on the allegations in the BVI statement of claim under Article 247 (1) (4) of the Arbitrazh Proceedings Code of the Russian Federation of 24.07.02 No. 95-FZ ("the APC"). Article 247 (1) (4) provides for the Russian Courts ' jurisdiction in business–related cases involving foreign entities, where the claim is based on injury to property that occurred due to actions or other circumstances located on the territory of the Russian Federation, and there is no property in Russia that could suffer "injury" within the meaning of this Article. (2) The BVI claim does not formally qualify in Russia as an attempt to contest the Arbitral Tribunal's award under the governing law: Article 231 of the APC and Articles 34 and 36 of the Law of the Russian Federation "On International Commercial Arbitration". (3) If per chance a Russian Court were to exercise jurisdiction over the BVI claim it would

only apply substantive foreign law and not foreign procedural rules, and it would consider what remedies to grant according to its own rules. A Russian court would not grant the remedies that might be available in the BVI simply because the law governing the action (*lex causa*) was the law of the BVI. A Russian court would not grant the declaration sought, or award the damages sought. (4) 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. (5) Article 247 (1) (10) of the APC provides for the Russian Courts' jurisdiction in business – related cases involving foreign entities in case of "instances of a close connection of the disputed legal relationships with the territory of the Russian Federation". Having regard to the facts concerning the parties and the law in Russia, the conclusion is "that the connection of the disputed relationships between the parties to the Russian Federation (through the Arbitration) is not material for the purpose of the BVI Case and there is therefore no "close connection" in the sense of Article…[247] (1) (10) and no jurisdiction of a Russian court over the BVI case under Article …[247] (1) (10) of the APC. "

[27] At paragraph 61 of her judgment the learned judge referred to Queen's Counsel Mr. Philipps' observations that Mr. Monastyrsky had not analysed the jurisdiction of Russia over the BVI claim where the injury occurred on the territory of Russia although at paragraph 14 of his affidavit he had recited Article 247 (1) (4) to provide for the Russian courts' jurisdiction in business – related cases involving foreign entities where "the claim is based on injury to property that occurred due to actions or other circumstances located on the territory of the Russian Federation, or if the injury occurred on the territory of the Russian Federation."

[28] Cukurova's chairman Mr. Karamehmet resides in Turkey. He referred to the unsuccessful proceedings in New York that Imanagement had brought against Cukurova before bringing the arbitral proceedings in Russia, alleging similar breach of an agreement surrounding the bid for the Turpas oil refinery. He

deposed that Imanagement's Mr. Lyustiger contended then in his affidavit that no other forum was more convenient than New York. The learned judge found this significant. Mr. Karamehmet deposed about Cukurova's version of the facts concerning the relationship with Imanagement, the history of the proceedings leading up to the BVI claim, the witnesses necessary for their case, and repeated the legal advice he had received concerning the availability of Russia as a forum for the trial of Cukurova's claim.

[29] In considering the submissions of counsel for the parties the learned judge referred to Mr. Higham QC's submission that Cukurova's statement of case would not ground a cause of action in Russia and the undertakings of Imanagement and CBVI were insufficient to found Russia's jurisdiction over the BVI claim. At paragraph 61 of the judgment, Hariprashad–Charles J mentioned learned Queen's Counsel Mr. Philipps' surprise that Cukurova should suggest that Russia is not an available forum inasmuch as the parties are already parties to proceedings in Russia where the very issue has been raised and the defendants were prepared to submit to the Russian courts. She noted that Mr. Philipp QC had canvassed that it was "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 its own pleaded case".

[30] At paragraphs 62 to 65 of her judgment, the learned trial judge relied on Mr. Monastyrsky's evidence concerning the absence of any statutory provision in Russia that would ground Cukurova's pleaded statement of case. She apparently found Cukurova's participation in the proceedings in Russia to be an insignificant factor for grounding Russia's jurisdiction in the present claims, considering that Cukurova was sued in Russia and had to resist the enforcement of the first award against it there. The learned judge concluded: "[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….[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…it is clear that undertakings would be insufficient to confer jurisdiction on the Russian Courts."

[31] The learned judge also gave serious consideration to the nature of the pleaded tortious acts, the documentary and affidavit evidence showing where they occurred, both Queen's Counsel's submissions and the law, at paragraphs 86 to 98 of her judgment. The evidence for Cukurova reflects that the fraudulent conduct of Imanagement and CBVI did not take place exclusively in Russia as they fraudulently commenced enforcement proceedings in Switzerland and the Dutch Antilles to enforce the Arbitral Tribunal's award. Cukurova's case was that the economic effects of the co-conspirators' fraud impacted in Turkey where Cukurova was incorporated and has property. The judge concluded that although it remains to be seen where the allegedly forged documents were created and where the defendants' alleged conspiracy took place, there was no evidence to show that the documents were created in Russia. She found in respect of the guarantee that on the face of it, it purports to have been executed in the BVI by individuals whose primary base might be the BVI itself, and it appears that they might have no connection whatsoever with Russia.

[32] The learned judge followed Lord Denning's exhortation that each tort has to be considered on its own to see where it is committed and where the damage is done and every tort must be considered separately.[5] She gave consideration to Lord Goff's statement of principle that "If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum." [6] Also Lord Steyn's approval in Berezovsky v Michaels of the statement of Hirst L.J that the court must identify the jurisdiction in which the case may be tried most

[5] Per Lord Denning M.R. in Diamond v Bank of London and Montreal Ltd. [1979] Loyd's Rep. 335, (C.A.) at pages 337 and 346.
[6] Per Goff L J in The Albaforth [1984] 2 Lloyd's Rep. 91, 96 (C. A.)

suitably or appropriately for the interest of all the parties and the needs of justice.[7] It was held in Berezovsky that though the burden was on the plaintiffs to prove that England was clearly the appropriate forum where there was international dissemination of libel in a magazine sold in the U.S.A., Canada, Russia, and England, regard was to be had to the principle that the jurisdiction in which a tort was committed was prima facie the natural forum for the dispute.

[33] Queen's Counsel Mr. Philipps referred the learned judge to the double actionability rule while submitting that the BVI court will inevitably have to consider issues of Russian law concerning the torts of conspiracy, malicious instigation of civil proceedings and malicious falsehood; which will render the continuance of the proceedings in the BVI more burdensome than if they were prosecuted in the natural forum of Russia.

[34] He also urged the learned judge to apply the common sense approach of Brandon J who said in Eleftheria[8] that "it is more satisfactory for the law of a foreign country to be decided by the Courts of that country." However the learned judge was not persuaded by Mr. Philipps' eloquent submissions that it could not be right for the BVI court to 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. She concluded at paragraph 101 that "the governing law to these tortious claims is BVI because of the underlying facts of the claims…." She later stated at paragraph 105: "I cannot say conclusively that these tortious acts were committed solely in Russia."

The discretion of the Judge

[35] It is well established that the role of the appellate court in forum non conveniens matters is restricted to ensuring a correct approach in principle in the judge's

[7] Berezovsky v Michaels [2000] 1 W.L.R. 1004, 1013
[8] [1969] 1 Lloyd's Rep. 237 at 246

exercise of discretion. The circumstances in which this court will interfere with the judge's exercise of discretion were stated by Lord Brandon in Abidin Daver[9] to be : (i) where the judge has misdirected himself/herself with regard to principles in accordance with which his/her discretion had to be exercised; (ii) where the judge in exercising his/her discretion had taken into account matters which he/she ought not to have taken into account or failed to take into account matters which he/she ought to have taken into account; (iii) where the judge's decision is plainly wrong.

Does Russia have jurisdiction over the BVI Claim?

[36] Ground 9 of the grounds of appeal complains that the judge was wrong to conclude that the Russian courts would not have jurisdiction over Cukurova's claim on the ground that the claimant's claim "is based on injury to property that occurred due to actions or other circumstances located on the Territory of the Russian Federation, or the injury occurred on the territory of the Russian Federation" (Article 247 (1) (4) of the Arbitrazh Proceedings Code of the Russian Federation) and/or that the parties' dispute had a close connection…with the territory of the Russian Federation" (Article 247 (1) (10). The submissions of learned counsel Mr. Fay and Mr. Higham Q.C. before us were similar to those made in the court below.

[37] Ground 12 speaks to the inconsistency in the judge's findings at paragraphs 96 and 99 of her judgment, and urges that the judge was wrong to hold that it is difficult to come to any definitive conclusion as to where the alleged tort was committed, although she had previously stated that it is not in dispute that the jurisdiction in which the tort is committed will usually be the appropriate forum for the determination of proceedings arising out of the tort. It is also contended in this ground that the alleged tort consisted of the allegedly fraudulent obtaining and attempted enforcement of an arbitration award made in arbitration proceedings between the parties conducted in Moscow, governed by Russian Arbitration law,

[9] [1984] AC 398 at page 420 paras A to C

and subject to the supervision of the Russian courts. Whilst tortious conduct may also have taken place outside Russia, the substance of the tort was plainly committed in Russia, and the judge was wrong to decline so to hold.

[38] The learned judge was inconsistent in her findings concerning the jurisdiction of the Russian courts over the BVI claim. She obviously appreciated that there were different considerations to be applied when determining whether the Russian courts were an available forum and had jurisdiction over the BVI claim as distinct from being the more appropriate forum. However the structure of her judgment demonstrates that although she dealt with the law, evidence and submissions of Queen's Counsel relating to the place where the tort was committed at paragraphs 86 to 98, she made no finding as to whether Russia had jurisdiction over the BVI claim then. It was in her deliberations as to whether Russia was an available and appropriate forum (paragraphs 54 to 65) that she made her observations concerning how Russia could acquire jurisdiction over the BVI claim, having already concluded at paragraph 62 that Russia would not be an available forum based on Mr. Monastyrsky's evidence that there appears to be no "property in Russia that could suffer "injury within the meaning of Article 247 (1) (4) of the APC.

[39] It must be noted also that at paragraph 110 the learned judge indicated that the matter as to where the action for fraud was committed "remains undecided" by her. Accepting the learned judge's findings that the events constituting the pleaded tortious acts may have occurred in several different countries, it seems to me that the most significant elements of these tortious acts occurred in Russia where Imanagement tendered the allegedly forged guarantee, wrote and published the malicious falsehood, brought the alleged fraudulent arbitration claim all of which caused the arbitral tribunal to make the award. In relation to the conspiracy, even if the guarantee agreement was executed in the BVI or New York, it seems arguable on the pleadings that the injury took place in Turkey where Cukurova is incorporated; and in such a case I agree with the learned judge that Russia would

have no jurisdiction.

[40] According to Cukurova's pleadings it suffered pecuniary damage in Russia, Switzerland and the Dutch Antilles. The second limb of Article 247(1) (4) of the APC provides for the Russian courts to have jurisdiction if the injury occurred on the territory of the Russian Federation. It appears that in the absence of any interpretation of the second limb of Article 247(1) (4) of the APC by the expert witness the learned judge left undecided the matter as to whether the Russian courts would have jurisdiction if the injury occurred on the territory of the Russian Federation. In any event even if this matter was undecided this does not hold much significance because she said at paragraph 65: "Even if I am wrong to conclude that Russia is not an available forum, I will move on to consider the other pointers or connecting factor" and she did go on to consider all the other circumstances of the case and apply the other forum non conveniens principles.

Submitting to the Jurisdiction of the Russian Court by undertaking

[41] Ground 7 alleges that the judge was wrong to hold that Russia was not an available forum for the resolution of the dispute between the parties in circumstances where both defendants had stated that they will unconditionally submit to the jurisdiction of the Russian courts to determine the dispute.

[42] Ground 8 asserts that the judge was wrong to regard the question as being whether "undertakings would be sufficient to confer jurisdiction upon the Russian courts." That the judge should have regarded the question as being whether the Russian courts have jurisdiction over a defendant who has submitted to that jurisdiction, regardless of whether those courts would have such jurisdiction in the absence of such submission, and in the absence of express evidence to the contrary, the judge should have held, consistent with generally accepted principles of private international law, that the Russian courts (like the BVI court) do have jurisdiction over a defendant who has submitted to that jurisdiction.

[43] Learned counsel Mr. Fay contended that it was not clear why the judge found that the undertakings of Imanagement and CBVI to submit to the jurisdiction of the Russian courts would not be sufficient to confer jurisdiction on them. He argued that if the only bar to an agreement to submit to the Russian courts' jurisdiction was the neglect or refusal of Cukurova to join in the agreement, then the judge should not have relied on or paid any heed to such refusal as a basis for finding that Russia was not an available forum. Learned Queen's Counsel Mr. Higham countered by referring to Mr. Monasttyrsky's unchallenged evidence concerning Article 249 of the APS (reflected at paragraph 26 (4) of this judgment) and its effect. In his view the undertakings were of uncertain scope and doubtful authority particularly where Imanagement's came from the deponent Mr. Klyukvin who in the course of the Russian proceedings fully terminated relations with Imanagement.

[44] At paragraph 55 the learned judge set out Mr. Monastyrsky's evidence concerning Article 249 of the APC (see paragraph 26 (4) above), and the fact that he had not been provided with any written agreement between the parties to try the BVI case in any Russian court. Thereafter at paragraph 63 the judge stated very clearly in my view the basis of her finding that the undertakings were insufficient. She said: "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". The learned judge obviously accepted Mr. Monastyrsky's evidence concerning Article 249 of the APC in arriving at her conclusions. This Russian law required the agreement of Cukurova also. The fact that Cukurova had prior to the bringing of the BVI claim submitted to the jurisdiction of the arbitral tribunal and other Russian courts would be immaterial in my view, because the BVI claim is distinctively dissimilar to the arbitration proceedings. The generally accepted principles of private international law, that Mr. Fay alluded to on mere common sense, pre -suppose that the claimant has brought the suit in the foreign jurisdiction to which the defendant is submitting, or that the claimant

has substantial connection with that foreign country, which is not the case here. The learned judge did not err in arriving at her conclusions about the insufficiency of the undertakings in my judgment.

The burden of proof on the Defendants

[45] The learned judge rightly held that the fact that Imanagement and CBVI were incorporated in the BVI and were served as of right with Cukurova's claim, this meant that the burden was upon them to establish that there is another available forum for trial which is clearly and distinctly more appropriate than the BVI. Ground 10 criticizes the learned judge for being wrong in going on to hold that the fact of incorporation in the BVI makes that burden a "very heavy" one or in any way greater than the burden assumed by any defendant served as of right with proceedings.

[46] The learned judge described the burden as "very heavy" apparently because of her interpretation of the judicial statements in the cases she referred to concerning this burden of proof. She relied on Banco Atlantico SA v British Bank of the Middle East [10] where a Spanish incorporated claimant company had established jurisdiction in the English forum where the defendant was incorporated. Bingham LJ [as he then was] in considering whether the defendant had shown that Sharjah was clearly a more appropriate forum than England for the determination of the issues, having regard to the interests of all parties and the achievement of justice, said at pages 508 and 510: (508) "In considering this question it is necessary to remember that Banco have established jurisdiction here, in the forum of BBME's incorporation, as of right. Very clear and weighty grounds must be shown for refusing to exercise jurisdiction…. A balance of convenience in favour of the foreign forum is not enough. The interests of justice are paramount. Although the Judge described BBME's connection with this forum as "not a fragile one" it is in truth very solid indeed. It must be rare that a corporation resists suit in its

[10] [1990] 2 Lloyd's Rep (C.A.). 504, 510

domiciliary forum. Rarely would this Court refuse jurisdiction in such a case. In my judgment very clear and weighty grounds for doing so were not shown."

[47] Hariprashad–Charles J also relied on the judgment of Rawlins J (as he then was) in **Bitech Downstream Ltd v Rinex Capital Inc and another**[11]. There, having stated the submissions of Mr. Philipps Q.C. that Bitech is entitled to proceed in this forum on its claim as a matter of public policy because the defendant companies were incorporated in the BVI, went on to repeat the other submissions of Mr. Philipps saying: "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…" Rawlins J thereafter indicated that he agreed with the thrust of these submissions and continued: "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."[12] I do not interpret Rawlins J's acceptance of the thrust of counsel's submissions to be any confirmation that the burden on the defendant is very heavy. Having regard to Gordon J.A.'s paraphrase of the governing principles enunciated by Lord Goff for forum non conveniens applications (at paragraph 23 (ii) above) it appears that Lord Goff in **Spiliada**[13] considered in a manner of speaking the extent of the burden of proof or the standard of proof on a defendant in a forum non conveniens application.

[48] At page 476 F Lord Goff said: "(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as

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[11] BVHCV 2002/ 0233 : paras 26 - 27

[12] See also 1. **Arabian American Insurance Co (Bahrain) E.C. v Al Amana Insurance and Reinsurance Co. Ltd:**Supreme Court Bermuda Civ Case No. 38 of 1993 (unreported) delivered 4/1/94 by Ground J. 2. **Hagstromer and another vSibneft Oil Trade Co. Ltd** High Court Case No BVIHCV: 2004/0055 (unreported) delivered 20/10/04 by Barrow J (as he then was).

[13] See FN1

of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favour of the defendant;"…. and also in Canada,.. Where it has been stated … that "unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed". This is strong language. However the United States and Canada are both Federal States; and, where the choice is between competing jurisdictions within a Federal State, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions "

[49] Indeed Lord Goff went on to conclude at page 477 E : " In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way proper regard is paid to the fact that jurisdiction has been founded in England as of right." It appears from this statement that the burden of the defendant in an English court may be different from the burden of the defendant in courts of Canada and the U.S.A.

[50] The authorities establish with clarity a burden of proof on the defendant, and the nature and quality of what is to be proved. The judicial statements that Hariprashad-Charles J relied on do not describe the defendant's burden as "very heavy". It is doubtful in my view that they have established any formulated standard of proof. Significantly, the restraint shown by Lord Goff is, in my opinion, a warning against formulating a standard of proof in the language used by the learned judge. Her use of the words "very heavy" to describe the burden may be perceived as giving impermissible weight to Cukurova's right to sue in the BVI. It may probably be wise therefore not to deduce from the authorities any legal

principle as to the degree of the standard of proof or the extent of the burden of proof.

[51] It seems sufficient that the authorities merely emphasise the requirements that the defendant is to prove; and inferentially what conclusion the court should arrive at from such evidence in order for the proceedings to be stayed: i.e. the court should be able to conclude that another available forum is clearly or distinctly more appropriate. The defendant's duty is to adduce evidence which fulfills the criteria established by the authorities. This is consistent with Lord Goff's statement of principle. The weight to be attached to the evidence and the inferences to be drawn from that evidence are naturally matters for the judge. The facts justifying the connecting factors, the law and submissions of counsel, the interests of the parties and the achievement of justice are what the judge will take into account in determining whether or not there is some other available forum having competent jurisdiction which is the appropriate forum for the trial of the action according to the nature of each case. It is probable therefore that the learned judge may have been inaccurate in stating the extent of the burden of proof.

The governing law

[52] Ground 11 alleges that the judge was wrong to hold (without any or any adequate explanation) that the governing law of Cukurova's claim was BVI law. The claimant's claim has no, alternatively no significant connection with the BVI. The Judge should have held that the governing law of Cukurova's claim is Russian law, being the law of the country with which the claim has its closest and most real connection.

[53] Ground 1 of Cukurova's Counter-Notice concerns the governing law. It is necessary to repeat that it alleges: that the learned judge ought to have taken into account the fact that to the extent, if any, that the substantive law of Russia was relevant to the claims made by Cukurova against Imanagement and CBVI in this

action, there was no evidence before the court that any complex or difficult issues of Russian law were likely to arise or that Russian law was any different from the law of the British Virgin Islands.

[54] The learned judge dealt with the governing law at paragraphs 99 to 101 of her judgment. It is not a valid complaint that her judgment does not reflect that she applied the double actionability rule to the underlying facts in arriving at her conclusion that the governing law for the tortious acts was BVI law although Queen's Counsel Mr. Philipps had referred her to this rule in his submissions. The learned judge merely mentioned that she was familiar with the rule, having applied it in a previous case,[14] but she obviously considered it in determining the governing law.

[55] This common law rule in private international law enables the BVI court to determine whether the BVI law (lex fori) should be displaced by the foreign law of the place where the tort was committed (lex loci delicti). The rule for the purposes of this case basically states that to found a suit in tort in the BVI for a wrong alleged to have been committed in a foreign country: (1) the alleged wrong must be civilly actionable as a tort if committed in the BVI; and (2) the alleged wrong has to be civilly actionable in the *lex loci delicti* (i.e. the law of the place where the wrong was committed): Boys v Chaplin.[15] "It is not necessary for the act or omission to be characterized as a tort or delict under the foreign law, provided that there is a right of recovery to a similar extent by way of civil action."[16] The recognition that the double actionability rule should be applied with flexibility has given rise to an exception to limb (2) of the rule, which states that a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and

[14] See Sibir Energy v Gregory Trading Ltd BVI Claim No. BVHICV 2005/0174 paragraphs 107 et sequiter.
[15] [1971] AC 356
[16] Grupo Torras [2001] CLC (C.A.) at para 141; Kuwait Oil Tanker SAK v Al Bader [2002] 2 All ER (Comm) 271 , para 165.

the parties.[17]

[56] The Privy Council in Red Sea Insurance Co. Ltd v Bouygues SA[18] considered whether the exception could extend to govern a whole case rather than specific isolated issues as was the case in Boys v Chaplin. Lord Slynn's reasoning seems to have extended the application of the exception by stating that although such instances might be rare, the exception was not limited in application to isolated issues but might also apply to the whole claim. This should take place in circumstances where all or almost all the significant connecting factors point in the direction of the law of the place where the wrong was committed.

[57] The scope of this common law rule has created much uncertainty over the years, resulting in the rule being modified by the Private International Law (Miscellaneous Provisions) Act (c.42) (U.K.). Counsel for the parties made no submissions before us as to whether this U.K. Act is to be applied in the BVI.

[58] The common law rules require that the place of tort be determined as a first step in the process of determining the applicable law for the BVI claim. Where the tort has been found to have been committed in a foreign country the general rule of double actionability applies.

[59] I have previously found that (excluding the alleged conspiracy and enforcement proceedings) the judge ought to have held that the most significant elements of these tortious acts occurred in Russia where Imanagement tendered the allegedly forged guarantee, wrote and published the malicious falsehood, brought the alleged fraudulent arbitration claim all of which caused the Arbitral Tribunal to make the award. I therefore endorse the argument of Imanagement's counsel in the court below and before us that where the torts were committed in Russia, if they are to be actionable in the BVI, prima facie they should be actionable under

[17] Dicey & Morris on The Conflict of Laws (1993) pages 1487 to 1488
[18] [1995] 1 AC 190

Russian Law as well as BVI law. Regarding the alleged conspiracy between Imanagement and CBVI, and the enforcement proceedings in Switzerland and the Dutch Antilles, it seems that the exception to limb 2 of the rule would apply.

[60] Counsel for Cukurova pointed out that Lord Goff indicated in Spiliada that the governing law may be of little importance when seen in the context of the case as a whole.[19] It must also be borne in mind that the burden of proof rests on the party asserting that foreign law differs from BVI law, and in the absence of such proof there is a presumption that foreign and English law (in this case BVI law) are the same.[20]

[61] Cukurova's counsel reminded us that Imanagement and CBVI adduced no evidence that the Russian law relating to the tortious acts in the BVI statement of case is different from the BVI law, or is complex, or presents difficult issues. In fact the defendants marshalled no evidence at all as to what the Russian law was in respect of each tortious act. Even if Imanagement is entitled to benefit from Mr. Monastyrsky,s evidence, this evidence was unhelpful as to what the law was in Russia for each of the tortious acts pleaded. Albeit that this is a preliminary stage and not the trial, in such circumstances the presumption applies. In the premise the learned judge inaccurately stated that the governing law for these tortious claims is BVI law although she was entitled to conclude that any governing Russian law was no different from the BVI law.

The appropriate forum

[62] In dealing with the contention that there may have been concurrent proceedings going on in Russia before the Moscow Commercial Court and the Cassation Court of Appeal, Mr. Higham QC submitted that since the issues before the Russian courts did not relate to whether or not the agreement to arbitrate was forged, there

[19] At pages 481H - 482 B supra.
[20] Cross on Evidence Fifth edition at page 634.

was no suit similar to the BVI claim pending elsewhere (lis alibi pendens) and so no issue estoppel existed to prevent Cukurova from bringing its claim for damages in tort in the BVI. Earlier in her judgment at paragraphs 42 to 45 the learned judge addressed Imanagement's attempt to treat the doctrine of lis alibi pendens as a separate doctrine from the doctrine of forum non conveniens. Having examined the relevant authorities, she concluded at paragraph 45 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.

[63] Also at paragraph 41 she said: "Perusing the judgment delivered 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 of Imanagement that Cukurova is trying to relitigate 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 Moscow Commercial Court that Cukurova is now barred from bringing claims for damages in tort against the defendants in … [this] jurisdiction. The fact that the Moscow Commercial Court has ruled that no agreement to arbitrate exists but left undecided the question of fraud, dismisses any doubt that Cukurova is in some way precluded from pursuing its claim before the defendants' home courts."

[64] Later at paragraphs 102 to 107 during her "Tipping the balance" deliberations, the learned judge focused on Imanagement's counsel's submissions that the Moscow Court was already familiar with the main issue in the BVI claim since it had received all the evidence, had already heard all of the legal arguments, and all that was lacking is a clear statement of its conclusion on one specific issue. In my view the main issues before the Arbitral Tribunal in Russia were whether there was an arbitration agreement disclosed in the 2 questioned e-mails and whether there was a breach of the agreement alleged concerning the oil refinery; which is

clearly different from the issues in the BVI claim.

[65] It appears from her judgment at paragraphs 102 to 105 that Mr. Philipps QC had repeated his arguments that the issue before the Russian courts was a forgery issue, and that having regard to the advanced stages of the forgery proceedings in Russia, a considerable burden will be upon the BVI court to hear numerous witnesses on the facts and on the law of Russia in order to determine the matter, which is not the case if the Russian courts which are clearly the appropriate forum be allowed to determine the matter. Despite her previous findings at paragraphs 41 to 45, the judge said that she regarded those submissions as one of the starting points in the enquiry, the other being that Cukurova had found jurisdiction in the BVI as of right. The judge then proceeded to conduct a balancing exercise, weighing the factors which fell in favour of a trial in Russia against the factors which fell in favour of a trial in the BVI.

[66] Ground 13 complains that the judge did not take the factors urged at paragraphs 102 to 104 in the submissions of Mr. Philipps into account in the course of her balancing exercise. That paragraph 107 of the judgment indicates that she wrongly regarded them as going to the separate issue already addressed by her as to whether the tort was committed in Russia. At paragraph 106 the judge examined the factors relating to convenience, witnesses, the language spoken by witnesses, and expense and then said at paragraph 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."

[67] Despite the fact that the judge did not explicitly mention at paragraph 106 of her judgment, the factors concerning the familiarity of the Russian courts with the arbitration dispute she did take them into account in my view, and obviously did not find that they provided a clear and weighty ground. This is implicit at

paragraph 108 where she said: "Although there are factors connecting this dispute with other jurisdictions beyond the BVI such as Turkey, Russia, Switzerland and the Dutch Antilles, the defendants have failed to adduce any evidence to demonstrate that there is another forum that is clearly more appropriate." I agree with the submission of Cukurova's counsel that this was quintessentially a matter for the judge to consider on the basis of evidence. There is therefore no proper basis to interfere with the learned judge's conclusion.

[68] Ground 14 urges that had the judge correctly held that the substance of the tort out of which the proceedings arise was committed in Russia, that the governing law of the claim was Russian law, and that the Russian courts were already seized of and/or were familiar with the dispute between the parties, then she ought to have held that Imanagement and CBVI had discharged their burden of establishing that Russia was a clearly and distinctly more appropriate forum for the trial of the BVI claim, and should have ordered that the proceedings be stayed.

[69] The focus of this ground was on paragraphs 77 to 80 of the judgment where the judge considered whether concurrent proceedings existed at the material time, and whether the impact described in Abidin Daver by Lord Brandon was likely. Lord Brandon said at pages 423 to 424:

> "In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if stay is refused in the present case, one or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned: or secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppel in the latter."

[70] The judge said at paragraph 80:

> "In my opinion, the Moscow Commercial Court has not ruled on the question of forgery and that (subject to an appeal), the proceedings in Moscow is at an end. In any event, the issue of forgery has still not been decided by the Russian courts and may very well never be decided by the Russian courts. So, this court need not concern itself that if it allows Cukurova's claim to proceed, either of the two undesirable consequences as enunciated by Lord Brandon in Abidin Daver will ensue. At any rate,

> Cukurova's role in the proceedings before the Moscow Court was entirely defensive in order to resist the enforcement of the first award. Cukurova's tortious claims in the BVI against the defendants are not duplicative of its defensive action to have the first award set aside. I agree with Mr. Higham that it seems iniquitous for the forum in which Cukurova is entitled to seek relief against the defendants to be dictated by what appears to be the defendants' fraudulent choice of forum."

These conclusions of the trial judge cannot be faulted in my view.

[71] Having considered the submissions of counsel for the parties, what seems clear is that the arbitration proceedings in Russia are of a contractual nature. Although the alleged tortious acts were committed in the course of alleged contractual relations the acts have a separate legal existence from the contractual obligations and breaches thereof. The Russian courts in the proceedings relating to the Arbitral Tribunal's award may have taken into account the alleged wrong doings of Imanagement and CBVI which constitute the pith and marrow of the BVI claim but this does not necessarily mean that the Russian courts have already determined the issues arising in the BVI claim.

[72] In light of my previous conclusions relating to the other grounds I can see no error of principle made by the judge that would serve to vitiate the learned judge's ultimate conclusion that the BVI is the most natural and appropriate forum to try this claim in tort. Ground 2 of the counter-notice (see paragraph 2 above) speaks to the circumstances adverted to by Cukurova which would cause loss of a juridical advantage if a stay was granted by this court. Having confirmed the learned judge's final conclusion, ground 2 of this counter-notice does not have to be addressed.

[73] Accordingly I would dismiss the appeal with prescribed costs to the 1st respondent under CPR 65.13 (b) which will await the determination of costs below under CPR 65.5 (2) unless the parties to the appeal agree otherwise.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Errol Thomas
Justice of Appeal [Ag.]

I agree the appeal should be dismissed, with costs to the respondent.

Denys Barrow, SC
Justice of Appeal