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PRIVY COUNCIL RULES ON FORUM AND GOVERNING LAW IN INTERNATIONAL FRAUD CASES

by Alexander Halban

What is the most appropriate forum for a claim involving an international fraud committed through offshore companies in multiple jurisdictions; and how does the court determine the governing law when money has been laundered each of through those companies?

Those were the issues in the recent decision of the Privy Council in Livingston Properties Equities Inc v JSC MCC Eurochem [2020] UKPC 31, a BVI appeal from the Eastern Caribbean Court of Appeal ('**ECCA**').

The ECCA's decision had caused concern for some practitioners when it was handed down in 2018.[1] It ruled that the BVI courts did not have jurisdiction to hear a claim against companies based in the BVI and elsewhere, which had received bribes paid to them for the benefit of former senior executives of the claimant ('**Eurochem**'), a large Russian company. This decision marked a restrictive approach to jurisdiction, which limited remedies for victims of cross-border frauds, especially if the alternative forum (like Russia) would not allow tracing or proprietary remedies.

The Privy Council has now reversed this decision, restoring the first instance judgment that the BVI courts did have jurisdiction, and confirming some important points on forum conveniens and governing law in fraud cases.

Background

The claim concerned an alleged bribery scheme for US$45 million carried out by two Russian defendants, former senior executives of Eurochem. They allegedly received secret commissions from Eurochem's trading partners, which they laundered through companies mostly based in the BVI, with others in Panama, Cyprus, Singapore, Switzerland and Scotland. Eurochem brought proceedings in the BVI against the Russian defendants and all the companies, and obtained permission to serve the non-BVI parties out of the jurisdiction.

A number of defendants applied to challenge jurisdiction on the basis that Russia, not the BVI, was the appropriate forum. Their challenge was rejected by Wallbank J in the

1 See further on the ECCA's decision https://littletonchambers.com/ed-kemp-on-private-international-law-in-bvi/

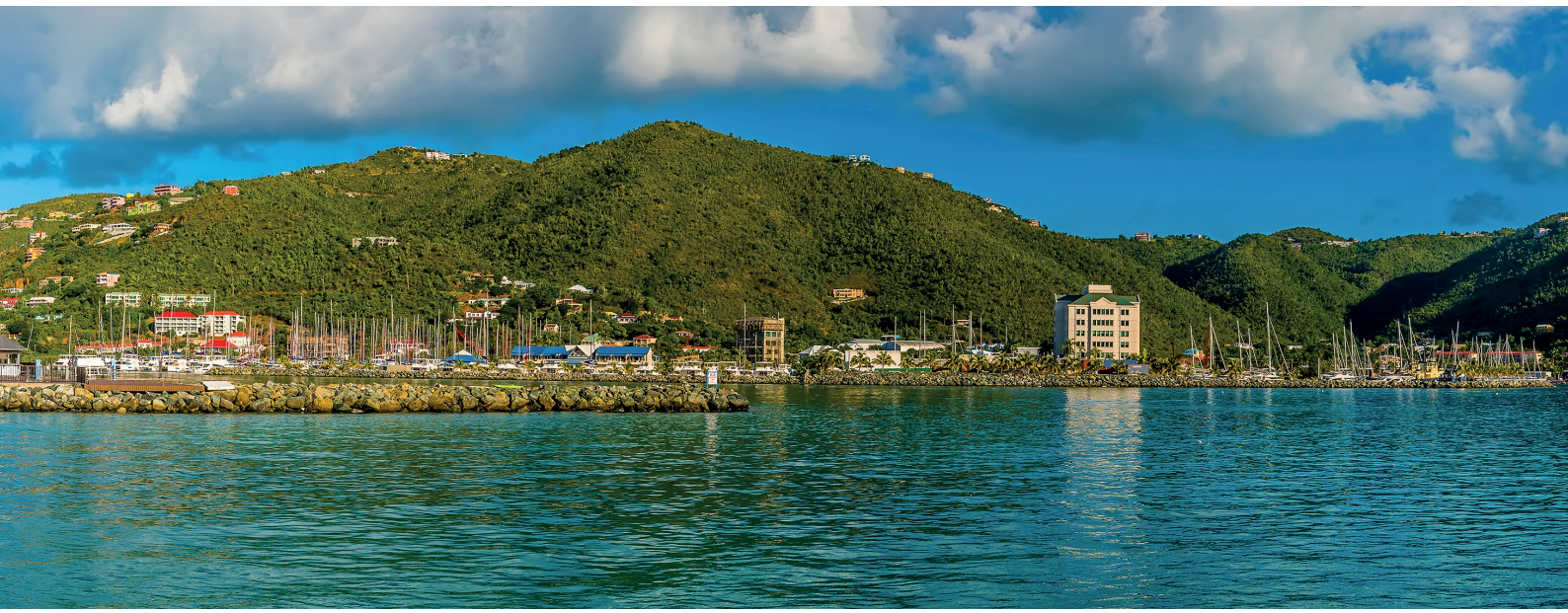
BVI Commercial Court, who found that the BVI was the appropriate forum. This was overturned by the ECCA, which found that Russia was the more appropriate forum and stayed the proceedings. Eurochem appealed to the Privy Council.

Legal framework

It was not in dispute that the claimants had a serious issue to be tried, and a good arguable case that the non-BVI defendants could be joined to the claim as necessary and proper parties. The dispute turned on whether the BVI was the appropriate forum for the trial of the claim.

On that issue the court applies the well-known principles in ***Spiliada Maritime Corp v Cansulex Ltd*** [1987] AC 460: whether there is another, available forum, more appropriate forum for the trial of the claim; and, if so, the proceedings should be stayed, unless there is a risk that the claimant will not receive justice in the foreign forum.

Relevant connecting factors for potential forums include (a) the place where the wrong was committed, which is a good starting point for jurisdiction; and (b) the law governing the claims, because it is generally preferable that the case should be tried in the country whose law applies: ***VTB Capital plc v Nutritek International Corp*** [2013] UKSC 5, [2013] 2 AC 337 at [40], [46] per Lord Mance.



Appropriate forum

The judge considered the parties' Russian law expert evidence on whether the Russian court would take jurisdiction over all the claims against all defendants, including the non-Russian parties. He found that he could not resolve conflicts on the evidence without cross-examination. The defendants had thus not shown that the Russian court would take jurisdiction, and so Russia was not an available alternative forum.

The judge also could not determine governing law at this stage. Without satisfactory evidence or pleading of Russian law, the judge applied BVI law instead, relying on Rule 25 of *Dicey, Morris and Collins on The Conflict of Laws* (15th ed).

There was also no evidence showing the country to which the claims were most closely connected. It could not be shown where the Russian defendants had taken the decisions in the bribery scheme, and Eurochem alleged that the events took place outside Russia.

The judge considered the BVI was the more appropriate forum because:

- Eurochem had no connection to the BVI but had chosen to litigate there.
- The Russian defendants used the BVI companies to carry out the scheme and they should expect the BVI courts to hold them to account.
- Proprietary remedies were not available in Russia, so that the BVI was more suitable for the proprietary claims advanced against the companies.

The ECCA disagreed. It held that the judge should have found that Russia was an available forum on the evidence. It criticised his reliance on the factors pointing towards the BVI – Eurochem's decision to litigate in the BVI resembled forum shopping; the companies' incorporation in the BVI was a neutral factor; and Eurochem could not rely on its own failure to plead Russian law to assert BVI proprietary remedies: if Russia was the appropriate forum, Eurochem had to accept the remedies available there.

The Privy Council found that the ECCA had no basis to overturn the judge's decision on forum, which was primarily a matter for a first-instance judge: *Spiliada* at p.465 per Lord Templeman. The judge had held that he could not reach a decision on the conflicting evidence and the ECCA had no basis to overturn this.

The Privy Council agreed that the BVI was the most appropriate forum for claims against the BVI companies, in the absence of a finding of an alternative forum. The judge was unrealistic to find that the defendants' use of BVI companies meant they had submitted to the jurisdiction – but the place of incorporation was still a relevant factor.

Writing the sole judgment, Lady Arden also noted that proprietary remedies were crucial to the claims against the companies and suggested (without deciding the point) that the absence of equivalent remedies in Russia might mean that practical justice could not be done there.[2]

Governing law

As above, the judge had relied on rule 25 of *Dicey* to apply BVI law in the absence of satisfactory foreign law evidence. The ECCA disagreed: Eurochem was obliged to plead and prove foreign law. It held that the governing law was Russian law, as the law of the Russian defendants' contracts with Eurochem, and thus the law to which the events and parties had the most significant relationship.

The Privy Council agreed that the judge could not make findings about the governing law at this stage. It rejected the ECCA's view that the events had their closest connection to Russia because there was no factual material to find that. The fact that the Russian

2 Lady Arden drew an analogy with Lord Goff's discussion in *Spiliada*, at pp. 483-4, of a case where the foreign limitation period has expired, and so practical justice is not available in the foreign forum.

defendants' contracts had Russian law clauses which covered the claims did not mandate that Russian law also governed the claims against the companies, which were not parties to those contracts.

Comment

These decisions highlight a number of important points for practitioners. The use of offshore companies as vehicles in a international fraud will be a relevant factor in jurisdiction. Their place of incorporation will often be a natural forum for the claim against those companies at least, unless there is a clear alternative forum. This can be very useful for victims of fraud, who may prefer to claim in jurisdictions where the corporate vehicles are based, such as the BVI, for the perceived advantages of its legal system, rather than the place where the alleged fraudsters are based.[3]

At the jurisdiction stage, it may be impossible to determine the governing law, or the place where the fraud took place, if these points require factual findings at trial. That does not mean that claimants do not need to plead and prove foreign law, as this will be crucial for trial and a failure to plead it could be seen as opportunistic. This will require foreign law evidence on the claims at an early stage.

Finally, claimants often depend on tracing proceeds of the fraud through money laundering networks, which makes proprietary remedies crucial. If the foreign forum does not allow proprietary remedies (as many civil law systems do not), then claimants can rely on the Privy Council's suggestion that this could be a denial of practical justice, avoiding a stay of proceedings. It remains to be seen whether this dictum is accepted in a future case.

3 See similarly the decision of the English Court of Appeal in ***JSC Commercial Bank Privatbank v Kolomoisky*** [2019] EWCA Civ 1708, [2020] 2 WLR 993, allowing a Ukrainian bank to claim in England against alleged fraudsters, now resident in Switzerland, and against English corporate vehicles used in the fraud. That decision was based on the Lugano Convention, but reached a similar result to the decision here at common law.

Alexander Halban (2009 call) practises in international commercial and civil fraud litigation, regularly involving jurisdiction and conflict of laws issues. He is a fluent Russian speaker and has particular expertise on Russian and CIS disputes.