

BVI vs Hong Kong: The Inconvenience of Forum Non Conveniens

The British Virgin Islands ("BVI") Commercial Court (the "Court") in the recent judgment of **Oscar Trustee Limited v MBS Software Solutions Limited BVIHC(Com) 2021/0022**, once again considered whether the BVI was an appropriate forum to bring a claim. In this instance, the Defendant argued that Hong Kong was a more appropriate jurisdiction for the claim to be tried.

Recently, the law surrounding jurisdiction challenges was considered in some detail in the long running case of *Livingston Properties Equities Inc v JSC MCC Eurochem* [2020] UKPC 31. The Eurochem case was heard by the Court, the Eastern Caribbean Supreme Court, Court of Appeal and the Privy Council, whereby the BVI's highest appellate court confirmed the law as set down *Spiliada v Cansulex Ltd* [1987] AC 460 should continue to be applied when determining whether another appropriate forum is more suitable. In short, when assessing such applications, the Court should consider:

"what connecting factors exist in relation to the forum, such as the place where the alleged wrongs were committed and the governing law of the pleaded claims. The governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies. "If there is no other available forum which is clearly more appropriate the court will ordinarily refuse a stay. In general, the assessment of the factors relevant to forum conveniens is a matter for the trial judge".

In coming to his decision, Justice Jack:

- afforded little weight to the Claimant's argument that enforcement of a Hong Kong judgment should be taken into account when assessing whether or not the claim should continue to be heard in the BVI. Justice Jack reinforced the BVI's position within the international market and highlighted how any judgment in Hong Kong would be readily enforceable in this jurisdiction.
- reiterated the position as previously stated by the Court that "*modest weight to be given to the place of incorporation*", making it clear that mere incorporation in the BVI will unlikely be sufficient to defeat a jurisdiction challenge.
- placed significant weight on the question of convenience for witnesses in the case. In coming to his decision, Justice Jack found that the BVI was not convenient for witness attendance for those in Australia and China. Further, the time zone differences in these countries would make it difficult for the Court to carry out a trial with a witness. This was a particularly interesting finding in circumstance where all hearings before the Court take place via Zoom, as in-person hearings have yet to return to the BVI. The Court recognised the practical difficulties of parties dialling into calls during anti-social hours and placed significant weight on this when determining whether a claim should be tried in the BVI.

This case further highlights that the Court will consider the interest of justice in exercising its discretion in determining issues of *forum non conveniens* and in so doing, will give some force to arguments of inconvenience to witnesses that are required to attend hearings in different time zones.

Further Information

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