**CITATION:** Jacubovich v. Israel (State), 2021 ONSC 3558
**COURT FILE NO.:** CV-20-00636575
**DATE:** 20210514

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** NICOLE SOFIA JACUBOVICH and CALANIT DIVA JACUBOVICH individually and on behalf of THE ESTATE OF MANUEL JACUBOVICH, Plaintiffs

**AND:**

THE STATE OF ISRAEL and COMPUTERSHARE TRUST COMPANY OF CANADA, Defendants

**BEFORE:** M. D. Sharma

**COUNSEL:** Jonathan C. Lisus, Nadia Campion and Lars Brusven for the Defendant/Moving Party, The State of Israel

Michael Schafler and Matthew Bradley for the Defendant/Moving Party, Computershare Trust Company of Canada

H. Scott Fairly, Ruzbeh Hosseini, and N. Joan Kasozi for the Plaintiffs/Responding Parties

**HEARD:** May 3, 2021

## ENDORSEMENT

### I. INTRODUCTION

[1] This is a motion to stay this proceeding on the basis that this Court lacks jurisdiction or, if it does have jurisdiction, that Ontario is not the most convenient forum for its adjudication.

[2] The defendants argue Israel is the most appropriate forum for hearing this action. The State of Israel also argues it enjoys sovereign immunity and that it cannot be sued in Ontario.

[3] The underlying dispute has a long history. Since 2014, the plaintiffs have sought to recover proceeds from two bonds, issued by the State of Israel, in the name of the Estate of their great-uncle. This dispute has resulted in proceedings in Argentina, Panama, New York, and now Ontario.

[4] The individual plaintiffs, Nicole Sofia Jacubovich ("**Nicole**") and Calanit Diva Jacubovich ("**Calanit**"), are twin sisters and Argentine citizens. Nicole is now a resident of the Principality of Andorra. Calanit remains a resident of Argentina.

[5] The Estate of Manual Jacubovich is the third plaintiff in this action.

[6] The defendant, State of Israel, is a sovereign nation.

[7] The defendant, Computershare Trust Company of Canada ("**CTCC**"), is a federally chartered trust company pursuant to the *Trust and Loan Companies Act*, S.C. 1991, c. 45. CTCC is registered to conduct business as a trust company in Canada and has offices in Montreal and Toronto. CTCC has a contractual relationship with Israel and acts as its fiscal agent with respect to bonds sold internationally and in Canada. It is not a fiscal agent with respect to bond sales in the United States of America.

[8] The plaintiffs allege that Israel and its fiscal agent in Canada, CTCC, breached implied covenants in contract and were negligent in paying out the principal and interest on Israeli bonds. They also allege Israel has not acted in good faith in seeking to recover the proceeds.

[9] Israel has not defended this action nor attorned to the jurisdiction of this court. CTCC has filed a Notice of Intent to Defend.

[10] For the reasons set out below, I grant both defendants' motions and stay this proceeding.

## II. BACKGROUND AND FACTS

*The Plaintiffs' Claim*

[11] Manuel Jacubovich was Nicole and Calanit's great-uncle. Manuel died on November 29, 2010 in Argentina. His nephew, Abel Jacubovich, was the heir to the estate of Manuel. A few weeks after Manuel's death, on December 21, 2010, Abel Jacubovich died intestate, also in Argentina. Nicole and Calanit, Abel's twin daughters, were 18 years old at the time of their father's death. Abel and Manuel were Argentine citizens, as are Nicole and Calanit.

[12] In 2011, an Argentine Court held Nicole and Calanit to be the sole heirs of both the Estate of Manuel Jacubovich and the Estate of Abel Jacubovich, with Nicole as the executor of the Estate of Manuel Jacubovich (the "Estate"). The is evidenced by a certified copy of the Argentine Court Order, which was filed on this motion.

[13] In 2014, Nicole and Calanit discovered that there was a Holder Account, number C0001066153, in the name of the Estate of Manuel Jacubovich and that certain transactions had been made from this account *after* the deaths of their great uncle and their father. The Holder Account contained two high value bonds issued by Israel, identified as:

a. 7TH JUBILEE FIX 2Y 1.02 2014/05/01. Amount US$ 5,425,000.00. Maturity, May 1, 2014 (the "**First Bond**"), and

b. 7TH JUBILEE FIX 2Y 0.74 2014/07/01. Amount US$ 4,940,000.00 Maturity, July 1, 2014 (the "**Second Bond**").

[14] Since Nicole and Calanit were the sole heirs of the Estate, in this action, they claim that these two bonds are theirs. They claim interest and payment of principal upon maturity.

[15] Nicole and Calanit state that on May 4, 2014, they asked their Argentine lawyer, Ms. Melina Shapira to request payment on the First and Second Bonds.

[16] Soon thereafter, Ms. Shapira discovered that the First Bond had been redeemed as it had matured on May 1, 2014. Ms. Shapira then met with an official in the Embassy of Israel in Buenos Aires. This meeting led to an investigation being launched. Payment on the Second Bond, which was to mature on July 1, 2014, was blocked until the matter was resolved.

[17] The plaintiffs state that on July 18, 2014, after more inquiries and meetings, including meetings with the Israel Bond International office in Jerusalem, and after they provided certified copies of the Argentine Court ruling showing that they were the sole heirs to the Estate, payment was made to them in the amount of USD $4.94 million on the Second Bond, plus USD $6,109.36 for interest. Both cheques were made payable to the Estate. These cheques were sent from Israel via overnight courier to the Plaintiffs.

[18] However, payment of principal and interest on the First Bond was not made, nor was certain interest on the Second Bond paid to the plaintiffs.

[19] The plaintiffs state that it was not until December of 2015 that they learned that the proceeds of the First Bond were wired to a bank account in Panama, in accordance with the instructions of, Jaime Jacubovich, purportedly as administrator of the Estate. Jaime was the brother of Manuel Jacubovich, and the grandfather to Nicole and Calanit.

[20] The following month, in January of 2016, the plaintiffs learned of a corporate entity created in Panama named "E.M.J., SA. (Estate of Manuel Jacubovich)", which they believe was created and is controlled by Jaime. The plaintiffs further state that the Panama account to which Israel paid the proceeds of the First Bond and interest on the Second Bond belongs to E.J.J., SA.

[21] The plaintiffs assert that the bonds were sold by Israel Bonds International which was Israel's exclusive underwriter for Israeli bonds sold outside of the United States and Canada. They note that their grandfather, Jaime, is an honorary president of Israel Bonds International, and closely affiliated with members of the Board of Israel Bonds International.

[22] The plaintiffs rely on a 2010 International Master Fiscal Agency Agreement, between Israel and CTCC, for bonds sold to residents of Canada, or to residents of countries outside of the United States and Canada (the "**IFAA**"). They contend it contains provisions that extend to bondholders.

[23] It is on these facts that the plaintiffs claim that Israel, and its fiscal agent in Ontario, CTCC,

a. Breached contractual obligations under the IFAA and First Bond (payment of principal and interest) by following payment instructions that did not come from the Estate;

b. Breached contractual obligations under the IFAA and Second Bond (payment of interest due) by accepting and following payment instructions that did not come from the Estate;

c. Breached implied covenants of good faith and fair dealing in the IFAA and First and Second Bonds by failing to confirm who was the proper payee, by failing to verify the authenticity and authority behind the instructions for redemption, and by their course of conduct that deprived the plaintiffs of the benefits of the Bonds;

d. Were negligent in acting on payment instructions from a party other than the plaintiffs, and in failing to pay proceeds on the First Bond to the plaintiffs, as well as interest on the Second Bond before maturity.

e. Breached duties of "issuers" under the *Securities Transfer Act,* S.O. 2007, c. 8 by failing to identify the entity that received the Bond payments, which constitutes a "wrongful registration of transfer" under the Act.

[24] The plaintiffs further assert that the defendants failed to act in good faith to rectify their errors.

[25] The Amended Statement of Claim and the evidence of the Plaintiffs speak to various efforts to obtain payment on the bonds with officials in Israel and IBI, all to no avail. I will return to these efforts in my analysis as to whether this Court should exercise its jurisdiction over this dispute.

*Israel Bonds Program*

[26] A description of the Israel Bonds Program is necessary to understand the relevant parties and potential parties in this action. This information is found in the affidavit of Ms. Orel Odette Krieff, the Chief Analyst and the Controller for the Economic Mission for the State of Israel's Ministry of Finance, and in the transcripts from her cross-examination.

[27] Ms. Krieff's affidavit states that in 1950, Prime Minister David Ben-Gurion convened leaders of the American Jewish community in Jerusalem to develop a program to offer interest-bearing bonds, backed by the full faith and credit of the State. In 1951, the Israel Bonds program was created with an initial bond offering in the United States. Since then, it has expanded and now reaches around the globe, with multiple types of securities and investment options available.

[28] As stated by Ms. Krieff:

> "4. The Israel Bonds Program plays an essential role in strengthening the relationship between the diaspora and Israel and has helped build every sector of Israel's economy. It is viewed by the State of Israel as an invaluable and strategic national resource that provides Israel with a reliable and independent financial pipeline. … [T]he program is a key feature of Israel's economic and national success. The funds generated from Israel bonds are used for the general purposes of the State of Israel, which include refinancing maturing debts, funding the budget deficit, and continuing to develop its modern, innovative and diverse economy.
>
> 5. More than $1 billion in state funds are raised annually from Israel bonds, representing approximately 2% of the State of Israel's overall debt. The State of Israel makes all principal and interest payments on the bonds."

[29] The Israel Bonds Program falls under the portfolio of the State of Israel's Ministry of Finance, which is responsible for determining and implementing economic policy in Israel.

[30] The Ministry's role in the bond program was described by Ms. Krieff as follows:

> "7. With respect to bonds, the Ministry of Finance is responsible for managing their issuance and ensuring that they are paid at maturity and interest is paid when due. However, the Ministry of Finance does not engage directly with individual or institutional bond purchasers nor is it responsible for or involved in the marketing, sale or registration of the bonds. These tasks are carried out by other arm's length third parties, described below.
>
> 8. The Ministry's role in the financial administration of the Israel Bonds Program is limited to setting the rates for bonds on a biweekly basis; processing replacements in the event of a lost or destroyed bond; providing direction and approval for early redemption requests stemming from personal hardship or extenuating circumstances; meeting with fiscal agents for the Israel Bonds Program; and receiving periodic reports from fiscal agents which, among other things, contain account information for all Israel bonds that have not been redeemed within six months of maturity."

[31] During the period relevant to this action, bonds were marketed and sold by Israel through arm's length broker dealers. The one that is relevant to this action and motion is Israel Bonds International ("**IBI**"), as it sold the bonds to the Estate.

[32] Ms. Krieff's affidavit described IBI:

> "as the exclusive broker-dealer for bonds sold internationally to residents of countries other than Canada and the United States. During the time

> period relevant to this action, IBI operated as a corporation based in Jerusalem and incorporated under the laws of the [British Virgin Islands]. As a private corporation, IBI's corporate governance structure was independent from the State of Israel, including that it had an independent and separate board of directors. IBI operated a bond-processing centre in Jerusalem. IBI was the broker dealer that sold the bonds to the Plaintiffs."

[33] It is important to note that on cross-examination, Ms. Krieff acknowledged that IBI ceased marketing and selling bonds in 2014. Its activities and records were transitioned to another company, Development Company for Israel (International) Limited ("**DCI International**"). DCI International operates out of the same IBI offices in Jerusalem and would have in its possession records for all bonds sold by IBI.

*State of Israel Fiscal Agents*

[34] While IBI sold and served as the broker-dealer, there were other fiscal agents responsible for bond registration and financial administration. During the period relevant to this action, Ms. Krieffe's evidence is that the financial administration of the Israel Bonds Program was carried out by one of two fiscal agents based in the United States and Canada pursuant to two separate agreements:

a. A 2010 Master Fiscal Agreement between Israel, Computershare Inc., and Computershare Trust Company, N.A. for bonds sold by the Development Corporation of Israel ("DCI") to residents in the United States (the "**MFAA**"); and

b. A 2010 International Master Fiscal Agency Agreement, between Israel and CTCC, for bonds sold to residents of Canada, or by IBI to residents of countries outside of the United States and Canada (the "**IFAA**").

[35] The IFAA is a critical document on this motion. Under it, CTCC is the fiscal agent, registrar, and transfer agent in respect of bonds issued by the State of Israel. It is also the authority by which CTCC maintains a Bond Register in Toronto, Ontario.

[36] The IFAA, and the provisions in it, is one of the central reasons why that the plaintiffs assert that Ontario has and should exercise jurisdiction over this case.

*How the bonds were purchased and redeemed*

[37] The plaintiffs' theory of their case is that their grandfather, Jaime, engaged in a scheme to deprive the plaintiffs of their rights under the First Bond.

[38] According to the plaintiffs, the defendants are liable in contract and in tort for (a) following payment instructions from a party other than the plaintiffs; (b) for making payments to the Panama Account on the First Bond; (c) for failing to act in good faith to rectify any errors caused; and (d) for failing to disclose all relevant information relating to the First Bond.

[39] The defendants' evidence supports basic details around the purchase of the bonds and their redemption, as alleged by the plaintiffs.

[40] Israel, through the affidavit of Ms. Krieff, confirmed that IBI, in 2012 was the broker-dealer that sold these two bonds to the Estate.

[41] Ms. Krieff's affidavit further states that the First and Second Bonds were purchased on May 1, 2012 and June 1, 2012, respectively, in the name of the Estate of Manual Jacubovich. The First Bond was in the amount of USD $5.425 million, and the Second Bond was in the amount of USD $4.94 million. Both had two-year maturity periods.

[42] Ms. Krieff states "the sale and purchase of the bonds took place in Panama and were processed in Jerusalem", although Israel has no knowledge of the particular circumstances of the sale. She also states that "all principal and interest on the bonds sold to the Plaintiffs have been paid in full by Israel through CTCC as its fiscal agent. The details of the payments are set out in Mr. Troisi's affidavit."

[43] I note that while Israel states that the bonds have been "paid in full to the Estate of Manual Jacubovich", the plaintiffs say payment has not been received. It appears that while payment on the First Bond and interest on the Second Bond may have been made to the Estate, those payments were made to the Panama Account which the plaintiffs do not control. The evidence of CTCC confirms this.

[44] The affidavit of Mr. Daniele Troisi, a Manager with CCTC in Montreal, describes what happened to the bonds after they were purchased and upon their maturity.

[45] Mr. Troisi states that on or about May 31, 2012, CTCC received a "Reinvestment Layout" from IBI with respect to the First Bond. This document is a summary of information IBI obtains from a bond purchaser and sent to CTCC. The Reinvestment Layout stated that:

a. the purchaser was "Estate of Manuel Jacubovich";

b. the purchase originated in Panama;

c. the First Bond would be registered on the Bond Register in the Estate's name;

d. the Estate would purchase the First Bond by reinvesting 19 cheques issued to the Estate by CTCC in its capacity as fiscal agent, with respect to other State of Israel bonds that the Estate had already purchased; and

e. the Estate directed that interest and principal payments were to be paid to an account in Panama.

[46] CCTC then logged this information in Montreal in a "Reinvestment Spreadsheet" in the ordinary course of business. It created a unique identifier for the bond. No bond certificate

was created for this book-entry bond. Rather, CCTC mailed a book-entry confirmation to the address that the Estate provided to IBI as its preferred address, namely:

> Estate of Manual Jacuovich
> IBI Jerusalem Processing Center
> PO Box 6001 Jerusalem 91060
> Israel

[47] Mr. Troisi's affidavit further states that on or about July 2, 2012, CTCC received a "Purchase Layout" from IBI with respect to the Second Bond. This document contains the same information as the Reinvestment Layout, however, a Purchase Layout is created for the purchase of a bond with new funds as opposed to reinvestment of funds.

[48] The Purchase Layout showed that the Estate purchased the Second Bond, the purchase originated in Panama, the Second Bond would be registered in the Estate's name, and that payment of interest and principal were to be paid to the Panama Account. The only difference with the First Bond is the amount, and that the Estate purchased the Second Bond by wiring USD $4.94 million from the Panama Account to CTCC at its US dollar contribution account for CTCC In Trust for the State of Israel at the Royal Bank of Scotland in London, United Kingdom.

[49] CTCC then recorded the Second Bond on the Bond Register as a book-entry bond and mailed a book-entry confirmation to the Estate's preferred address, noted above.

[50] Mr. Troisi's affidavit also speaks to payment on the First and Second Bonds:

a. Interest payments on both bonds were made between 2012 and 2014 by wiring funds to the Panama Account.

b. On May 1, 2014, when the First Bond matured, CTCC wired the principal and accrued interest to the Panama Account.

c. On May 12, 2014, a staff member of CTCC in Montreal received an email from IBI at its processing center in Jerusalem asking CTCC to "remove the payments (sic) instructions" from the Second Bond account. This Montreal staff member then forwarded this instruction to a staff person at CTCC in Toronto. Following receipt of this email, CTCC removed the Panama Account from the Bond Register.

d. On July 1, 2014, when the Second Bond matured, CTCC issued two cheques payable to the Estate, one for principal (USD $4.94 million) and one for accrued interest (USD $6,109.36). CTCC mailed the cheques to the IBI processing centre in Jerusalem.

[51] This evidence from the defendants suggest there is no dispute on the following facts as alleged in the plaintiffs' Amended Statement of Claim:

a. The two bonds were sold by IBI.

b. The two bonds were held in the name of the Estate of Manuel Jacubovich.

c. Payment instructions were provided by IBI to CTCC on the First Bond and Second Bond. These instructions were initially the same (i.e. deposit both to the Panama Account), but the instructions changed on May 12, 2014 to direct payment on the Second Bond be made out by cheque to the Estate, to be delivered to IBI in Jerusalem, and then couriered to the plaintiffs in Argentina.

d. Interest payments on both bonds were made by CTCC to the Panama Account,

e. Payment on principal and accrued interest from the last interest period on the First Bond was made to the Panama Account, and

f. Payment on the principal and accrued interest from the last interest period on the Second Bond was made by CTCC to IBI, who in turn couriered the cheques to the plaintiffs.

*Related Proceedings in other Jurisdictions*

[52] The plaintiffs and their grandfather, Jaime, have been involved in three proceedings in three countries to recover the bond proceeds.

a. *Argentine Proceeding*

In August of 2016, the plaintiffs filed a criminal complaint against Jaime and others in Argentina for alleged fraud in redeeming the First Bond. This criminal investigation is ongoing, and the case remains pending.

b. *Panamanian Proceeding*

Also in 2016, a Panamanian entity, E.M.J. S.A., commenced civil proceedings in Panama against Computershare (the US counterpart to CTCC), and DCI International for the alleged payment of the Second Bond to the plaintiffs, rather than to the Panama Account. Israel advises in its factum that a motion to dismiss for lack of jurisdiction was brought by Computershare, that the Panama court annulled the proceedings in June of 2018, and that E.M.J. S.A. appealed the decision and it remains outstanding.

c. *New York Proceeding*.

In April of 2018, the Plaintiffs commenced an action in the Southern District New York against Israel, Computershare Inc., and Computershare Trust Company, N.A. According to the affidavit of the plaintiffs' Argentine lawyer, Ms. Shapira, the plaintiffs brought their proceeding in the United States partly because Ms. Shapira

had obtained a US Prospectus and a document entitled Master Agreement between the State of Israel and Computershare Inc. and Computershare Trust Company, N.A. (i.e., the Fiscal Agents who managed bonds sold exclusively in the United States under the MFAA, and different than CTCC which serves as the Fiscal Agent for bonds sold in Canada and internationally outside of the US). Both the MFAA and the Prospectus contained explicit waivers of sovereign immunity in relation to all transactions to which it applied. It appears that the plaintiffs thought the MFAA was the document that governed the transaction with respect to the bonds at issue.

The defendants filed motions to dismiss the action, which was granted on September 9, 2019 (*Jacubovich v Israel*, 397 F. Supp. 3d 388 (S.D.N.Y. 2019). On review of this decision, it is clear that the Court granted the motion because it concluded that Israel had not lost or waived state immunity, and because the US Fiscal Agents were not involved in the Bonds at issue since the MFAA only dealt with US bond sales.

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which affirmed the decision of the lower court (*Jacubovich v Israel*, 816 Fed. Appx. 505).

## III. ISSUES AND LEGAL ANALYSIS

[53] There are three issues raised on this motion:

1. Does this Court have jurisdiction *simpliciter* to hear this case?

2. If so, should this Court decline to exercise its jurisdiction (the doctrine of *forum non conveniens*) because an Israeli court would be a more appropriate forum?

3. If this Court does exercise jurisdiction in this case, is Israel, as a sovereign nation, immune from the jurisdiction of Ontario's courts?

[54] The defendant, Israel, argues all three issues. CTCC argues only that it is more appropriate for a court in Israel to adjudicate this case, as it recognizes this Court's *in personam* jurisdiction.

[55] The plaintiffs argue that: (a) Israel does not have sovereign immunity because it engages in "commercial activity" in Ontario; (b) this Court does have jurisdiction *simpliciter*; and (c) it should exercise its jurisdiction to hear this case.

[56] While much of the parties' submissions focused on the state immunity argument, the analysis of jurisdiction *simpliciter* must be separate and distinct from the analysis of whether Israel enjoys state immunity (*Bouzari v Islamic Republic of Iran*, 2004 CanLII 871 (ON CA) at para 29).

**Issue 1: Does this Court have jurisdiction *simpliciter* to hear this case?**

*Legal Principles*

[57] This motion deals with conflict of laws, or its more contemporary term, private international law. This area of the law is rooted in constitutional principles about a court's lawful authority and its permissible reach in a manner consistent with its territorial jurisdiction as derived from s. 92 of the *Constitution Act, 1867*. It is also rooted in common law principles about conflict of laws which speak to which laws should govern a dispute with multi-jurisdictional attributes.

[58] A conflict of laws approach seeks to manage the tension that exists between fairness and flexibility, on the one hand, and predictability and order, on the other, as well as the principle of judicial comity. It requires a Court to determine whether it may legitimately exercise authority over a matter because it has a real and substantial connection to the jurisdiction. This analysis prioritizes order, stability and predictability. If a Court has jurisdiction, the next analysis is whether fairness and efficiency can most appropriately be achieved by the Court exercising its jurisdiction (*Haaertz.com v. Goldhar*, 2018 SCC 28 (CanLII) at para 28 ("*Haaertz.com*")).

[59] In *Muscutt v Courcelles*, 2002 CanLII 44957 (ON CA), the Ontario Court of Appeal distinguished between whether the Court has jurisdiction, and if so, whether it should exercise that jurisdiction. The first concept is known as jurisdiction *simpliciter.* It demands the Court determine whether this case has a "real and substantial connection" to Ontario. As stated by Sharpe JA at para 43:

> "[T]he real and substantial connection test involves a fact-specific inquiry, but the test ultimately rests upon legal principles of general application. The question is whether the forum can assume jurisdiction over the claims of plaintiffs in general against defendants in general given the sort of relationship between the case, the parties and the forum."

[60] The leading case on both jurisdiction *simpliciter* and *forum non conveniens* is *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII) ("*Van Breda*"). At paras 101 -102, Justice LeBel confirmed that the legal analysis for establishing jurisdiction is separate and distinct from the analysis as to whether the court should exercise its discretion to hear a case.

> 101. As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.
>
> 102. Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court

> cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim."

[61] With respect to jurisdiction *simpliciter*, *Van Breda* established a list of presumptive connecting factors in tort claims that, *prima facie*, entitle a court to assume jurisdiction over a dispute, namely:

> (a) the defendant is domiciled or resident in the province;
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> (b) the defendant carries on business in the province;
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> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.
> (see *Van Breda*, para 90)

[62] However, the existence of one or more of these factors is not irrebuttable. Justice LeBel in *Van Breda* described the analysis a Court must engage when a defendant seeks to rebut a presumptive connecting factor.

> 95. The presumption of jurisdiction that arises where a recognized connecting factor — whether listed or new — applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.
>
> …
>
> 98. However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor — listed or new — the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction, but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

[63] The rationale for the ability of a defendant to rebut a "weak" presumptive factor has constitutional underpinnings. As stated at para 32 of *Van Breda*,

> 32. As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of

> legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

*Presumptive Connecting Factors*

[64] Of the presumptive connecting factors set out in *Van Breda*, the plaintiffs claim CTCC operates out of Toronto, both defendants carry on business in Ontario, the tort occurred in Ontario, and the IFAA contract between CTCC and Israel on which the plaintiffs rely is subject to Ontario law and the jurisdiction of Ontario courts. They say they have met this burden, and the onus shifts to the defendants to establish that a real and substantial connection does not exist.

[65] The CTCC is not disputing that this Court has jurisdiction *simpliciter* with respect to it. Israel, however, states there is no real and substantial connection between Ontario, the parties, and the claims advanced in this action. To the extent any connecting factors exist to the claims advanced in this action, Israel submits that they are tenuous and rebuttable.

1. *Do the defendants reside or carry on business in the province?*

[66] In the case of CTCC, I find the evidence is clear that CTCC does operate in Toronto, Ontario. While the evidence of Mr. Troisi suggests that CTCC operates principally out of Montreal, it does maintain an office in Toronto, and CTCC's Montreal office communicates and gives direction to staff in Toronto, based on instructions it receives from Israel, its sales agents, and its underwriters. For example, Mr. Troisi's evidence includes an email from CTCC's Montreal office to its Toronto office, dated May 12, 2014, instructing staff in the Toronto office to remove wire payment instructions in relation to the Second Bond.

[67] There is no evidence that Israel carries on business in Ontario, other than through the IFAA contract it has with CTCC, which I review next. Based on that contract, I do find that Israel is carrying on business in the province.

2. *Is there a contract connected with the dispute made in Ontario?*

[68] Mr. Troisi's affidavit on behalf of CTCC acknowledges that CTCC is a federally regulated trust company that has a close commercial relationship with Israel. Mr. Troisi's affidavit also references CTCC's IFAA agreement with Israel.

[69] The plaintiffs place much weight on the provisions of the IFAA contract between Israel and CTCC, arguing that the provisions contained therein extend to bondholders - in this case, the Estate.

[70] I shall review some of this contract's provisions. The IFAA codifies the relationship between Israel and CTCC and their respective duties. It appoints CTCC as its fiscal agent, registrar and transfer agent for bonds issued in Canada and outside both Canada and the United States (s. 1). The contract makes CTCC the Bond Registrar for the purpose of registering or transferring bonds and requires a Bond Register to be kept in Toronto (s. 2.12). It includes various procedures for the issuance of bonds and subscription procedures (s. 3.1 and 3.2). With respect to bond payments, Israel is required to deposit with CTCC as its Fiscal Agent sufficient funds to pay interest and principal on bonds on maturity, and CTCC is to then effect payment to bondholders (s. 4.1, 7.1). It imposes an obligation on CTCC to promptly notify Israel and IBI regarding any material issues encountered with Bondholders, or any problematic or questionable transactions (s. 6.2(f)). The contract was executed in New York, but in all other respects, it places obligations on Israel and CTCC in Toronto (e.g., location of CTCC's office, location of bond register).

[71] Based on these contractual provisions, I am satisfied that there is a contract that is *connected with* the dispute and with Ontario. While it was executed in New York, the contract creates obligations that Israel must perform in Ontario, notably among other obligations, to deposit with the CCTC funds sufficient to pay out bonds on maturity or redemption. This contract also shows there is a further presumptive connecting factor, namely, that Israel carries on business in Ontario.

*3. Was the tort committed in Ontario?*

[72] A tort involving the transmission of false information occurs in the jurisdiction where the information was received and acted or relied upon (*2249659 Ontario Ltd. v. Sparkasse Siegen*, 2013 ONCA 354 at para 31 ("*Sparkasse*"), citing *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517 (CanLII) at para 52). Since the affidavit of Mr. Troisi on behalf of CTCC admits that CTCC acted on the payout instructions provided to it by IBI from the original bond purchaser, I find that this presumptive connecting factor is met.

*4. Has Israel sufficiently demonstrated that the presumptive connecting factors do not point to any real relationship between the subject matter of the litigation and Ontario, or to a weak relationship?*

[73] In *Van Breda*, Justice LeBel explains how the presumptive connecting factors may be rebutted.

> 96. Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the

> litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.
>
> 97. In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

[74] If this Court is to determine it has jurisdiction simpliciter, it must assess the strength of the presumptive connecting factors and whether they have been rebutted from the totality of the allegations as set out in the Amended Statement of Claim. The Statement of Claim "frames the action for the purpose of analysing the assumption and exercise of jurisdiction" (*Haaeretz.com, supra* at para 21).

[75] In this case, there are two different views of what comprises the *subject matter of this litigation*. The view chosen informs the *Van Breda* analysis of jurisdiction *simpliciter*, and whether the presumptive connecting factors are weak or tenuous. The subject matter of the litigation must be assessed from what is set out in the Statement of Claim (*Sparkasse, supra* at para 29).

[76] The first view, advanced by the defendants, is that this is a multi-country family dispute between two Argentine plaintiffs and their grandfather in relation to bonds sold internationally outside Ontario. The defendants say the dispute involves possible fraud or negligent misrepresentation originating from their grandfather who was likely in Panama at the time of the purchase of the Bonds, and possible negligence on the part of IBI who, in Jerusalem, did not engage appropriate mechanisms to detect a possible fraud or misrepresentation when the bonds were purchased. Israel may have liability in contract and tort as a result, depending on the contractual terms between IBI and Israel, which may bestow rights and relief for bondholders. The defendants say that while none of Jaime, IBI nor its successor, CDI International, is a party to this case, the factual underpinning in the plaintiffs' Amended Statement of Claim implicates and involves these parties and events that significantly precede the role CTCC exercised in this case.

[77] The other view of the subject matter of this litigation is a narrow one. While the plaintiffs in their Amended Statement of Claim allege improper acts by Jaime and IBI, they argue that this dispute at its heart is about improper payment by Israel through its fiscal agent, CTCC, to a rogue corporation in Panama, rather than to the plaintiffs. It is also about the defendants' refusal to act in good faith to provide information, remedy the harm caused,

and Israel's "hopscotch" approach to challenging the jurisdiction of various courts – first in New York and now in Ontario. The plaintiffs argue that fairness requires that Ontario assume jurisdiction.

[78] In my view, the subject matter of the litigation is not the narrow view of whether Israel and CTCC breached their obligations in contract or tort to the plaintiffs. The plaintiffs' Amended Statement of Claim expressly alleged that Jaime provided the payout instructions to the Panama Account that CTCC and Israel acted upon (para 87(a)), that IBI was Israel's "exclusive underwriter for Israeli bolds sold outside of the United States and Canada" (para 15), and that Israel through its agents, including IBI and CDI International, refused to make payment on the First Bond (para 73).

[79] While I have found that the defendants carried on business in Ontario as a presumptive connecting fact, that business related exclusively to the registration and fiscal administration of bonds, after the bond contract was established.

[80] The evidence of Ms. Krieff is that "the sale and purchase of the bonds took place in Panama and were processed in Jerusalem". Where contracting parties are located in different jurisdictions, the contract will be formed in the jurisdiction where the last essential act of contract formation, such as acceptance occurred (*Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para 40 (S.C.C.)).

[81] Again, the subject matter of this litigation and the claims in tort or contract originate from the original bond contract that Jaime (or someone else) sought from Panama and entered into with IBI in Jerusalem. This is confirmed in Ms. Krieff's evidence. None of these sale activities around the bonds occurred in Ontario and are only tenuously connected with the business activity of the defendants in Ontario.

[82] The role of CTCC and Israel in Ontario related to the registration and fiscal administration of the bonds, and these administrative functions after the bond contracts were established, and after CTCC received instructions with respect to the bonds from IBI. The evidence of Mr. Troisi reveals the purely administrative function CTCC performs, which is based on payment instructions it receives from IBI.

[83] The fact that a Bond Registry is maintained in Toronto (although Mr. Troisi confirmed the registry is now electronic and hosted on a website with servers in the US), CTCC has an office in Toronto, and a trust account in Toronto operated by CTCC on behalf of Israel has little to no bearing on the claims alleged by the plaintiffs.

[84] The plaintiffs' claims would be the same regardless of where the bond registry, CCTC's office and bank account were located. These connections relied upon by the plaintiffs are peripheral to the core narrative as alleged in the Amended Statement of Claim, which implicate Jaime, IBI, CDI International, as well as Israel.

[85] The plaintiffs' witness, Ms. Shapira, on cross-examination, acknowledged that her affidavit evidence with respect to CTCC reflected her attempt "to get this action somehow located in Toronto."

[86] For these reasons, I find that Israel has rebutted the presumptive connecting factor of where the defendants carried on business. It is a weak connecting factor given the true subject matter of this litigation.

[87] Further, while there is a contract connected with the dispute, the IFAA contract does not govern the relationship that Israel had with IBI, nor does it govern the relationship between Israel and bondholders. Israel pointed to section 9.18, which makes clear that the agreement only binds Israel and CTCC, and that there are no third party beneficiaries. It reads:

> The provisions of this Agreement are intended to benefit only Fiscal Agent, the State and their respective permitted successors and assigns. No rights shall be granted to or may be inferred to be granted to any other person by virtue of this Agreement, and there are no third party beneficiaries hereof.

[88] The plaintiffs argued that notwithstanding this clause, Schedule B to the IFAA, includes a standard form CTCC is to use when a Derivative Bond is issued which states: "This Bond shall in all respects be governed by, and construed in accordance with, the laws of the province of Ontario and the laws of Canada applicable therein without regards to principles of conflict of laws."

[89] In response, Israel notes that the bonds in this case were not Derivative Bonds, but Book-Entry bonds, for which no bond certificate was created.

[90] The evidence of Mr. Troisi confirms that CTCC mailed a book-entry confirmation to the address that the Estate provided to IBI (which was to IBI's Processing Centre in Jerusalem), and the form at Schedule B was not issued. In addition, the contract is clear in its recital that it does not extend any benefits to parties other than Israel and CTCC.

[91] Therefore, I find that Israel has rebutted the presumptive connecting factor of a contract connecting the dispute with Ontario. That contract governed the relationship between Israel and CTCC and it expressly extended no benefits to third parties, such as the plaintiffs in this case. Israel could not have reasonably expected to be called to answer a legal proceeding in Ontario, commenced by bondholders, because of the IFAA contract. At best, the IFAA has a tenuous connection with the plaintiffs and the true subject matter of this litigation.

[92] If I am wrong and the IFAA contract does extend contractual rights to bondholders such as the plaintiffs in this case, resulting in remedies in contract available in Ontario, should this Court hear their contract case, with the balance of the tort claims heard elsewhere? The answer must be "no". As stated by Justice LeBel in *Van Breda* (para 99),

> 99. I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[93] Further still, as Justice LeBel stated, it may be possible to rebut a presumption regarding the location of a tort in a multi-jurisdictional tort were only a relatively minor element of the tort has occurred in the province.

[94] In this case, the plaintiffs allege that Jaime from Panama falsely asserted that he had authority to contract on behalf of the Estate in purchasing the Bonds and in providing payment instructions, and that IBI in Jerusalem allegedly failed to confirm what authority Jaime had.

[95] However, as the defendants argued, this is a multi-jurisdictional tort that originated from transactions that occurred exclusively in jurisdictions outside of Ontario between Jaime and IBI, a different agent of Israel, with only a final and minor administrative task occurring in Ontario through CTCC. If the plaintiffs claim as asserted is true, at best only a minor aspect of the tort of negligence occurred in Ontario. The original tort occurred in either Panama or Israel, and it would not be reasonable to expect that Israel would be called to answer proceedings in Ontario as a result.

[96] If I were to find that this Court has jurisdiction *simpliciter* in this case, a curious result ensues. Plaintiffs who have no connection to Ontario would have recourse to this Court for a tort or contractual claim that originated entirely outside Ontario and with multi-jurisdictional parties who also have no connection to Ontario, against defendants, only one of whom is resident in Ontario, and who only exercised an administrative function that was minor in relation to the original alleged wrongdoing.

[97] Counsel for Israel argued that this would result in Ontario becoming an international "hosting court" for any number of international disputes that have no real or substantial connection to Ontario. This would be inconsistent with the principles of fairness, predictability and comity set out in *Van Breda*. I agree.

[98] Accordingly, I find that Israel has rebutted the presumptive connecting factors. Any presumptive connecting factors are tenuous and not sufficiently connected to the subject matter of the litigation.

**Issue 2: Should this Court decline to exercise its jurisdiction (the doctrine of *forum non conveniens*) because an Israeli court would be a more appropriate forum?**

[99] Given my conclusion that this Court does not have jurisdiction *simpliciter*, it is not necessary for me to examine whether Ontario is the most appropriate forum if it had jurisdiction. However, since CTCC recognizes this Court's *in personam* jurisdiction, and in the event I am wrong in my conclusion about jurisdiction *simpliciter*, I will proceed to address *forum non conveniens* factors.

[100] Both CTCC and Israel argue that Ontario is not the appropriate forum, and that Israel is. The plaintiffs argue that Ontario is the proper jurisdiction, and that unfairness would result if they were to bring another proceeding in Israel.

*Legal Principles*

[101] The burden is on the party resisting jurisdiction to show why the court should decline to exercise its jurisdiction. The defendants must identify another forum that has an appropriate connection under the conflict rules. The party asking for the stay on the basis of *forum non conveniens* must show why the alternative forum is "clearly" more appropriate (*Van Breda*, paras 103, 108).

[102] The factors that a court may consider when deciding whether to stay a proceeding on *forum non conveniens* grounds may vary depending on the context. They include:

a. the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

b. the law to be applied to issues in the proceeding;

c. the desirability of avoiding multiplicity of legal proceedings;

d. the desirability of avoiding conflicting decisions in different courts;

e. the enforcement of an eventual judgment; and

f. the fair and efficient working of the Canadian legal system as a whole (*Van Breda, supra* at para 105).

*Analysis*

*1. Comparative Convenience*

[103] The defendants argue that Israel is clearly more convenient and less expensive a forum for adjudicating this dispute.

[104] I agree. The plaintiffs have identified sixteen potential witnesses. None reside in Ontario or have any connection to Ontario. It seems seven reside in Israel, four reside in Argentina, one in the UAE, and four in New York. This list does not include the plaintiffs or Ms. Shapira, who are also not resident in Ontario.

[105] The defendants also argue that the "nerve centre" of the transactions in respect of the Bonds is in Israel. Key documents and witnesses related to payment instructions in respect of the Bonds are in Israel. Ms. Krieff, on cross-examination explained that those records belonged to IBI, but are now maintained by CDI International which operates out of IBI's former offices in Jerusalem. Ms. Shapira during cross-examinations, acknowledged that IBI's internal discussions and communications with Jaime are critical to the plaintiffs' claim.

[106] The evidence and key witnesses from IBI are all in Israel, including the evidence of IBI's managing director with whom Ms. Shapira spoke to prevent payment of the Second Bond to the Panama Account. Ms. Shapira also acknowledged that someone at IBI might be able to acknowledge how these bonds were purchased in the first place.

[107] CTCC states it was a stranger to any discussions IBI had with the bond purchaser or any instructions IBI received. Its bond register is in electronic format, and any documents it has could be made available digitally. This is supported by Mr. Troisi's evidence.

[108] The plaintiffs argue that the location of witnesses and documents is not a significant factor with technologies that this Court is now using to hear witness evidence remotely and to receive documents digitally. There is some truth to this, although there would be additional hurdles in Ontario if critical witnesses outside Ontario were compelled to testify.

[109] On this point, and while no evidence or argument was submitted on this issue, there is case law from the Supreme Court of Canada which concludes letters rogatory cannot be used to compel Israeli witnesses to testify in Ontario (*Haaretz.com v. Goldhar*, supra at para 57-58). Since evidence of the communications and documents around how the bond contracts were created is critical in this case, and that this evidence would come from IBI or CDI International witnesses in Israel, this is a significant factor favouring Israel.

[110] The plaintiffs also argue that CTCC and its relevant witnesses are in Toronto or Montreal, but as I found in the previous section on jurisdiction *simpliciter*, this is a narrow view of the subject matter of this litigation which is not limited to a breach of the IFAA contract. This litigation also relates to contractual and negligence claims arising from the First and Second Bonds sold by IBI. In any event, to the extent CTCC becomes a party to Israeli proceedings or has relevant evidence, CTCC states it would be confined to the evidence already provided by Mr. Troisi on this motion.

[111] I find that this factor significantly favours Israel since no witnesses are in Ontario, seven are in Israel and those witnesses are critical witnesses, relevant documents are in Israel, and any relevant documents and witness statements from CTCC in Ontario have already been produced. While there are technologies available to access witness testimony and

documents remotely, the absence of letters rogatory as a tool to compel Israeli witnesses to testify favours Israel.

*2. Law to be Applied*

[112] With respect to the applicable law for the plaintiffs' breach of contract claims, those claims arose from the initial bond contracts and is not limited to the IFAA contract. The evidence of Ms. Krieff is that the bonds were purchased from Panama, and IBI sold the bonds from Israel and they were processed in Jerusalem.

[113] There is no evidence that any aspect of the contract with respect to the bonds occurred in Ontario. There is strong and unrefuted evidence that the Estate communicated its acceptance to purchase these bonds to IBI in Israel, and that IBI sold the bonds from Israel. A contract is made where the offeror receives notification of the offerees' acceptance of the offer (*Eastern Power Ltd. v Azienda Communale Energia and Ambiente*, 1999 CanLII 3785 (ON CA) at para 22). Therefore, the contract on the bonds was made in Israel.

[114] Similarly, the plaintiffs plead CTCC and Israel were negligent because they "failed to verify the identify of the entity that received the First Bond payment" and "failed to verify the identify of the receiver of the interest payment" for the Second Bond. The law to be applied in tort claims should be governed by the substantive law of the place where the activity or wrong occurred, or the *lex loci delicti* (*Das v. George Weston Limited*, 2018 ONCA 1053 (CanLII) at para 83, citing *Tolofson v Jensen*, 1994 CanLII 44 (SCC)).

[115] The plaintiffs' negligence claim is that, but for the purported negligence of CTCC and Israel, CTCC would have sent cheques to Israel, rather than to the Panama Account, so that they could have been forwarded to the Estate in Argentina in the same manner as the payments on the Second Bond. Therefore, there is strong argument that the *lex loci delicti* is Israel.

[116] The plaintiffs argue Ontario law governs. The plaintiffs rely on Schedule B of IFAA, the form used for the issuance of Derivative Bonds, which states that the applicable law is Ontario.

[117] I disagree. The bonds at issue were Book-Entry bonds, not Derivative Bonds. The evidence of Mr. Troisi is that the form found in Schedule B of the IFAA was accordingly not issued; instead, a certificate was mailed to the Estate which did not make any representations about the governing law. Moreover, the IFAA states that the agreement does not confer rights on third parties, such as bondholders.

[118] One piece of Ontario legislation on which the plaintiffs rely is the *Securities Transfer Act* to advance an argument that Israel and CTCC breached their duties as "issuers" by a "wrongful registration of transfer". Section 91(1) states an issuer is liability for wrongful registration of transfer if,

(a) the issuer has registered a transfer of a security to a person not entitled to the security; and

(b) the transfer was registered by the issuer,

(i) under an ineffective endorsement or instruction,

…, or

(ii) acting in collusion with the wrongdoer.

[119] The plaintiffs, in their Amended Statement of Claim, allege that by failing to follow procedures to confirm the identity and orders from the entity that received payments from the First Bond, Israel acted under an ineffective and invalid instruction. Therefore, the plaintiffs claim, Israel and CTCC are liable for the wrongful registration of a transfer under the *Securities Transfer Act*.

[120] It is questionable, as the CTCC argued, that there has been a wrongful registration of transfer as defined under the *Securities Transfer Act*. As I read s. 91(1)(a) of the Act, it requires that "the issuer has registered a *transfer* of a security to a person not entitled to the security" (emphasis added). But the parties do not dispute that at all relevant times, the bonds were registered in the name of the Estate. The bonds did not transfer, they only matured. In any event, if I am wrong in this analysis, there is no reason why a court in Israel could not consider this legislative provision.

[121] In fact, I note that the *Securities Transfer Act* contains a section on conflict of laws. In this case, since Israel issued the bond, s. 44(1)5 suggests that the validity of the bond is governed by the laws "of the jurisdiction under which the issuer is incorporated or otherwise organized." In this case, that would be Israel.

[122] As a result, I find that Israeli law would likely govern both the contract and tort claims, as well as any alleged breach of the *Securities Transfer Act*. If this action proceeds in Ontario, additional expense, time and complexity will be incurred because Israeli law will have to be proved through expert evidence. This is a significant factor.

*3. Loss of Juridical Advantage & Expense*

[123] The defendants argue that under Israel's statutory *Prescription Law*, there is a seven year limitation period for civil claims. In contrast, there is a two year limitation period in Ontario. If this action were to proceed in Ontario, counsel for Israel advised it would argue that the limitation period provides a defence.

[124] If this action proceeds in Israel, Israel has undertaken not to dispute jurisdiction nor advance a sovereign immunity defence in Israel if this motion is granted.

[125] The plaintiffs argue there would be a juridical disadvantage because Israel would achieve deferral of this case, yet again, on its merits. As a rationale for these proceedings in Ontario, the plaintiffs point to the lack of good faith on the part of Israel, IBI, and CDI International in disclosing material to them. Ms. Shapira's evidence recounts her many calls, meetings and emails with representatives of Israel, IBI and DCI International, which led to the discovery of a US Prospectus and the MFAA between Israel and US Computershare equivalent of CTCC, which agreement the plaintiffs thought governed the First and Second Bonds. This led to the New York proceedings being launched in 2018, only to discover in the course of that proceeding that the MFAA did not apply to internationally sold bonds – only to US bond sales. The IFAA governed bonds sold internationally outside the US.

[126] The plaintiffs argue it would be unfair, as a result of Israel being less than transparent about this case, for them to have to launch a further proceeding in Israel. They further allege the approach of Israel has been an "anything but here" approach, and it was not until this proceeding was commenced in Ontario that Israel suggested Israel was the appropriate forum.

[127] In my view, the plaintiffs had contemplated a legal proceeding by June 27, 2017 and could have commenced it in Israel. On that day, Ms. Shapira sent an email to the President of DCI International and officials at Israel's Ministry of Finance indicating that the plaintiffs "will file a legal action" if her clients were not reimbursed. On cross-examination, Ms. Shapira stated that the object of a court action, as she meant it in that email, was to get justice and she further confirmed her intention in this email was to get "Israeli justice." I am not satisfied that this email or her statements on cross-examination lead to the conclusion that the plaintiffs were contemplating litigation in an Israeli court over a proceeding in another jurisdiction. What Ms. Shapira's evidence does make clear is that litigation in Israel was an option that ought to have been in the contemplation of the plaintiffs by at least June 27, 2017.

[128] Ms. Shapira's evidence and the plaintiffs' Amended Statement of Claim also suggest that because of Jaime's connections to the State of Israel and his role as honorary president of IBI, the plaintiffs will be prejudiced if this matter is not heard in Ontario. The plaintiffs fall short of stating that an Israeli court would not be independent or impartial. They also cite the cost of commencing a new proceeding in Israel.

[129] I find that the defendants have demonstrated there would be a juridical advantage - to the plaintiffs - if this matter were heard in Israel, which has not been displaced by plaintiffs. While there will be costs inherent in commencing a new proceeding in Israel, those costs do not outweigh the juridical advantages identified by the defendants.

*4. Avoiding Multiple Proceedings*

[130] Proceedings around this factual matrix have been launched in four jurisdictions – Argentina, Panama, New York and Ontario.

[131] Proceedings in Panama have been dismissed for a lack of jurisdiction, but that decision is being appealed. Proceedings in New York have been dismissed because of Israel's sovereign immunity.

[132] The plaintiffs' evidence from their expert, Prof. Sebastian Paredes, opined that an Argentine Court would unlikely assume jurisdiction of a civil matter seeking to recover payment on the bonds. There was no argument on whether this expert evidence should be admitted by the Court, although the respondents similarly relied on this expert evidence in their submissions. Prof. Paredes is a lawyer called to the bar in Buenos Aires, Argentina, with 17 years of experience in litigation and as a Private International Law academic at the Universidad de Buenos Aires, Argentina. He has acknowledged his duties as an expert in his affidavit pursuant to rule 53.03, and has attached his c.v. I am satisfied that he has the necessary qualifications to provide opinion evidence on whether a court in Argentina would assume jurisdiction over this proceeding.

[133] The plaintiffs state that an Israeli Court would not have jurisdiction to deal with crossclaims as between CTCC and Israel, which would be subject to Ontario law pursuant to the IFAA. Therefore, according to the plaintiffs, this factor favours Ontario.

[134] I disagree. Where parties have by contract specified a particular jurisdiction as having exclusive jurisdiction, this is a very weighty, although not conclusive, factor that favours the specified court as being the natural forum (see Paul M. Perell, John W. Morden, *The Law of Civil Procedure, 4th Ed.,* para 2.550).

[135] The plaintiffs' claims are in negligence and contract not only in relation to the IFAA contract, but also in relation to the contracts formed when the First and Second Bonds were established. The evidence strongly suggests that these contracts were formed in Israel, any tortious conduct on the part of IBI and Jaime around those contracts also occurred in Israel, and Israel is also where witnesses and key documents would be found. This is where the core of the dispute arose.

[136] Furthermore, there are strong indemnity provisions found within the IFAA, guaranteeing Israel would indemnify and save harmless CTCC from liability in connection with rendering services under the IFAA. As the scope of CTCC's uncontradicted evidence on this motion is that it was acting on payment instructions from IBI consistent with its duties under the IFAA, the prospect of liability against CTCC may be slim. Again, the core of this dispute relates to events surrounding the purchase of the First and Second Bonds and payment instructions given at that time.

[137] For these reasons, I find that the desire to avoid multiple proceedings favours Israel as the forum where the core events leading to these tort and contract claims arose.

*5. Avoiding conflicting decisions in different courts*

[138] The New York proceeding concluded that Israel was immune from prosecution, and the Panama proceeding was stayed for lack of jurisdiction, although it is the subject of an

appeal. If this action were to proceed in either Ontario or Israel, there would be one proceeding around this factual matrix – namely, the criminal proceedings against Jaime in Argentina, and the appeal in Panama.

[139] It is possible that an Argentine Court would find against Jaime on a criminal standard of proof, and that a court in Ontario or Israel might find Jaime liable on a civil standard of proof, were he to be named as a defendant in either forum.

[140] In addition, the plaintiffs' Argentine law expert, Professor Paredes opined that an Argentine Court would not exercise jurisdiction to hear a case with the same facts as those in this action. As such, the prospect of a civil proceeding in Argentina on these facts resulting in a different outcome than a court in Ontario or Israel is slim.

[141] The appeal in Panama revolves around the same factual matrix, but I understand it is commenced by Jaime or the Panama corporate entity, and it relates to payment on the Second Bond, not the First Bond.

[142] As a result, I do not find that this factor favours one forum over another.

*6. The enforcement of an eventual judgment*

[143] The defendants argue that Israel is protected from sovereign immunity in Canada under the *State Immunity Act*, although the plaintiffs dispute this and argue that Israel is engaged in commercial activity in Ontario and therefore is not entitled to protection under this Act. For the reasons set out in the next section, I decline to decide this issue.

[144] Although, assuming for the sake of argument that Israel was not immune from civil prosecution because of its commercial activity, there is the prospect that the plaintiffs would encounter problems with enforcing an eventual judgment of this Court in Ontario. For example, Israel noted that under the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (article 22, para 3), state property is immune from enforcement in Canada where it is used for diplomatic purposes.

[145] While not argued by the parties, it is possible that the plaintiffs may seek to enforce an Ontario judgment from the trust accounts held by CTCC. According to section 7.1(a) of the IFAA, Israel deposits money with the CTCC that are held in trust for application of payment of the principal of bonds or in connection with their redemption. One can imagine scenarios where these funds may be insufficient to satisfy an Ontario judgment obtained, or where there may be competing creditors (e.g., bondholders) entitled to these funds resulting in potential further litigation. Consequently, even if this action did proceed in Ontario, the plaintiffs may still need to enforce an Ontario judgment in Israel.

[146] The Supreme Court of Canada has confirmed that enforcement issues favour a trial in the foreign court where a party's lack of assets in Ontario would mean that any judgment made against it would have to be enforced by a foreign court, thereby raising concerns about a multiplicity of proceedings (*Haaretz.com v Goldhar*, 2018 SCC 28 (CanLII) at para 142).

[147] Therefore, given the potential challenges with enforcement of a judgment in Ontario, and the prospect of enforcement proceedings being launched in Israel, I find this factor favours Israel as the appropriate forum.

[148] Looking at these factors together and having weighed them, I find that if this Court has jurisdiction *simpliciter*, the defendants have demonstrated that Israel is clearly the more appropriate forum to hear this action.

**Issue 3: If this Court does exercise jurisdiction in this case, is Israel, as a sovereign nation, immune from the jurisdiction of Ontario's courts?**

[149] Given my conclusions that Ontario does not have jurisdiction *simpliciter*, and if it does, this Court should not exercise its jurisdiction because Israel is a more appropriate forum for hearing this case, it is not necessary for me to decide whether Israel, as a foreign nation is immune from the jurisdiction of Ontario's courts.

## IV. CONCLUSIONS

[150] I conclude that this Court does not possess jurisdiction *simpliciter* over the plaintiffs' claims. In any event, having weighed and considered the various factors under the *forum non conveniens* analysis, I find that Israel is the more appropriate forum for hearing this case.

[151] Therefore, the plaintiffs' motion to stay this proceeding is granted.

## V. COSTS

[152] The parties are encouraged to agree upon costs for this motion. If the parties are unable to agree, they may make brief written submissions to me (maximum two pages double-spaced, with an attached bill of costs). The defendants may have 14 days from the release of this decision to provide its submissions, with a copy to the plaintiffs. The plaintiffs shall have a further 14 days to respond. The defendants shall have a further 7 days for a reply, if any.

Sharma J.

Justice Sharma

**Date:** May 14, 2021