IN BRIEF

▶ Whether the success of the UK as a forum for Russian/CIS litigation can survive today's political and more competitive environment.

Russian litigation in London (Pt 2)

Simon Davenport QC & Helen Pugh consider how a deteriorating geopolitical environment & the limbo land of Brexit could affect Russian/CIS litigation in London

The past popularity of London as a centre for Russian litigation is undoubtedly being threatened by a number of dark clouds on the horizon. First and foremost is the deteriorating geopolitical environment. While the invasion of Ukraine, the attempted assassination of Sergei Skripal and tragic death of 'bystander' Dawn Sturgess on British soil, and election meddling and alleged links to the Trump Presidential campaign all steal the headlines, it is the anti-corruption campaign which is likely to have the greatest impact on Russian nationals and Russian assets in the UK.

The UK Foreign Affairs Committee report entitled 'Moscow's Gold: Russian Corruption in the UK', published on 21 May 2018, concluded frankly that: 'The use of London as a base for the corrupt assets of Kremlin-connected individuals is now clearly linked to a wider Russian strategy and has implications for our national security. Combating it should be a major UK foreign policy priority.' The committee also favoured a so-called '*Magnitsky* amendment' to UK legislation which would freeze the assets of Russians implicated in gross human rights abuses and corruption.

The cold wind is undoubtedly being felt in the Anglo-Russian professional sector. In January 2017 the UK's Financial Conduct Authority fined Deutsche Bank £163m for its role in failing to prevent $10bn being laundered through so-called 'mirror trading' between Moscow, London and New York to offshore bank accounts in Cyprus and the British Virgin Islands.

Law firms are not immune from the chill. In the May 2018 report the UK Foreign Affairs Committee report criticised Linklaters for failing to appear before the committee, cuttingly saying: 'We regret their unwillingness to engage with our inquiry and must leave others to judge whether their work at "the forefront of financial, corporate and commercial developments in Russia" has left them so entwined in the corruption of the Kremlin and its supporters that they are no longer able to meet the standards expected of a UK-regulated law firm.' Linklaters robustly rejected any implication of involvement in Russian corruption.

'You don't have to be a super sleuth to pretty quickly wonder whether being involved in a deal that involves a big oligarch is going to hit you reputationally,' said Tom Keatinge, director of the centre for financial crime and security studies at RUSI (who formerly worked as a JPMorgan eurobond banker in Moscow) in May 2018.

Red notice abuse

The end of 2018 saw a controversial election at Interpol in which Russia is accused of abusing the 'red notice' system to harass critics and dissidents. A bipartisan group of US senators said electing Alexander Prokopchuk, a Russian former general with ties to the Kremlin, would be 'akin to putting a fox in charge of the henhouse'. Vigorous lobbying from the US and UK among others is thought to have contributed to the election of Mr Kim Jong Yang of South Korea instead.

With the arrest in Russia last month of US citizen and founder of private equity firm Baring Vostok Capital Partners, Michael Calvey, and the sentencing of Danish citizen, Dennis Christensen, to six years' imprisonment for practising as a Jehovah's Witness in Russia, it is clear that the chilly relationship between Russia and the West shows no signs of thawing.

The limbo land of Brexit

Second, is the limbo land of Brexit. Assuming it goes ahead at some future point, unhitching the British wagon from the EU will undoubtedly have consequences for the harmonisation of the English and EU jurisdictions. This is no more apparent than in the area of recognition and enforcement of judgments governed by EU Regulation 1215/2012 (Brussels Recast) until 'Brexit day'. While the British government has signalled an intention to recognise and enforce judgments from the EU for an extended period thereafter, the EU has not been minded to reciprocate in the case of a no deal Brexit. Judgments of the English courts will not be recognised or enforced by EU law after 'Brexit day'; rather they will be subject to the national jurisdiction invited to recognise and enforce that judgment unless another convention such as the Hague Convention applies. In practice this is only likely to affect those parties with judgments against Russian parties which have assets across the EU but for those affected the increased complexity, costs and uncertainty will be significant.

Sanctions

On a political level Brexit looks set to have a significant impact on the sanctions placed on Russian interests and some Russian nationals. The UK is expected to devise its own sanctions


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regime and it is widely anticipated to take a harder line on sanctions, moving from economic sanctions alone to economic sanctions with asset freezing and seizures pursuant to a so-called *Magnitsky* amendment inspired by the US Magnitsky Act. Having received the Royal Assent already, this *Magnitsky* amendment is ready to take effect once the UK has left the EU.

Given that hitherto the UK has been a significant driving force behind the EC's approach to Russian sanctions and given the well-known apathy to sanctions on Russia among some European countries, Brexit is likely to lead to divergence between the UK and EU sanctions regimes. This may deter Russian nationals and business interests from using the UK as a base in the future in favour of other European jurisdictions.

Increased competition

The third potential issue is increased competition from other jurisdictions offering their own versions of the English Commercial Court. Jurisdictions such as Hong Kong and Singapore in the Far East, and Dubai's DIFC in the Middle East are continuing to push into the global commercial litigation market and have strong arbitration centres, as do relative newcomers such as Qatar. Closer to home, a new Parisian Commercial Court conducting proceedings in English and applying English common law opened in 2018 with similar institutions either in existence or planned in the Netherlands Commercial Court, the commercial chamber in the Frankfurt Regional Court and Brussels International Business Court.

Cost

A fourth issue is cost. Leaving aside potential collateral reasons for litigation in the UK, sometimes the recovery rates of monies and assets or enforcement results against parties captured by jurisdiction victories have offered poor returns on the serious cost exposure endured. There is a growing body of interest in pursuing direct intervention from influencers and empowered third parties.

Unexplained wealth orders

Another issue which may have a dampening effect on Russian litigation is unexplained wealth orders (UWOs). UWOs came into force on 31 January 2018 but as yet there has been little guidance or caselaw on their use. That said, the publicity alone of the first UWO case, involving the wife of the chairman of the International Bank of Azerbaijan and an alleged £16m Harrods shopping bill, is likely to deter some high net-worth individuals from living in the UK unless they can adequately explain their wealth.

Ben Wells, chairman and founder of the Russian Speaking Legal Professionals' Forum and associate at Pinsent Masons, noting the change in political climate, has identified a concern about the prejudicial effect of a tendency to 'label' or synonymise Russian and CIS nationals in the UK as potential UWO targets. We will be considering this issue in more depth in a future article.

Looking forward

Despite the gloom on the horizon, we remain optimistic that London's Commercial Court (and London based arbitration centres) will continue to be a leading centre for Russian—and increasingly CIS—litigation. Five of the largest 15 Global 100 law firms, based on number of lawyers in 2017–18, have their main base in the UK. More than 200 foreign law firms from around 40 jurisdictions operate in the UK. The UK Office for National Statistics estimates that 66,000 people born in Russia were resident in the UK in 2016 with other estimates suggesting considerably higher numbers of 150,000 to 300,000. The promise of Brexit is greater openness—at least with countries outside the EU—and not less.

The attraction of the certainty of English law, the mature and effective approach of English procedural law to asset recovery and tracing, and the impartiality and professionalism of the Commercial Court judges (and the breadth and excellence of arbitrators here) are all strong reasons for continuing to litigate in London in the future. The growing market in litigation funding from funders such as Omni Bridgeway even specialise in supporting them.

Broader economic factors also suggest that a downturn in Russian litigation is unlikely. The Russian economy experienced the twin shocks of a sharp decline in oil prices and economic sanctions in 2014–15. While the Russian economy rebounded in 2017 and 2018, there is a negative outlook for the Russian economy in 2019 and in the short-term generally. This would suggest that defaulters and commercial disputes may become more, not less, common. While the blockbuster pieces of litigation of *Berezovsky v Abramovich* and *Ablyazov* may remain outliers in terms of scale, the need for Russian businessmen, exiles and ex pats to settle their disputes in impartial litigation will remain.

The Commercial Court also continues to have several advantages over its newer rivals. Unlike other commercial courts, it combines both a 120-year history, with the well-worn procedure and stability that implies, with an aptitude for innovation. The judiciary has been responsive to the legal community's desire for London, and other UK regional commercial centres, to remain a leading global litigation centre. It has also shown itself reactive to complaints that a one-size fits-all, Rolls-Royce system can lead to costly and lengthy proceedings.

Two recent reforms stand out.

- First, since 1 October 2015 the Commercial Court has been operating a shorter and flexible trials scheme which has now been made permanent. Suitable for trials listed for up to four days, the timetable between the preparatory hearing and the trial is six months with pared back disclosure, oral and written evidence. The same judge will both case manage and hear the trial. There is no upper limit on the financial value of claims which can use this procedure.
- Second, the Commercial Court has launched a disclosure pilot in January 2019. Found in Practice Direction 51U, the aim of the pilot is a simpler and less expensive approach to disclosure. Instead of applying standard disclosure by default, the pilot requires parties to select from a menu of five options ranging from disclosure of known adverse documents to wider search-based disclosure going beyond the traditional standard disclosure model.

In addition to specific reforms, the Commercial Court has been ready to embrace technology. It now has a mandatory e-filing system which logically is the first step paving the way for entirely paperless proceedings. As *New Law Journal* reported in a series of articles in March and April 2018, real-time transcription of proceedings, video-link evidence, electronic or e-bundles and electronic presentation of evidence or EPE are all becoming more common in the Commercial Court (see Michael Fletcher and Helen Pugh, 'Trial technology': Pt 1, 168 NLJ

7787, p17; Pt 2, 168 NLJ 7788, p16; Pt 3, 168 NLJ 7789, p18; and Pt 4, 168 NLJ 7790, p15). This has significant advantages in Russian/CIS litigation which, as with many cases in international litigation, may utilise this technology to call witnesses from abroad or enable parties (or their advisers) to follow court proceedings while abroad, be it seeing to their other business interests or for other reasons.

For Russian/CIS parties seeking a confidential forum or yet more flexibility over procedure, arbitration in London provides a popular alternative to litigating in the Commercial Court. The Arbitration Act 1996 supports arbitration by providing for the supervision by the experienced Commercial Court yet also ensures that challenges to arbitral awards are limited so as not to undermine the arbitration system. The London Court of International Arbitration (LCIA) remains one of the global leaders in arbitration. According to Dan Hayward, now partner at Fieldfisher, quoted in a CDR article published in October 2016: 'The LCIA recently stated that every third case that it handles currently involves a CIS related party. Over the last two years the LCIA has also noted that there has been a slight increase in the number of CIS related disputes registered with them after a stable five-year period,' ('Changing times for Russian disputes in London', Ben Rigby, *www.cdr-news.com*, 24 October 2016).

Finally, there is increasing recognition within the legal community that high costs, or the perception of high costs, has been a significant factor in clients choosing to litigate in other jurisdictions. The days when the heavyweight litigation was monopolised by a handful of Magic Circle City firms are long gone, paving the way for a variety of different specialist firms ranging from the City giants to the boutique litigation firms. The position is no different with barristers. The days of uncompetitive monopoly rates have given way to a range of different rates and funding options offered by specialist counsel from a number of different sets.

Conclusion

The *Abramovich*, *Aeroflot* or *Ablyazov* mega-cases may be few and far between, but the desire—and need—for litigation to resolve disputes between Russian/CIS nationals or in respect of Russian/CIS business interests remains and is founded on an increasingly substantial client base. It is difficult to see geopolitical factors such as Brexit and sanctions having a long-term significant impact on the sector as a whole, rather than on a few individuals.

Of greater importance is the increased competition from other jurisdictions. London's intrinsic advantages as a global and vibrant city with the English language and a welcoming attitude to ex pats will be difficult for rivals to replicate. Yet the legal community should not be complacent. The Commercial Court is moving in the right direction, streamlining and modernising its procedure, but that should be considered a continual project and not one which stops with the recent reforms.

With more law firms and an increasing number of specialist barristers in an already competitive market, we are seeing more competitive pricing which tackles the notion that London is an increasingly expensive place to litigate. London will not give up its top spot as a place for Russian and CIS litigation easily, neither apparently will citizens and corporations from the former flag bearer for communism give up their appetite for enforcing or defending their commercial rights. **NLJ**

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