IN BRIEF

- Many recent commercial litigation cases with one or more Russian/CIS parties share a number of common features.
- The calibre of the Commercial Court judges and the certainty of English law—as well as the courts' impressive asset recovery weaponry—make London an attractive choice for contracting parties.
- The popularity of London and its suburbs among expats and exiles makes London a possible jurisdiction in other cases.

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Russian litigation in London (Pt 1)

Simon Davenport QC & Helen Pugh examine the reasons behind the buoyancy of Russian/CIS litigation in London: the pursuit of clarity & certainty, or something more pragmatic?

With episodes as high-profile as the Skripal poisoning, Roman Abramovich's visa problems, and even Maria Sharapova's doping scandal, the Russian influence in Britain in areas as diverse as espionage and sport is headline news in technicolour. Commercial litigation involving Russian and Commonwealth of Independent States (CIS) institutions, companies and people has the same high tempo, high stakes characteristics.

According to the report *UK legal services 2018* by TheCityUK, in 2017 almost 1,200 claims were issued in the Admiralty and Commercial Court, now part of the Business and Property Courts of the High Court of Justice (referred to in this article as 'the Commercial Court'). Of these, 78% involved at least one party domiciled outside England and Wales, and 51% were cases where all parties involved were international. While the report does not break down cases by country or nationality of the parties, it is clear from the most cursory glance through the daily list and recent reported cases that many, including many of the most high-profile and high value, involved Russian/CIS parties and/or interests. At the height of the *JSC BTA Bank v Ablyazov* litigation, numerically at least more cases originated from Kazakhstan than anywhere else.

The uncertainties of Brexit, the dampening effect of UK sanctions and the hardening political climate against 'Russian' influence all justify revising the question of whether the buoyancy in Russian/CIS litigation in London will continue.

Features common to Russian/CIS litigation

While by no means a uniform sub-set of litigation, there are features common to much of the commercial litigation in recent years which have featured one or more Russian/CIS parties.

1. **Jurisdictional arguments.** In many Russian/CIS cases, jurisdiction continues to depend upon the domicile or physical presence of an individual or corporate defendant in England and Wales. A staple tactic of claimants is to issue against a so-called 'anchor' defendant on which to tether a claim against Russian/CIS defendants. In *Shulman v Kolomoisky and another* [2018] EWHC 160 (Ch), [2018] All ER (D) 58 (Feb), Ukrainian national Mr Bogolyubov contested jurisdiction on the basis that he was domiciled in Switzerland and not England precisely because he had been targeted on two previous occasions as an anchor defendant for litigation which otherwise had nothing to do with England. While undoubtedly a successful strategy in many cases, the court is astute to the abuse of this device. In obiter dicta in *Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), [2008] All ER (D) 299 (Oct), the court indicated that it considered an English company with minimal assets to have been sued as an unjustifiable 'anchor' defendant to the claims against Mr Abramovich and, but for deciding the case on other grounds, would have 'loosed the chain' (at [490]).
2. **Interim remedies and asset recovery.** English law's menu of interim remedies is a significant attraction to parties concerned that its counterparty will dissipate assets pending the outcome of the litigation. The willingness of the Commercial Court to deploy not just the domestic freezing order, but the international freezing order, in appropriate circumstances can be a very effective tool in the quest to trace assets. Many of the notable Russian/CIS cases of recent years have involved freezing injunctions, including *JSC Mezhdunarodniy Promyshlenniy Bank v Sergei Viktorovich Pugachev* [2014] EWHC 2810 (Ch) and *National Bank Trust v Yurov and others* [2016] EWHC 1913 (Comm).
3. **Local law expert evidence.** Parties to contractual disputes will often have chosen English law as the governing law. Otherwise, the English court will apply its choice of law provisions which, in

many cases involving Russian nationals or Russian business interests, will point to Russian law as the applicable law, or the relevant home jurisdiction in other CIS cases. While each case ought to be decided on the quality of the expert law evidence in that particular case, given the prevalence of Russian litigation in particular in the Commercial Court, it is almost inevitable that the judges will build up a body of knowledge of Russian law which will affect how they assess the credibility of the parties' Russian law experts.

4. **Foreign language needs.** As with many international cases, the involvement of non-English speaking parties or witnesses or experts brings with it the need for excellent translation and interpretation support. Disclosure may involve upwards of tens or hundreds of thousands of foreign language documents. Witnesses and the parties may require an interpreter. The legal team may require a Russian or other local speaker to support their understanding of translated documents or evidence given through a court interpreter.

Given the experience which London and its legal community has gained of Russian litigation, litigants now have an impressive choice of veteran solicitors, and an increasing number of experienced specialist counsel, who are adept at dealing with these issues.

The UK's recent dominance as a jurisdiction for Russian/CIS litigation

The UK is the second largest legal services market globally (behind only the USA) and the largest legal services market in Europe. Typical explanations for this success include the calibre of the Commercial Court judges and the certainty of English law, making it an attractive choice when contracting parties are opting for jurisdiction and choice of law clauses. English jurisdiction and choice of law clauses saw the Commercial Court in 2018 host the approximately $US1.477bn shareholder dispute in *United Company Rusal plc (a company incorporated in Jersey) v Crispian Investments Ltd (a company incorporated in Cyprus) and another company* [2018] EWHC 2415 (Comm), [2018] All ER (D) 10 (Oct) between Oleg Deripaska, Vladimir Potanin and Roman Abramovich.

The quality—and impartiality—of judicial decision-making can be particularly important in the context of Russian/CIS litigation. It is not uncommon to hear parties resisting a stay in favour of litigation in Russia to raise arguments on the risk of an unfair trial in the Russian courts. These arguments have had varying success: in the recent case of *Bazhanov and another v Fosman and others* [2017] EWHC 3404 (Comm) and the earlier case of *Erste Group Bank AG v JSC 'VMZ Red October' and others* [2015] EWCA Civ 379, [2015] All ER (D) 135 (Apr) neither the High Court nor the Court of Appeal accepted the unfair trial argument, whereas Mrs Justice Gloster had more sympathy towards such an argument in *Berezovsky v Abramovich; Berezovsky v Hine and others* [2012] EWHC 2463 (Comm), [2012] All ER (D) 116 (Sep), as was the case in *Cherney v Deripaska* [2008] EWHC 1530 (Comm), [2009] 1 All ER (Comm) 333. An express jurisdiction clause in favour of the English courts saves contracting parties the time and uncertainty of raising such issues at the jurisdictional stage.

> *"The quality—& impartiality—of judicial decision-making can be particularly important in the context of Russian/CIS litigation"*

For contracting parties, English law is often the gold standard for those in search of certainty. Until amendments to the Russian Civil Code in 2015, there was a widespread view that Russian law took a hostile or equivocal approach towards many clauses considered boilerplate in English law. The amendments governing representations, conditions precedent, indemnification clauses and penalty clauses, among others, are aimed at increasing certainty and expanding contractual freedom. Even after these amendments, Russian parties or parties with a Russian counterparty will still prefer to choose English law with its centuries-old history of contractual precedent and caselaw.

Yet while the calibre of judges and certainty of English law explains why many contracts involving Russian parties opt for express jurisdiction and choice of law clauses, a closer look at individual cases would suggest there are often other, more pragmatic, reasons for the UK being the forum for Russian litigation.

In *National Bank Trust v Yurov,* heard in the Commercial Court in October and November 2018 (judgment awaited), a Russian bank brought proceedings for recovery of circa £1bn against its former directors and shareholders for, among other things, breach of fiduciary duty and fraud. The bank successfully applied for freezing orders. While involving Russian parties, two of the defendants were resident in England and served as the 'anchor' defendants.

In the 'Putin's banker' case of *JSC Mezhdunarodniy Promyshlenniy Bank and another v Pugachev and others* [2017] EWHC 1847 (Ch), [2017] All ER (D) 74 (Sep) the English Commercial Court was originally asked to grant a without-notice worldwide freezing injunction against Mr Pugachev in support of Russian proceedings. Those proceedings resulted in a judgment in Russia in respect of circa £1bn in misappropriated funds which the claimants sought to enforce in England against trust assets located in the jurisdiction. Mr Pugachev had been domiciled in London (but subsequently—in breach of a court order to surrender his passport—had fled to take up residence in his French chateau).

And of course few will forget the well-publicised efforts by Mr Berezovsky to serve Mr Abramovich during one of his trips to the UK to support Chelsea FC. The drama played out when Mr Berezovsky spotted Mr Abramovich shopping in a London branch of Hermès and, fetching the £5bn writ from his Maybach limousine, served Mr Abramovich in front of stunned shoppers. Although resident in Russia and sued in relation to business interests in Russia, Mr Abramovich chose not to challenge jurisdiction. Mrs Justice Gloster considered this 'a realistic decision' by Mr Abramovich in circumstances where Mr Berezovsky was unable to return to Russia without facing arrest and would have difficulties obtaining a fair trial. Whether these reasons influenced Mr Abramovich or whether there were other strategic reasons for his decision to submit to the English jurisdiction remains a matter of speculation.

These examples of Russian litigation in recent years suggest that, in addition to commercial contract claims in which both parties have deliberately chosen to litigate in the English courts, much of the Russian/CIS litigation in London hinges upon the popularity of the UK as a place for exiled or ex-pat Russians and CIS nationals to visitor live, and upon the claimant's desire to use the English court's impressive asset recovery weaponry. **NLJ**

Next time

In Part 2 we consider whether the success of the UK as a forum for Russian/CIS litigation can survive today's political and more competitive environment.

Simon Davenport QC, 3 Hare Court, practises in Russian and CIS commercial and commercial fraud cases. **Helen Pugh**, 3 Hare Court, practises in commercial and civil fraud with a strong international element (*www.3harecourt.com*).