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FRAUD CLAIMS AGAINST RUSSIAN AND FSU DEFENDANTS

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Jurisdiction Post-Brexit

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Brussels Recast (EU Reg: 1215/2012)

- Jurisdictional rules on civil commercial matters (**Art 1(1)**)
- Brussels Recast primarily engaged where D is EU domicile
- Exception - exclusive jurisdiction:
  - **Art 25** (jurisdiction agreement)
- Continues to apply to proceedings commenced before **1.1.21**

Lugano Convention 2007

- UK applied to join on **8.4.20**
- Lugano (**Art 23(7)**) only applies to jurisdiction agreements if 1 party is domiciled in a contracting state, unlike Brussel Recast (**Art 25**)
- General domicile rule (**Art 2**) is the same as Brussels recast (**Art 4**)
- Accession requires consent of all signatories – not yet provided.

In the meantime …

- The Convention of 30 June 2005 on Choice of Court Agreements **("2005 Hague Convention")**

- Common law rules: **CPR PD6B, para.3.1**

2005 Hague Convention

- Applies to Jurisdiction Agreements:
  - entered after Convention came into force in State of chosen court **(Art 16(1))**.
  - in *international cases*
  - are *exclusive* **(Art 1(1) + *Etihad Airways v Flother*** [2020] EWCA Civ 1707**)**.
- Contracting State Court has jurisdiction unless the agreement is null and void under the law of that State **(Art 5(1))**
  - cannot decline on *forum conveniens* grounds **(Art 5(2))** .

2005 Hague Convention

- 32 Signatories: UK, EU, Singapore, Mexico, [USA, China, Ukraine].
- EU acceded on **1.10.15**
- UK acceded in its own right on **1.10.20** + came into effect on **1.1.21.**
    - UK's position: 2005 Hague Convention applies to UK EJCs from **1.10.15**
    - EU's position: only applies between UK + EU members from **1.1.21**

Common Law Rules

- ***Owusu v Jackson*** (ECJ Case C-281/02) does not apply
    - *Forum conveniens* discretion whether to accept jurisdiction based on domicile
- ***Turner v Grovit*** (ECJ Case C-281/02) / ***West Tankers*** (ECJ Case C-185/07) no longer applies
    - English Courts can now grant A-SIs re EU proceedings

Summary

- English proceedings **pre 1.1.21**:
  - Brussels Recast

- English proceedings **from 1.1.21::**
  - 2005 Hague Convention, *if* based on UK EJC
  - *Otherwise*, Common Law rules
  - Lugano Convention 2007 *if/when* EU agrees to UK accession

Effect on cases against Russian/FSU Defendants

- No effect/good prospects if based on an English EJC
- Harder to peg jurisdiction on domicile if Common Law Rules apply
- Same (wider) scope for establishing domicile-based jurisdiction if/when UK accedes to Lugano
- No effect on English arbitrations (save for ASIs) – or governing law.

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Worldwide freezing orders - pursuing assets in the name of foreign nominees

Charles Samek QC

WFO – "assets" definition

a. Paragraph […] applies to all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise.

b. For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own.

c. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions.

"Babanaft" proviso

THIRD PARTIES

(1) Except as provided in paragraph (2) below, the terms of this order do not affect or concern anyone outside the jurisdiction of this Court.

(2) The terms of this order will affect the following persons in a country or state outside the jurisdiction of this Court—

(a) the Respondent or its officer or its, her or his agent appointed by power of attorney;

(b) any person who–

(i) is subject to the jurisdiction of this Court;

(ii) has been given written notice of this order at it, her or his residence or place of business within the jurisdiction of this Court; and

(iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this order; and

(c) any other person, only to the extent that this order is declared enforceable by or is enforced by a Court in that country or state.

"Baltic" proviso

ASSETS

Nothing in this order shall, in respect of assets located outside England and Wales, prevent any third party from complying with—

(1) what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and the Respondent; and

(2) any orders of the Courts of that country or state, provided that reasonable notice of any application for such an order is given to the Applicant's solicitors.

Cases referred to

International Credit and Investment Co Ltd v Adnam [1998] BCC 134

Lakatamia Shipping Company Ltd v Su & Ors [2014] EWCA Civ 636

JSC BTA Bank v Ablyazov [2015] UKSC 64; [2015] 1 WLR 4754

Dadourian Group Int'l Inc v Simms [2006] EWCA Civ 399; [2006] 1 WLR 2499

C Inc plc v L [2001] EWHC 550 (Comm); [2001] 2 All ER (Comm) 446

Belletti v Morici [2009] EWHC 2316 (Comm); [2010] 1 All ER (Comm) 412

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Contempt of Court –
new rules, but new landscape too?

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Applications to commit a person to prison for contempt of court: important recent developments

- New Procedural Rules

  October 2020 revision to the English Civil Procedure Rules (CPR) Part 81

- New Landscape?

  Reappraisal of the role, and pursuit, of committal applications after the case of:

  Navigator Equities & Chernukhin v Deripaska [2020] EWHC 1798 (Andrew Baker J)

Russian & FSU Defendants to Contempt Applications

- Committal commonly sought for breaches of asset freezing orders / undertakings

- Committal also possible for knowingly giving false evidence. New emphasis on policing against this type of contempt, see new form of statement of truth:

> ***CPR PD22, para. 2.2***:
>
> "*I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.*"

BUT: need the Court's permission first to make an application based on this type of contempt – ***CPR r 81.3(4)(b)***

New CPR Part 81

- New Part 81: ten short rules of general application – replacing messy set of rules, practice directions and diffuse caselaw
- Very helpful formalisation of the caselaw requirements on information to be included in a contempt application – checklist at ***CPR r 81.4(2)***
- Codification of certain powers of the Court: *e.g.*, to issue a bench warrant to secure a defendant's attendance – ***CPR r 81.7(2)***
- No change to the substantive law of contempt – ***CPR r 81.1(2)&(3)***
- Came into force on 1 October 2020

Chernukhin v Deripaska: background

- 2017 arbitration award: Deripaska ordered to buy out Chernukhin's interest in a joint venture property company for US$95million
- Deripaska did not pay; Chernukhin sought an English Court WFO to assist enforcement
- In June 2018, Deripaska gave undertakings to the Court, broadly to the effect that shares in EN+ (holder of the controlling stake in Rusal) would not be dealt with or disposed of
- Around this time: process of redomiciliation of EN+ from Jersey to Russian SAR – part of broader restructuring package to alleviate sanctions issues
- English Court challenge to arbitration award failed; Deripaska paid the award in full in October 2019; undertakings discharged
- In 2019, Deripaska had pursued a criminal private prosecution in England against Chernukhin for allegedly perverting the course of justice in the arbitration award challenge; Crown Prosecution Service took it over and discontinued it in 2020

Chernukhin v Deripaska: committal application

- Nevertheless, in November 2019 Chernukhin launched application to commit Deripaska to prison for contempt

- Alleged contempt: essentially that Deripaska procured EN+ shareholders to vote in favour of the redomiciliation, which caused the EN+ shares to have been dealt with / disposed of

- Deripaska denied contempt *and* cross-applied to strike-out the committal application as being an abuse of the Court's process

Striking-out contempt applications: legal test

- Application may be struck-out if pursued for improper or illegitimate motivation or purpose

- Assess applicant's actual subjective motive or purpose for pursuing committal (not whether there is an objectively reasonable basis for doing so) [138]

- Judge did not decide the required threshold for an improper motivation / purpose to warrant strike-out, *i.e.*, whether it need only be "*real and substantial*" or must be the applicant's "*predominant*" motivation / purpose [140]

Chernukhin v Deripaska: decision

- Chernukhin had improper motivation / purpose & lack of openness:
  - Not open with the Court as to what he knew about the redomiciliation process and when
  - Wasn't concerned by redomiciliation until it became apparent it could be used as a basis for committal application
  - Deliberately waited until the buy-out completed then launched the application
  - Committal sought out of "*revenge and personal animosity*"; "*livid*" about the private prosecution
- Evidence in support was materially misleading
- Application presented in aggressively partisan fashion: evidence & skeleton argument

Chernukhin v Deripaska: lessons 1

Unfamiliar role for litigators – applicant performing a "*quasi-prosecutorial role in the public interest*":

- "*proper function is to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment*" – [143]

- Role is ***not***: "*to advance as forcefully as possible the best case she could argue for her client why Mr Deripaska should be found to have been in contempt*" – [156(ii)]

- Previous adverse findings against Deripaska (including re: his honesty) in the arbitration proceedings: all the more reason why he should have had "*the protection of a scrupulously careful and even-handed prosecution of the charge against him*" – [145]

Chernukhin v Deripaska: lessons 2

- Neutral description of events; omit irrelevant prejudicial material – [159]
- Necessary to investigate and scrutinise before putting forward own client's account of events in solicitors' evidence in support of the application – [156(iv)]
- Everything more closely scrutinised given gravity of committal context. Chernukhin's solicitor in cross-examination, explaining mistaken evidence put forward in support of the application: "*it was sloppy drafting*". Judge not impressed: "*sloppy drafting* ***in sworn evidence intended to put a man's liberty at risk***" – [156(vi)]
- Do not address length of sentence before judgment – [160(vii)]

Chernukhin v Deripaska: lessons 3

- Independence / keep appropriate "*objectivity and detachment*" from your own client – [162]
  - Important to the decision about whether or not to pursue committal
  - Important for how committal application is pursued

- Judge' s Have two separate teams within the law firm: one dealing with the day-to-day substantive litigation, another for private prosecutions / committal – [163]

2020: Scrutiny of Contempt Applications

- ***Integral Petroleum v Petrogatz*** [2020] EWHC 558 (Comm)
  - alleged breach of an injunction not to move cargo
  - strike-out sought on basis that committal application used as leverage / pressure to force a settlement of the main dispute between the parties
  - abuse argument failed, notwithstanding "*unwise*" and "*ill-judged*" aspects of applicant's solicitors' correspondence

- ***Deutsche Bank v Sebastian Holdings & Vik*** [2020] EWHC 3536 (Comm)
  - alleged failure to disclose assets in breach of a Part 71 order & lying under oath
  - strike-out sought on basis of delay, failure to particularise allegations, putting forward and then withdrawing some allegations, misleading evidence, oppressive approach etc.
  - abuse argument failed; legitimate purpose – essentially, not seeking imprisonment for its own sake but to get the defendant to disclose his assets & to enforce judgment

- ***Cole v Carpenter*** [2020] EWHC 3155 (Ch)
  - alleged falsified document exhibited to statement of case
  - permission for committal application to proceed before trial refused: applicant's "*outrage*" meant that it was not possible before trial to reliably assess whether or not applicant could fulfil the quasi-prosecutorial role

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Obtaining the best evidence from foreign law experts

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How the court decides foreign law issues

- Foreign law pleaded and proved by expert evidence: *Dicey*, rule 25(1)
- English court's function is to decide how the foreign court would apply foreign law: *Yukos Capital v Rosneft* [2014] 2 Lloyd's Rep 435, [26]
- Experts' task is to inform the English court of the meaning and effect of foreign law: *Yukos,* [27] – but not how it would apply to the case
- If expert evidence conflicts, English court looks at foreign law sources to decide the conflict: *Dicey*, para. 9-17
- Foreign law should be judged at level of highest appeal court in the foreign jurisdiction: *Re Duke of Wellington* [1947] Ch 506, p. 514

National Bank Trust v Yurov
[2020] EWHC 100 (Comm)

- $1 billion banking fraud against former shareholders & employed directors of NBT
- Issue: did Civil Code or Labour Code apply?
- Bryan J started with recent first instance Russian Arbitrazh court decisions; not precedent but persuasive; used as lens to interpret other Russian law sources
- Ds' expert forced to say cases wrongly decided, judge disagreed

  'I have found the Arbitrazh judgments referred to by [C's expert], including cases with striking similarities to the present, and his analysis of the same, to be of the greatest assistance, and the most helpful guide, as to the position of Russian law […]' [985]

  'I bear well in mind that in the Russian system, unlike in this jurisdiction, judgments are not formal sources of law and do not create precedent. I also bear in mind that the position under Russian law should be considered through the lens of the Russian final appeal court, and not simply through the lens of the court of first instance which accepts jurisdiction. However, I do not consider that either Russian legislation or Supreme Court resolutions lead to a contrary conclusion.' [986]

Danilina v Chernukhin
[2019] EWHC 173 (Comm)

- D and C formerly long-term partners; D alleged C orally agreed to share assets with her
- Russian law, art. 162 Civil Code: oral contract cannot be proven with witness evidence
- Issue: was art. 162 substantive rule (applied in England) or procedural (not applied). Conflicting Russian Supreme Court cases: 2003 case: art. 162 substantive rule: 2017 case: art. 162 procedural rule
- Judge used two approaches to resolve conflict:
  i. Examine reasoning in context: to decide which was more authoritative [339]

     'the court in the later case considered carefully the question of how to determine whether a provision is substantive or procedural (noting that the question is determined by the "content" of the rule rather than its location within a particular statute) and then deliberately choses to cite article 162(1) as an example of a procedural rule' [339]

  ii. Statutory interpretation of art. 162: [340]

     'there is an important distinction between the facts which must be proven and the evidence by which those facts might be proven. A rule stating that certain evidential consequences flow from a particular failure of formality is materially different from a rule setting out the essential elements of a contract' [340]

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VTB Bank v Laptev
[2020] EWHC 321 (Ch)

- VTB Bank claimed against L on guarantee contracts for debts owed by L's companies; L in bankruptcy in Russia, VTB was recognised as a creditor there
- VTB brought English bankruptcy petition, based on same Russian debts
- L's expert said this was prohibited by Russian law – exclusive remedy is registering claim in Russian bankruptcy, not claiming elsewhere; domestic cases but none with foreign element
- VTB's expert disagreed: no cases close enough, so only question of public policy
- Judge weighed up reasoning of experts – preferred L's expert: closely reasoned, built on previous authority by analogy, impartial and assisted court; vs VTB's expert gave her preferred answer without authority or explaining her reasoning steps

  'I find [L's expert's] argument compelling, well-researched by reference to comparative domestic decisions and preferable to the opinion of [VTB's expert] who dismissed the relevance of domestic decisions and appeared less open to considering the merits of arguments which conflicted with the opinion set out in her written report' [61]

Tips for the best foreign law expert evidence

1. Cite foreign law court decisions, even if not precedents
2. Deal with decisions contrary to their opinions
3. Explain rationale and policy behind foreign legislation
4. Give ‘building blocks’ in reasoning, not just give expert’s answer
5. Evidence must be impartial, expert should assist the court
6. Check expert’s previous opinions for contrary views

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