

Civil fraud – here to stay?

Akin Gump's Mark Dawkins and Kambiz Larizadeh discuss England's future as a centre for disputes

Recent geopolitical events have reignited the perennial debate about whether the tide has turned for the English court being the chosen venue for major, complex, international commercial disputes, particularly those involving Russia, and other eastern European and current and former CIS states. An altered approach to US foreign policy, the imposition of US sanctions upon Russian business people and Russian companies, and our own political and social issues triggered by Brexit, have together served to create uncertainty in some minds over Britain's continued place as a centre of gravity for the resolution of the high-value, complex, international disputes that have been the staple diet of London's civil fraud practitioners.

The current political climate appears to demonstrate hostility from the West, in particular towards the so-called oligarchs and their investments. This apparent hostility has been exacerbated by a souring of diplomatic relations combined with legal and economic measures taken by the Russian government in recent years, such as the 'de-offshorisation' initiative, which are designed to encourage its ultra-high-net-worth individuals to repatriate their foreign holdings back to Russia. Taken together, these factors raise the concern that such business people are making fewer investments in the UK, with a consequent downturn in major transactions for City lawyers, and therefore the risk advisory and disputes work that often flows from such deals.

For any fraud practitioner, it is a familiar enough concern that has been raised repeatedly over the last decade, usually at the conclusion of any of the substantial pieces of hard-fought and highly-publicised international litigation. At the end of the long-running *Berezovsky* and *Cherney* series of disputes, it was asked whether we had seen an end to the era of Russian mega-litigation. However, by way of an answer, one only need look at the stream of significant pieces of Russian complex commercial litigation that



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has followed them in the Commercial Court and Chancery Division over the past five years; complex, high-value, cross-border disputes – often involving allegations of fraud, injunctions and the tracing of assets across multiple jurisdictions – have been regular fixtures, such as the *Ablyazov*, *Pugachev*, *Pinchuk* and *Arkhangelsky* litigations to name but a few, not to mention the more recent *Tatneft* and *Norilsk Nickel* cases, and

the dozens of high-value confidential arbitrations that have been – and still are being – conducted in London.

For the disputes team at Akin Gump Strauss Hauer & Feld, it is a moot question as we are still seeing new disputes from Russia and the CIS, and we know from first-hand experience that sophisticated Russian entrepreneurs and businesses still value the objectivity, rigour and transparency of the English

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legal system. Moreover, one must not lose sight of the fact that, even in the unlikely event that the English courts and London as a seat for arbitration were to fall out of favour going forward, English law and jurisdiction have been the preferred choices for a considerable number (if not the majority) of the major structured transactions of the last 20 years, particularly those involving current or former CIS parties. To the extent that any future disputes arise from those deals, it remains likely that they will be conducted in London.

Of more interest, though, is whether the sweeping tide of oligarch litigation has changed the landscape for London's civil fraud specialists.

While Russian litigation 'on an extravagant scale' (as one Commercial Court judge put it) has received a good deal of publicity in recent years, largely due to a media-friendly mix of the wealth and lifestyle of the litigants involved combined with colourful allegations of post-Soviet betrayal and corruption. It is simply reflective of the wider trend of the English court's role as an anchor point for large-scale, cross-border disputes from all parts of the globe, together with the rapid growth in the number of cases in the past decade, domestic and international, in which parties are prepared to make allegations of fraud. In that context, we have seen a marked increase in commercial civil cases where one or both parties allege fraud: ten years ago, such cases were the exception; this is no longer the case. Over the last two years alone, in our practice, we have been running four large cases involving international parties and claims ranging from the hundreds of millions of dollars to in excess of US\$1bn (two with one or more Russian parties, but two with no connection with Russia); in each instance, allegations of fraud have been advanced by one or both parties. New cases are in the pipeline in which fraud, or bad faith, will form one of the central issues. We would be surprised if our practice is unique in experiencing the growth in fraud-type allegations and this prompts the question: what has changed compared with the situation a decade or more ago?

The trite answer could be: there are more fraudsters engaged in commercial transactions. However, this is most unlikely to be the answer. We suspect an accumulation of factors.



Kambiz Larizadeh

First and foremost, many large, cross-border transactions involve increasingly-sophisticated contracts and complex structures, which may be intended to insulate putative defendants from the consequences of their conduct. Therefore, in order to obtain effective relief, a

of its jurisprudence in order to give effective relief to an aggrieved claimant.

Second, although we would hesitate to draw a direct connection between Russian/oligarch litigation and the number of civil fraud claims, it is undoubtedly the case that the phenomenon of 'extravagant'

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claimant often may need to look to a claim in fraud, or some form of conspiracy, dishonest assistance or breach of trust; and these claims have in turn encouraged the English court to push the boundaries

cases has been assisted by the great wealth of many of the claimants. Cross-border commercial litigation remains a very expensive activity. Fraud-related cases are intensively fact-based and it

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often takes much time (and accordingly money) to unearth key facts and evidence. In many cases, the ultra-high-net-worth Russian claimants have not balked at this expense and thus claims that might not otherwise have been pursued have been, and often with vigour.

The claimants’ ability to bring and the English court’s willingness to entertain non-contractual claims in fraud also



Richard Hornshaw

allow claimants, who may otherwise have very limited remedies in contract, to join and pursue claims against associated and implicated third parties located in other jurisdictions (with potentially deeper pockets and with whom the claimants have no direct contractual relationship); to trace and secure misappropriated assets through

different hands and multiple different countries; and to deprive a defendant and their accomplices of any wrongful additional financial benefit, such as bribes or unearned profits, that they may have obtained only as a result of their misconduct.

For these reasons, it is now routine for any experienced English litigation practitioner advising a client in a commercial dispute to consider whether additional claims in fraud could be brought and to advance them where the facts support them.

Added to which, litigation in England provides a number of general advantages for those involved in large-scale disputes and these can be particularly attractive where allegations of fraud are being made. Litigants before the English courts (for now at least) continue to have the benefit of a generous disclosure regime generally unknown to many civil law jurisdictions, casting much needed sunlight on often highly-complex and correspondingly opaque business dealings – one which forces the disputants, witnesses and even third-party institutions to provide sometimes key documents and information. The court also has a wide array of powerful interim remedies at its disposal to ensure that the proceedings are conducted fairly and robustly. Through the use of worldwide freezing orders, search and disclosure orders, and Norwich Pharmacal orders, the court is able to identify wrongdoers, get at the key facts of a dispute, and ensure that relevant assets can be both identified and preserved, wherever they may be in the world and however they may be held.

Furthermore, the English court has shown time and time again that it is prepared to develop its jurisprudence and to deploy these remedies in an innovative fashion, in particular in cases of fraud, in order to adapt to the constantly-evolving nature of this type of litigation, so that wrongdoers cannot



Hamish Lal

easily escape the consequences of their wrongdoing. This is well illustrated through developments in the use and application of worldwide freezing orders to identify and preserve assets: in one recent notable case, in the form of a ‘John Doe’ freezing order against persons unknown, the identity of the wrongdoers was not certain, but a fraud was plainly in progress. Further examples can be found in the willingness of the English court to scrutinise the validity of trust

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structures and ‘trust bust’ or pierce them where they are shown to be little more than vehicles for fraud, and its extensive experience and expertise in handling disputes involving the application of foreign systems of law and conflicts of laws.

Few jurisdictions are likely to be in a position to offer such a compelling combination of judicial expertise and experience, together with a robust

and evolving jurisprudence. As a consequence, despite recent geopolitical turbulence, the attraction of England as a key venue for high-stakes, cross-border disputes, particularly involving allegations of fraud, is likely to remain undiminished. Moreover, the factors summarised above lead us to believe that civil fraud claims, in all their various guises, will remain a feature of complex, cross-border disputes for the foreseeable future.

AKIN GUMP'S LONDON DISPUTES TEAM

Akin Gump Strauss Hauer & Feld's London disputes team has grown steadily in recent years, by building strategically on its key strengths of finance litigation, international arbitration and energy disputes. In 2015, Hamish Lal joined the team, bringing his established reputation as a leading construction disputes expert to complement the firm's existing arbitration practice; and in 2017, Kambiz Larizadeh joined the team to add depth and focus to the firm's fast-growing civil fraud practice.

Mark Dawkins, who heads the London disputes group, comments: ‘As we have continued to build on our traditional strengths – finance and insolvency litigation and energy disputes – we have steadily acquired a larger footprint in the litigation market and this acted as a catalyst for the growth we have experienced in complex, cross-border disputes. That in turn has supported a focus on civil fraud disputes, which was boosted last year by the arrival of Kambiz.’

The traditional strengths of the London disputes team reflect the firm's transactional strengths. The disputes team, especially senior lawyers such as Dawkins, fellow partner Richard Hornshaw and senior counsel Sheena Buddhdev, works closely with the firm's market-leading financial restructuring practice, often being called on to handle the highest-profile, complex, cross-border contentious restructuring cases. The firm's roots are in Texas and it has a correspondingly powerful reputation in energy, with market-leading practices in key jurisdictions, including the UK, UAE and Moscow.

Justin Williams, who heads the firm's international arbitration practice, works closely with clients in the energy practice, alongside Hamish Lal. Williams comments: ‘Given the depth of the firm's strength in the energy sector, and the importance of arbitration as the preferred mechanism to resolve disputes in international energy/infrastructure deals and other cross-border transactions, international arbitration remains a strategic priority



‘International arbitration remains a strategic priority for the firm.’

Justin Williams

for the firm. We have also successfully developed our treaty arbitration practice through a combination of exploiting the firm's strong policy and international trade practices, and working with our financial-investor client base.’