

17 APRIL 2024

ENGLISH LAW DAY IN ISTANBUL

TOPICS

- 1 Arbitration in Türkiye and the wider Eurasian region
- 2 Resolving disputes through the eyes of a company
- 3 Dispute resolution, enforcement and finances, unlocking value in claims, judgments and awards / damages masterclass
- 4 Impact of sanctions on trade, transactions, contracts and disputes
- 5 The psychology of arbitration
- 6 Combating corruption and fraud through freezing orders, investigations, private prosecutions etc.

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The Bar Council



Eurasian Legal
Professionals' Forum

Opening remarks

09:45 - 10:00



RUPERT D'CRUZ KC

The Bar Council of England & Wales



BENJAMIN WELLS

The Eurasian Legal Professionals' Forum



SAM TOWNEND KC

The Bar Council of England & Wales

Session 1

10:00 - 11:00

Arbitration in Türkiye and the wider Eurasian region



MAXIM KULKOV
KK&P



ANDREW BURR
16 Marina One Chambers



POLEN BAYRAK
Bayrak Law Office



BENJAMIN WELLS
Belgravia Law

Moderator:

YESIM BEZEN
Bezen & Partners





ENGLISH LAW DAY

17 April 2024

Istanbul

DEVELOPMENTS IN INTERNATIONAL ARBITRATION

- Most preferred seats for arbitration: London, Singapore, Hong Kong, Paris, and Geneva
 - Growing arbitration activity in Asia
 - Pro-arbitration stance of jurisdictions in Asia enhancing arbitration's standing at home and abroad
 - 2021 Arbitration Survey: Singapore and Hong Kong rank as the top international arbitration hubs
 - Turkiye as the hub between Europe and Asia on the development of arbitration
- 

REGIONAL DEVELOPMENTS IN ASIA

- Legislative Developments:

- Shanghai International Arbitration Center updated rules (2024)
- Hong Kong allows Conditional Fee Agreements and Damages-Based Agreements
- Japan amended its Arbitration Act to align with UNCITRAL Model Law (2006)

- Trends:

- Converging towards pro-arbitration approaches
- Increasing number of arbitrations in Asia

LEGAL FRAMEWORK AND TRENDS IN INTERNATIONAL ARBITRATION

- UNCITRAL Model Law:
 - Assists in modernizing arbitration laws globally
 - Adopted by 74 states, including South Korea and Myanmar (2016)
 - Enforcement of Arbitral Awards:
 - Singapore courts practice minimal intervention
 - High enforcement rates in China, reaching 91% between 2012 and 2022
- 

EUROPE AND TECHNOLOGICAL INTEGRATION

- London (LCIA): 293 arbitrations in 2022/2023, diverse international participation
- European Arbitration Centres:
 - ICC Paris celebrated its 100th anniversary with over 27,000 arbitrations
- AI in Arbitration:
 - Used for e-discovery, document preparation, and enhancing decision-making processes
 - Lord Justice Birss's acknowledgment of ChatGPT's utility in legal drafting (2023)
- Data Confidentiality:
 - Importance of in-house AI platforms to ensure client data security

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11:00 - 11:30

COFFEE BREAK



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Session 2

11:30 - 12:30

Resolving disputes through the eyes of a company



DENIS ALMAKAEV
LEVEL Legal Services



OLIVER POWELL
Outer Temple Chambers



STANISLAV PETROV
Infralex

Moderator:

DANIEL BARTON
Alvarez & Marsal



Law firm «Infralex», Moscow, Russia

**Bankruptcy of Foreign Companies in Russia:
New Approaches in Court Practice**

*Stanislav Petrov,
partner, attorney*

April 17, 2024



Challenges in protecting the violated rights of Russian companies within the sanction regime

- Prohibition on providing certain legal services to Russian companies from the EU and other unfriendly countries (defined by the Russian Government), such as assisting in legalizing judicial acts from Russian courts, legal consultation, and representing Russian companies in transactions
- Difficulties in legalizing Russian judicial acts in unfriendly jurisdictions due to a high risk of rejection of recognition and enforcement based on the refusal to acknowledge the authority of Russian courts and violations of public policy
- Lack of legal remedies against practices by foreign companies during sanctions, the inability to declare the foreign companies' insolvency in Russia and the difficulty in recovering debts from foreign companies abroad due to the sanction policies and restrictions that impede foreign companies from engaging with Russian counterparts

New legal solutions for addressing sanction practices by foreign companies

Recent legal developments in Russia have expanded the scope of insolvency proceedings for foreign companies – the Supreme Court has recognized the potential for foreign companies to undergo bankruptcy in Russia by introducing the concept of main/secondary insolvency proceedings – this was established through a decision on February 8, 2024 (*Decision No. 305-ES23-15177*)

Another significant development is consolidated financial liability where companies within the same group are held accountable for paying the debts of any other company within the group – this was affirmed by the Ninth Commercial Court of Appeal on December 27, 2023 (*Decision No.09AP-83334/2023*)

Main Insolvency Proceeding

The main insolvency proceeding refers to the insolvency proceeding involving a foreign debtor whose primary centre of interests is in the state where the proceeding is initiated

Centre of main interests (COMI) is defined as the debtor's main place of business or the location of its assets used for its primary activities

Indicators of a Centre of Main Interests:

- The debtor's principal assets, management bodies, and controlling persons are situated in Russia
- The debtor conducts its primary activities in Russia
- Controlling persons have been held subsidiary liable in the bankruptcy proceedings in Russia
- Other circumstances that establish Russia as the centre of the debtor's main interests

Secondary Insolvency Proceeding

A secondary insolvency proceeding refers to an insolvency proceeding involving a foreign company whose primary centre of interests is not within the jurisdiction where the proceeding is being initiated, but which has a permanent establishment or assets within that jurisdiction

Indicators of a secondary insolvency proceeding:

- The foreign company's permanent establishment being situated in Russia
- Lack of viable access for creditors to the jurisdiction where the main insolvency proceeding is taking place (due to international sanctions, high costs associated with initiating bankruptcy proceedings abroad, etc.)
- Inability to restore creditors' rights in the absence of insolvency proceedings
- Presence of assets belonging to the foreign company in Russia for eventual satisfaction of creditors' claims and funding of the insolvency process

Consequences of initiating main or secondary insolvency proceedings

Main Insolvency Proceeding	Secondary Insolvency Proceeding
A court's decision has a binding effect in all jurisdictions	A court decision is binding only within the territory of Russia
Applies to all of the debtor's property, including assets located abroad	Applies only to the debtor's assets in Russia
The proceeding is initiated in relation to the debtor	The proceeding is initiated in relation to the debtor's bankruptcy estate

N.B. Recognizing Russian bankruptcy proceedings abroad by acknowledging the authority of the bankruptcy trustee is challenging due to the following reasons: a) Russia is not a party to international agreements regarding the legalization of bankruptcy court decisions b) Sanctions have been imposed on Russia, making it unlikely for court decisions to be recognized and enforced in countries that support the sanctions regime

Tort liability in the company groups

Peculiarities of bringing companies in a holding company to joint tort liability :

- This legal mechanism addresses the issue of foreign holding company with no assets in Russia avoiding debt payment to Russian entities
- In cases where one or more companies within a group have assets in Russia, any foreclosure actions are generally directed towards these assets
- Holding companies linked to the original debtor can be held accountable for the debt of the original debtor if their coordinated actions or inactions were intended to cause harm to the Russian entities
- Several conditions must be met for liability to be established: the presence of harm, harm caused by unlawful behavior, a direct link between the harm and the actions of the responsible party, and the culpability of the party causing the harm

Circumstances indicating the possibility of bringing a group of companies to joint tort liability:

- Using the corporate structure or policies of a group to comply with sanctions (RusChemAlliance vs Linde Group, case No. A56-129797/2022, Sberbank vs. Glencore Croup, case No. A40-153363/2023)
- Failing to take necessary steps to adjust relations with a counterparty following changes due to sanctions being imposed (Sovcombank vs Citibank, case No. A40-167352/2023)



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Stanislav Petrov,
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Session 3

12:30 - 13:30

Dispute resolution, enforcement and finances, unlocking value in claims, judgments and awards / damages masterclass



ANTON KUBASOV
TENET



ALEXANDRA KOMAROVA
CIS LONDON & PARTNERS



KONRAD ROGERS
Enyo Law

Moderator:



SVETLANA LONDON
CIS LONDON & PARTNERS

→ April 2024

Tenet

Estimation of damages in commercial disputes



Anton Kubasov

Director, Head of Forensic

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tenet



Overview

Terminology and approach

Types of damages

- Real damages
- Lost profit

01

Timing

- Historical damages
- Future damages

02

Approaches

- Income (usually DCF)
- Cost
- Market

03

Real damages

- Based on historical data and supporting documents

04

Lost profits

- Building of financial model
- Two scenarios: Actual and But-For

05

Questions to consider:

- The nature of damages
- Causal relationship
- Assumptions and forecast

06

Recent case

Case №1. Termination of EPC-construction contract in CIS.

Case description:

- Two companies signed an EPC-construction contract
- Customer breached and then terminated the contract
- Both parties suffered damages caused by breaches and termination

Damages estimation of the contractor

1) Real historical damages:

- Unpaid works performed
- Unaccepted and unpaid works
- Purchased and not supplied equipment
- Fines and penalties from subcontractor
- Expenses related to bank loan restructuring
- Interest

2) Future potential damages:

- Potential penalties from subcontractors

3) Lost profit:

- Lost margin due to early termination of the contract

Challenges

Deduplication of damages: different breaches may result damages of the same nature

Example:

- The customer did not pay for works performed. In turn, the contractor did not pay its subcontractors
- Claim includes (1) interest of debt and (2) penalties from subcontractors.
- Those two heads of claim are of the same nature and deduplication if required.

Split of damages by types of breaches: absence of clear basis for allocation of damages

Example:

- The customer in different periods did not (1) pay for works, (2) accepted works, (3) provided approvals from authorities. All breaches resulted in liquidity shortage: debt restructuring costs, fines from subcontractors and other costs.
- The expert is required to find a reasonable basis for allocation of damages between breaches.

Isolating of external factors

Example:

- Dealing with breaches requires a management decision of the contractor. Different options are possible. Liquidity shortage could be also caused by different factors.
- All those external factors are irrelevant and should be isolated in calculations.

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ENYO LAW

DISPUTES. NO CONFLICTS.

Enforcement of Judgments in England

Istanbul Law Day

17 April 2024

KONRAD RODGERS
PARTNER



Scenarios in which Judgment Creditor may seek to enforce in England

- Judgment issued in a Foreign Court:
 - A Judgment Creditor wishes to execute against assets of a Judgment Debtor which are located in England
 - A Judgment Debtor has receivables due from a third party in England
 - A Judgment Creditor wants to appoint a Receiver, by way of equitable execution, to manage the assets of a Judgment Debtor.

Enforcement under Treaty regime

- Various Treaties in place between England and other countries which make enforcement of Judgments faster and less expensive
- Hague Convention on Choice of Courts Agreement
- Administration of Justice Act 1920 for former Commonwealth countries
- Foreign Judgments (Reciprocal Enforcement) Act 1933
- Otherwise common law regime

Enforcement pursuant to common law regime

- Applies to enforcement from a range of countries where there is no Treaty in place with England
- For example, Turkey, various Eastern European and Eurasian countries and the United States
- Under common law regime, Foreign Judgment treated as obligation which can be enforced as debt and a party can seek to enforce through summary judgment process
- General conditions for enforcement; (1) Court which issued Judgment had jurisdiction; (2) final and conclusive Judgment; (see *Midtown Acquisitions LP v Essar Global Fund Limited* [2017] EWHC 519 (Comm)); (3) For a debt or definite sum of money (see *VTB Bank vs Skurikhin* [2014] EWHC 271

Defences to common law enforcement

- Foreign Judgment which is final and conclusive on merits cannot be challenged on basis of factual or legal error
- Limited number of grounds upon which enforcement can nevertheless be challenged.
 - Judgment contrary to public policy (eg *ED&F Man (Sugar) Ltd vs Haryanto (No 2)* [1991] 1 Lloyd's Rep 429)
 - Enforcement would be contrary to natural justice
 - Judgment obtained by fraud

Execution mechanisms post enforcement

- Third party Debt Order
- Charging Order
- Writ of control
- Appointment of Receiver
- Asset preservation measures pending execution

Konrad Rodgers

Partner, Enyo Law LLP

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- Konrad's practice focuses on international commercial litigation and cross-jurisdictional fraud disputes. He has acted for a broad range of corporates, financial institutions and high-net worth individuals on civil fraud, banking, shareholder and restructuring matters. Konrad has particular expertise in Eastern Europe and Eurasia related disputes and has frequently acted in cases involving worldwide freezing orders, other interlocutory relief and enforcement measures. Konrad additionally has experience of arbitration matters across an array of institutions.
- Konrad is a barrister with full rights of audience. He has experience of acting as part of the counsel team in Court hearings and in ICSID proceedings.
- Konrad is ranked as a "Leading Individual" in Civil Fraud in Legal 500 (2024) and is also recommended by Legal 500 for International Arbitration and Who's Who and Legal 500 (2024) for commercial litigation. He has been described by legal directories as a "top-quality litigator" and a "stand-out partner."



13:30 - 14:30

LUNCH



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Session 4

14:30 - 15:30

Impact of sanctions on trade, transactions, contracts and disputes



ÉTIENNE ÉPRON
Épron Quievy & Associés



JOSHUA RAY
LSAA



ALEX HAINES
Outer Temple Chambers



MATTHEW WALKER
Raedas



DORAN DOEH
36 Group



LIDIA GORSHKOVA
Pepeliaev Group

Moderator:

GIZEM ALPER
Consultant



Session 5

The Psychology of Arbitration

15:30 - 16:15



DENIS ALMAKAEV
LEVEL Legal Services



**FATMA GUNEY
AKINCI**



KONRAD ROGERS
Enyo Law

Moderator:

RUPERT D'CRUZ KC
Littleton Chambers



THE PSYCHOLOGY OF ARBITRATIONS

1. The Tribunal

Same throughout.

Different jurisdictions + cultures (including legal)

Party appointed v Institution appointed

Choosing your arbitrator (interviews; research etc)

2. “Due process paranoia”

Indulgence of terrible behaviour and terrible arguments

3. Advocacy, drafting and correspondence styles.

4. Counsel team

Flexibility to choose

Professional conduct – differences within the team.

16:15 - 16:45

COFFEE BREAK



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Session 6

16:45 - 18:00

Combating corruption and fraud through freezing orders, investigations, private prosecutions etc.



DR. DOĞAN GÜLTUTAN
Baker McKenzie



ANTON ALEXANDROV
Monastyrsky, Zyuba, Stepanov & Partners



BERCESTE ELIF DURANAY
Duranay



SHANTANU MAJUMDAR KC
Radcliffe Chambers

Moderator:

JOHN MCKENDRICK KC
Outer Temple Chambers



**Baker
McKenzie.**

Combatting fraud through innovative injunctions and ECCT Act 2023

Dr Doğan Gültutan
Lecturer, City, University of London
Senior Associate and Solicitor-Advocate, Baker McKenzie (London)



Short Agenda

01 Introduction

02 "Persons Unknown" &
"Newcomer" Injunctions

03 Case Studies

04 Economic Crime and Corporate
Transparency Act 2023

05 Close



"Persons Unknown" and "Newcomer" Injunctions



An injunction against "persons unknown":

- Used to restrain individuals whose identities are unknown or not named in the Court order.
- First established in *Bloomsbury Publishing Group v News Group Newspapers Ltd* [2003]: copies of the then unreleased fifth Harry Potter book (*Harry Potter and the Order of the Phoenix*) had been stolen from the printers and were being offered to newspapers by unknown individuals. The claimants sought and were granted injunctions against those offering the copies.



"newcomer" injunctions:

- Created by the UK Supreme Court in 2023 for circumstances where there is a need to protect civil rights or enforce public law that is not adequately met by any other remedies.
- These injunctions go one step further as they reach as far as persons who have not yet breached, nor threatened to breach, the act which is prohibited by the order.
- It is inherently an order with effect *contra mundum* (against the world) and is not to be justified on the basis that those who disobey it automatically become defendants.

"Persons Unknown" Injunctions in Fraud Cases

AA v Persons Unknown [2019] EWHC 3556 (Comm)



- A hacker (the First Defendant) managed to infiltrate the IT system of a Canadian Insurance Company.
- The hacker demanded a ransom in the form of Bitcoins, in exchange for the decryption software needed to re-access its data and systems.
- The Insurance Company paid \$950,000 in Bitcoins to the hacker and duly, slowly, regained access.
- A tracing investigation revealed that a substantial proportion of the Bitcoins were transferred to a specific wallet or address linked to an exchange known as Bitfinex (operated by the Third and Fourth Defendants).
- The Court issued proprietary injunctions against all defendants as "persons unknown", freezing the Bitcoins.
- This case is also significant in the context of fighting e-fraud as the Court established that crypto assets are to be treated in principle as property under English law.

"Newcomer" Injunctions – A New Tool

Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47



- The case concerned a series of newcomer injunctions obtained by local authorities, or groups of local authorities, to prevent gypsies and travellers from camping on local authority land without permission.
- The injunctions were addressed to "persons unknown" and were obtained at without notice hearings where the interests of the persons affected were not represented.
- This development is expected to have wider significance for situations where the anonymity of wrongdoers operating online risks giving them immunity from the law.
- The Supreme Court commented – *"If injunctions are available only against identifiable individuals, then the anonymity of wrongdoers operating on-line risks confers [sic] upon them an immunity from the operation of the law"*.
- The recognition of this new type of injunction provides businesses who are victims of cyber-crime, online frauds, and other anonymous unlawful activities with an additional weapon against the perpetrators.
- We may also see enforcement agencies looking for creative way of using these injunctions against future frauds.

The Economic Crime and Corporate Transparency Act 2023

Expanding the Prosecution Toolbox



The Economic Crime and Corporate Transparency Bill introduced in 2023 contains proposals to combat online crime and that recognise crypto as an asset fit for the proceeds of crime asset forfeiture and seizure powers.

- A new criminal offence of failure to prevent fraud for large organisations profiting from fraud committed by their employees or agents acting on their behalf. Violations can result in unlimited fines for organisations involved.
- Applies across the UK and in circumstances where an employee (wherever based) commits fraud offences, or targets victims in the UK, in which case an organisation could still be caught even if it is itself based overseas. The underlying fraud offence must have a UK nexus.
- Defence of reasonable prevention procedures available, considered on a case-by-case basis.
- In certain circumstances, a person will no longer need to have been arrested before seizure powers can be used (earlier seizure will include crypto assets).



The Economic Crime and Transparency Act 2023 (2)

- The addition of a specific provision for officers to recover intangible crypto assets in a broadly similar way provided for tangible property by tweaking their search, seize and detention powers.
- Providing the magistrates' court with the powers to authorise the sale of any crypto assets, in the same way magistrates do with cash, funds in bank accounts and other types of personal seized property.
- Providing for the destruction of crypto assets in exceptional circumstances.

Questions

The image consists of a white circular shape on a red background. The red background has a wavy, textured pattern of thin, curved lines. The word "Questions" is written in a bold, black, sans-serif font inside the white circle.

Dr Doğan Gültutan*

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18:00 - 18:15

CLOSING SPEECH



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