



JUDICIARY OF
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THE HON. MRS JUSTICE CARR

Closing address for British Turkish Lawyers Association seminar - the inner temple

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1. The opening of the Rolls Building in 2011 and the media frenzy surrounding one of its inaugural disputes – between Boris Berezovsky and Roman Abramovich – did much to celebrate the success and profile of the Commercial Court in London. The run-up to the opening of the Rolls Building (which houses the Commercial Court, Chancery Division and Technology and Construction Court) enabled the UK to showcase its proud legal traditions and market its court and justice systems. Then Justice Secretary Kenneth Clarke told City figures in September 2011 that:

“The provision of modern, high-quality services for all parties will present the opportunity to market the facility at a global level in order to maintain the unrivalled work of the High Court and English law ... The UK may no longer be able to boast that it is the workshop of the world ... but the UK can be lawyer and adviser to the world”.

2. Two years on, the Commercial Court’s cross-border caseload is as large as ever and continues to reinforce the view that parties from all over the world are seeking to have their commercial disputes settled in the English Courts. A recent survey of 705 judgments published

by the Commercial Court between March 2008 and March 2013 shows that 61.6% of litigants were based outside England and Wales.

3. Why do international litigants want to come to London? The coexistence of London's reputation as an international business with its reputation as a global legal centre is no coincidence. Business requires expert legal advice and a predictable and stable legal system in which to operate. The English Courts are a safe and neutral forum for the resolution of disputes, overseen by a strong and famously independent judiciary.

4. Predictability is in particular afforded by the absence of juries in civil cases and the possibility of punitive damages, both of which are reasons why some litigants are said to prefer the Commercial Court in London over another litigation-friendly jurisdiction, the United States. Disclosure, a hugely expensive and time-consuming element of commercial litigation, is considerably more narrowly focussed under English civil procedure than in the US. As the Court of Appeal recently observed in *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154, the duty of disclosure applies to "supportive" or "adverse" documents: the word "relevant" does not appear in the rule, despite being regularly used as shorthand. By contrast, the US test is even broader than "relevant", encompassing anything "reasonably calculated to lead to admissible evidence".

5. Furthermore, English law provides litigants with a significant arsenal of powerful interlocutory weapons, including freezing injunctions and search orders, to ensure that there are assets available to enforce against following judgment.

6. Finally, the UK is unusual in possessing a specialist commercial court, with an experienced judiciary competent to deal with the ever more complex material arising in commercial disputes. Solicitors and barristers are highly sought-after and the direct instruction of members of the Bar has become easier in recent years for international parties. BARCO, a recent Bar Council initiative, allows parties to fund litigation directly by paying sums on account which are then held for the barristers who are themselves prohibited from handling client funds. Expertise is not limited to the judges and lawyers: the activity of the Commercial Court ensures that there is a network of highly experienced expert witnesses, translators and technical wizardry available to litigating parties.

7. The wealth of experience of the English courts is also available to UK overseas territories, crown dependencies and some Commonwealth countries through the Judicial Committee of the Privy Council. Earlier this year, the Committee heard the final appeal in the long-running dispute between Cukurova Finance and Alfa Telecom over the controlling interest in Turkcell, Turkey's largest mobile phone operator. (Cukurova is a company incorporated in the British Virgin Islands, hence the appeal the Privy Council.)

8. The highest profile international activity in the Commercial Court has, of course, involved litigants from former Soviet republics. The largest case of the last two years in terms of numbers of legal advisers was *JSC BTA Bank v Ablyazov & Ors* which drew in more than 50 lawyers, including 22 partners, 32 barristers and 8 silks. Since 2009, there have been over 40 decisions of the English Courts naming Mr Ablyazov as a party. This time last year saw the conclusions of the *Berezovsky v Abramovich* litigation followed by the settlement of Oleg

Deripaska and Michael Cherney's dispute a month later. In 2014 the trial of a Ukrainian dispute is due to be heard centering around the alleged failure to deliver ownership of an iron ore business.

9. These disputes have raised accusations of 'forum shopping' and question marks over the readiness of courts to accept jurisdiction over disputes entirely unconnected with England.

Thirty years ago, Lord Diplock in *The Abidin Daver* [1984] AC 398 first accepted that a claimant could in principle resist a stay of proceedings where a foreign court was shown to be the natural forum for a dispute but there was clear and cogent evidence that that court would fall below minimum acceptable standards of doing justice. Since 2009, this principle has been put into practice by the English courts, most notably in the case of *Cherney v Deripaska* [2009] EWCA Civ 849, in which the Court of Appeal upheld the decision of the High Court that, although Russia was the natural forum for the parties' dispute, there was sufficiently cogent evidence that justice would not be done to Mr Cherney if he were to sue in Russia. The Privy Council (on appeal from the Isle of Man) in *AK Investments v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 emphasised the importance of hearing a trial in a jurisdiction that may not be the natural forum, but would be the only forum where the dispute would realistically be heard: on the evidence before the Isle of Man High Court, it was wholly unrealistic that the Isle of Man-based counter-claimant would ever be able to assert their civil claims in Kyrgyzstan.

10. It is important to emphasise that in these decisions, as with the principle announced by Lord Diplock in the *Abidin Daver*, insinuation or general criticism of the foreign court will not suffice. As an example, permission to serve out of the jurisdiction was refused by the High Court in *Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), where the judge refused to rely

upon generic witness evidence and media reports citing problems of corruption in the Russian courts. This criticism of the foreign court did not, unlike that in *Cherney*, point to a risk of injustice that was specific to the particular parties to the dispute. Similar decisions were reached in two cases where Ukraine was found to be the natural forum: *Pacific International Sports Club Ltd v Surkis* [2010] EWCA Civ 753 (concerning the ownership of Dynamo Kiev Football Club) and *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm).

11. In May last year, Anton Ivanov, the Chairman of Russia's Supreme Commercial Court, spoke out against the "abuse" of forum shopping, advocating that Russia should "guarantee its citizens and entities protection from the unfair competition of legal systems of other states by way of adopting a special law". Russian judges should be given the right to annul foreign judgments or arbitration awards, if they feel that Russian parties are unfairly prejudiced.

12. Shortly after these comments, in June, in a dispute between Sony Ericsson Communication Rus v Russian Telephone Company, Russia's Supreme Commercial Court Panel held that the parties did not have the right to refer a matter to arbitration in London. Instead, the Panel gave the Moscow Commercial Court jurisdiction to try the case. The Panel concluded that the optional arbitration clause in the distribution agreement was not valid since it gave Sony Ericsson (but not Russian Telephone) the unilateral right to submit the dispute either to arbitration or to a court of law. This, the Panel said, was unfair and breached Article 6 (the right to a fair trial) of the European Convention on Human Rights. In previous cases, and the three lower courts in Sony Ericsson, the Russian courts have not questioned the validity of optional arbitration clauses.

13. It remains the case that English jurisdiction and conflict of law rules are as sound, sophisticated and expertly applied as anywhere else. The combination of Brussels jurisdictional rules and high-profile non-EU cases ensures that these principles are regularly considered, adapted and reinforced.

14. To praise the excellence of the English courts and legal system is not to denigrate those of other nations. However, it is clear that the relative youth of legal systems such as those in former Soviet republics do not have the wealth of precedent to ensure that results in litigation are both principled and predictable. The nature of the common law reliance on precedent is valuable precisely because there is a considerable volume of precedent upon which to rely, resulting from 900 years of recorded judgments on the one hand and the critical mass of disputes litigated on the other.

15. Furthermore, the fact that parties are choosing to litigate outside of their own country may provide an incentive to reform or to adopt English legal principles for their own domestic courts.

16. One example is the Dubai International Financial Centre Court, established in 2006, which has jurisdiction over all civil and commercial claims brought by or against DIFC establishments. The DIFC has adopted the common law, and defaults to English law in the event of an ambiguity. Its judiciary is made up of judges from common law jurisdictions such as England, Singapore and Hong Kong. Its first chief justice was Sir Anthony Evans, formerly the senior commercial judge in England and a member of the Court of Appeal.

17. Qatar also established a civil and commercial court at its Qatar Financial Centre in 2007, with the former Lord Chief Justice and lead architect of the Civil Procedure Rules, Lord Woolf, as its first President. Meanwhile, the Financial Times reported last year that Saudi Arabia have considered setting up a London-based arbitration centre to hear commercial disputes.

18. Arbitration is another significant means for international parties to access English law and legal professionals. Research carried out last year by the School of International Arbitration at Queen Mary, University of London (in association with White & Case) has revealed that 40% of the 710 respondents choose English law to govern their contracts most frequently, followed by 17% choosing New York law. London was the preferred seat of arbitration. Of course, one of the key advantages of arbitration is the supervision of arbitration agreements by the courts for purposes of enforcement. Although this role is limited, it plays an important part in ensuring that litigants have confidence in the arbitration process and the binding nature of its outcome.

19. The natural English reticence about praising one's own institutions gave way somewhat with the opening of the Rolls Building and the unprecedented advent of a PR campaign on behalf of the English courts. Although this address may seem to have jumped somewhat on that particular bandwagon, I hope that it has conveyed something of the pride that one very new member of the judiciary feels about the international work of the English Commercial Court.

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