INTERNATIONAL

Russian tort law in the eyes of the English courts—Part 2

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Conflict of laws; Fraud; Russia; Torts

Abstract

In part 1 of this article (published in the previous issue[1]) we covered the relevant Russian law concepts and authors' view as to how they have been applied by the Russian courts so far. There are many aspects of Russian law that have been considered by English judges so far, but, in our view, the most interesting cases for review are those that concern the application of arts 10 and 1064 of the Russian Civil Code (RCC). These articles deal with the general civil law principle of prohibition of abuse of rights and tortious liability for causing harm. For some unexplained but at the same time unsurprising reasons, these rules of the RCC have featured in the cases where allegations of commercial fraud, corporate raids and dissipation of assets were pleaded. In this part 2 we provide a comprehensive overview of the cases heard by the High Court of Justice in which relevant concepts have been considered, but from the perspective of Russian law practitioners.

OJSC Oil Co Yugraneft v Abramovich (2008)[2]

Cause of action: claim for compensation of damages caused by dilution of the shareholding in a Russian company.

Outcome: claim dismissed based on the expiration of the limitation period.

Concepts/principles considered: limitation, notion of harm, interference in contractual relations, liability for apparently lawful actions.

Background facts

One of the first tort cases where art.1064 was applied by the English court was a dispute between Roman Abramovich (the defendant), a Russian billionaire and the owner of Chelsea FC, and Chalva Tchigirinsky, ex-owner of Sibir Energy Plc., which owned Yugraneft (the claimant) in the relevant time.

In 2000, Sibir Energy (owned by Mr Tchigirinsky) and Sibneft (owned by Mr Abramovich) executed in Russia a document named "Principles of cooperation" (possibly a usual term sheet, which is used hereinafter), under which it was agreed to set up a company Sibneft-Yugra, to which Yugraneft (in return for 50% stake) was to transfer the licenses for some oil fields in Russia, and Sibneft was to finance its activities. During 2001–2003, Sibneft provided financing to Sibneft-Yugra by way of loans. Sibneft-Yugra, however, did not repay the loans, and Sibneft organised transfer of shares in Sibneft-Yugra to other companies controlled by Mr Abramovich by increasing the share capital in exchange for the forgiveness of the debt related to the non-repaid financing.

Eventually, the stake of Yugraneft in Sibneft-Yugra was substantially diluted. Yugraneft thought it became a victim of fraud directed by Mr Abramovich, whereby its interest in the joint venture company was reduced from 50% to less than 1% as a result of which it has suffered a loss of billions of dollars.[3]

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[1] Dmitry Vlasov and Dmitry Ilin, "Russian tort law in the eyes of the English courts—Part 1" [2022] 43 The Company Lawyer 125.

[2] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm).

[3] Hereinafter, for illustrative purpose, we set out charts showing the facts and legal relations relevant to this article in respect of each case; these charts, however, are simplified and/or adapted versions. The charts show the persons involved in the dispute, the types of their legal relationship (with arrows) and the sequence of actions/occurrence of the relationship. It is advisable to view the chart by referring to the numbers that indicate the sequence of actions.

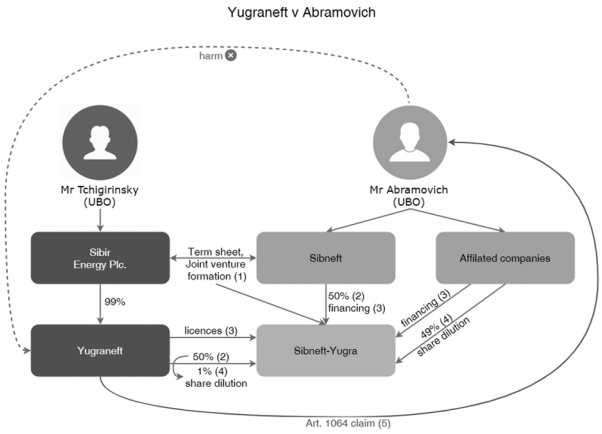

Figure 1

Legal analysis

Application of art.10 of the RCC (in the context of a limitation defence)

The court dismissed the claim, because it found that the claimant missed the statute of limitations.[4] This issue per se is outside of the scope of this article, but it is helpful to look at the conclusions on art.10 reached by the court in this context. The noteworthy point that the court considered was whether the claimant could rely on art.10 to prevent the application of the statute of limitations due to an abuse of rights by the defendant, who allegedly concealed the relevant information from the claimant.

This is a true position under Russian law that a defendant in certain circumstances may be prevented from relying on a limitation defence (i.e. expiry of a limitation period) where the expiry was caused by its own abuse of rights preventing a claimant from seeking judicial protection. However, not every act, even if carried out with some bad faith, would preclude a defendant from invoking the limitation defence. Only those acts would be relevant that essentially and directly prevented a claimant from filing a claim (e.g. hiding information without which it was impossible for the claimant to learn of the violation of its rights). In other words, the case law shows that a direct link between a defendant's abuse of rights and the claimant's inability to file a claim in time needs to be established in order to disapply the limitation defence.

The court in this case (applying art.10) concluded that

> "[w]hatever information Yugraneft claims it lacked, there is no basis for the allegation that it did not have sufficient information to bring its claims against either Mr Abramovich, who was a party to the BVI proceedings, or Millhouse within the limitation period."[5]

It was pleaded that the defendant concealed information about relevant offshore companies what prevented the claimant from discovering the full picture of the fraud.[6]

It appears that the court correctly applied the Russian law principle, since there was no direct link between the defendant's abuse of rights and the claimant's inability to file a claim. Moreover, as Part 1 of this article explains, a claimant under Russian law has a high burden of proof in relation to abuse of rights under art.10; therefore, a mere allegation of some bad faith on the part of the defendant is insufficient, the claimant must prove the abuse of rights and how that prevented it from issuing a claim.

Application of art.1064 of the RCC

As it appears from the judgment, (i) the acts of Sibneft were formally lawful (increase of a share capital is a typical corporate procedure permitted by law and prima facie is lawful), and Mr Abramovich was not a direct participant in any subsequent transactions (relating to the purchase of the newly issued shares by the entities related to him; again, a prima facie lawful conduct to purchase shares) that allegedly caused dilution of Yugraneft's share in the joint venture (this immediately raises the question as to what specifically unlawful Mr Abramovich has done), and (ii) decrease in the size of the participation interest by itself does not mean the existence of "harm" (under art.1064) on the part of the claimant, because that is not the "harm to its property" (the claimant still keeps the share but of the different percentage), insofar as this does not mean that the *actual* value of the share reduced (decrease in the size of the share does not necessarily mean that the amount of the assets attributable to the share decreased).

Therefore, based on the alleged fact pattern, the court would be expected to resolve the following issues as a matter of Russian law:

[4] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [342] and [498].
[5] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [329].
[6] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [326].

- whether Mr Abramovich may be held liable for the "interference" in the corporate relations between Yugraneft and Sibneft-Yugra under art.1064;
- whether formally lawful acts may be declared unlawful in a claim under art.1064 without commencing separate legal proceedings in this respect;
- whether decrease of the shareholding per se may constitute "harm" under art.1064 (i.e. the issue of lack of "harm to property" (absolute rights)).

However, of these three points, only the last one was directly reflected in the judgment. Regarding which it is notable that even the claimant's expert said that there was no tort claim in this case. The High Court summarised the view of the claimant's expert as follows:

> "in the absence of any development of the law on Article 1064 so as to embrace recovery for economic loss, neither Sibir nor Yugraneft had any claim in tort against any of the defendants, *since Sibir's claim was not for physical damage*."[7]

The defendant's expert agreed with this thesis.
The High Court then held that

> "[this] is not the same as saying that the interests which were issued to the dilution companies (and still remain with them) became in some (unexplained) manner the property of Yugraneft."[8]

Thus, the notion of "harm" under art.1064 was interpreted by the English court rather narrowly. In 2008 see "Authors' view on the discussed issues" in Part 1) this was the true position under Russian law since the traditional view (as developed in the case law and confirmed by the legal doctrine) was that, as a general rule, art.1064 protects only absolute rights.

However, recently another approach has started to develop in case law which can support a view that the notion of property for the purposes of art.1064 should be understood more broadly (i.e. to encompass not only absolute rights). The Supreme Court has recently spelt out the notion of harm as follows:

> "Within the meaning of Article 1064 of the RCC harm is defined as any diminution of a tangible or intangible benefit protected by law, or an adverse change in such benefit, which may be property or non-property (intangible)."

Although the case itself did not concern any exotic type of tort, some commentators have inferred from this holding that it means that art.1064 can also protect relative rights. This is at least pre-mature, in our view (see "Authors' view on the discussed issues" in Part 1).

Thus, the English court took the right general position that the claimant had no tort claim against the defendant. However, were the claim considered nowadays, this conclusion would not have been the complete answer to this claim, since the court did not analyse whether the acts of the defendant were committed in abuse of rights and/or there existed any other exception (see "Authors' view on the discussed issues" in Part 1).

Fiona Trust Holding Corp v Privalov (2010)[9]

Cause of action: compensation of harm caused by dishonest conduct of company's managers who benefitted from the transactions made on behalf of the company.

Outcome: claim dismissed (except for an alternative claim under English law, concerning some of the commission schemes, which is outside of the scope of this article).[10]

Concepts/principles considered: competition of claims, notion of harm, reflective loss, interference in contractual relations, liability for apparently lawful acts.

Background facts

The *Fiona Trust* case is another well-known case where art.1064 was considered. The claim was brought by Sovcomflot, one of the largest Russian operators of tankers and other commercial ships, and its subsidiaries, including Fiona Trust. It was alleged that several managers of Sovcomflot's subsidiary, Fiona Trust, committed acts that enriched them and caused harm to the claimant (i.e. they allegedly dissipated assets from the relevant companies by way of the diversion of commission fees).[11] The defendants, in opposite, contended that all transactions, which were alleged to have caused harm, were lawful.

[7] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [109] (emphasis added by the authors).
[8] *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [362] (although we note that the discussion was made in the context of unjust enrichment).
[9] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm).
[10] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1490].
[11] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [47].

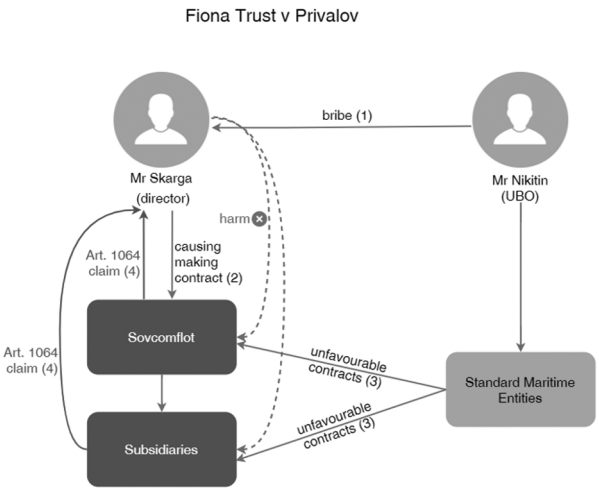

Figure 2

Legal analysis

The High Court had to resolve the same legal problems which should have been considered in the *Yugraneft* case (described above), namely: (i) competition of claims and correlation between a contractual claim and a tort claim; (ii) whether there is liability for "interference" in contractual relations; (iii) apparent lawfulness of the transactions; and (iv) the notion of harm.

Competition of claims

Firstly, the court concluded that the principle of prohibition of competition of claims exists under Russian law.[12] This is a correct starting point in relation to the determination whether a tort claim was available to the claimant. Under this principle only one claim, either contractual or non-contractual, can be brought against one defendant, and the contractual claims have priority over the non-contractual (including tort) claims. We agree with this conclusion. At the same time, this principle mostly works in the framework of bilateral relations (i.e. where the creditor cannot issue a tort claim against a counterparty with whom it has a contract). If a third party "interfered" in this contractual relation, then (depending on the facts) some of the exceptions (we discuss in "Authors' view on the discussed issues" in Part 1) may be applicable.

Application of art.10 of the RCC

Secondly, the court observed that payments made in the legitimate business transactions are not per se unlawful. The requirement of unlawfulness may be satisfied if the claimants succeeded in establishing "dishonesty".[13] It appears that both Russian law experts agreed on this issue. In general terms, this is a correct conclusion. However, it is at least a controversial conclusion, since Russian law does not operate with a stand-alone concept/notion of 'dishonesty', more so in the context of art.1064.

Instead of this concept, the court could find support for its finding in art.10 (prohibition of abuse of rights). It allows to impose civil liability in circumstances where the defendant has formally acted lawfully. But as we also explain in Part 1, the circumstances in which liability should be imposed under art.10 are required to be strictly circumscribed, so as to avoid unacceptable levels of legal uncertainty and arbitrary outcome to the parties. In our view, it should be an exceptional situation where art.10 may be applied, and this is not just "dishonesty" on the part of the defendant as the court stated, since dishonesty may not necessarily constitute an abuse (see "Article 10 of the RCC" in Part 1). So, again, this is not an entirely accurate (or at least complete) conclusion of the English court.

Notion of harm

Thirdly, the court held that the "harm within the meaning of art.1064 includes both damage to property and financial losses such as lost profits".[14] On the one hand, this is a broader definition of "harm" than "harm to the property", which was applied in the *Yugraneft* case, since there is a reference to "financial losses" (rather than to "property" only as the article spells out). On the other hand, the court drew a parallel with the "lost profits", and thus it seems to be an indication of application of the wording from art.15 of the RCC[15] (and nothing more), which provides that damages can include both actual loss and a lost profit. Such (narrow) interpretation of the cited finding by the

[12] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [85]–[86].
[13] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [95].
[14] *Fiona Trust Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [96].
[15] Article 15 provides as follows: "1. A person whose right has been violated may demand full compensation for the losses caused to him unless a statute or a contract provides for compensation of losses in a lesser amount. 2. Losses means the expenses that the person whose right was violated made or must make to reinstate the right that was violated, the loss of or injury to his property (actual damage), and also income not received that this person would have received under the usual conditions of civil commerce if his right had not been violated (forgone benefit). If the person who has violated a right has received income thereby, the person whose right has been violated has the right to demand along with other losses compensation for forgone benefit in a measure not less than such income."

court would be in line with the *Yugraneft* case. But it appears that at least one of the experts was inclined to apply a wider interpretation of the notion of harm:

> "[the expert of the defendant] was not, as I understood his evidence, suggesting *any restriction* upon what sort of loss could in principle constitute harm for the purpose of article 1064."[16]

If that was the case, it would have been a far-reaching conclusion without proper legal basis, but the court adopted a narrow interpretation.[17]

Fourthly, even though the court did not analyse the issue of "interference" of the defendant in the relative/contractual relations, it made one noteworthy conclusion (as if anticipating the extensive application of "abuse of rights" concept in Russian law):

> "[i]f a claimant company had entered into a contract that resulted in loss, Russian law would not attribute that loss to the act of a defendant for the purposes of article 1064 unless the claimant showed that the defendant directly caused the company to enter into the contract … The bribery would only be a sufficient cause of the contract and so any loss or harm resulting therefrom if, because of the bribe, the recipient therefore caused the company to decide to contract, for example by misleading those taking the decision to do so."[18]

Again, nowadays, this would be a fair starting point. Also, it appears that an abuse of rights could have been implied by that statement, considering that it is followed by this statement: "[t]he bribery would only be a sufficient cause … if … the recipient … caused the company to decide … by misleading those taking the decision". However, at the time of the adoption of this judgment (2010), there was no such position under Russian law.

Accordingly, the above-raised problematic issues did not get the deserved court's analysis.

Finally, the court made a fair observation, in the context of a claim brought by a parent company for the harm caused by the defendant to the former's subsidiary, to the effect that any diminution of the value of its share in the subsidiary would not constitute harm under Russian law. In short, the court blocked the claim since the claimant's loss was reflective:

> "… Russian law would not consider that a company has been caused harm simply because the value of its shares in a subsidiary was reduced by harm caused to the subsidiary. The harm suffered by the shareholder would not be sufficiently closely linked to the action of the defendant … Thus, I conclude that Sovcomflot and NSC would not have claims under article 1064 on the basis that they suffered harm because the value of their interest in their subsidiaries was reduced by the acts of the defendants."

OJSC VTB Bank v Parline Ltd (2015)[19]

Cause of action: compensation for loss by reference to diminution of value of receivables under loan agreement.

Outcome: claim dismissed.

Concepts/principles considered: competition of claims, notion of harm, interference in contractual relations, liability for apparently lawful actions.

Background facts

According to the circumstances of this case, in 2008, VTB Bank (the claimant) issued a loan in the amount of RUB 1 bn. to Yurganz (the borrower). Yurganz was a Russian company, subsidiary of Parline (the defendant), which held the rolling stock which was leased out to the operating companies.

In 2010, the borrower became insolvent and commenced insolvency proceedings; thus, it did not repay the loan to the claimant. The claimant sought compensation from the defendant as a controlling company of the borrower in the High Court, alleging that the insolvency of the borrower was caused by the defendant's acts. The claim was dismissed based on several grounds: (i) the claim of a creditor under art.1064 could not be brought against the third party outside the bankruptcy proceedings until the conclusion of the contractual debtor's bankruptcy; (ii) lack of causation; and (iii) the loss was not proved with the necessary certainty and specificity.

[16] Article 15 (emphasis added).
[17] The following finding of the court shows that it preferred a narrow approach to the notion of harm (at [101(iii)]): "Russian law would not consider that a company has been caused harm simply because the value of its shares in a subsidiary was reduced by harm caused to the subsidiary".
[18] At [101(i)] (emphasis added).
[19] *OJSC VTB Bank v Parline Ltd* [2015] EWHC 1135 (Comm).

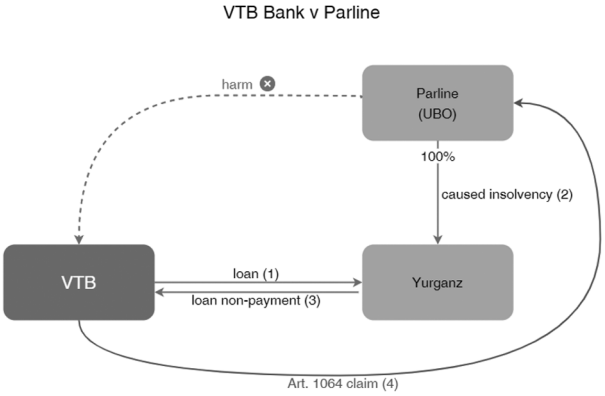

Figure 3

Legal analysis

Application of art.1064

Similar to the cases discussed above, the claimant in this case issued a claim against a third party that allegedly interfered in the contractual relations of the contractual parties (by procuring insolvency of its subsidiary), and not against the direct contractual debtor (i.e. the borrower). Therefore, the court faced the same issues of Russian law: (i) correlation between a contractual claim and a tort claim; (ii) whether there is liability for "interference" in contractual relations; (iii) apparent lawfulness of the complained acts (i.e. "legitimate business transactions" point as we refer to it above and in Part 1); and (iv) notion of harm.

As regards issue (i), the court upheld the principle of priority of a contractual claim over a tort claim, and as regards issues (ii) and (iv), it allowed a tort claim to be brought for the protection of relative rights (harmed by the third party's interference), but only in case of the exhaustion of contractual remedies by the claimant (including through the insolvency proceedings).[20] In relation to the last point the following passage is noteworthy:

> "(1) If Article 1064 is available during a pending bankruptcy then:
>
> (i) the specific provisions dealing with subsidiary liability would effectively be rendered redundant;
>
> (ii) the principle of limited liability would be seriously undermined.
>
> (iii) the proper and fair operation of the bankruptcy process would be disrupted.
>
> (2) It is not possible or appropriate to quantify what, if any, loss has been suffered until the bankruptcy process is completed …
>
> I accordingly find that VTB's claim under Article 1064 cannot be brought *until* the conclusion of the bankruptcy process, which has yet to occur".[21]

This reasoning given by the court is in line with our understanding of availability of a tort claim under Russian law against a third party for non-performance of the contractual debt by its subsidiary (i.e. where it would be available only in exceptional circumstances and not as a general rule). This conclusion is even more far-reaching in relation to this point than the conclusion on another issue made in the *Fiona Trust* case (discussed above) and too outpaced the development of Russian law for 2015.

As we explain (see "Authors' view on the discussed issues" in Part 1), this issue is even more complex. At the same time, we agree that in any case the claimant should first exhaust available contractual remedies before it can resort to such other remedy as seeking compensation of damages by virtue of a tort claim against a third party.

The court explained impossibility to bring a tort claim against a third party solely by reference to the pending borrower's bankruptcy proceedings, also relying on the pari passu principle.[22]

However, it is possible to argue that the relevant rules of the Russian insolvency law do not have extraterritorial effect, and therefore they should not, as a general rule, preclude the creditor of a debtor company or its trustee from taking legal actions (for instance, bringing a general tort claim) outside of Russia. This does, however, pose a question as to how to reconcile individual recovery by a particular creditor in circumvention of the debtor's insolvency estate. Practically and legally (although there is no rule to that effect) such creditor should be able to transfer voluntarily the recoveries to the insolvency estate. Therefore, the reference by the English court to the fact that the "fair operation of the bankruptcy process would be disrupted" if a tort claim beyond the insolvency is allowed, is not that bulletproof.

Thus, again, the problematic issues were raised but did not get the deserved analysis.

[20] Issue (iii) was not explicitly reflected in the judgment.
[21] *OJSC VTB Bank v Parline Ltd* [2015] EWHC 1135 (Comm) at [68]–[70].
[22] *OJSC VTB Bank v Parline Ltd* [2015] EWHC 1135 (Comm) at [68].

JSC BM Bank v Kekhman (2018)[23]

Cause of action: compensation for harm caused by misrepresentation to creditor and dissipation of assets.

Outcome: claim granted.

Concepts/principles considered: notion of harm, interference in contractual relations, liability for apparently lawful actions.

Background facts

This is yet another noteworthy English case regarding the application of arts 10 and 1064 (not only because all cases considered in this article were dismissed but for this one). The defendant in this case was held liable for misrepresentation to the claimant when obtaining loans on behalf of the company under his control and subsequent dissipation of assets from the borrower company that later became insolvent and thus could not perform its contractual obligations.

In 2011, JFC Russia (the borrower), controlled by Mr Kekhman (the defendant, who was a borrower's UBO and in certain times its director), obtained a loan of US$ 140 mln from BM Bank (the claimant). The loan was guaranteed by two BVI companies also controlled by the defendant.

In 2012, the borrower became insolvent and defaulted on the loans. Shortly thereafter, the borrower filed for an insolvency order from a Russian court. Then Mr Kekhman (although being a Russian national) upon his petition was adjudged bankrupt in the UK. The claimant, after obtaining judgments against the BVI guarantors in England which could not be enforced as they were penniless and liquidated the same year, and after the personal insolvency of Mr Kekhman was initiated in Russia, decided to seek compensation directly from the defendant in England.

In 2014, the claimant commenced proceedings in England advancing a claim in tort in parallel with the pending insolvency proceedings of the borrower in Russia in which it had been already admitted as a creditor. In the English proceedings the claimant alleged that the defendant made fraudulent misrepresentations when the loan was advanced and also that it dissipated the assets from the borrower and the BVI guarantors in favour of his own companies and to his own benefit.

Thus, in this case the English court had to resolve similar legal points (it was facing these issues, but did not consider them all): (i) correlation between a contractual claim and a tort claim, (ii) whether there is liability for "interference" in contractual relations, (iii) apparent lawfulness of the defendant's acts (i.e. "legitimate business transactions" point), and (iv) the notion of harm.

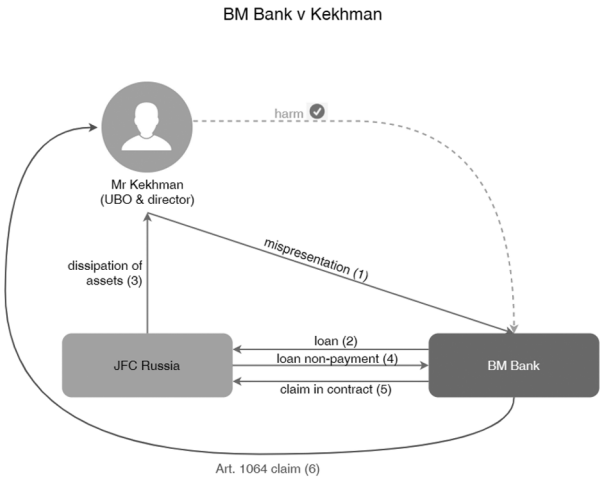

Figure 4

Legal analysis

Application of arts 10 and 1064

The court considered both alternative claims advanced by the claimant: (i) fraudulent misrepresentation, and (ii) dissipation of assets. We consider them in turn too.

(i) **'Fraudulent misrepresentation' claim—**

The court established that the claimant was induced to enter into the loan agreements with the borrower as a result of false representations made at the direction of the defendant.[24] This claim was granted. However, the legal problems mentioned above do not arise in this part of the claim due to the following reasons.

[23] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm).
[24] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [439] and [459].

Notion of harm. The defendant committed standalone fraud upon the claimant. This means that he fraudulently, in some sense, stole the bank's money (procured the same). There is no harm to the contractual rights of the bank since the defendant directly infringed upon the bank's property (regardless of the non-performance of the contractual debtor). Effectively, there was an independent tort committed by the defendant before (or at the same time) when the agreement between the bank and the borrower was made. In our view, this is not a situation of interference in an existing contractual relation.

Unlawfulness. As explained in Part 1, under the 'general delict' principle, acts of the defendant are presumed to be unlawful where the harm is shown, unless it is permitted by law. Obviously, there can be no lawful right to *steal* someone's money. There was no issue of apparent lawfulness of the complained acts in this case (the false representations were made and the fraudulent accounts were produced to the claimant under the instruction of the defendant in order to obtain the loans).

Moreover, the court correctly applied art.10 and held that even if the defendant would have referred to such a right to cause harm, the exercise of such right would still be unlawful. This is because he would, in a case of fraud, be said to have acted in conscious bad faith.[25] As we explain in Part 1, the existence of conduct which falls short of good faith is not enough to apply art.10, and thus to declare the acts of the defendant unlawful. Specifically, "conscious bad faith", i.e. an abuse of rights, is required.

Competition of claims. The court did not consider this issue at all. In respect of this part of the claim it appears to be correct, since in cases such as this one the third person (that is not a party to a contract) is liable for causing the claimant to enter into the contract with the debtor, and *not* for causing the debtor to fail to perform a contract that was properly entered into. In other words, it is a situation where a third party itself, by its own unlawful conduct, committed *prior* to any contract between a debtor and a creditor, created a direct tortious relation with the creditor (i.e. committed a tort). The general rule on competition of claims is thus not engaged.

Interference. This issue is also not applicable, because unlawful conduct was committed *prior* to the time when the loans were advanced, and thus there is no issue of interference of the third party in the existing contractual relation between the creditor and the debtor (see discussion in Part 1 regarding the notion of harm).

(ii) **"Dissipation of assets" claim—**

Although this claim was also granted by the court,[26] it is important to note that the analysis on this head of claim was in effect obiter dicta.[27]

Where dissipation of assets is pleaded by a claimant there are often such elements of the cause of action as interference in contractual relations, harm to relative rights and prima facie legitimate transactions by virtue of which assets (money) are dissipated. Therefore, the court would have to address all the problematic issues that we discuss above. However, on this occasion, the English court also failed to do that (probably because the parties did not advance these arguments, whereas foreign law is treated as an issue of fact) and instead limited its analysis to the following:

- As to the element of harm, the court concluded that this requirement was satisfied, because the claimant "would have made greater recoveries in respect of its loans had the dissipations not taken place".[28] Perhaps, what the court wanted to say is that as a result of the conduct of the defendant the claimant's property was harmed (in this case being a creditor's right to receive back funds loaned), because the borrower and the guarantors were left with fewer monies insufficient to pay off the loans. But, strictly speaking, the court's reasoning looks like an application of a plain "but-for" causation test than anything else. The court did not

[25] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [437].
[26] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [492].
[27] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [460] ("In the light of my finding that C's claim in respect of each of the Garold Representations claim and the Security Representation claim succeeds, the dissipation claim is academic (as the sums claimed are not in addition to those that C claims and is entitled to in relation to the Garold Representations and the Security Representation). However it has been fully argued before me and I will accordingly address it below.").
[28] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [473].

analyse whether in principle such type of harm is compensable under art.1064.

- As to the unlawful conduct, the court concluded that this element was also satisfied with reference to the principles of general delict and abuse of rights. The court concluded:

> "the causing of harm to another is prima facie unlawful, and therefore once a claimant has discharged its burden of proving that the defendant's conduct has caused it harm, such conduct is presumed to be unlawful unless there is a lawful justification for it… [I]t is not suggested that Mr Kekhman had a prima facie lawful basis for the conduct that [the court] have found, nor has he invoked a lawful justification defence… Even if he had, the exercise of such a right in circumstances where it was to defraud creditors would necessarily amount to bad faith and as such would be unlawful".[29]

However, there is no analysis as to whether the dissipation transactions were invalid as a result of the fraud, whereas under Russian law, should the court establish abuse of rights in such an instance, it would entail invalidity of the relevant transactions, and thus it displaces the issue of competition of claims (because there is no contract between the parties).

As to the "interference" issue, there is no analysis of this point. This may be explained by the fact that the court considered this part of the claim "*academic*".[30] Moreover, it appears that there was no respective defence from the defendant to rely upon these issues before the court (namely, whether as a matter of principle the claimant could have a claim in tort against the defendant).

There was in fact a belated attempt by the defendant to advance a new argument, after the hearing was closed, suggesting that

> "as a matter of law a claim under Article 1064 in respect of the actions of a controller of a company that harms a creditor as a result of the dissipation of the assets of the company was not available against the creditor."[31]

The defendant was allegedly trying to rely upon the rule that this claim should be properly made in the Russian insolvency proceedings. The court, however, observed that if such an argument was being advanced it would have amounted to a new defence that had not been pleaded previously. The defendant then (rather creatively but very artificially) tried to wrap this argument up as a part of the previously pleaded defence on causation. However, based on the experts' evidence, the court concluded that "the question of causation was one of fact" and dismissed the argument.[32]

But this head of the claim was nevertheless granted, and therefore it is sensible to consider whether and how the findings of the court in this case are aligned with the conclusions reached by the English courts in *VTB Bank v Parline* and other cases discussed above. In some sense, the English court changed the approach to the issue of availability of a tort claim where there exists a primary (contract) route to pursue a claim against a third party that was applied in the *VTB Bank* case. Moreover, one may contend that the court went further and directly stated that a UBO is liable for the debts of the contractual debtor (whereas in the *VTB Bank* case the court did not make such a conclusion and, by referring to the need to pursue the bankruptcy route against the contractual debtor, rejected the claim). However, in our view, as we explain further below, this decision should not be interpreted towards any wider approach to the notion of harm or protection of relative relations by art.1064.

Notion of harm. As a general rule, art.1064 protects only absolute rights. But, as we explain above, the new approach has recently started to develop according to which art.1064 may in certain instances

[29] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [474]–[475].
[30] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [460].
[31] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [479].
[32] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [481].

protect relative rights too (thus extending the notion of harm). To give an example relevant to the cases discussed in this article, if a contractual debtor fails to perform its monetary obligations, then a creditor would suffer an economic loss represented by the amount of the sum not received. In legal terms, this may constitute "harm" of the creditor. What that means is that in the *Kekhman* case, whether it realised that or not, the court inadvertently adopted a wider approach to the notion of harm.

This is a controversial issue whether the new approach could have been applied to the events that took place in 2011–2012.

Unlawfulness. We also explain above that under Russian law it is possible to recognise apparently lawful transactions as unlawful, and thus void, based on art.10 (prohibition of abuse of rights) without resorting to any specific separate civil proceedings (i.e. a claim to invalidate a transaction based on specific grounds) proceedings. However, art.10 is an exceptional remedy, and as we discuss in Part 1, it requires proving three elements.

It appears that all three elements were established by the court in the *Kekhman* case (again, it cannot be said that the court specifically named these elements but the result fits into the relevant test):

- the court found that the misuse of rights was intentional: "In relation to the [fault] requirement that the defendant be at fault, Mr Kekhman was at fault in intentionally causing harm to creditors including [the claimant]";[33]
- the court established that the defendant exercised his own legal rights and that it was done for an abusive purpose:[34]

> "… I am satisfied that [the defendant] benefitted from the dissipations … I am satisfied that these employees would not have made the transfers without instructions from Mrs Zakharova who in turn would not have given such instructions without her having in turn acting on the instructions of Mr Kekhman, and I so find … I am satisfied that the wrongful dissipations … were made with an intention to injure [the claimant] by putting money out of [the claimant's] reach of enforcement, and inducing [the debtor] and the guarantors to breach their obligations to [the claimant], and that Mr Kekhman conspired with Mrs Zakharova and the relevant JFC companies to dissipate such assets."

Interference. The fact that the acts of a defendant were unlawful and a claimant suffered harm as a result thereof does explain why it would be permitted to recover damages from a defendant based on the "general delict" principle , but this does not per se explain whether it is possible to claim damages from a tortfeasor, who did not cause harm directly but has only interfered in a relative relation between a claimant and its (contractual) debtor. This is one of controversial issues discussed recently in Russian law.

First of all, a party to a contract is responsible for its performance even if the contracting party's non-performance is caused by non-performance or other acts of a third party (this can be deduced from art.401(3) of the RCC). Therefore, lack of money (whatever the cause for this might be) cannot serve as an excuse for the contractual debtor. Furthermore, the shareholders of a legal entity are not liable for obligations of the legal entity (art.56 of the RCC). Thus, as a general rule, the company's controlling persons cannot be held liable for the non-performance by the legal entity of its obligations (as otherwise it eliminates the whole idea behind a corporation as a separate entity from its shareholders).

The only relevant exception to the present discussion provided for by law is the event of a debtor's insolvency, in which case its insolvency trustee or admitted creditors would be entitled to bring a claim for secondary (subsidiary) liability against controlling persons. The cause of action for this claim, however, is not any type of debtor's breach of a civil law obligation: it requires establishing that the bankruptcy of

[33] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [477].
[34] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [468]–[469].

the company was caused by such persons, whereas the company's assets are insufficient to satisfy all creditors' claims (if the funds are sufficient, it does not matter what the controlling persons might have done to the company and the right to bring such claim simply does not arise).

For general tort claims, as we explain, another exception may be of relevance. It is an "abuse of rights" exception under art.10 of the RCC. It is controversial and it is not well established. There appear to be a few specific examples of application of such exception in the case law.

The High Court did not analyse this issue (possibility to bring a claim against an interferer) which could have led to a rather extensive interpretation of Russian law in relation to a tort claim brought in connection with situation where a contractual debtor is put out of the money (e.g. dissipation of assets, misappropriation or diversion of funds). However, not only a respective argument was not advanced by the parties, at the relevant time there was no discussion in Russia over potential/possible application of art.1064 for the purposes of protecting the relative rights. The relevant case law that triggered such discussions started to appear only since 2017.

Moreover, the issue of "interference" in this case was not that important, because the defendant (Mr Kekhman) was a director (at least during certain times) of the contractual debtor (owed similar duties to its guarantors), and thus he had special corporate duties owed both to the contractual debtor and, in some respect, to its creditors. The existence of such special duties and their breach by him means that the defendant was a direct tortfeasor in relation to the assets dissipated from the debtor.

Competition of claims. The High Court did not analyse whether the contractual remedies were fully exhausted by the claimant and whether that was a pre-requisite for a claim, considering the borrower's pending bankruptcy proceedings in Russia.

However, it may be said that the cause of action ("abuse of rights" exception) accrued in this case (if we consider the facts without regard to the defendant's directorship in the debtor) because the claimant (1) has actually exhausted contractual remedies; and (2) was therefore completely and permanently deprived of the means to obtain payment from the contractual debtor:

- the claim was filed in the High Court in 2014—that is the key date before which all other relevant events must to have taken place;
- prior to this, in 2012, the insolvency proceedings were initiated by the contractual debtor itself in Russia (already indicating his inability to pay off debts), and the claimant in 2013 utilised a contractual remedy by filing a claim in the debtor's insolvency and having its claim admitted;
- also, before 2014, the claimant issued a claim for payment against the guarantors of the debtors (two BVI companies) and obtained a judgment in its favour in 2012;[35]
- on 5 April 2018, the creditors of the contractual debtor were denied in granting the claim in Russia on subsidiary liability of Mr Kekhman in the debtor's insolvency;
- the claim in the High Court was granted on 12 April 2018 (by that time the BVI companies were insolvent, the contractual debtor was also in insolvency);
- later in 2018, when the debtor's insolvency proceedings were terminated, the Russian court stated that only 3% of the creditors' claims were satisfied.

Formally, the High Court did not wait for the termination of the bankruptcy proceedings, but in fact it appears that there was no chance for the claimant to receive compensation by virtue of contractual remedies. In any case, the claimant first tried to receive compensation from the contractual debtors up to their liquidation and made a number of other actions to exhaust available remedies.

Accordingly, the position of the High Court in this case should be considered as a certain deviation from the position set out in *VTB Bank v Parline*, where the High Court denied the tort claim, since the debtor's bankruptcy case was still pending.

On any view, in the authors' opinion, it is important to remember that the claim on dissipation of assets in the *Kekhman* case was (using the court's own words) "*academic*", whereas the granted claim on fraudulent misrepresentation was at the forefront. Therefore, the broad interpretation of art.1064 in this claim should not

[35] *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm) at [4].

be viewed as a full picture of Russian tort law. In any event, it would be sensible that all the problematic issues indicated above are put forward before the court (and respective Russian law experts) in cases concerning wrongful interference in relative relations.

Bank St Petersburg PJSC v Arkhangelsky (2018)[36]

Cause of action (for counterclaim): damages in respect of alleged conspiracy to raid unlawfully and seize assets of counterclaimant's subsidiary companies.

Outcome: counterclaim dismissed (case is subject to retrial).

Concepts/principles considered: reflective loss, notion of harm, protection of relative (contractual) rights.

Background facts

According to the circumstances of the case, the defendant (Mr Arkhangelsky) was liable to pay to the claimant (Russian Bank St Petersburg) under six personal guarantees securing the loans advanced to Oslo Marine Group (OMG), his group of companies, and a personal loan. When the claim was issued in the High Court against him, the defendant alleged that the personal guarantees were forged and that he was never duly notified of the demands for payment under the loan and the guarantees.

Moreover, the defendant issued a counterclaim for damages based on the alleged fraudulent raiding of OMG's assets by the bank.[37]

The bank's claim against the defendant was of contractual nature, and thus is beyond the scope of this article.[38]

The defendant's counterclaim, in its turn, was aimed at compensation of what appeared to be reflective loss caused by the bank to the defendant (by reference to the value of the shares it held) as an ultimate owner of the OMG group, in the course of enforcing the pledge provided by OMG.[39] This raises the need to consider, particularly, the issues of notion of harm and unlawfulness under art.1064, since the alleged acts of the bank were committed on a prima facie lawful basis (enforcement of a pledge is a typical creditor's right).

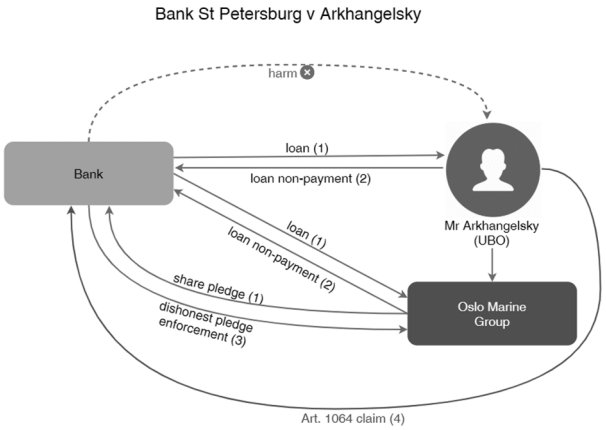

Figure 5

Legal analysis

In respect of the unlawfulness element, the High Court considered the principle of prohibition of abuse of rights. The court stated that

> "it would not be a lawful justification for the [bank] to say that [it] or any third parties acted in accordance with contractual arrangements that they had entered into with OMG companies or others, in circumstances where they had acted dishonestly… [O]nly the *good faith* enforcement of rights is sufficient to negate fault for the purposes of Article 1064."[40]

It appears that this conclusion is correct. Under Russian law, good faith of each party in civil relations is presumed, and therefore it is a claimant (in this case it was Mr Arkhangelsky, the counterclaimant) who must prove that a third party acted in bad faith. If the bank acted in accordance with the contractual arrangements, it should prima facie mean that it acted lawfully, and thus if the counterclaimant pleaded dishonest conspiracy in respect of what otherwise is an absolutely legitimate exercise of civil rights, it was up to him to prove the unlawfulness of the bank.

Then, based on the above and the expert evidence, the court concluded that

[36] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch). We note that the lower judgment was recently overturned on appeal and the case was sent for retrial [2020] EWCA Civ 408. Nevertheless, we still find it useful to consider this case.
[37] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [20].
[38] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [782].
[39] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [857] (emphasis added by the authors).
[40] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [861].

> "if the Counterclaimants succeed in proving their factual case as to the dishonest conspiracy to steal their assets, liability under Article 1064 is established."[41]

This conclusion on its own seems also correct. The trial court found that there was no wrongful execution of the rights by the bank.[42] However, the Court of Appeal disagreed with this conclusion, and the judgment is now under retrial.

In respect of the notion of harm, the conclusion of the court above, concerning the potential success of the counterclaimant's claim in case of proving dishonest conspiracy, could mean that apparently reflective loss of the counterclaim could be compensated under arts 10 and 1064 applied together. The court then stated as follows:[43]

> "This clash of expert evidence and differences in academic commentary, and the admitted lack of any express enunciation under Russian law of what we know in England as the 'rule on reflective loss', suggests to me that though Russian courts would be likely to accept the logic inherent in the rule, its ambit and application is far from settled or clear."

Afterwards, the court concluded that it does

> "not think the evidence of Russian company law and procedure establishes a settled rule against the recovery of reflective loss, and still less its confines; I do not, in such circumstances, accept that a fledgling Russian law version of the rule against reflective loss would be held to preclude the claims advanced by counterclaim."[44]

In making such conclusion the court addressed some public policy considerations, including the risk of double recovery and that whilst "making good the company will restore the shareholder, the converse is not true" (because it is a company who suffers loss).[45] Despite the fact that the court's argumentation may sound convincing, it is not entirely correct to use it to fill in the shortcomings of Russian law.

Considering that the defendant's counterclaim was dismissed,[46] the compensation for the reflective loss was not awarded. As in the *Kekhman* case, the court did no need to resolve this point and it was reflected in the judgment ("[b]ut in the end a final determination of this is not necessary on the findings I have made").[47] But the above court's reasoning on reflective loss may be too brave and premature in respect of the extensive interpretation of Russian law.

Yukos Finance BV v Lynch (2019)[48]

Cause of action: recovery of costs and expenses connected with legal proceedings.

Outcome: claim dismissed.

Concepts/principles considered: "general delict" principle, notion of harm.

Background facts

This is yet another well-known dispute which concerned the formerly largest Russian Yukos Oil Company. According to the circumstances of the case, the claimants alleged that the defendants (five individuals) took part in an unlawful auction of the shares of the Dutch subsidiary of Yukos Oil (the shares were said to have been purchased by a particular company at a pre-agreed price which participation was caused or facilitated by the defendants). As a result of a number of legal proceedings outside of Russia, the claimants eventually recovered control of those shares. The claimants then sought a relief not in respect of the shares but compensation for the costs and expenses that they incurred in order to recover these shares.

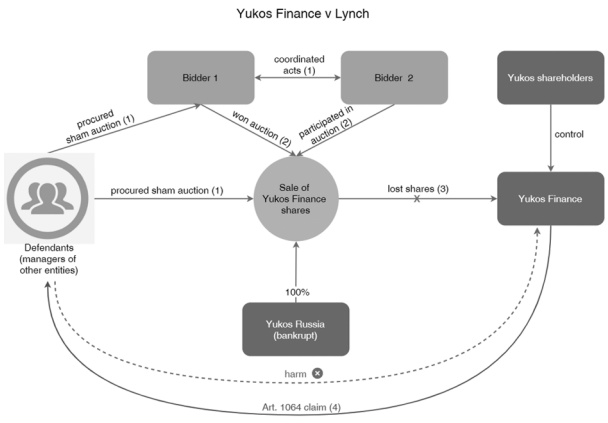

Figure 6

[41] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [862].
[42] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [1386].
[43] *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 1077 (Ch) at [1572].
[44] *Bank St Petersburg PJSC v Arkhangelsky* at [1583].
[45] *Bank St Petersburg PJSC v Arkhangelsky* at [1583], [1576].
[46] *Bank St Petersburg PJSC v Arkhangelsky* at[1638].
[47] *Bank St Petersburg PJSC v Arkhangelsky* at [1583].
[48] *Yukos Finance BV v Lynch* [2019] EWHC 2621 (Comm).

Legal analysis

The High Court dismissed the claim based on the factual finding that there was no unlawful agreement involving the defendants to rig the relevant auction.[49] As a result, the need to resolve Russian law issues fell away and there is no detailed analysis of them in the judgment.

Moreover, the claim was sought in respect of the legal costs/expenses incurred in recovering the shares, and not in respect of loss caused by the loss of the shares or their diminution in value. Therefore, the problematic issues discussed in this article were not considered in that case.

The only relevant conclusion is where the court stated that

> "Article 1064 is prima facie broad enough to extend wider than the straightforward claims of diminution or loss of a shareholding resulting from an unlawful act said to cause loss to a victim."

This may look like an indication towards a wider interpretation of the notion of harm under art.1064, and which goes against the findings in the *Yugraneft* case. However, this conclusion was made in the context of some other issues, namely the "standing" to bring a claim under this article (in this case the claimant's interest in the relevant entity was lost by virtue of legal proceedings and not as a result of any allegedly unlawful act like dissipation or misappropriation) and possibility to recover legal costs as damages. The said passage in any event lacks any preceding analysis and therefore should not be relied upon as a delineation of the limits (or their lack) in the general rule. This is particularly so in light of the other authorities that thoroughly considered the same issues and found otherwise.

PJSC Tatneft v Bogolyubov (2021)[50]

Cause of action: compensation for harm caused by non-performance of payment obligations by a contractual debtor.

Outcome: claim dismissed based on a limitation defence.

Concepts/principles considered: notion of harm, pure economic loss, knowledge of the defendant for commencement of a limitation period, protection of relative (contractual) rights.

Background facts

Tatneft brought this claim against four defendants who are well-known Ukraine businessmen (Mr Ihor Kolomoiskiy and others). It was alleged that Tatneft sold oil to Ukrtatnafta (UTN), an oil refining company in Ukraine, through several intermediary suppliers. Eventually, UTN ceased paying for the supplied oil, and as a result each of the suppliers in the contractual chain defaulted thus leaving Tatneft out of the money. Tatneft contended that the defendants had perpetrated a takeover of UTN and procured siphoning of the funds what caused insufficiency of UTN's money to make payments in favour of Tatneft, whilst procuring liquidation of the Ukrainian intermediary suppliers (except for Tatneft's Russian agent company).

The defendants denied these allegations and argued that UTN's insolvency was the reason of its default but not their acts. This claim concerned the alleged harm in the amount of US$ 300 million.

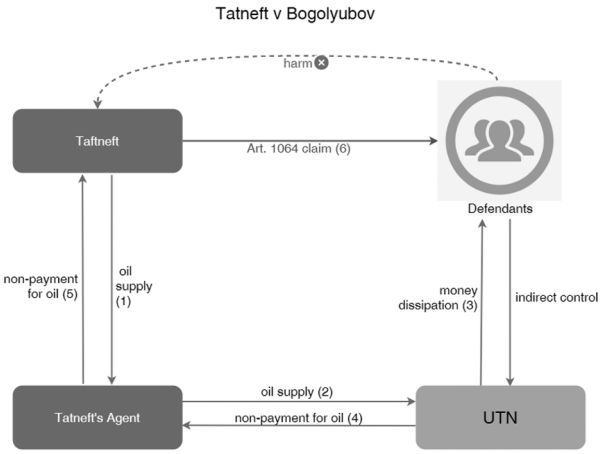

Figure 7

[49] *Yukos Finance BV v Lynch* [2019] EWHC 2621 (Comm) at [82].
[50] *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm).

Legal analysis

Multiple complex and unexplored issues of Russian law were raised in this case, including such as possibility to bypass the "competition of claims" principle, and issues of pure economic loss and liability for interference with contractual rights.

However, in the judgment only very few of them were considered. Particularly, the limitation defence under Russian law was described in detail. The claimant argued that although it knew about the violation of its right (since there had been default by the contractual debtor), it, however, did not know who exactly caused the harm and thus could not issue a claim. The court concluded that there was no such rule under Russian law before 2013 that the claimant had to have knowledge of the identity of the defendant for the limitation period to start running.[51] Therefore, this argument of the claimant was dismissed by the court. We agree with such interpretation of Russian law, since there is no indication that before 2013 Russian law required the knowledge of the identity of the claimant for a limitation period to start running (save perhaps for *rei vindicatio* claims due to express guidance of the highest court issued at the time).

Unfortunately, due to the fact that the claim was statute-barred, the court held it was unnecessary to consider all other issues of Russian law. However, this case did concern application of Articles 10 and 1064 and the relevant legal issues, namely:

- whether the defendants may be held liable for the "interference" in the contractual relations between Tatneft and UTN;
- whether legitimate transactions allegedly procured by the defendants may be declared unlawful under Article 1064 without commencing separate court proceedings in this respect;
- whether a non-performance of a contractual debt may constitute harm under art.1064.

Only the last question was partially covered in the judgment. On this point the court held as follows:

> "… had it been necessary to decide the point, I would have held that 'harm' for the purposes of Article 1064 does not extend to a claim by [the claimant] based only on financial loss caused by the non-receipt of economic benefits which it had 'a legitimate expectation' of receiving."[52]

In other words, the fact that the counterparty did not perform an obligation due to certain acts of third parties, does not allow to conclude that financial losses of the claimant suffered as a result constitute harm caused by such third parties. Also, the court held in respect of possibility "to claim financial or economic losses" under art.1064 that the Russian law commentary relied upon by the claimant only "sets out a proposition which is not supported by case law and [the court infer[s] that it does not represent the current state of the law but is a statement as to the possible future development of the law".[53]

We agree with this conclusion as it is in line with the analysis set out in "Authors' view on the discussed issues" in Part 1.

Conclusion

The English courts often have to apply Russian law provisions in order to resolve disputes brought before them. It appears that this trend will not fade away in the near future. The problem with this, however, is that the application of Russian law by the English courts is not unified. Specifically, as we demonstrate, this is the case in application of arts 10 and 1064 of the RCC, concerning the principles of "general delict" and abuse of rights.

The tort law principle of "general delict" establishes that any person is prohibited from inflicting harm to another person or his property, and any infliction of harm to another person is presumed unlawful. The notion of "harm" within this principle is not defined in the law (and thus, one may unjustifiably contend that it is not limited by any confines and may apply to various situation, for example, such as "a legitimate expectation"). Abuse of rights (as part of the "unlawfulness" element) can also be expressed through the different types of acts. This causes some discussions in the legal doctrine about whether harm to relative rights and harm caused by an "interferer" (i.e. not a direct tortfeasor) may be compensated under art.1064. Some of the authors also refer to the issues of compensation of pure economic losses and reflective losses in this regard.

We believe that to date, reflective loss as well as pure economic loss could not be compensated under Russian law. The harm caused to relative rights (i.a. in case of interference from a third person) may be compensated in exceptional situations only. Firstly, this is because art.10 applies only in exceptional situations. Secondly, Article 1064 was originally devoted to the protection of absolute rights (rights *in rem*) only, rather than to protection of relative rights (i.e. it was not designed to capture and compensate for such extravagant species as interference in other person's contractual relations, pure economic loss or reflective losses).

However, it appears that the English courts went a step further in the application of these articles preferring a wider interpretation of Russian law concepts despite the lack of proper legal authorities.

In the first case concerned with this issue, *Yugraneft* case (2008), the English court did not provide any relevant analysis. However, it chose to apply a narrow notion of harm in line with the state of Russian law at the time. In the next case, the *Fiona Trust* case (2010), some analysis was given by the English court. The court also preferred

[51] *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm) at [90].
[52] *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm) at [677].
[53] *PJSC Tatneft v Bogolyubov* [2021] EWHC 411 (Comm) at [675].

a narrower interpretation of the notion of harm, but it was prepared to allow a claim for compensation of damages caused by tortious interference in a situation involving bribery (but as we understand it, with reference to abuse of rights). Thus, the approach was softened, but without proper analysis and ahead of the development of Russian law.

Thereafter, in the *VTB* case (2015) some analysis also was provided, but the court applied a wider interpretation of the notion of harm and was be prepared to allow a claim against the interferer in a situation where the contractual remedies were exhausted by the claimant. So the court again went further where there was no such position under Russian law at the time (in 2015). Only since 2017 some indications of availability of such claims started to appear.

Then, in 2018, two cases were handed down, the *Kekhman* case and the *Arkhangelsky* case. This was an apogee of the application of Russian tort law, such as a wider approach to arts 10 and 1064 and reflective loss. Again, these cases were ahead of Russian law: at the time there was no discussion in Russia over possible application of art.1064 for the purposes of protecting relative rights. The relevant case law that triggered such discussions only started to appear in 2017.

In the *Kekhman* case, there is no analysis of the relevant Russian law concepts. However, it appears that the court almost followed the criteria/test mentioned by us in "Authors' view on the discussed issues" and "Article 10 of the RCC" in Part 1 (that is for a claim based on abuse of rights).

In the *Arkhangelsky* case some analysis was provided. The court stated that the harm caused by the interference (and which also appeared to constitute reflective loss) may be compensated under art.1064, if the dishonest conspiracy of the defendant is proved. So the court applied the "abuse of rights" principle for determination of the "unlawfulness" element, but it did not analyse other requirements in relation to the determination of the notion of harm or the availability of contractual remedies to the debtor.

Finally, in the *Tatneft* case (2021), the court did not provide relevant analysis, but it stayed within the narrower interpretation of the notion of harm which does not allow, particularly, to compensate financial loss caused by the non-receipt of economic benefits which the claimant had a legitimate expectation of receiving. Similar approach featured in the *Yugraneft* case in 2008.

This demonstrates that the following tendencies exist in the approaches adopted by the English courts so far:

- to apply art.10 in order to overcome the prima facie lawfulness of the defendant's acts;
- to apply a wider interpretation of the notion of harm (except for the *Tatneft* case);
- to allow tort claims against an interferer if certain pre-requisites are complied with.

In summary, considering the specifics of the English procedure, the litigants are allowed to deploy academic arguments to the English court which are not supported by the Russian doctrine or Russian case law. We believe that it would be more appropriate to rely on the existing case law when considering claims for reflective loss or pure economic loss that are not expressly allowed under Russian law, and that an interferer may be held liable only in exceptional situations.