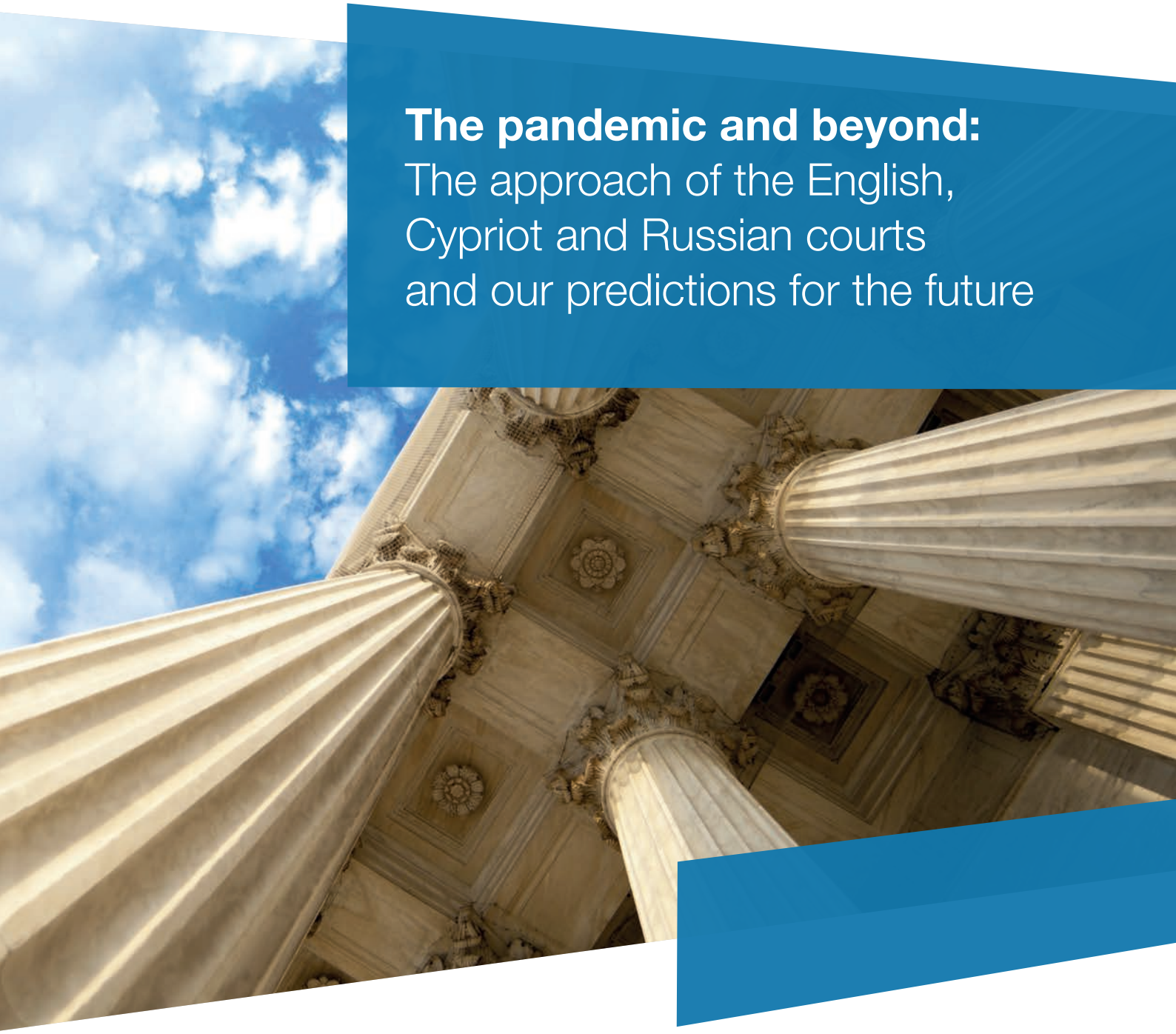
The pandemic and beyond:
The approach of the English, Cypriot and Russian courts and our predictions for the future



AK LAW

ReedSmith
Driving progress
through partnership

Introduction

In producing this publication, we are delighted to partner with Argyrou & Konstantinou L.L.C. to discuss a number of significant legal and economic developments in England, Cyprus and Russia.

In a volatile and unpredictable environment, we endeavour to answer questions key to many of our clients, and compare and contrast the ways in which courts in these jurisdictions have reacted to the events of 2020, and the uncertainty that remains in 2021.

We have provided legal commentary and analysis around a number of questions, including:

- How have the courts in each jurisdiction reacted, and adapted, to the COVID-19 pandemic?
- How has the law in those jurisdictions developed in light of the distressed economic climate of 2020, and what remedies have been offered to creditors?
- What has been the impact of Brexit on the law and courts in those jurisdictions, and are there likely to be further consequences?
- What tentative predictions can be made for court proceedings in those jurisdictions in 2021 and beyond?

We put these wide-ranging questions to Nick Brocklesby, partner at Reed Smith LLP in London; Christos Konstantinou, partner at Argyrou & Konstantinou L.L.C. in Cyprus; and Dimitriy Mednikov, a Russian qualified lawyer at Argyrou & Konstantinou L.L.C. With extensive experience in representing clients in cross-border matters, the authors have worked together successfully on disputes involving Russian, CIS and Cypriot parties, brought in the English courts, and are therefore well positioned to offer their insights into recent changes and developments.

We hope you find this of interest, and if you have any questions please do not hesitate to follow up with the authors directly.

How have the courts in your jurisdictions reacted, or adapted, to the COVID-19 pandemic?

Nick:

Notwithstanding the pandemic, the wheel has kept turning in the English courts. Significant progress has been made in the English courts' approach to remote justice. The English courts' willingness to embrace technology in the face of the extraordinary circumstances of the COVID-19 pandemic is a great achievement, but it does not surprise us. Commercial Court judges in London are, in our experience, as comfortable with technology as those that appear before them. Indeed, we have been involved in a number of successful and efficient remote hearings over the course of the pandemic and we can see that they are likely to be a permanent fixture in some shape or form going forwards.

During this time, the Commercial Court has also expedited a number of critical and complex cases, for example, the FCA's test case seeking legal clarity on the meaning and effect of certain business interruption insurance policy wordings, specifically in relation to the COVID-19 pandemic.[1] This involved consideration of 25 different legal issues across 21 different common policy types in an extremely short period of time (it was issued on 10 June 2021 and a Supreme Court judgment was handed down on 15 January 2021).

The courts' approach to the pandemic has also evolved. In 2020, the courts made a temporary amendment to the Civil Procedure Rules that allowed parties to agree certain extensions of up to 56 days for court deadlines, without having to notify or seek approval from the court (Practice Direction 51ZA). This temporary amendment expired on 30 October 2020 and the courts declined to extend the measure.

Given the protracted nature of the pandemic and the fact that remote working and remote justice have largely been successful, the courts have become increasingly reluctant to grant extensions of time solely as a result of the pandemic and/or the remote format of hearings. Litigators and their clients are now expected to adapt to the 'new normal'.

1. *FCA v. Arch Insurance (UK) Ltd and others* ([2020] EWHC Comm 2448).

Christos:

By contrast, the operation of the Cypriot courts has been significantly affected by the COVID-19 pandemic. After the Ministry of Health measures between March and April 2020, the Supreme Court unanimously voted to suspend all cases with the exception of urgent cases (i.e., extradition procedures, prerogative writs and applications for interim injunctions). The registrars were also closed and filings to registries were limited to specific documents and actions.

After the relaxation of measures from May 2020 onward, the courts reopened subject to strict restrictions. For instance, the registries worked with appointments only and the first instance courts proceeded with scheduling and examining cases before them, taking into account the specific features and needs of each case. The courts were closed again in January 2021. They reopened in February 2021, again under the strict conditions imposed by the Ministry of Health.

The COVID-19 pandemic has accelerated discussions regarding the implementation of an e-Justice system, which will be a major and important step in modernising the Cypriot justice system.

Dimitriy:

Similarly, the Russian courts were largely closed from March to May 2020, with only a limited category of proceedings allowed to move forward (e.g., preventive measures against a suspect or accused in criminal proceedings, civil cases considered in simplified proceedings or concerning the protection of the interests of a minor or an incapacitated person). As of May 2020, the courts have been open, and all visitors are required to wear masks and gloves. However, some courts have restricted public access to hearings and limited the number of representatives to one per party.

The Russian commercial (Arbitrazh) courts have begun using virtual hearings technology, allowing the parties to connect from their office or home. This is a big step forward from the existing framework for videoconferencing under the Russian Commercial (Arbitrazh) Code, which requires the parties to use the courts at the place of their location. The option of virtual hearings is now available at around 100 commercial (Arbitrazh) courts, some courts of general jurisdiction and the Russian Supreme Court. A party that wants to take part in a virtual hearing should file a motion with the court. Furthermore, 111 commercial (Arbitrazh) courts now allow for online review, audio-transcripts of court hearings and consulting case documents submitted in a digital format.

What are the key legal developments in light of the distressed economic climate of 2020 in your jurisdictions?

Christos:

The pandemic brought the main ‘enemy’ of economic activity: uncertainty.

The public finances of all countries have been impaired, and national surpluses have been spent to economically support those affected by the pandemic. In Cyprus, we have seen one of the deepest contractions on record due to the pandemic with the tourism sector bearing heavy losses.

The banking system has also been affected with the reduction in non-performing loans which has slowed down on the back of the pandemic. For example, the moratorium on loan repayments introduced on 30 March 2020 has had significant take-up in Cyprus, helping to relieve the impact of the COVID-19 crisis on the financial sector in 2020. The moratorium is substantial as it covers about 41% of the total volume of loans in the banking sector. This has particularly helped those involved in tourism-related activities, including accommodation and food, arts, entertainment and recreation, and construction.

Another development is related to foreclosures. The Supreme Court upheld amendments to the framework governing foreclosures, which are now in force. In June 2020, the Supreme Court confirmed the constitutionality of the legislative changes adopted a year earlier. The changes backtrack on key elements of the 2018 reform that streamlined enforcement proceedings. The Estia scheme (a scheme introduced before pandemic) has also been implemented in 2020. Its purpose is to deliver a socially acceptable solution to vulnerable borrowers who have mortgaged their primary residence as collateral for loans they secured from banks and who are experiencing difficulties in repayment. Due to the pandemic crisis, the authorities are considering complementing ESTIA with a more targeted scheme for the most vulnerable households.

Dimitriy:

The leading development related to bankruptcy proceedings in Russia is that on 1 April 2020, the Law ‘On Insolvency (Bankruptcy)’ was amended to allow the Russian Government to impose a moratorium on the commencement of bankruptcy proceedings in emergency situations. Two days later, the Russian Government imposed a moratorium on the bankruptcy of legal entities and individual entrepreneurs most affected by the pandemic, based on a list of the most affected sectors of the economy. The moratorium was in force until 7 January 2021.

The bankruptcy moratorium also prohibited imposing financial sanctions (e.g., contractual penalties) on legal entities and individual entrepreneurs operating in the affected sectors of the economy. However, in December 2020, the Russian Supreme Court clarified that if a creditor proves that the debtor was not actually affected by COVID-19-related issues, the court can impose financial sanctions on such a debtor despite the moratorium.

Nick:

The pandemic also brought into sharp focus the efficacy of the UK’s insolvency framework. The Corporate Insolvency and Governance Act 2020 (CIGA), brought into force in June 2020, incorporates COVID-19 temporary measures as well as the broader insolvency reforms contemplated over the last few years. Together, they are the most significant changes to UK insolvency law in a generation.

In terms of permanent measures, distressed but viable companies can now take advantage of a moratorium, which provides a payment holiday of most pre-moratorium debts and restrictions against enforcement action. It also contains a new restructuring plan modelled on the scheme of arrangement and a prohibition on suppliers terminating the supply of goods and services on a counterparty’s insolvency.

CIGA also introduced various temporary debtor-friendly insolvency measures designed to provide breathing space during the COVID-19 pandemic, some of which have been extended into 2021. For example, statutory demands made between 1 March 2020 and 31 March 2021 are void. Winding-up petitions presented from 27 April 2020 to 31 March 2021 are suspended where a company’s inability to pay is as a result of COVID-19. In addition, restrictions on the courts’ jurisdiction to make a winding-up order will apply until 31 March 2021.

In terms of commercial properties, landlords are prevented from using commercial rent arrears recovery before 31 March 2021 and commercial leases cannot be forfeited for non-payment of rent or other sums due between 26 March 2020 and 31 March 2021.

The FCA is, in light of its recent test case on business interruption insurance, mentioned above,[1] actively pushing for businesses with valid business interruption claims to receive the payments due to them as soon as possible.[2]

Finally, the Government has sought to save employees’ jobs by introducing the Coronavirus Job Retention Scheme, which allows businesses that cannot maintain their workforce because their operations have been affected by the pandemic to furlough employees and apply for a grant to cover a portion of their usual monthly wage costs. This scheme has been extended until 30 September 2021.[3]

1. *FCA v. Arch Insurance (UK) Ltd and others* ([2020] EWHC Comm 2448).
2. https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-business-interruption-insurance-january-2021.pdf.
3. https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme.

Given the current economic climate, what remedies can the courts in your jurisdictions offer to creditors of companies made insolvent as a result of the pandemic?

Dimitriy:

The Russian Government and legislature have always been more concerned with supporting debtors rather than creditors, and this has not been affected by the pandemic. Thus, no special remedies were offered to the creditors. In fact, non-affiliated creditors are now in an even less advantageous position than they were before the pandemic.

In December 2020, the Russian Supreme Court clarified that if the owner of a debtor company provided it with additional financing but after the end of the moratorium the company was still declared bankrupt, such an owner's claims would be ranked *pari passu* with claims of other creditors. This measure, of course, was intended to stimulate business owners to support their companies with personal funds during the pandemic.

However, the fact that the bankruptcy moratorium was not extended in the beginning of January is good news for creditors, as they were afraid that during the moratorium period the debtors would withdraw their assets.

Nick:

Creditors in England and Wales have similar concerns. Whilst it is generally accepted that the temporary COVID-19 measures set out in the CIGA are necessary to avoid the widespread failure of viable businesses, there is also a real risk that these measures will allow directors, intent on fraud, the time and opportunity to strip a company of its assets, leaving creditors without any remedies available in a winding up.

There is, however, good news for creditors in the form of a recent decision of the Supreme Court in *Sevilleja v. Marex Financial Ltd*[2] on the 'reflective loss rule'. This decision provides creditors of asset-stripped companies an easier route of direct recovery against the wrongdoer.

The traditional reflective loss rule provides that a shareholder cannot bring a claim for a fall in the value of their shares or dividends due to loss suffered by the company where the company has a cause of action against the same wrongdoer. A shareholder's loss is said to be merely a 'reflection' of the loss suffered by the company, and the company (or its liquidator) is the proper claimant. Over time, this rule has been extended to creditors and employees.

The Supreme Court has now significantly narrowed the scope of the rule so that it no longer captures creditors. It applies only to claims brought by a shareholder relating only to the diminution in value of shares where the diminution in value is the result of the company having suffered damage and where the company can claim for that damage against the same wrongdoer against whom the shareholder is bringing the action. The Supreme Court's decision will come as a great relief to finance parties and judgment creditors since it offers the option of direct recourse against wrongdoers. That said, if creditors believe that asset-stripping is a genuine risk, they should consider early strategies to pre-empt such wrongdoing.

2. *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31.

Christos:

Bankruptcy and liquidation remain the most common solutions for companies in financial distress in Cyprus. In June 2020, the House of Parliament enacted a law governing the Department of Insolvency and related matters. The purpose of the Law, among others, is to restructure and modernise operational procedures, which will enable the department to successfully meet its duties; the effective management of personal repayment plans for insolvent natural persons that may be restored to solvency; and the effective implementation of insolvency proceedings for individuals and legal entities, including the execution of bankruptcy and liquidation orders.

The foreclosure procedures were revised, and in particular, the deadlines were extended (i.e. the 30-day mortgage repayment deadline was extended to 45 days, while the 30-day deadline to file an appeal from the date of a letter's formal issuance was extended to 45 days) and a new ground of appeal was introduced for debtors in cases of setting aside an enforcement procedure.

What is the impact, or what are the consequences, of Brexit for the law and the courts in your jurisdiction?

Nick:

We can confidently say that the sky has not fallen in on the English courts as a result of Brexit.

We do not consider that Brexit will dampen the appeal of English law and the English courts for the resolution of disputes. The calibre of judges (particularly in the Commercial Court), respect for freedom of contact, clear litigation procedure, well-established and sophisticated common law and familiarity of language will mean that English law and the English courts will continue to be the jurisdiction of choice for many companies.

That said, the fact that the UK left the EU on 31 December 2020 without any agreement to replace the civil justice cooperation framework provided by the Recast Regulation and the Lugano Convention will undoubtedly have an impact on how cross-border EU disputes are conducted. The loss of the Recast/Lugano rules is mitigated to some extent by the UK's accession to the 2005 Hague Convention on Choice of Court Agreements, but this applies only to exclusive jurisdiction clauses entered into after 31 December 2020. For all other proceedings, issues of jurisdiction and enforcement involving EU parties will be determined according to the same common law rules they would use for any other internationally based party, in which the English courts are well versed.

As a result of the general uncertainty, the Commercial Court has predicted an increase in anti-suit injunction applications.[3] Such injunctions had previously been prohibited as against EU domiciled opponents on the basis that they were inconsistent with the Recast Regulation.[4] They are a powerful litigation tactic, not generally available to civil law EU jurisdictions, so will be another attractive feature of the English courts.

3. Commercial Court User Group Meeting Minutes, 25 November 2020.
4. *West Tankers Inc. v. Allianz SpA2* (Case C-185/07) [2009] EUECJ C-185/07.

Christos:

Brexit will affect all member states including Cyprus in terms of contract and tax law, and litigation proceedings. For instance, Brexit will have an impact on commercial contracts, and it might frustrate the purpose of a contract (e.g. by reducing a company's access to foreign staff). If a contract was drafted applying 'English law' as the governing law, this would be taken to include the relevant EU law. It must be considered whether the law in an area is harmonised at an EU level – if it is not, then English law may be different and Brexit will not matter. But if the law is harmonised, it depends on whether the underlying rule is a regulation or a directive.

In terms of changes to substantive law and direct and indirect taxation, the UK can now set its own rates, but would be deemed as a 'third country' by other EU member states, which may affect cross-border supply chains. This will affect Cyprus because the UK is one of Cyprus' top three export destinations and one of its top four import origins. Consequently, it is certain that Cyprus will be affected by changes in indirect taxation law.

In relation to arbitration, both Cyprus and the UK are parties to the New York Convention, and it is unlikely that Brexit will have any adverse impact on the enforcement of arbitral awards.

Dimitriy:

Brexit has not affected the Russian law and court system. However, Russian companies whose business is likely to be affected by Brexit should obviously pay special attention to Brexit-related legal developments, such as the recently concluded EU-UK Trade and Cooperation Agreement.

What are your predictions for court proceedings in your jurisdictions in 2021 and beyond?

Nick:

Given the inherent uncertainty in the world, any prediction about English litigation in the years to come is tentative at best. That said, we can see two main themes emerging:

(a) Remote justice

Whilst the English courts have traditionally expressed reluctance in permitting witness evidence to be given by video link, our own experience is that remote cross-examination can be effective. We therefore expect that remote hearings will continue,[5] but it is likely that the English courts will publish a codified set of rules as to the circumstances where remote evidence will be permitted and whether it can be recorded or watched live from other jurisdictions. It will also be necessary for parties to consider whether permission is required from the court in the jurisdiction from which the evidence will be given.[6]

This may have consequences beyond practicalities. Jurisdiction disputes often involve questions as to the difficulties faced by foreign parties or witnesses participating in English court hearings. Those will, we predict, be considered less significant if remote participation is possible. The ability of foreign defendants to avoid English court litigation may therefore be impacted.

5. In September 2020, the Commercial Court reported that 81% of respondents were of the view that procedural hearings of under 0.5 days should be remote by default and 58% said that substantial interlocutory applications should remain remote in some form.
6. *Interdigital Technology Corp and others v. Lenovo Group Ltd and others* [2021] EWHC 255 (Pat) (8 February 2021).

(b) Witness statements

There are new rules applicable to witness statements for use at trials in the Business and Property Courts signed on or after 6 April 2021.[7] A statement needs to be the witness's recollection of matters of factual dispute, in their own words, as opposed to running through documents and supporting submissions. There are also provisions in place to try to avoid the contamination of a witness's memory during the statement preparation process.

Accordingly, witness statements are likely to be subject to increased judicial scrutiny. Practically speaking, this is likely to mean lengthy witness proofing meetings and careful consideration as to what documents each witness is shown during that process, since it will be necessary to list those documents in the statement. It may also result in increased emphasis on the written submissions of counsel.

Christos:

The unpredictable duration of the postponement of the judicial proceedings underlines the necessity for the development of an e-justice environment. Judicial proceedings might introduce and implement technology applications, which would contribute to a more efficient justice system. Perhaps cases may be heard remotely and judgments may be handed down remotely, and face-to-face hearings will take place where deemed urgent.

Video conferencing hearings may be introduced allowing the parties to attend through electronic means. Judges will become more flexible when considering applications for extensions of time or adjournments at the early stages of proceedings when the parties rely on the disruption caused by the pandemic. The administrative personnel will continue the work and communication via email. The current health crisis may be a good opportunity to improve the operation of the Cypriot courts and to enhance effective judicial protection.

Dimitriy:

As the bankruptcy moratorium has expired, Russian commercial (Arbitrazh) courts should expect an influx of bankruptcy filings, especially from banks. It is hoped that virtual hearings will not be abolished and that the number of online hearings will increase.

7. Practice Direction 57AC.

Authors

Nick Brocklesby
Reed Smith
Partner, London
nbrocklesby@reedsmith.com

Felicity K. Dart
Reed Smith
Associate, London
fdart@reedsmith.com

Christos S. Konstantinou
Argyrou & Konstantinou L.L.C.
Partner, Cyprus
ck@akfirm.law

Dimitriy Mednikov
Argyrou & Konstantinou L.L.C.
Senior Associate, Cyprus
d.mednikov@akfirm.law

Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City/DX18 London

As the seventh largest global litigation firm in the world, Reed Smith has more than 1,000 litigators who have garnered a reputation for comprehensive and international counsel and representation of Fortune 500 and global multinationals in a number of industries, including financial services, life sciences and health, energy and natural resources, media and entertainment, and transportation. Reed Smith is on hand to help you achieve solutions that are right for you.

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

reedsmith.com