

Russian Anti-Suit Injunctions: Impediments to International Commercial Arbitration.

Dr Michael Reynolds¹

The recent amendment to the Russian Commercial Procedural Code raises some difficult issues for practitioners dealing with Russian companies in the context of seeking redress in international commercial arbitration or through commercial litigation.

This amendment to the Russian Arbitrazh (i.e., Commercial) Procedure Code (Federal Law no.171-FZ) was aimed at protecting the rights of natural persons and legal entities in connection with sanctions imposed by foreign countries. The amendment (new articles 248.1 and 248.2 to the Arbitrazh Procedure Code) came into force on 19 June 2020 granting exclusive Russian jurisdiction over disputes: where one of parties is a person or legal entity placed under sanctions by a foreign state, state union or institution, or disputes between Russian or foreign entities that are based on or concern foreign sanctions implemented against Russian citizens or Russian legal entities.

The amendment specifies persons deemed placed under foreign sanctions and applies not only to Russian people and entities, but also foreign legal entities placed under restrictions on the ground of foreign sanctions against Russian citizens or legal entities. This would apply to those imposing sanctions on persons actively supporting or implementing actions or policies which undermine or threaten the territorial integrity sovereignty and independence of Ukraine by EU Council Decision 2014/145/CFSP 17th March 2014 or imposed on specified persons operating in sectors of the Russian economy identified by the Secretary of the Treasury under the Executive Order 13694 1st April 2015 of the President of The United States.

The EU Decision prevents transit through the EU of *inter alia* persons responsible for actively supporting or implementing, actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and the freezing of funds of any persons engaged in undermining the Ukraine.

The effect of the amendment to the Arbitrazh Procedure Code enables a Russian person placed under foreign sanctions to claim exclusive Russian jurisdiction for all disputes that involve such person, even with respect to agreements, obligations or actions not connected with sanctions. However, the exclusive jurisdiction rule does not apply where otherwise prescribed by an international treaty signed by the Russian Federation, or where the parties expressly agreed on a foreign jurisdiction for the resolution of disputes. In the latter case, however, the exclusion may not apply where the foreign jurisdiction because of sanctions inhibits access to justice. This would appear to raise serious questions as to the jurisdiction of the Commercial Court in

¹ Dr Reynolds is a Senior Law lecturer in International Dispute Resolution and Arbitration at BPP University College and a Visiting Senior Research Fellow at the Centre for International Studies at the Department of International Relations at the LSE.

London and international commercial arbitrations conducted in London involving a Russian party.

Furthermore, the amendment to Article 248.2 of the Arbitrazh Procedure Code is possibly of more concern where a claim has been already filed in a foreign court or notice of arbitration given in an international arbitration outside Russian jurisdiction. The amendment enables the party to such action or arbitration to claim an anti-suit injunction from the Russian court.

Article 248.1, para.4 provides that so far as international arbitration is concerned the Russian applicant must demonstrate that the arbitration clause or arbitration agreement is unenforceable because of sanctions which impede access to justice for that person.

Where the proceedings against the person are not yet instituted, but there is evidence that such proceedings are contemplated the intended Respondent (Russian applicant or sanctioned person) could seek a judicial order prohibiting the claim being made or notice being given whether in a foreign court or arbitration proceedings outside Russia. This seems an extraordinary extension of the Russian court's jurisdiction and it is hard to understand how such Russian rule could prevent the claim being made or Notice of Arbitration being given in a foreign jurisdiction. On the other hand, it does appear to frustrate any proceedings that were issued presumably giving the Russian applicant cause not to participate in the proceedings and then to counter any enforcement against them in Russia.

Before any such anti-suit injunction is granted by the Russian courts, the Russian applicant is required to prove first, the exclusive jurisdiction of the Russian court and the difficulty the Russian applicant has with accepting the arbitration process or legal action because of sanctions, and second, the consequent disadvantage they would have in any proceedings. In addition, the Russian applicant must provide evidence of the intended proceedings, and copies of all relevant procedural documentation e.g., claim form, statement of claim or case and request for arbitration. Article 248.2, para. 10 provides that if an anti-suit injunction is granted to the Russian applicant, then the Russian court can award the applicant damages to be recovered from any foreign party who fails to comply with the injunction.

It is important to note that the new amendment does not prevent the recognition and enforcement of foreign awards or judgements where the person placed under foreign sanctions has not objected to the jurisdiction of the foreign court or arbitration and has failed to file an application for an anti-suit injunction before the Russian courts. But more importantly it is concerning that under Article 248.1 para. 5 where the Russian applicant has opposed the dispute being heard in a foreign court or international commercial arbitration the effect of an anti-suit injunction being granted in those circumstances will prevent the foreign judgement or international commercial arbitration award against the applicant from being recognised and enforced in Russia. This would appear to abrogate the New York Convention of 1958 which would appear to be a *prima facie* breach by Russia of that international convention.

Alarm was raised when the Judicial Panel on Economic Disputes of the Russian Supreme Court in effect permitted a sanctioned Russian party to avoid arbitration and obtain an anti-suit injunction in the Russian courts. The recent case of *Pojazdy Szynowe PESA Bydgoszcz SA (PESA) v Ural Transport Mechanical Engineering Plant JSC (Ultratransmarsh)* illustrates the difficulties that have arisen by the imposition of sanctions and the impediment to due process and questions of impartiality. The Russian Supreme Court identified the place of that arbitration (Sweden) as the problem was the fact that the applicant for the anti-suit injunction was subject to sanctions. Sweden was imposing sanctions on Russia.