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## Enforcement of Treaty Awards against Russia in Asia: A Safe Haven for Russian Assets?

Olga Boltenko (Fangda Partners) · Thursday, September 3rd, 2015

In recent years, Russia has become a frequent respondent in investment treaty matters. This is a new development. There are currently at least ten treaty claims pending against Russia, with a number of other disputes threatened. At the same time, Russia is trying to protect its assets against a large-scale enforcement campaign in Europe and the US.

On 6 August 2015, in response to these developments, the government of the Russian Federation introduced a draft law ‘On Jurisdictional Immunity of Foreign States and Foreign Sovereign Assets in the Russian Federation’ in the State Duma. Under the draft law, Russian courts would be entitled, based “on a reciprocity principle”, to exercise the same jurisdiction over foreign sovereign assets located in Russia that is accorded to Russia’s sovereign assets abroad. The draft law would not allow Russian courts to “confiscate foreign property”, as has been suggested by mass media. The ‘reciprocity principle’ is similar to the position taken by China with regard to foreign sovereign assets, namely, that if a foreign State infringes upon sovereign immunities enjoyed by China and its property, China will reserve its right to take counter-measures accordingly. The draft law is largely based on the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). If the draft law is adopted, Russia would make abundantly clear that it adheres to the restrictive sovereign immunity doctrine, whereby immunity is granted to States in respect of public acts carried out in their sovereign capacity (acts *jure imperii*) but the protection is lifted for commercial activity activities (acts *jure gestionis*).

The deluge of treaty claims and enforcement actions has altered the way in which Russian State-owned enterprises operate abroad. They have become increasingly aware of treaty enforcement risks and are inevitably looking eastwards, with good reason.

### Enforcement of treaty awards against Russian assets in China

Traditionally, Russian State-owned enterprises have maintained a significant presence in China. They include Russia’s oil and gas giants Gazprom and Rosneft and major Russian banks Sberbank, VTB and VEB, along with many other corporations. Could China become a forum in which to enforce treaty awards against Russian assets?

Enforcing a treaty award under the New York Convention in China appears to be problematic. In 1986, China acceded to the New York Convention with both the commercial and the reciprocity reservations. Under the commercial reservation, China will recognise and enforce only those

awards that have been rendered in commercial cases. On 10 April 1987, the Supreme People's Court clarified that this reservation was to be interpreted so that the term 'commercial relationship' excluded disputes between a foreign investor and a host government. This significantly limits the probability of enforcing treaty awards against Russia's assets in China under the New York Convention.

Further, China adheres to the absolute sovereign immunity doctrine. Under this doctrine, Chinese domestic courts do not have jurisdiction to adjudicate upon matters in which another State is named as a defendant, except where that State validly waives immunity before the forum State. A 2008 note by the Chinese Office of the Commissioner of the Ministry of Foreign Affairs in relation to the China Railway Group Ltd case confirms this position. In that note, the Chinese government made clear that:

“The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government.”

There is, however, no publicly available case law in China that sheds light on how Chinese courts would handle a request to attach property of a State-owned enterprise as a means of enforcing a treaty award under the New York Convention. The only known judgment in which Chinese courts considered sovereign immunity issues dates back to 1927, in a case between *Rizaëff Frères v Soviet Mercantile Fleet* (1927) 40 ILR 84. Rizaëff Frères, merchants of Persian nationality, sued the Soviet company in a Shanghai court for damages allegedly arising out of a consignment contract. The court granted immunity from local jurisdiction to the defendant company on the basis that “merchants belonging to a foreign State are exempt from local jurisdiction”.

A good deal has changed since 1927. A State-owned enterprise possesses a separate legal personality in China. The benefit of this detachment is that Chinese State-owned entities may be sued in other jurisdictions in disputes arising out of their commercial activities, while leaving intact the immunity of China as a State. Property owned by a State-owned enterprise would not be protected by sovereign immunity unless the enterprise was acting as an agent or instrumentality of the State. Consequently, there would have to be a separate determination as to control and function if the property of a State-owned enterprise in China were to become a subject of enforcement attempts. That said, and irrespective of the outcome of the control and function test, any attachment of such property in the context of treaty award enforcement proceedings under the New York Convention appears unlikely in the light of China's commercial reservation.

### **Enforcement of treaty awards against Russian assets in Hong Kong**

Hong Kong has recently experienced an influx of Russian businesses. Many Russian State-owned enterprises established a presence in Hong Kong between 2012 and 2015. These include not only Russian oil and gas corporations but also State-owned banks and investment vehicles, such as VEB. Would it be easier to enforce treaty awards against Russian assets in Hong Kong than in China?

Following the resumption of sovereignty over Hong Kong by China on 1 July 1997, China continued to extend the territorial application of the New York Convention to Hong Kong, but subject to the two reservations it originally made upon accession (prior to 1997, only the ‘reciprocity’ reservation applied to Hong Kong). The application of the commercial reservation to Hong Kong is likely to hinder the enforcement of treaty awards under the New York Convention.

Further, in *FG Hemisphere Associates LLC v Democratic Republic of Congo and Ors* [2011] HKCFAR 41, the Hong Kong Court of Final Appeal held that absolute immunity applies in Hong Kong, bringing it into line with the position in Mainland China. This reversed the previous common law position under which Hong Kong applied the principle of restrictive immunity. Thus, unless immunity is waived in the face of the court, Hong Kong courts have no jurisdiction over Russian sovereign assets, whether at the suit or enforcement stages.

Much like in China, there would need to be a separate determination on whether a State-owned enterprise is entitled to immunity in Hong Kong. That would be a question of control and function of the enterprise. At the same time, China’s commercial reservation to the New York Convention as extended to Hong Kong would most likely hinder the attachment of property of Russia’s State-owned entities in the context of treaty award enforcement proceedings under the New York Convention.

### **Enforcement of treaty awards against Russian assets in Singapore**

Russian State-owned enterprises have also established a presence in Singapore. While that presence continues to grow, however, it is less significant in extent by comparison with Russian assets in China and Hong Kong. Would Singapore be a likely forum for treaty enforcement actions against Russia?

Singapore adheres to the restrictive sovereign immunity doctrine. The position in Singapore with respect to State immunity is set out both at common law and in the State Immunity Act (Cap 313), section 11(1) of which provides that:

“Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.”

State-owned enterprises in Singapore are entitled to claim State immunity only in very specific circumstances, such as in respect of acts performed by a State-owned enterprise in the exercise of sovereign authority, or in circumstances such that a State would have been immune. Simply put, this means that Russia’s State-owned enterprises are unlikely to be able to claim State immunity in treaty award enforcement proceedings.

Whether friends or foes, it would appear that Russia is gravitating towards Asia perhaps faster than many anticipated. This trend will no doubt continue to bring into the spotlight the immunity issues discussed above.

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