Kluwer Arbitration Blog

Search for Justice in an Imperfect World: Gazprom Export v Uniper Global Commodities SE and Methanhandel Gmbh

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On 4 July 2024, Russia's Arbitrazh Court of the North-Western Region (cassation) confirmed the earlier decision of the Arbitrazh Court of Saint Petersburg (first instance) to grant an anti-suit injunction prohibiting German Uniper Global Commodities SE ("Uniper") and Methanhandel GmbH ("Metha") from continuing *ad hoc* arbitration proceedings in Stockholm (Case No. ?56-16212/2024).

The reasons behind this decision are sanctions and the now infamous Article 248.1 of the Russian Arbitrazh Procedural Code ("RAPC"), which allows Russian parties to sue their foreign opponents in the Russian courts, disregarding otherwise valid and enforceable arbitration agreements.

This case is not the first of its kind. The Russian courts have consistently allowed Russian parties to advance claims that, strictly speaking, should have been brought in arbitration. They have also proved themselves ready to "defend" their jurisdiction when faced with competent foreign courts by issuing anti-suit injunctions. It seems this trend of jurisprudence is here to stay, at least for as long as sanctions against Russian entities and individuals remain in place.

Background

By way of background, Uniper and Metha entered into a series of long-term gas supply contracts with the Russian state-owned company Gazprom Export ("Gazprom").

Since mid-2022, only limited gas volumes have been delivered. Since late August 2022, no gas whatsoever has been delivered. Gazprom attributed these reduced/non-existent deliveries to technical issues on the Nord Stream pipelines, blaming Western sanctions for disrupting the maintenance and repair cycle of the compressor station's turbines.

In November 2022, Uniper and Metha announced that they had initiated a Stockholm-seated *ad hoc* arbitration against Gazprom. They sought compensation of EUR 14.3 billion for damages resulting from Gazprom's failure to deliver gas volumes since June 2022.

On 26 February 2024, Gazprom sought an anti-suit injunction in the Arbitrazh Court of Saint Petersburg against Uniper and Metha in order to discontinue the arbitration proceedings in Stockholm. Gazprom invoked Articles 248.1 and 248.2 of the RAPC arguing that:

- The arbitration agreement is unenforceable because Gazprom is subject to restrictive measures imposed by foreign states;
- Gazprom has "limited access to justice" in the sense of Article 248.1 of the RAPC, according to which Russian courts have exclusive jurisdiction over cases involving Russian sanctioned entities or disputes that involve sanctions at their heart. Gazprom justified this limitation with reference to Article 5n of Council Regulation (EU) No 833/2014, which prohibits EU lawyers and law firms from providing legal services to Russian entities (with certain exceptions);
- Gazprom can only *de facto* claim justice in Russia.

On 15 March 2024, the Arbitrazh Court of Saint Petersburg ruled in Gazprom's favor, granting an anti-suit injunction requiring the discontinuation of the arbitration proceedings. The court also ruled that Uniper and Metha would be fined EUR 14.3 billion (*i.e.*, the exact amount claimed by Uniper and Metha in Stockholm arbitration) if they failed to comply, *i.e.*, if they continued with the arbitration.

In its decision, the court found that foreign states' imposition of restrictive measures prevents Gazprom from accessing justice outside Russia. The court made a general observation that, in order to bring the dispute within the jurisdiction of the Russian arbitrazh courts, it was sufficient for the Russian party to express its intention unilaterally.

The court also noted that: first, the defendants are German companies, and Germany is listed as a foreign state adopting "unfriendly actions" against Russia; and second, Gazprom, as the sole participant in Gazprom Germania GmbH, had its assets unlawfully seized by the German Federal Ministry for Economic Affairs and Climate Action without compensation.

The court dismissed Uniper's argument that Gazprom (ironically) was in fact participating in the Stockholm arbitration and had legal representation in those proceedings. Rather, the court stated that, in any case, Gazprom's ability to engage qualified lawyers outside of Russia is still restricted in theory.

Uniper's and Metha's challenge of this first-instance decision was unsuccessful and the cassation court dismissed their appeal and upheld the lower court's ruling in favor of Gazprom. In its ruling dated 4 July 2024, the cassation court stated that:

- Foreign states' restrictive measures and sanctions against Russian entities damage their reputation and create an unequal playing field;
- If a Russian entity is subject to restrictive measures, it can request an anti-suit injunction from the Russian courts in order to halt foreign arbitration proceedings, without the need to prove difficulty in accessing justice abroad;
- Since Gazprom's rights and interests can at present only be protected in Russia, the first-instance court rightly granted an anti-suit injunction.

Context in Russia

The Russian courts have liberally applied Articles 248.1 and 248.2 of the RAPC and have granted many anti-suit injunctions in support of Russian parties' efforts to stop foreign proceedings. In

Uraltransmash v PESA, the Russian Supreme Court established for the first time that there was no need to prove the actual effect of sanctions on the enforceability of an arbitration clause for the Russian courts to seize jurisdiction. This approach has been followed ever since.

Notably, this trend concerns both foreign arbitration and litigation proceedings.

On the same date that the first instance court handed down the judgement in *Uniper and Metha v Gazprom*, the same court granted Gazprom an anti-suit injunction prohibiting Dutch Gasunie Transport Services B.V. from continuing litigation in the Netherlands. Five days later, the same court prohibited Czech company NET4GAS s.r.o. from continuing arbitration proceedings against Gazprom in the Czech Arbitration Court. Once again, the court imposed a fine equal to the quantum claimed in the arbitration in the event NET4GAS s.r.o. failed to comply with the judgement. NET4GAS s.r.o. unsuccessfully appealed the decision to the cassation court. It filed a complaint with the Russian Supreme Court on 13 August 2024. However, we are unlikely to see a *volte face* in the jurisprudence, as the question appears to be well settled (for the time being at least).

Context in the UK

Although the English courts are very familiar with Articles 248.1 and 248.2 of the RAPC and the powers of the Russian courts to grant anti-suit injunctions, recent case law indicates that they do not take these provisions too seriously.

Recently, Mr. Justice Bright granted an anti-anti-suit injunction prohibiting the parties from complying with the original injunction imposed by the Arbitrazh Court of Moscow in response to a party attempting to litigate its conspiracy and fraud-related claims against a Russian-sanctioned entity in the English courts (*Magomedov & others v PJSC Transneft & others* [2024] EWHC 1176 (Comm)).

The central question was whether Russian parties affected by sanctions are actually prohibited from accessing justice in Western countries, and not simply in theory. After all, the Explanatory Note accompanying the bill presented to the Russian parliament when it adopted Article 248 of the RAPC stated that Russian parties "are deprived of the opportunity to defend their rights in the courts of foreign states […] located outside the territory of the Russian Federation."

In *Magomedov & others v PJSC Transneft & others*, the court accepted "the very real difficulties that [a party affected by sanctions] has experienced in litigating in this jurisdiction [England and Wales]" (at para. 43). The judge could not be certain that "[a party affected by sanctions] will be able to pay for and retain the services of its chosen legal representatives", which undoubtedly constitutes limitation of a party's access to justice (at para. 52). Interestingly, in response to the argument that Article 248 of the RAPC constitutes an offence to international comity, the judge opined that Article 248 could be used by a litigant in a manner consistent with international customary law and, in and of itself, would not give rise to manifest injustice (at paras. 109-110).

Notwithstanding these considerations, the English courts have nevertheless granted anti-anti-suit injunctions. However, while not determinative, the above reasoning still serves as important guidance with regard to the English judiciary's view on Article 248 of the RAPC.

Context in the EU

In response to the increased use of Article 248.1, the EU has amended its sanctions legislation (14th package) to prohibit all direct and indirect transactions with Russian companies that interfere with arbitration or exclusive jurisdiction clauses by initiating claims in Russia under this provision.

Additionally, EU companies can also claim compensation in the EU courts for losses arising out of claims brought by Russian parties in Russia in violation of arbitration agreements and jurisdictional clauses.

Article 11a of the Council Regulation (EU) 2024/1745 of 24 June 2024 grants EU parties the right to recover losses resulting from claims initiated by Russian parties outside the EU, concerning contracts and transactions impacted by the EU sanctions. This includes claims that are also covered by the "no claims" provision. This provision introduces a new cause of action designed to counterbalance the effect of Article 248 of RAPC, enabling EU companies sued in Russia in violation of EU sanctions, and whose assets have been seized, to seek compensation for their losses. Claims must be filed before the competent courts of the relevant Member State, following "the relevant provisions of Union and Member State law regarding jurisdiction and court procedures […]" (Recital 25 to the Council Regulation (EU) 2024/1745 of 24 June 2024).

It still remains to be seen whether this provision will actually deter Russian parties from litigating their disputes in their domestic courts.

Conclusion

In brief conclusion, the present geopolitical climate poses a major threat to international judicial comity. The Western world, traditionally the center of international arbitration, is no longer a venue of choice for many Russian parties as the procedural mechanism adopted in Russia allows them to bring their disputes home. It is clear that the Russian courts will unconditionally support Russian entities willing to litigate disputes in Russia rather than complying with the applicable arbitration agreements. The degree to which sanctions do in fact affect Russian parties' access to justice is of no relevance to the Russian court.

As of the date of this blog post, we have seen no evidence that this approach will change in the foreseeable future. Unfortunately, it seems that before there can be a resolution of these legal issues, there first needs to be a political resolution.

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