Kluwer Arbitration Blog

Dealing with Anti-Arbitration Injunctions in International Commercial Arbitration

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Since the Russian invasion of Ukraine in 2022 and the European Union's ("EU") subsequent tightening of Russia sanctions, Western parties to international arbitration proceedings involving Russian parties have increasingly been confronted with anti-arbitration injunctions issued by Russian courts. These injunctions have their basis in Article 248 of the Russian Arbitrazh Procedural Code ("APC"), which also allows Russian courts to claim exclusive jurisdiction over disputes involving parties subject to sanctions imposed by "unfriendly states" or the EU. It further enables Russian courts to impose penalty payments on parties not complying with the injunctions. Such penalties are owed to the Russian party and generally correspond to the main claim in the arbitration converted into Russian rubles.

This post discusses the use of Article 248 APC in currently ongoing or recently concluded publicly known arbitrations. In particular, it deals with the legal and factual consequences of the issuance of a Russian anti-arbitration injunction and possible follow-on decisions for the arbitral tribunals concerned, national courts at the enforcement level, and the parties to the arbitration. Before concluding, we present possible "countermeasures".

Application of Article 248 APC in Current Proceedings

The standard Russian parties have to meet under Article 248 APC is low. As already discussed on the blog, the Russian Supreme Court held in the *UralTransMash* case that the imposition of sanctions against a Russian party alone suffices. No concrete disadvantage in the actual arbitral proceedings needs to be shown. But even non-sanctioned Russian parties have by now been able to obtain favorable rulings and injunctions without facing significant obstacles in court. Consequently, the number of Article 248 APC proceedings appears to have increased significantly since 2022. In many instances, the relevant Russian parties are not even participating in the arbitration proceedings initiated against them. Instead, they solely turn to the Russian arbitrazh courts. In particular, Russian state-owned enterprises or their subsidiaries regularly make use of this option.

Implications for Arbitral Tribunals and Annulment Proceedings

While the rationale behind the Russian anti-arbitration injunctions is to block the continuation of international arbitral proceedings, arbitral tribunals will generally not consider them an obstacle to their exercise of jurisdiction. International arbitral tribunals operate under the principle of *Kompetenz-Kompetenz*, allowing them to independently determine their jurisdiction, subject only to the mandatory rules of the applicable *lex arbitri* and the law applicable to the arbitration agreement (should it differ from the *lex arbitri*). Foreign injunctions are generally irrelevant for this assessment. The same should apply to any national court at the seat of the arbitration when faced with applications for annulment.

In line with this approach, e.g. the arbitral tribunal in *Uniper v. Gazprom Export* (discussed in a previous post) appears to have simply disregarded an injunction by the Arbitrazh Court for Saint Petersburg and the Leningrad Region and issued a 13 billion euro award. Other arbitral tribunals that had to deal with anti-arbitration injunctions in prior cases condemned their issuance. For example, in the ICSID case of *Saipem v. Bangladesh*, albeit in a different context, the tribunal found it was:

> "generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in Article II of the New York Convention" (Award of 30 June 2009, para. 167).

Implications at the Enforcement Stage

The same should hold true for enforcement proceedings outside of Russia. Even though Russian parties may seek to rely on Article V(1)(a) or (b) of the New York Convention to resist enforcement, such arguments should not be successful. As long as Russian law does not apply to the arbitration agreement, recourse to Article V(1)(a) ("invalid agreement") is not possible. Russian parties may argue that the arbitral proceedings were unfair or violated their procedural rights, referring to sanctions as a hindrance to their ability to adequately present their defense. Nevertheless, domestic courts generally tend to conduct their independent assessment of the fairness of the proceedings under Article V(1)(b) rather than simply rely on the assessment given by the Russian courts (see, e.g., in the different context of an anti-suit injunction, the High Court of Hong Kong, para. 55). Currently pending arbitrations, however, show that Russian parties or their affiliates–even state-owned ones–continue to be capable of hiring reputable international counsel (see only the PCA case of *Nord Stream 2 AG v. European Union*). What is more, even in the case of sanctioned parties, EU sanctions foresee arbitration exceptions, as reaffirmed by the EU's General Court.

At the same time, the enforcement of any arbitral award in Russia appears to not even be worth considering. In August 2024, for instance, the Arbitrazh Court of the Region of Sverdlovsk refused to enforce an SCC award even in a case where the Russian Supreme had denied an anti-arbitration injunction in 2021.

A separate matter is the risk of enforcement of the Russian penalty payments for non-compliance with the Russian injunctions. The non-Russian parties to the dispute are well-advised to consider their relevant risks. Within the EU, the newly introduced Article 11(c) of Regulation 833/2014,

which was part of the EU's 15th sanctions package, now largely addresses this issue. It obliges EU courts not to enforce any decision based on Article 248 APC. Outside the EU, the legal situation is less straightforward.

Implications for Western Parties Involved

In addition to the risk of enforcement of penalty payments, Russian anti-arbitration injunctions however also present another, more personal risk for the individuals acting on behalf of Western corporates or their own behalf as parties to the arbitration. Russian law penalizes non-compliance with court decisions, and hence most likely also with anti-arbitration injunctions. Article 315 of the Russian Criminal Code even foresees imprisonment. Russia maintains a significant number of mutual assistance agreements with other states, which also extend to criminal matters. Managing directors of parties that continue an arbitration with Russian counterparties despite a Russian anti-arbitration injunction should think twice when booking their next horseback riding tour in Kazakhstan.

Possible "Countermeasures"

As a reaction to the challenges raised by Russian anti-arbitration injunctions, a number of options may be considered. Several parties have already turned to domestic courts outside of Russia to obtain anti-suit injunctions, aimed at restraining Russian parties from continuing anti-arbitration proceedings in Russia. Applications for such injunctions have been successful in several common law countries, where courts are generally open to granting this kind of remedy. The most important limitation will be that a sufficient nexus between the arbitration and the place where the anti-suit injunction is requested needs to be established. In the United Kingdom, however, the courts up to the Supreme Court found a sufficient nexus to be present through the application of English law in an ICC arbitration seated in France between the German UniCredit bank and the Gazprom joint venture RusChemAlliance. The High Court of Hong Kong found a sufficient nexus in the seat of an HKIAC arbitration in Hong Kong in *Linde v. RusChemAlliance*.

Courts in civil law countries, by contrast, will be reluctant to grant anti-suit injunctions. Representative in that regard is a decision by the Higher Regional Court of Düsseldorf of 17 June 2024. The German Code of Civil Procedure, however, allows for another type of application: parties to an arbitration agreement may request a declaration of admissibility of an arbitration – albeit only until the constitution of an arbitral tribunal–under Section 1032(2) of the German Code of Civil Procedure. As part of those proceedings, also the validity of the arbitration agreement may be confirmed. In effect, German law therefore still allows for the confirmation of an arbitral tribunal's jurisdiction despite a Russian injunction.

Given that Russian parties are unlikely to follow anti-suit injunctions issued by courts in common law countries, both such injunctions and declaratory decisions under Section 1032(2) of the German Code of Civil Procedure will essentially have the same effect: they confirm the jurisdiction of an arbitral tribunal to decide the matter, with respective argumentative force for proceedings before other courts. Both instruments, where available, can therefore be useful strategic tools to ensure the enforceability of arbitral awards and counter the enforcement of the

penalty payments under Article 248 APC.

Conclusion

The approach parties should adopt towards arbitrations subject to Russian anti-arbitration injunctions therefore varies from case to case. In light of the circumstances, tribunals will have to apply additional caution to ensure due process and mitigate any allegations of unfair treatment. The non-Russian parties to the arbitration will need to protect themselves as best as they can against the potential follow-on measures the Russian parties may take outside the arbitration, including by evaluating global assets to identify vulnerabilities in jurisdictions favorable to Russia as well as any travel risks.

While countermeasures like anti-suit injunctions and declaratory relief can mitigate risks and increase the chances of enforcement of awards, their availability depends on the specific legal and jurisdictional context. Careful planning, informed decision-making, and proactive strategies are ultimately essential for parties engaging in arbitrations involving Russian entities.

The above is an abbreviated version–slightly updated by reference to subsequently published 15th EU sanctions package–of an article published in the SchiedsVZ | German Arbitration Journal, Vol. 22, No. 6 (2024), which is also included on Kluwer Arbitration. See here for more information on and other contributions to the Journal.

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