Anti-suit injunction in aid of an arbitration

Arbitration agreements (typically just a clause in a contract) are a common feature in material transactions of Russian parties that either involve foreign counterparties or are structured through offshore holding companies. Historically, LCIA (the London Court of International Arbitration) is the most popular institution selected by the arbitration agreements in such transactions. Arbitration agreements are typically incorporated without much consideration about how the future arbitration will play. The parties typically put their faith in a reputable and independent arbitral institution.

References to LCIA have been showing in the Russian news recently due to the corporate conflict between Finvision Holdings and Baring Vostok regarding Bank Vostochny. It appears that the parties have entered into an arbitration agreement, yet there was no mutual will to resolve the dispute in London anymore.

Politics aside, what recourse does a party have if its counterparty refused to go through with arbitration in the institution that they have previously agreed upon and instead launches litigation in a court of a jurisdiction which it finds more convenient? This is not an uncommon situation after all.

The first instrument of hope is the New York Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in 1958). In theory (which usually correlates with practice), if a lawsuit is brought in a jurisdiction that is a signatory to the New York Convention, and the parties have entered into a valid and applicable arbitration agreement, the court should deny jurisdiction and refer the parties to the agreed arbitration mechanism. The party that wants to proceed with arbitration should try to enjoin the proceedings in the local court.

In accordance with Article II of the New York Convention,

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
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> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
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> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The last provision is indeed mirrored in article 8 of the Russian Law on Arbitration (Federal Law No. 382-FZ "On arbitration (arbitral proceedings) in the Russian Federation" dated 29 December 2015). However, the latter, coupled with article 8 of the 1985 UNCITRAL Model Law on International Commercial Arbitration, further contemplates that any party requesting the court to refer the dispute to arbitration shall do so prior to the first statement on the substance of the dispute.

A motion to dismiss, which is generally filed in such circumstances, shall distinctly contain a plea to refer the parties to arbitration. The mere indication of the arbitration agreement entered into between the parties will not suffice and may result in the court going forward with the proceedings despite the arbitration agreement in effect, as in case No. A57-16403/2014. Likewise, Russian courts may qualify the silence on the part of the litigant as a 'green light' to proceed with the case (see case No. A60-5127/2014).

Other grounds enabling local courts to allow proceedings could be that the relevant jurisdiction is not a signatory to the New York Convention, or the court believes that the arbitration agreement is not broad enough or invalid.

In such event, the party that wants to proceed in accordance with the arbitration agreement should attempt to obtain an anti-suit injunction to block the parallel proceedings. Such injunction can be typically obtained from the court of the jurisdiction selected by the applicable arbitration agreement. Yet the question of whether such form of equitable relief is applicable to Russian procedure continues to be a subject of debate and speculation.

In accordance with article 144(5) of the Commercial Procedure Code of the Russian Federation, "the [arbitrazh] court may suspend proceedings if an international court or a court of a foreign state is examining another case, the judgment on which may be of significance for the consideration of the given case". The court is to decide whether the foreign court has jurisdiction over the case and whether it is possible to recognize and enforce its judgments in Russia and bind it over the litigants. The court should also make sure that there is an interrelation and no identity between both cases.

Notwithstanding the above, the stance of Russian supreme courts toward anti-suit injunction has been quite negative. "A court order aimed at prohibition against participating in proceedings in the Russian Federation does not prevent the competent Russian court from hearing the case. The individuals and entities binding by such court orders are to define the risks and potential negative consequences outside the Russian Federation resulting from its violation" (clause 32 of the informational letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 158 dated 9 July 2013 "Review of Russian Commercial Court Practice in Proceedings Involving Foreign Entities").

The aforementioned provision was virtually duplicated in a subsequent Resolution of Plenum of the Supreme Court of the Russian Federation No. 23 dated 27 June 2017 "On Consideration of Cases in Economic Disputes Arising Out of Relations Complicated by a Foreign Element by the Arbitrazh Courts".

Below are several cases which deal with anti-suit injunctions.

Nori Holding and others v PJSC Bank Otkritie Financial Corporation

Nori Holding and others v Public Joint-Stock Company Bank Otkritie Financial Corporation [2018] EWHC 1343 (Comm) (Nori Holdings) is an interesting case that deals the anti-suit injunction against proceedings in a Russian court.

The claimants executed pledge agreements with Bank Otkritie securing several loan agreements. The pledge agreements contained arbitration provisions that selected LCIA as the forum for resolving any disputes:

> "In the event of any dispute or disagreement arising under, or in connection with, this Agreement, such dispute or disagreement shall be resolved by binding arbitration held in London under the rules of the London Court of International Arbitration (which rules are deemed to be incorporated herein; hereinafter – the 'Rules'), save that no requirements of the Rules as to the nationality of arbitrators shall apply, with 3 (three) arbitrators appointed in accordance with the Rules (where each of the Pledgee and the Pledgor shall appoint one arbitrator; the two arbitrators

> so elected shall appoint the chairman). The London Court of International Arbitration shall be the appointing authority. The working language of the proceedings shall be English. The Parties' addresses for service of process shall be the addresses specified in this Agreement."

Soon after the execution of the pledge agreements, the claimants and the bank restructured the loan arrangement and terminated the pledge agreements. The pledge termination agreements also selected LCIA as the forum for resolving any disputes by incorporating by reference the relevant arbitration clauses from the pledge agreements.

A few weeks later, a temporary administrator for the Bank Otkritie was appointed by the Central Bank of Russia. The temporary administrator and the bank commenced proceedings in the Moscow Arbitrazh Court seeking to, among other things, find the pledge termination agreements void and reinstate the pledge agreements. The claimants insisted that the issue of pledge termination agreements validity should be resolved by LCIA in accordance with the respective arbitration agreements.

The English High Court provided the following reasoning for its decision to issue an anti-suit injunction:

> "The legal framework within which this application has to be determined is well established. Where court proceedings are brought (otherwise than in the courts of an EU or Lugano Convention state) in breach of an agreement to arbitrate, the court will generally grant an anti-suit injunction to prevent any further breach unless there are strong reasons not to do so… It does not depend on whether an arbitration has been or is about to be commenced. When such an injunction is sought, it is for the court to determine whether there is a binding arbitration agreement and whether the pursuit of the foreign proceedings constitutes a breach of the agreement. Moreover, an arbitration agreement is distinct from the contract of which it forms part and will be binding notwithstanding the invalidity of the main contract unless the ground for invalidating the main contract applies equally to the arbitration agreement."

As a result of the English High Court decision, representatives of Bank Otkritie petitioned the Moscow Arbitrazh Court to drop the claims against the claimants. However, considering that the bank was under administration of the Central Bank of Russia, the Russian court refused to do so.

In some cases though the anti-suit injunctions do reach the desired effect. For example, in Mace (Russia) Ltd v Retansel Enterprises Ltd & Anor [2016] EWHS 1209 (Comm), the English judge granted an application for an anti-suit injunction against two parties in order to restrain them from taking further steps in proceedings before St Petersburg Arbitrazh Court because there was a binding agreement with an LCIA arbitration clause. As a result of the injunction, the defendants petition the St. Petersburg court to terminate Russian proceedings.

Alfa-Bank v Reznik

Those who defy anti-suit injunction need to be wary of possible criminal penalties. Alfa-Bank v Reznik [2016] EWHC B21 decision serves as an illustration. Ilya Reznik, a Russian businessman, provided a personal guarantee securing the loan from Alfa-Bank to a legal entity affiliated with him. The personal guarantee was governed by English law and subject to LCIA arbitration in London.

In 2016, Alfa-Bank served a demand on Reznik pursuant to the guarantee. An English court has granted a worldwide freezing order in aid of the claim by Alfa-Bank in the LCIA arbitration. Reznik did not comply with the freezing order and did not provide any information in accordance with the order. The English judge did an extensive analysis of whether Reznik was aware of the freezing order and LCIA arbitration and concluded that he did.

In conclusion, the judge stated the following:

> "The degree of culpability involved, therefore, I regard as a high one. The order which he has breached is a very important aspect of the [world freezing order] and he has deliberately ignored it. There is no reason to think that anyone else has been involved. The responsibility is his and his alone. He must have appreciated the seriousness with which this court took his breach. The letters from the Bank's solicitors, the penal notice and the other matters that I have referred to must have brought that home to him. He has not cooperated in any way. He has not shown any apology or remorse. He has not put forward any explanation or excuse for failing to comply with the order.
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> I conclude, therefore, that, in order to punish the contempts and in order to encourage compliance now with the [world freezing order], I should impose a sentence of 18 months' imprisonment in respect of each of the two contempts which I have found, which are to run concurrently with each other."

Please feel free to contact us if you have any questions about international arbitration agreements. Our team will be happy to assist you with both drafting and arbitration issues.

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