

November 2023

Anti-suit injunction in favour of arbitration — Can sanctions override an arbitration agreement – the effect of foreign law on the arbitration agreement**LINDE GMBH AND ANOTHER V. RUSCHEMALLIANCE LLC [2023] HKCFI 2409**

The Hong Kong Court of First Instance (HKCFI) upheld a temporary anti-suit injunction, restraining the Defendant from continuing proceedings in Russia brought under Russian law but in breach of an arbitration agreement referring all disputes to arbitration administered by the Hong Kong International Arbitration Centre (HKIAC).

Following the imposition of sanctions by the European Union (EU) against Russia, the plaintiffs served a sanctions notice on the defendant suspending work on a gas processing plant and claimed suspension costs. The defendant subsequently sought to terminate the contract, and demand repayment of advance payments. The defendant applied for and obtained a freezing order from the Russian courts over the plaintiffs assets in Russia, on the basis that the plaintiffs would not be able to pay the sums demanded to Russia and relying on article 248.1 of the Russian procedural code which grants the Russian court the exclusive jurisdiction to deal with matters arising in connection with foreign sanctions.

The plaintiffs commenced arbitration at the HKIAC and successfully applied for, an interim anti-suit injunction requiring the defendant to stay the Russian proceedings on the basis that the contract contained an arbitration agreement. The defendant opposed the anti-suit injunction claimant that the Russian court has exclusive jurisdiction over the dispute, the arbitration agreement is invalid, that Hong Kong would be biased and/or affected by the EU sanctions and that it would not be just to continue the injunction.

Dismissing the defendant's application to discharge the injunction, the Court ruled that, notwithstanding the provisions of the Russian procedural code, the defendant had given up their right to insist on the Russian jurisdiction by agreeing to arbitrate.

What are the practical implications of this case?

Given the increase of sanctions against Russia, some Russian companies, anticipating hostile administration of justice outside Russia are seeking to rely on Russian procedural law to challenge agreed dispute resolution procedures. In this case in particular, the Russian court ruled on 8 June 2023¹ that the fact that measures of a restrictive nature/sanctions are put in place against a Russian person participating in a dispute in an international commercial arbitration located outside Russia can by itself be sufficient to conclude that such person's access to justice is limited. However, as a matter of Hong Kong law, if the parties agreed to arbitrate in a jurisdiction like Hong Kong where no restrictive measures/sanctions towards Russian persons have been applied, the HKCFI considers that the arbitration agreement should be upheld.

Unlike a situation of *forum non conveniens* an injunction to restrain the foreign proceedings brought in breach of an arbitration agreement should, given that there is a clear jurisdictional agreement, be ordinarily granted in Hong Kong. However, if the foreign proceedings have been commenced and are at an advanced stage this may be a factor to render it unjust or inconvenient to grant or continue an injunction. A party must act promptly to seek anti-suit injunction.

What was the background?

The defendant entered into a contract with the plaintiffs to construct a gas processing complex in Russia. Following Russia's invasion of Ukraine, the EU imposed sanctions on Russia. As a result the plaintiffs suspended performance of work under the contract and claimed approximately EUR7m in suspension costs. The defendant accused the plaintiffs of breaching the contract by suspending those portions of the work that were not affected by the sanctions. The defendant issued a termination notice on 23 September 2022 purporting to terminate the contract and further claimed for reimbursement of the advance payments in the sum of approximately EUR970m as well as damages.

On 21 February 2023, the defendants obtained a freezing order over the plaintiffs' assets in Russia and commenced proceedings in Russia relying on part 4 of the Article 248.1 of the Russian Arbitrazh Procedural Code. On 4 March 2023 the plaintiffs commenced arbitration proceedings in Hong Kong and on 17 March 2023 obtained an interim injunction to stay the Russian proceedings. The defendant applied to discharge the injunction mainly on the grounds that (a) the plaintiffs failed to make full and frank disclosure regarding its ability to pay damages should the Court subsequently determine that the grant of the injunction caused loss to the defendant; (b) the Russian court has exclusive jurisdiction over the claims and the arbitration agreement in the contract is invalid in Russia; and (c) the defendant cannot gain access to justice and obtain a fair trial by arbitration in Hong Kong.

What did the court decide?

The Court considered the following in their judgment:

- 1 Applicable legal principles concerning whether to grant anti-suit injunctions in the arbitration context:

The Court is prepared to grant an injunction to restrain proceedings brought in breach of an agreement to arbitrate and will ordinarily exercise its discretion to grant such an injunction unless the defendant can

¹ <https://kad.arbitr.ru/Card/6047cdd9-1247-4d04-b76b-bb6f14579d6a>

show that there is a strong reason to the contrary. There is no need to prove that the arbitral tribunal is the more convenient forum.

2 Whether there was material non-disclosure in the plaintiff's application to the Court for the injunction

The plaintiffs' payment of damages arises as a result of a separate obligation assumed under an order of the Court, as opposed to the satisfaction of an obligation arising under the contract which is the subject matter of the sanctions. So failure of the plaintiffs to raise the impact of the sanctions as rendering it unable to pay damages does not constitute non-disclosure of a material fact or law, to justify discharge of the injunction.

3 Whether the injunction should be granted/continued or discharged

The Court did not consider it necessary to make a conclusive finding on whether the defendant can invoke article 248.1 of Russia's Procedural Code, when article 248.1 is made expressly subject to the absence of an agreement between the parties to submit their dispute to arbitration.

Generally speaking, foreign proceedings in breach of an arbitration agreement will ordinarily be restrained by the grant of an injunction restraining the party in breach from conducting such proceedings, unless there are strong reasons to the contrary shown. To demonstrate that there are "strong reasons" for suing in a non-contractual forum, there must be something unforeseeable at the time of the contract, or something so exceptional that goes to the interests of justice. As provisions of the contract show that the effect of the sanctions was not unforeseeable at the time of the contract and that arbitration in Hong Kong in accordance with the contract would afford a fair trial to the defendant, the Court held that the injunction should be continued.

Case details

- Court: IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTRUCTION AND ARBITRATION PROCEEDINGS
- Judge: Hon Mimmie Chan J
- Date of judgment: 27/9/2023

Contact us



Andrew Rigden Green

Partner

T: +852 2533 2761

E: andrew.rigdengreen@shlegal.com

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