

Russian “Anti-Suit Injunction” to Proceedings in Foreign Arbitration Tribunal

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Abstract. The paper describes a new legal remedy against foreign arbitration tribunals in the face of sanctions imposed against Russian people, briefly discloses its origins and application abroad, the first judicial practice. The author, based on the analysis of foreign and Russian literature, judicial practice, deduces basic features of anti-suit injunction. Particular attention is paid to the fact in issue stipulated in Article 248.2 of the Arbitration Procedural Code of the Russian Federation. The paper provides a rationale for the optional nature of unenforceability of arbitration agreements.

1 Introduction. Objectives of the new law

In 2020, Federal Law No. 171-FZ of June 8, 2020 On Amendments to the Arbitration Procedure Code of the Russian Federation in Order to Protect the Rights of Individuals and Legal Entities in Connection with Restrictive Measures Granted by a Foreign State, State Association and/or Union and/or State (Interstate) Institution of a Foreign State or State Association and/or Union” was adopted (hereinafter referred to as Federal Law No. 171), which supplemented the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as the APC RF) with Articles 248.1 and 248.2.

Based on some preparatory materials, the following goals behind the Law can be inferred:

- expanding opportunities for legal protection of Russian legal entities and individuals who have been subject to restrictive measures by foreign states, state associations and/or unions and/or state (interstate) institutions of a foreign state or state association and/or union by introducing new legal instruments into the Russian arbitration procedural legislation;
- establishing conditions under which the rules of exclusive competence of arbitration courts of the Russian Federation on disputes involving persons against whom restrictive measures are imposed, by including Article 248.1 in the APC RF;
- establishing conditions for application by arbitration courts of the Russian Federation of a prohibition to commence or continue proceedings in disputes involving persons against whom restrictive measures are imposed, by adding Article 248.2 into the APC RF;
- integrating interim relief into Russian arbitration procedural legislation that would ensure binding and

enforceable measures provided for by Federal Law No. 171.

Federal Law No. 171 introduced into the Russian procedural legislation (Article 248.2 APC RF) a new legal instrument that allows a person concerned to obtain an order issued by a court restraining to commence and/or continue a proceeding in foreign jurisdiction, largely similar to the English “anti-suit injunction”.

2 Historical Basis and Comparative Law

An issue has been occasionally discussed in Russian doctrine and jurisprudence as to whether it is possible to apply a prohibitive injunction to commence and/or continue a foreign lawsuit (“anti-suit injunction”). At that, the positions were different, from proposing to carefully study this institution for its applicability to the Russian judicial procedure [1-6], to questioning whether it is possible to apply it due to a number of reasons [7; 8, p. 317; 9], the main of which being its contrariety to the Russian public policy and the fundamentals of Russian justice.

Russian judicial practice was quite cautious about this institution, and, most likely, negative rather than positive. In particular, **Paragraph 32 of Information Letter No. 158 of the Presidium of the Supreme Arbitrazh Court of the Russian Federation dated July 9, 2013 Review of the Practice of Consideration of the Cases Involving Foreign Persons by Commercial Courts**” states the following:

“Provisional measures in the form of prohibition to participate in the consideration of a dispute in the courts of the Russian Federation, taken by a foreign court, do not prevent the commercial court from considering the dispute <...> A judicial “anti-suit” order issued by a foreign court, neither by its nature nor by virtue of international and Russian legal rules may prevent from

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arbitrating in the Russian Federation and have legal implications in the Russian Federation.”

Paragraph 52 of Resolution No. 23 of the Plenum of the Supreme Court of the Russian Federation of June 27, 2017 On Consideration by Commercial Courts of Economic Disputes Involving Cross-Border Relations” states the following:

“Provisional measures in the form of prohibition to participate in the consideration of a dispute in the courts of the Russian Federation, taken by a foreign court, do not prevent the commercial court from considering the aforementioned dispute, if by law that dispute is within the competence of the commercial court.”

Thus, it could be stated that there is a negative attitude towards anti-suit injunctions by the highest judicial authorities of the Russian Federation prior to the adoption of Federal Law No. 171 due to it being perceived as a constraint or even an illegal regulator of the competence of Russian courts, contrary to the rules of the APC RF and international treaties on legal assistance, and, as a result, due to it being contrary to the public policy of the Russian Federation.

The following can be said about a legal nature of this institution and its scientific characteristics. This preventive injunction originated from English law and forbids a defendant who is subject to the jurisdiction of the English court from starting or continuing civil proceedings in a foreign state or participating in arbitration [10, p. 434]. In the event that this injunction is violated, a person concerned may be subject to procedural and criminal sanctions for contempt of court.

The term “anti-suit injunction” is sometimes “... misleading, as it gives the impression that the order is directed to and binding upon another court. It could be assumed that the jurisdiction of a foreign court is being questioned and the injunction is an order for a foreign court not to exercise the powers conferred on it by state law. All this is wrong” [10, p. 435].

To explain the details of this preventive injunction, Neil H. Andrews cites an extract from a famous English court decision: “When the English court grants any freezing injunctive relief, it is awarded only against a party concerned. It is not awarded against a foreign court ... The relief is binding only upon this party and is effective only if this party is under the English jurisdiction and can be compelled to comply with the order ... We emphasize that injunctions granted for these purposes are against a party in bad faith, and not against other jurisdictions” [10, p. 436].

This circumstance – that the order granted by the English court restraining the actual or potential participation of a person in another proceeding is directed to a potential or actual party to judgement, and not to another court – is also pointed out by T. Raphael, the author of a special study on anti-suit injunctions [11, p. 4].

Therefore, if a foreign proceeding has already been commenced, “by such an injunction, the plaintiff is prohibited from continuing the proceedings commenced in the foreign court. Such an injunction is not directed to the foreign court (which would be contrary to international law), but to the plaintiff who is compelled

to ... withdraw his/her request for arbitration or refuse to further participate in the proceeding” [12].

Although anti-suit injunction is a remedy that goes back to the common law system in England and the United States, its application is not completely rejected by specialists from civil law states. In particular, H. Schack writes that “in Germany, an action to compel a defendant to refrain from foreign proceedings has a chance of success if there is a substantive requirement to refrain from foreign proceedings.” [12]. This approach is interesting, since it is known that the Russian civil proceeding, subsequently followed by arbitration tribunal, has its historical roots in the German civil proceeding. In addition, there is some judicial practice on this issue, for example, the Court of Appeal in Paris and the Supreme Land Court in Dusseldorf [11, pp. 1-2].

Summarizing the above, it is possible to define anti-suit injunction as follows:

firstly, it is an injunction restraining another person to commence or maintain a parallel proceeding in another court or arbitral tribunal;

secondly, this relief is awarded specifically against certain parties – individuals or legal entities;

thirdly, this measure is not awarded against a foreign court and/or arbitral tribunal, it does not call into question the competence of the foreign court;

fourthly, this preventive injunction is based on the competence of the English court, resulting from the law or agreement of the parties, or other circumstances that have legal and factual relevance for a particular trial at the English court;

fifthly, this preventive injunction is, ultimately, a way to combat one of the parties abusing their procedural rights through unfair parallel proceedings in another court in order to make it difficult or impossible for a future judgment of the English court to be considered.

Therefore, only through the prism of combating the abuse of procedural rights, in order to eliminate a conflict of competences of different courts and future judicial acts, should the content of this injunction be assessed.

This institution is characteristic of common law countries and is hardly ever used in the European Union countries [13]. In particular, the EU Court of Justice in Luxembourg in the decision of 10 February, 2009 in the Allianz SpA case (formerly Riunione Adriatica di Sicurtà SpA) and *Generali Assicurazioni Generali SpA v. West Tankers Inc.* No. C-185/07 expressed its position on the incompatibility of anti-suit injunctions with European law [8, p. 303; 10, pp.441-442].

3 Overview of Article 248.2 APC RF

Summarizing all of the above, these novels can be generally based on the rules of English law. The first assessments vary from critical [14] to positive [15-16]. In the author’s opinion, Article 248.2 APC RF is a long-overdue measure that can be applied even within the current legislation. In one of his earlier publications, the author wrote that “anti-suit injunction in the form of an

order issued to forbid commencement and/or continuation of foreign proceedings can be taken under Paragraph 2 Part 1 Article 91 APC RF as “a prohibition restraining the defendant or prospective defendant to perform certain actions concerning a subject matter”, since in fact it is exactly a prohibition. Consequently, it is encompassed by a broader type of anti-suit injunctions referred to in Paragraph 2 Part 1 Article 91 APC RF [4, pp. 84-92]. Therefore, the author believes that Article 248.2 APC RF only specifies the conditions for anti-suit injunctions to be applied, since being listed in accordance with Part 1 Article 91 they are not secret.

Thus, Article 248.2 APC RF is aimed at protecting the interests of the Russian party that, firstly, has already become a party to arbitration proceedings in international commercial arbitration outside the Russian Federation, or, secondly, arbitration proceedings may be initiated against it, and thirdly, such proceedings (initiated or potentially possible) involve a Russian restricted person, i.e. subject to restrictive measures.

4 Are the Norms Stipulated in Article 248.2 APC RF Super-Imperative?

This is an important issue that determines, among other things, the approaches to a subject matter and the very possibility of obtaining an injunction to commence or continue proceedings involving restricted persons.

Russian law delineates the so-called super-imperative norm. Under Part 1 Article 1192 of the Civil Code of the Russian Federation “The regulations of the present section shall not affect the applicability of the imperative norms of the legislation of the Russian Federation which, due to some indication in the imperative norms themselves or due to their special significance, in particular, for safeguarding the rights and law-protected interests of participants in civil law relations, regulate the relevant relations, irrespective of the law that is subject to application (direct application rules)”.

As noted by the analysts of Article 1192 of the Civil Code of the Russian Federation: “A legal provision is imperative if it says that “it regulates relevant relations regardless of the foreign applicable law”. In addition, the court itself may qualify a provision as imperative if the legislator has emphasized “special significance” of the imperative provision, which, in particular, can be expressed in the focus of the provision on “ensuring the rights and law-protected interests of parties to a civil transaction” [17].

Judicial practice drew attention to the fact that: “The arbitration court applies super-imperative norms (Article 1192 of the Civil Code of the Russian Federation) to disputed legal relations, regardless of the law chosen by the parties as applicable” (Paragraph 16 of Information Letter No. 158 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated July 9, 2013 Review of the Practice of Consideration of the Cases Involving Foreign Persons by Commercial Courts).

A similar provision is emphasized in Paragraph 11 of Resolution No. 24 of the Plenum of the Supreme Court

of the Russian Federation of July 9, 2019 “On the Application of Rules of International Private Law by the Courts of the Russian Federation”: “A court may take into account imperative norms of another country closely related to the relationship if under the law of that country such norms are direct application rules (Part 1 Article 1192 of the Civil Code of the Russian Federation)”.

The legal doctrine also notes that super-imperative norms are “rules of direct action and immediate application (lois d'application immediate). They are to be applied regardless of which law is recognized as competent” [18].

Among super-imperative norms coming under unconditional application, there are both material and procedural provisions. In particular, an example was given regarding super-imperative procedural norms: “Among the super-imperative norms of Russian legislation, those that contain an indication to it can be primarily accentuated. Thus, in accordance with Paragraph 2 Article 404 of the Code of Civil Procedure of the Russian Federation “jurisdiction of cross-border cases established by Articles 26, 27, 30 and 403 of this Code cannot be changed by agreement of the parties” [19].

Therefore, the rules set out in Articles 248.1, 248.2 APC RF, most likely, can be qualified as super-imperative norms of procedural law applied at the request of a person concerned – a Russian legal entity or an individual. Besides, an order compelling a person to carry out a certain act directly prohibited by the super-imperative norms set out in the legislation of the Russian Federation is considered as one of the elements of an act of public nature (Paragraph 1 of Information Letter No. 156 of the Presidium of the Supreme Arbitration Court of the Russian Federation Summary of Arbitrazh Courts’ Rulings in Cases for Application of Public Policy as the Ground to Deny recognition and Enforcement of Foreign Judgements and Awards, 26 February 2013 and Paragraph 51 of Decree of the Plenum of the Supreme Court of the Russian Federation dated December 10, 2019 No. 53 On Fulfilment by Courts of the Russian Federation of the Functions of Assistance and Oversight in Respect of Arbitral Proceedings and International Commercial Arbitration) [20-21].

5 The subject matter in the case on the grant of anti-suit junction to continue proceedings in international commercial arbitrations located outside the Russian Federation, for disputes specified in Article 248.1 APC RF

Pursuant to Part 2 Article 65 APC RF, the circumstances relevant to the case to be properly considered shall be determined by the arbitration court on the basis of claims and objections of the persons involved in the case, in accordance with the applicable rules of substantive law. “The sources for determining the subject matter are: 1) provisions of substantive law (in some cases, provisions of procedural law); 2) grounds for a claim and defenses

to a claim” [22]. As the doctrine correctly noted, “substantive law offers a model of abstract evidence without reference to specific circumstances” [22].

Since injunctive relief is being discussed, the facts included in the subject matter are mainly of procedural-legal nature, since they are related to determination of the competence of a state court and/or international commercial arbitration. In accordance with a well-established approach in the Russian legal doctrine, the norms of competence (Jurisdiction and Cognisance) are of procedural nature and are part of inter-branch institute of jurisdiction, which is part of the system of arbitration procedural, civil procedural and other procedural branches of law (being branches of public law) [23-26].

Therefore, the subject matter in the case on the grant of anti-suit injunction to continue the proceedings in international commercial arbitrations located outside the Russian Federation in relation to the disputes referred to in Article 248.1 APC RF, includes the following legal facts, based on the assumptions of Articles 248.1, 248.2 APC RF.

The main fact is the evidence that there are restrictive measures granted by a foreign state, a state association and/or a union and/or a state (interstate) institution of a foreign state or a state association and/or a union, in relation to a Russian person – an applicant under Article 248.2 APC RF, which is a party to this arbitration agreement.

The fact is crucial in terms of the conditions for applying the assumptions of Article 248.2 APC RF, since in accordance with the Explanatory Note and the Conclusions of the Committees of the Federal Assembly of the Russian Federation, Articles 248.1, 248.2 were associated with the application of restrictive measures by foreign states and organizations.

Therefore, the court, first of all, must establish and qualify the measures taken against the applicant as restrictive, i.e. to determine the subject criterion for the application of Article 248.2 APC RF. As per the doctrine, this fact refers to a number of directly legal-productive, since the presence of restrictive measures granted by those foreign persons specified in Article 248.1 APC RF in relation to citizens of the Russian Federation gives the right to the latter (Russian person) to justify his/her right to initiate an injunction.

Facts confirming the status of a Russian person in terms of the criteria in Part 2 Article 248.1 APC RF – application of restrictive measures specifically in relation to this Russian person.

The fact is also of prominent importance in the subject matter, since it determines the subject criteria for the application of Article 248.2 APC RF, confirming that restrictive measures were taken by the subjects specified in Part 1 Article 248.1 APC RF, in relation to the Russian persons specified in Paragraph 1 Part 2 Article 248.1 APC RF. In the doctrine, such facts are referred to as the facts of active and passive legitimation, which determine the connection of a disputed legal relationship with its participants.

Facts confirming the exclusive competence of arbitration courts in the Russian Federation on the criteria set out in Article 248.1 APC RF.

The fact is directly indicated in the conditions of application of Article 248.2 APC RF. As stated in Part 1 Article 248.2 APC RF, “a person in respect of whom proceedings have been initiated in a foreign court, international commercial arbitration, located outside the territory of the Russian Federation, for disputes referred to in Article 248 1 of this Code...” is entitled to apply to the arbitration court.

The fact of presence of an arbitration agreement to consider disputes that have arisen or likely to arise in international commercial arbitration located outside the Russian Federation.

Since the grounds for imposing a ban may only be an already arisen or likely to arise arbitration case in international commercial arbitration, accordingly, pursuant to Part 1 Article 248.2 APC RF, it is necessary to prove an arbitration agreement established by an international treaty of the Russian Federation.

Facts confirming the intention to initiate proceedings in international commercial arbitration located outside the territory of the Russian Federation, or the fact of commencement of proceedings in international commercial arbitration, including claims, demands, suits and other documents (Paragraph 1 Part 4 Article 248.2 APC RF)

The facts are also indicated consistently in the assumptions of Article 248.2 (Paragraph 1 Parts 4, 8-10). For example, as per Part 1 Article 248.2 APC RF, “a person against whom proceedings have been initiated in a foreign court, international commercial arbitration located outside the territory of the Russian Federation, in disputes specified in Article 248.1 of this Code, or if there is evidence that such proceedings will be initiated” is entitled to apply to the arbitration court with a statement prohibiting initiating or continuing such proceedings.

The last two facts are also included in the subject matter in cases of application of anti-suit injunctions against international commercial arbitration in the United States [27].

Paragraph 1 Part 4 Article 248.2 APC RF also states that “copies of documents confirming the intention to initiate proceedings in a foreign court, international commercial arbitration located outside the territory of the Russian Federation, or the fact of the commencement of proceedings in a foreign court, international commercial arbitration ...” should accompany the application to prohibit initiating or continuing proceedings.

Optionally, not necessarily though, the subject matter includes the following legal fact: the circumstances (if any) confirming that the agreement of the parties, according to which the consideration of disputes with their participation is within the competence of international commercial arbitrations located outside the Russian Federation, cannot be executed by a party to the dispute – herein by the applicant (Part 4 Article 248.1 APC RF and Paragraph 4 Part 2 Article 248.2 APC RF).

An indication to the circumstances of failure by a party to the dispute to execute a judicial act is optional, since Paragraph 4 Part 2 Article 248.2 APC RF explicitly states that they are included in the subject matter and are proved only “(if any)”. Therefore, the lack of evidence that the arbitration agreement is not executed does not prevent a Russian person from initiating an application under the rules of Article 248.2 APC RF and a positive decision on the grant of anti-suit injunction by the Arbitration Court of the Russian Federation.

6 First court practice

So far judicial practice has not had any certainty in interpreting the conditions for the application of Article 248.2 APC RF. Thus, Ruling No. 309-ЭС21-6955(1,2,3) of the Supreme Court of the Russian Federation dated May 28, 2021 in case No. A60-36897/2020, stated that “For dispute resolution, the courts were guided by Articles 248.1, 248.2 APC RF and concluded that the applicant failed to provide evidence on any circumstances limiting access to justice, not allowing the right to judicial protection in the Arbitration Institute of the Stockholm Chamber of Commerce.

The courts proceeded from the fact that “JSC Uraltransmash fully exercises its right to judicial protection in the Arbitration Institute of the Stockholm Chamber of Commerce, for more than two years has been actively participating in arbitration proceedings, appointed a well-known and respected arbitrator, presented many procedural documents, including the counterclaim, has access to qualified legal assistance ...”.

Thus, in this case, the court, within the powers to determine the subject matter and distribute evidentiary duties, considered it necessary to obtain from the Russian party that has become the object of sanctions evidence on any obstacles to justice under the previously concluded and already executed arbitration agreement. The circumstance complicating the position of the Russian party was that the applicant had been continuing arbitration proceedings abroad for more than two years and had no real obstacles to that.

In another case, a Russian person entered into an arbitration agreement with a foreign company and applied for remedies under Article 248.2 APC RF before applying to the arbitration court. Ruling No. 09AII-80251/2019-ГК of the Ninth Arbitration Court of Appeal dated February 10, 2020 in case No. A40-149566/2019, stated the following:

“The arbitration clause puts the foreign person (the defendant) in an advantageous position over the plaintiff, since under the current sanctions regime against the plaintiff, his/her ability to protect his/her rights and economic interests is significantly limited. When concluding the disputed orders, the parties could not foresee that sanctions would be imposed by a foreign state.

Meanwhile, the agreement to refer the dispute to the Arbitration Court cannot be executed, since the US sanctions were applied to the plaintiff, and the defendant, being a person of the United States, refuses to fulfill the

obligations assumed under the Orders, to pay the existing debt, which is not refuted by the latter.

It is also clear from the case file that the defendant has not provided a response to any of the plaintiff’s claims, or to the proposal to amend the arbitration clause in connection with freezing relief granted to US persons to enter into any communications with restricted persons. In view of the US sanctions, an arbitral award at any location of the debtor-defendant, except for the Russian Federation, cannot be enforced, because all bank transfers to the plaintiff are blocked, since financial transactions pass through correspondent accounts of banks controlled by the US Federal Reserve System. Thus, the US sanctions and the debtor’s conduct directly indicate that the agreement to refer the dispute to arbitration tribunal cannot be enforced.”

Ruling No. 305-ЭС20-14523 of the Supreme Court of the Russian Federation of October 12, 2020 in case No. A40-149566/2019 stated that “... under the current US sanctions regime against society, its ability to protect its rights and economic interests is significantly limited, given that the rights and interests of society at present can only be protected within the territory and jurisdiction of the Russian Federation, the court came to the conclusion that there are grounds for changing the terms of the agreement and satisfied the claims.”

Unlike the case mentioned before, here the Russian party did not apply to the arbitration court and provided evidence of the impracticability of the arbitration agreement, which the arbitration court finally noted.

By this Ruling, the Supreme Court of the Russian Federation noted the following: “Nor does an applicant’s argument about absolute changes in the terms of the agreements between the parties on the choice of means of resolving any potential disputes indicate a significant miscarriage of justice in the contested judicial acts, since in the event of a significant change in circumstances, in particular, cancellation of restrictive measures against its counterparty, the applicant is not deprived of the opportunity to justify the enforceability of the original agreement on dispute resolution.”

Herewith, the Supreme Court of the Russian Federation confirmed the position on the absolute right of the applicant to change the terms of the agreement on the choice of means of dispute resolution, including through Articles 248.2 APC RF. At that, the right of the other party to appeal this judicial act in cassation procedure (Part 9 Article 248.2 APC RF) and to return to the original jurisdictional conditions for dispute resolution in case of cancellation of restrictive measures is retained.

7 Conclusion

Thus, freezing injunctions awarded against Russian persons and the arbitration agreement executed under restrictive conditions violates the public policy of the Russian Federation. The provisions stating that a Russian person is entitled to apply to the arbitration court in the manner provided for in Article 248.2 APC RF with a statement prohibiting initiating or continuing

proceedings for disputes involving Russian persons in respect of whom restrictive measures have been introduced are considered super-imperative and are granted to application by a competent arbitration court of the Russian Federation at the request of a Russian legal entity concerned.

The possibility of non-recognition or recognition of the ban of the Russian court granted under Article 248.2 APC RF, and the effectiveness of these measures depends on a variety of circumstances. However, the task of the law is to provide its subjects with various legal means and the possibility of choosing them. Therefore, further enforcement will show the degree of effectiveness of the new legal remedy.

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