

English anti-suit injunctions in Russian bankruptcy – evolution or revolution?

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Over the past few months, Her Majesty's High Court of Justice in England has issued a number of landmark judgments relating to the application of anti-suit injunction to claw back actions pending in Russian bankruptcy proceedings.¹ While, in general, Russian courts tend not to recognise any interference from foreign courts, it appears that these judgments will have important legal implications for all clawback actions in Russia which are based on English law contracts with arbitration or exclusive jurisdiction clauses.

Since the authors are not qualified in English law, and are not in a position to comment on the purely English law aspects of the injunctions, this article focuses on the Russian view of the approach taken by the High Court of Justice and its reflection in the local proceedings. Using an example of one Russian bankruptcy case, we will briefly consider the effect of anti-suit injunctions and the problems that this development brings.

Clawback actions in Russian bankruptcy – jurisdictional issues

In line with the general approach employed in many jurisdictions, the Russian bankruptcy law provides for a number of special bankruptcy-related grounds for challenging a debtor's suspicious transactions (the so-called 'clawback action'), which differ from the general civil grounds for invalidity. Without going into details, the entire set of grounds for challenging transactions in Russian bankruptcy legislation comes down to the prevention of actions aimed at the illegal withdrawal of the debtor's assets prior to its bankruptcy. The main difference between the special grounds of the bankruptcy law and the general civil grounds for challenging a transaction is that, through bankruptcy grounds, a type of public interest pertaining to the institution of bankruptcy as such is secured.²

Article 61.8 of the Russian Bankruptcy law sets the following fundamental rule establishing competence of the Russian arbitrazh (state commercial) courts over

disputes for invalidation of the debtor's transactions: 'An application for invalidation of the debtor's transaction must be submitted to the arbitrazh court, which considers such debtor's bankruptcy case, and shall be considered within this bankruptcy case.'

In other words, the Russian bankruptcy law establishes the principle of concentration of the specific disputes within a bankruptcy case, which includes inter alia disputes on debtor's transaction invalidation. From a Russian judge's perspective, all cases challenging debtor's transactions must be considered by the same court, which supervises the whole bankruptcy case. In practice, this rule (with rare exceptions³) is understood as setting exclusive jurisdiction of Russian arbitrazh courts over the disputes for invalidation of the debtors' transactions on the grounds provided by bankruptcy law. A direct consequence of this approach is that Russian courts tend to ignore arbitration (prorogation) clauses that are included in the agreements being invalidated.

The general approach of the Russian courts is that the provisions of bankruptcy law setting special grounds for invalidation of transactions have a specific public policy background, especially when such claims are brought in the bankruptcy proceedings of the banks and other financial institutions by the Deposit Insurance Agency (DIA) in its capacity as official receiver. One of the fundamental Russian authorities dealing with this issue is the *Phosint Limited* case,⁴ where the Supreme Court of Russia ruled as follows:

'Thus, a bankruptcy prevention procedure was initiated against the bank – a rehabilitation carried out by the DIA in accordance with the requirements of a special law and regulations of the Bank of Russia issued in its development, which implied public interference in private-law relations in the credit sphere, aimed, inter alia, at protecting the rights of depositors, during which the existence of a disputed contract was established, the claim for invalidation of which was lawfully submitted by the bank to the arbitrazh court.'

‘Due to the fact that the financial activities carried out by the state in the person of the Agency in the organisational and legal form of a state corporation, for the implementation of measures to prevent the bankruptcy of a credit institution, are state activities of a public nature, economic and social orientation, the dispute was not subject to transfer to the arbitration.’

A similar approach was taken by the Russian courts in the *Figebor Consulting* case,⁵ the *Russian Investment Bank* case⁶ and other cases where the defendants raised objections to the competence of Russian arbitrazh courts. Russian courts disregard arbitration clauses and ignore the will of the contracting parties for the above reasons – which are occasionally complemented by further considerations of the bankrupt’s lack of funds to pay the arbitration fees or simply because the concentration of public interest in bankruptcy cases does not allow any disputes to be referred to arbitration.⁷

This is widely used by Russian bankruptcy receivers or creditors (subject to certain conditions), who are entitled to apply for invalidity of the debtor’s transactions. As a consequence, some foreign counterparties of the Russian debtors find themselves in very uncomfortable situations, dealing with multi-million claims in a non-contractual forum. Until recently, there was little hope for improvements and a more pro-arbitration approach.

The IBSP case – a new hope...

The winds of change have blown from the city of Saint Petersburg, where the local arbitrazh court is considering the huge bankruptcy case of the International Bank of Saint Petersburg (IBSP) – formerly one of the largest banks in the north-west region of Russia. In this case, the DIA, being the official receiver of IBSP, is challenging a number of transactions with IBSP’s foreign counterparties on special grounds provided for by the bankruptcy law. The contracts that give rise to the DIA’s claims are governed by foreign (mostly English) law, and contain arbitration clauses in favour of the London Court of International Arbitration (LCIA) and other reputable arbitration centres.

Despite the aforementioned uniform approach that has been established in Russian court practice, a number of respondents in the IBSP bankruptcy case – namely RiverRock Securities Limited and Louis Dreyfus Company Suisse S.A. – have applied to the High Court of Justice for an anti-suit injunction. In the English proceedings, the DIA constructed its objections to the application for anti-suit injunction essentially on the following three basic grounds:

- the proceedings in the Russian arbitrazh court are not being pursued by IBSP but by the DIA, which is not a party to the agreement containing an arbitration clause;
- the arbitration agreement does not cover the claims brought in the arbitrazh court in a bankruptcy case while such claims are guided by special provisions of the bankruptcy law; and
- in any event, the claims brought in the arbitrazh court are non-arbitrable.

The High Court of Justice did not find these arguments convincing and granted the anti-suit injunction, by which the DIA, IBSP, their agents and representatives were prohibited from advancing in front of the Russian court any claims arising from the agreements containing arbitration clauses. We will not go into detailed discussion of the approach taken by the English court (which has been dealt with in numerous publications by our English colleagues), but will touch upon the actual effect of the injunction in Russia. For the sake of completeness, it will be sufficient to say that the judge did not find a ‘good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings’.⁸ The court also found that the DIA’s claims are contractual in nature, and therefore are covered by the arbitration clause.

In this context, it is worth mentioning that, until recently, the prevailing approach of Russian courts towards anti-suit injunctions was dominated (although with some exceptions⁹) by the widely discussed *Nori Holding and others v PJSC Bank Otkritie Financial Corporation* case.¹⁰ As a result of the English High Court decision granting the application of Nori Holding, the representatives of Bank Otkritie (ie, the DIA as its receiver) filed an application on withdrawal of their claims. However, considering that the bank was placed under the temporary administration of the Central Bank of Russia, the arbitrazh court dismissed this application and held that the claimant acted under the threat of criminal liability; in any case, such actions shall be deemed as the waiver of constitutional right to judicial protection, which as a matter of Russian law is null and void.¹¹ Moreover, the court ruled as follows:

‘This being so, the court believes that the motion on partial withdrawal of the claims may affect rights and legitimate interests of the third parties – bank’s creditors, since ... it may affect composition of the bank’s assets, and is therefore the ground for dismissal of the said motion.’

In IBSP’s case, the DIA chose different tactics. It completely abstained from the proceedings without making any specific motions related to the effect of the injunction (eg, motion on withdrawal of claims). By virtue of express provisions of applicable procedural

rules, this automatically results in termination of the proceedings in the DIA's claim, since the failure to represent oneself in court and plead the case invokes the presumption of the claimant's losing interest in its own case. In such circumstances, the judge in IBSP's case, being bound by express provisions of procedural legislation, apparently found no other solution but to leave the claim without consideration. It is not clear what the outcome would have been, had there been an active creditor supporting the DIA in the proceedings.

Most probably in the given circumstances, the tactics of complete abstention from the proceedings, forcing the court to terminate them based on an imperative requirement of the procedural law, was intentionally employed by the DIA in order to prevent the risks associated with the court's refusal to accept withdrawal of the claim, as happened in *Nori Holding* case some time ago.

... or new challenges?

The IBSP case aggravated the problem of conflict between the bankrupt's counterparties' private interests and the DIA's public function aimed at serving the best interests of the respective bankrupt's creditors. Future cases will have to address these new challenges and give answers to the new tactics that the DIA and its procedural allies (eg, loyal creditors) may (and most probably will) employ in order to overcome the effect of anti-suit injunctions.

One of the central questions that remains without answer is whether the creditors of the bankrupt entity shall be bound by the anti-suit injunctions. From the Russian perspective, the answer to this question may be found in consistent findings made by the Russian supreme judiciary.

In particular, while exercising its rights and taking actions to replenish the bankruptcy estate the creditor similarly to the bankruptcy receiver acts:

- on behalf of the debtor/bankruptcy estate; and
- on behalf of all the debtor's creditors that represent a united group in terms of class action, and whose interests are indirectly ensured by such derivative class actions as a challenge of the debtor's transactions or by bringing the debtor's controlling persons to the subsidiary liability.¹²

This is also reflected in the position of Russian courts in respect of the creditor's status in disputes related to the imposition of subsidiary liability on the debtor's controlling persons. In accordance with the legal position of the Supreme Court of the Russian Federation, a claim for bringing to subsidiary liability is a derivative class action as well, since it implies the submission of such a claim by an authorised person in the interests of a group of persons uniting the legal community of the debtor's creditors.¹³ This approach is

upheld by the position of Russian legal academics, who note that the creditor, challenging the transactions or pleading about bringing to subsidiary liability, acts not in its own interests but in the interests of the civil-law community – uniting all creditors and carrying out the functions assigned to the bankruptcy receiver.¹⁴

This logic typically leads to a legitimate conclusion: that creditors, along with the bankruptcy receiver, act on behalf of the debtor and therefore are bound by the debtor's agreements containing arbitration or exclusive jurisdiction clauses. It is also clear that the alternative argument is possible with reference to the existence of the creditors' own interests, which are not always congruent with those pertaining to the debtor and its official receiver. All this leaves a lot of room for discussion, such as: (1) whether an approach shall be differentiated depending on the independent character of the creditor's action or existence of the signs that such action is inspired by the DIA with a view to overcome the effect of the anti-suit injunction; (2) how the statute of limitation shall apply to the creditors; (3) whether the previous behaviour and statement of the receiver shall somehow affect the rights of the creditors; and so on.

Resolving these problems is an even more complex task, taking into account the lack of any cross-border treaties on bankruptcy issues where Russia is a signatory, as well as the very controversial and unpredictable practice of local courts.

At the same time, this distinguishes such cases for their unprecedented interest from a legal point of view. It also (based on this article's authors' own experiences) opens up a lot of room for creativity and opportunities for lawyers to influence the landscape of cross-border bankruptcy issues involving Russia and foreign jurisdictions.

Notes

- 1 *RiverRock Securities Ltd v International Bank of St Petersburg* (JSC) [2020] EWHC 2483 (Comm); *Louis Dreyfus Company Suisse SA v International Bank of St. Petersburg (Joint-Stock Company)* [2021] EWHC 1039 (Comm).
- 2 See: SV Usoskin, 'International arbitration and bankruptcy: a claim to invalidate a transaction. Commentary on the Ruling of the Judicial Collegium for Economic Disputes of the Russian Supreme Court', 2016, No 305-ES16-4051, Bulletin of Economic Justice of the Russian Federation, 18–20.
- 3 See: Ruling of the Supreme Court of the Russian Federation No 304-ES16-3766, 16 May 2016, in the matter No A67-4741/2015.
- 4 Ruling of the Judicial Collegium for Economic Disputes of the Russian Supreme Court No 305-ES16-4051, 16 August 2016, on case No A40-117039/2015.
- 5 Resolution of the Arbitrazh Court of the Moscow Circuit No F05-9073/2019, 29 July 2019, on case No A40-184814/2018.
- 6 Resolution of the Ninth Arbitrazh Court of Appeal No 09AP-3989/2018-GK, 14 March 2018, on case No A40-69796/2017.

- 7 See: Resolution of the Arbitrazh Court of the Moscow District, 28 February 2017, in case No A40-113033/16; Resolution of the Arbitrazh Court of the North-Western District, 19 October 2015, in case No A56-86904/2014.
- 8 *RiverRock Securities Ltd v International Bank of St Petersburg* (JSC) [2020] EWHC 2483 (Comm), para 44 (i).
- 9 See: *Mace (Russia) Ltd v Retansel Enterprises Ltd & Anor* [2016] EWHC 1209 (Comm).
- 10 *Nori Holding and others v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).
- 11 Ruling of the Arbitrazh Court of Moscow City, 3 August 2018, on case No A40-204393/17.
- 12 See the Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation No 02-ES20-19914, 17 March 2021, on case No A19-14083/2015: 'Acting on behalf of the debtor (its bankruptcy estate) by virtue of the authority based on the law (paragraphs 1, 2 of Article 61.9 of the Bankruptcy Law), the initiator of a separate dispute essentially acts as a representative of the debtor, and indirectly – a group of its creditors'. In this regard, the Supreme Court of the Russian Federation concluded that it is necessary to apply the regime of class actions to such disputes (namely the rules of Chapter 28.2 of the APC governing class actions in Russian law) and recognised for the bankruptcy creditor the same status of the debtor's representative as that of the bankruptcy receiver in terms of the challenge of the debtor's transaction.
- 13 See para 57 of Resolution No 53. Also see the Rulings of the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation No 308-ES17-6757 (2,3), 6 August 2018, on case No A22-941/2006; No 305-ES19-17007 (2), 3 July 2020, on case No A40-203647/2015; No 310-ES20-7837, 28 September 2020, on case No A23-6235/2015.

- 14 See: DA Petrov, 'Problems of Calculating the Limitation Period When a Bankruptcy Creditor Challenges the Debtor's Transactions on Special Grounds Provided for by the Bankruptcy Legislation', 2018, 2 Arbitrazh Disputes, 89–96; OV Gutnikov, 'Corporate Liability in Civil Law' (Monograph, 2019), 488; DV Dobrachev, 'Judicial Practice Problems of Bringing the Debtor's Controlling Persons to Subsidiary Liability in Bankruptcy Proceedings' (Infotropic Media, 2019), 172; IV Gorbachev, 'On Some Legal Material Issues in the Ruling of the Supreme Court of the Russian Federation Regarding the Invocation for Subsidiary Liability', 2018, 4 Bulletin of Civil Law, 154–202.

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