The sanctions balancing act: the English courts' current approach

Due to the ongoing war in Ukraine, judicial decisions on financial sanctions relating to Russia are in the spotlight. This article focuses on three recent cases on sanctions and the UK Government's recent attempts to beef up its Russian sanctions regime.

THE REGULATIONS

The Russia (Sanctions) (EU Exit) Regulations 2019 ('the Regulations') detail financial prohibitions relating to certain 'designated persons'. The Regulations are made under the Sanctions and Anti Money Laundering Act 2018 ('SAMLA'). SAMLA allowed the UK Government to impose economic and other sanctions, and money laundering regulations, after the end of the Brexit transition period from 1 January 2021.

The Secretary of State can designate both natural or legal persons as 'designated persons' if he/she has reasonable grounds to suspect that they have been involved with destabilising Ukraine or undermining or threatening its territorial integrity, sovereignty or independence.

The recent cases discussed below illustrate the delicate balancing act that the English courts face between robust and wide enforcement of the Regulations and – in certain cases – ensuring that non-sanctioned parties do not suffer.

HIGH COURT SUPPORTS SANCTIONED CLAIMANTS – *FOR NOW*

PJSC National Bank Trust & anor v Boris Mints & ors [2023] EWHC 118 (Comm) gives us an insight into how the English court is approaching the application of the sanctions regime. In this case, the court allowed sanctioned claimants to proceed with English litigation. However, the judgment is subject to appeal.

The claimants, two Russian banks, sued nine defendants for approximately US$850m. The claimants alleged that the defendants had conspired with the claimants' representatives to enter into uncommercial transactions with companies connected with the defendants. The claimants obtained freezing orders against those defendants and provided cross-undertakings in damages. The litigation was progressing towards trial when Russia invaded Ukraine. Following the invasion, the UK Government made the second claimant bank a 'designated person' under the Regulations, meaning that dealing in that bank's assets became prohibited.

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Four of the defendants applied for a stay of the proceedings. The four applicants argued that entry of any judgment for the claimants would be unlawful since the claimants could not, whilst subject to the Regulations, lawfully satisfy any interlocutory orders made against them (e.g. adverse costs orders or security for costs). Additionally, the applicants alleged that the claimants would not be able to pay any damages that might be awarded in respect of their cross-undertaking in damages. Therefore, the applicants argued that allowing the proceedings to continue would cause serious prejudice.

Rights v the Regulations: a legal dilemma
In its judgment, the court acknowledged that the right to have access to justice is a fundamental common law right; the court concluded that SAMLA does not show that it was Parliament's intention to curtail such a fundamental right for sanctioned parties. As a result, sanctioned parties should retain a right of access to justice. The court also rejected the applicants' argument that entering a judgment in the claimants' favour would constitute the court 'dealing' with an underlying cause of action when it merges in the resulting judgment debt.

Financing the forbidden: prohibited acts are licensable
Turning to payments pursuant to interlocutory orders and/or awards of damages, although these are prohibited under the Regulations, the court found that these acts are licensable by the Office of Financial Sanctions Implementation ('OFSI'). This meant that the claimants, in this case, would not be prevented from complying with any orders. Therefore, the court dismissed the application for a stay of the proceedings and the litigation continues.

This decision is significant to any current or contemplated litigation involving sanctioned parties. The payment of adverse costs orders and security for costs are a regular feature of English proceedings; if these could not be complied with by sanctioned parties, this might prejudice non-sanctioned parties and hamper the progression of litigation. This judgment may increase the confidence of sanctioned claimants, who may feel emboldened that the courts will allow their claims to proceed. Depending on the facts, sanctioned claimants may wish to consider taking the initiative to apply to OFSI for the necessary licences to avoid the cost and time of dealing with an incoming application for a stay. In the meantime, we can expect to hear many of these arguments again as the court has granted the Defendants permission to appeal.

REGULATION V CONTRACTUAL OBLIGATION: WHICH TAKES PRECEDENCE?

In *Celestial Aviation Services v UniCredit Bank AG* [2023] EWHC 663 (Comm), the Regulations also took centre stage, even though neither party to the litigation was a designated person. The court found – in this case – that the Regulations did not relieve a party of payments due under a contract to supply aircraft that pre-dated the Regulations.

At issue was the effect of Reg 28 of the Regulations, which prohibits the provision of funds in connection with an arrangement whose object or effect is the supply of aircraft to Russia. The claim related to payment obligations under letters of credit (LOC) confirmed by UniCredit in relation to the lease of aircraft by Celestial to Russian companies, which were entered into before Reg 28 took effect in March 2022. UniCredit refused to pay, arguing that payment was prohibited under Reg 28 as it would be 'in pursuance of or in connection with' the supply of aircraft.

Stressing the importance of a purposive interpretation of the Regulations, the court identified that the purpose of Reg 28 is to cut off the supply of financing used to obtain restricted goods (including aircraft) to Russia. Reg 28 is prospective: the legislature enacted it to stop access to aircraft from the date it took effect in March 2022. The court concluded that the LOC created an autonomous payment obligation, separate to the underlying leases: performance of that obligation would not in any way enable the supply of aircraft to Russia as Celestial had already supplied them. Prohibiting payment would also penalise Celestial and give UniCredit a corresponding windfall whilst, as the court put it, 'no consequences would be felt by Russia'.

The court's confirmation that the approach to the interpretation of the Regulations should be purposive (rather than literal) is likely to inform the courts' future interpretation of the Regulations.

ARE THE REGULATIONS LEGAL?

The purpose of sanctions under the Regulations will again be considered in a test case launched against the Foreign Secretary by Eugene Shvidler, a Russian-born billionaire and close associate of Roman Abramovich (see report in *The Guardian*). Shvidler is seeking to overturn UK sanctions imposed on him, claiming the Foreign Secretary's decision is based on 'significant errors'. The case is likely to turn on the extent to which Shvidler is an 'involved person' in Russia's actions via his connection to Abramovich, whose steel firm (Evraz) is allegedly supporting Russia's war effort.

Shvidler claims that, far from exerting influence on the Russian government's actions in Ukraine, he has publicly expressed opposition and his activity with Evraz is wholly lawful. Since the purpose of the Regulations is to encourage 'Russia to cease actions destabilising Ukraine', Shvidler appears to believe that they do not apply here.

Whilst the precise basis of Shvidler's claim is not currently clear, by personally suing the Foreign Secretary it appears that he is not invoking the procedure under s23 SAMLA of requesting the Foreign Secretary to revoke the designation.

The case is likely to raise interesting issues as to whether the issuing of sanctions by the government undermines the rule of law, since the imposition of sanctions follows a government, not a court, decision, thereby giving the executive legal powers to impose sanctions. Shvidler's apparent decision to launch a case against a member of executive, rather than applying for a revocation via s23 SAMLA, suggests that his case will proceed on the basis not only that SAMLA provides insufficient redress, but also whether it is even applicable in the first place because Shvidler believes the Regulations are not applicable to him. The *Shvidler* case is one to watch.

NEW UK SANCTIONS – HOW FAR DO THEY GO?

On 12 April 2023, the UK government issued a press release announcing a new round of sanctions. The sanctions are aimed at cracking down on 'oligarch enablers', i.e. those individuals and organisations who have knowingly helped hide the assets of designated persons to circumvent sanctions made against them. This applies to 'financial fixers', financial networks and family members of oligarchs acting as proxies to hide the wealth of those oligarchs with UK interests. The sanctions include asset freezes and travel bans.

The UK Government's press release reports that the designated financial fixers include Demetris Ioannides who it alleges pre-emptively created offshore structures for Roman Abramovich just before the UK Government sanctioned him. The government also sanctioned Christodoulos Vassiliades, a Cypriot lawyer, for his alleged involvement with trusts and offshore companies connected with Alisher Usmanov. Although the power to issue sanctions against 'professional enablers' is not new, the willingness to use it indicates that the UK government is trying to step up the UK sanctions regime to, according to the Foreign Secretary, 'close the net on the Russian elite'.

The new sanctions are also aimed at six named individuals, who are family members of other sanctioned oligarchs; the Government alleges they are being 'used as proxies' to hold UK property. However, the few individuals named are, it seems, just the tip of the iceberg: according to a recent *Sunday Times* investigation, there are hundreds of millions of pounds worth of prestige UK property currently held in this way, potentially illustrating just some of the loopholes in the UK's sanctions regime.

More generally, the Economic Crime and Corporate Transparency Bill ('the Bill'), currently going through the UK House of Lords, should strengthen the UK sanctions regime. The Bill principally provides for several reforms to Companies House, expanding its role and giving it greater powers to ensure the transparency of UK corporate entities via a range of provisions. These include amending the existing provisions of the Company Directors Disqualification Act 1986 to allow for the disqualification of persons designated under SAMLA (and it will be an offence for directors subject to financial sanctions to continue in post). Other measures that will improve transparency are provisions allowing information-sharing between businesses such as banks, law firms and accountants for the purpose of preventing, detecting and investigating economic crime, which definition specifically includes sanctions evasion.

THE REGULATIONS - AN EVOLVING MEASURE

As the practical application of the Regulations continues to develop, and as a result of the enhanced sanctions imposed on Russia, we can expect to see more activity in this space. In the meantime, parties contracting with entities from higher-risk jurisdictions such as Russia should continue to exercise extra care when drafting their contracts and when considering their own compliance procedures.