

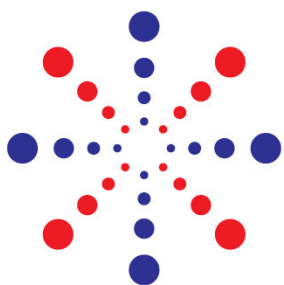
Disputes and Sanctions

Shantanu Majumdar QC, Radcliffe Chambers

Susan Leddy, Swiss Re

Artem Zhavoronkov, Borenus Attorneys Russia

Ben Wells, Candey



London International Disputes Week

**Shantanu Majumdar QC, Radcliffe Chambers (UK)**

In his first few years at the Bar, Shantanu Majumdar practised in most areas known to the law, once even cross-examining a police officer in the Court of Appeal. For the past 20 years he has specialised in commercial and commercial Chancery litigation and arbitration and professional negligence. He thinks very hard about his cases for, as a famous Roman once said: "Grasp the subject matter and the words will follow". Shantanu undertakes litigation, arbitration and advisory work in the following fields, much of it of an international nature involving foreign parties and/or foreign law and/or foreign proceedings.

**Susan Leddy, Senior Legal Counsel, Group Operations, Director, Legal & Compliance, Swiss Re (Switzerland)**

Susan is a Senior Legal Counsel at Swiss Re in Zürich. She is a qualified lawyer in the UK and has considerable in-house global (re) insurance experience, particularly in the area of financial crime with a focus on sanctions compliance.

**Artem Zhavoronkov, Specialist Partner, Borenus Attorneys Russia (Russia)**

Artem specialises in corporate, antitrust, banking and financial law, as well as cross-border M&A transactions. Over the past 27 years, Artem has taken a hands-on role in providing legal support for international transactions, representing a wide range of foreign and Russian clients from various business sectors. These have included social networks, software development, telecommunications, direct investments, financial institutions, the motor industry, oil & gas, the iron & steel industry, food products, as well as development and construction.

**Ben Wells, Partner, Candey (UK)**

Ben Wells is a Solicitor Advocate and a fluent Russian speaker. The majority of his work is focused on Russian-speaking clients.

Ben is experienced in international arbitration and dispute resolution related to cross-border disputes. Ben has a particular focus on contentious trusts issues, claiming relief under Part III of the Matrimonial and Family Proceedings Act 1984, asset-tracing and recovery. Ben also assists clients to decide contentious issues in relation to commercial contracts, trading, investments, banking, company and shareholder disputes, cross-border insolvency, international civil fraud and enforcement.



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Disputes and Sanctions

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Sanctions and Contractual Obligations

Shantanu Majumdar QC, Radcliffe Chambers



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Illegality in the place of performance

- ***Ralli Bros (Ralli Bros v Compania Naviera Sota y Aznar*** [1920] 2 KB 287

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- “a prohibition on the opening, and a prohibition or the imposition of strict conditions on the maintaining, in the United States of a correspondent account or a payable through account by the foreign financial institution ...”
section 5(c) of Ukraine Freedom Support Act 2014

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***Lamesa v Cynergy* [2020] EWCA Civ 821**

“such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction”

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Lamesa v Cynergy

- “(iv) a “ **regulation** ” includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental, or supranational body, agency, department or of any regulatory, self-regulatory, or other authority or organisation.”

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Lamesa v Cynergy

- “[n]o person ... shall comply, whether directly or [indirectly] with any requirement or prohibition... resulting directly or indirectly from the laws specified”

Article 5, EU Blocking Regulation No 2271/96.

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Banco San Juan Internacional Inc v Petróleos De Venezuela SA [2020] EWHC 2937 (Comm)

"Sanctions. [PDV] will not repay Loans with the proceeds of

- (a) business activities that are or which become subject to sanctions, restrictions or embargoes imposed by the Office of Foreign Asset Control of the U.S. Treasury Department, the United Nations Security Council and the U.S. Department of Commerce, the U.S. Department of State [sic] (collectively, 'Sanctions'); or

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Banco San Juan v Petróleos De Venezuela SA

"(b) business activities in/with a country or territory that is the subject of Sanctions (including, without limitation, Cuba, Iran, North Korea, Sudan and Syria) ('Sanctioned Country')".

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Susan Leddy

Senior Legal Counsel, Group Operations

Director, Legal & Compliance

Swiss Re (Zurich)



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What does the re/insurance industry do ?

SANCTION LIMITATION AND EXCLUSION CLAUSE

No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America.

15/09/10 LMA3100

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Why is the re/insurance industry so keen on sanctions clauses ?

- [OFAC \(Office of Foreign Asset Control\) FAQ 102](#). How can an insurer participate in worldwide insurance markets through global insurance policies if, by definition, coverage extends to potential risks in sanctioned countries? The best and most reliable approach for insuring global risks without violating U.S. sanctions law is to insert in global insurance policies an explicit exclusion for risks that would violate U.S. sanctions law et seq. (2007)
- [Lloyd's Sanctions Guidance – Sanctions Clauses](#) Y4916

Lloyd's considers the appropriate and risk based use of sanctions clauses to be a matter of good underwriting practice and a means of achieving contract certainty in highlighting to insureds the sanctions obligations with which the insurer must comply. (2015)

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What do re/insurers think about when looking at clauses ?

- “Exposure” v “Violate”
- [Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others \[2018\] EWHC 2643 \(Comm\)](#)
- Which regimes are in scope – new UK sanctions
- EU and UK Blocking Statutes
- German anti boycott law

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NEW REGULATIONS ON EXCLUSIVE COMPETENCE ON SANCTIONS-RELATED CASES

Artem Zhavoronkov, Borenus Attorneys Russia Ltd



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Commercial (Arbitrazh) Procedure Code

Section 248.1:

Russian Commercial Courts Have Exclusive Competence in Respect of (i) Disputes Involving Sanctioned Persons, and (ii) Disputes Based on Sanctions Against Russia

NB! Exclusive Competence Also Applies to Cases Where (i) Disputes Are Subject to Non-Russian Courts or Arbitration, and (ii) the Sanctioned Person Is Denied Justice Due to Sanctions

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Commercial (Arbitrazh) Procedure Code

Section 248.2:

A Person May Request a Russian Commercial Court to Issue a Ruling to Prohibit a Sanctions-Based Proceeding in a Non-Russian Commercial Court or Arbitration Tribunal

A Hefty Fine May Be Imposed on the Defendant If It Fails to Abort the Proceedings in a Foreign Court or Arbitration

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Ural Vagon Zavod vs. Pesa Bydgoszcz Case

- No Reason To Apply Russian Court's Exclusivity
- Stockholm Arbitration Has Already Started and Is in an Active Phase
- Ural Vagon Zavod Is Not Restricted to Participate at Arbitration Tribunal Hearings

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Tsargrad Media vs. Google (US, Ireland, Russia)

- Russian Courts Jurisdiction Should Apply as Tsargrad Media Is Denied Justice in US/Ireland
- Ruling on the Merits of the Case Is Issued in Favor of Tsargrad Media
- A Hefty Fine To Be Paid by Google for Each Day of Delay

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What is this all about?

- Siemens Gas Turbines Technologies OOO vs. TechnoPromExport OOO of 2018
- Now, the Tsar Grad Media Case

The Bottom Line: The Application of Western Sanctions Against Russian Persons in Russia Contradicts Public Order

The Goal: To Eliminate the Possibility for Non-Russian Counterparties to Apply Sanctions in Russia

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UK Sanctions Regime

Ben Wells - Partner – CANDEY



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UK Sanctions Regime

The UK sanctions regime is in force under the Sanctions and Anti-Money Laundering Act 2018 and came into force on 31 December 2020

- Policy considerations remain aligned
- Denser & more complex than EU sanctions

Who is impacted?

- Apply to all in UK territory and all UK persons
- Includes UK nationals & UK incorporated entities

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UK Sanctions Regime

The UK government publishes the UK sanctions list, which provides details of those designated under regulations made under the Sanctions Act. The list also details which sanctions measures apply to these persons, and in the case of UK designations, provides a statement of reasons for the designation.

As governments increasingly rely on sanctions as a tool for political foreign policy, new entities are added to, and removed from sanctions lists, all of the time. Over the past 5 years, the average number of designated entities has increased significantly.

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Office for Financial Sanctions Implementation (OFSI)

OFSI is responsible for ensuring UK sanctions are implemented and enforced.

The penalty threshold is reached where, on the balance of probabilities, there has been a breach and the person committing it knew or had reasonable cause to suspect they were committing a breach as well as one of the following conditions:

- the breach has involved funds or economic resources being made available to a designated person;
- there is evidence of circumvention. By making arrangements to circumvent the law, a person not only breaches the law but attacks the integrity of the system;
- for some other reason, OFSI believes that a monetary penalty is appropriate and proportionate; or
- a person has not complied with a requirement to provide information.

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Monetary penalties

- Imposed for breaches of UK sanctions
- Where there is a connection with the UK

UK Nexus

- UK company overseas
- Transactions using clearing services in the UK
- Subsidiary of a UK company

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Asset freezing measures

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The 50% rule

- Where a non designated entity is owned or controlled by a designated person more than 50%
- Automatic asset freeze against that entity & prohibition on making funds available without a licence

Sectoral sanctions on Russia

- No longer EU exemption for financing the import of goods between the EU and a third country
- Licence required for the sale of *“Annex II Items”* not only *“for use in Russia”* but also *“to a person connected with Russia”*.



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