Sanctions versus contractual liability in Jersey law

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The Jersey Royal Court decision of OWH v RTI [2025] JRC137 on 22 May 2025 addresses the challenge to the enforcement of an arbitral award where sanctions are at play.

It provides valuable insight into the considerations of the court in Jersey (the **Court**) in the emerging area of sanctions law where case law remains light.

The key issue for RTI Ltd (a Jersey company) was whether enforcement of the arbitral award would be contrary to public policy in Jersey as reflected in Article 46A of the Sanctions and Asset-Freezing (Jersey) Law, 2019 (the **Jersey Sanctions Law**):

'A person is not liable to any civil proceedings to which that person would, in the absence of this Article, have been liable in respect of an act, if at the time of the act the person reasonably believed the act was necessary to comply with an obligation or prohibition imposed:

a. *by this Law;*

b. *by an enactment under this Law; or*

c. *by a direction or other instruction given under this Law or under an enactment under this Law.'*

Article 46A is a provision introduced into the Jersey Sanctions Law from 8 June 2022, adopting very similar wording to section 44 of the Sanctions and Anti-Money Laundering Act 2018 (**SAMLA**).

The issue all came down to timing.

The contract / sanctions dilemma under Jersey law

The Court made it clear that *'Article 46A is intended to support the important public interest of Jersey playing its part effectively in supporting sanctions imposed by the UN or the UK. … it was specifically intended to ensure that the Island complies with the technical requirements of Recommendations 6 and 7 of the FATF Recommendations.'*

It recognised that prior to Article 46A a person under a contractual liability to pay, where doing so may turn out to be a breach of sanctions, was on the 'horns of a dilemma'. If they refused to pay, but it turned out they were not prohibited from making the payment, they may be liable in damages. In effect, they had to weigh up meeting contractual obligations against the risk of committing a criminal offence.

It considered *'the introduction of Article 46A… was no doubt intended that it would be more likely that a payer would err on the side of complying with sanctions because there would be protection from any liability at the instance of the payee* ***if the payer reasonably***

believed that he was prevented from making the payment because of sanctions. He no longer had to prove that he was actually prevented.'

Brief background to OWH v RTI

In 2019, RTI, a member of the Rusal Group (the third biggest aluminium maker in the world), entered into a USD/rouble currency swap contract with OWH (a German Bank at that time known as VTB Bank (Europe) SE) in the form of an ISDA Master Agreement (the **Agreement**) with the aim of hedging its exposure to rouble currency fluctuations.

Between April 2019 and November 2021, RTI and OWH entered into 11 USD/rouble swaps or forward transactions.

On 24 February 2022, Russia invaded Ukraine and OWH's parent, VTB Russia, became a Designated Person under the UK and Jersey sanctions regimes. OWH and VTB Russia were added to the list of Specially Designated Nationals and Blocked Persons by the US sanctions authority (OFAC).

The rouble immediately fell in value, causing OWH to issue a margin call to RTI on 25 February 2022 requiring payment of USD43.5m. OWH issued 18 more margin calls between 25 February and 24 March 2022 (the **Margin Calls**).

RTI did not meet the Margin Calls due to sanctions concerns. It was particularly concerned that paying the Margin Calls would result in funds being made available, directly or indirectly, to VTB Russia in breach of Article 11 of the Jersey Sanctions Law.

On 23 March 2022, in light of RTI's failure to pay, OWH terminated the Agreement and calculated the sum due as €214m.

The matter was determined by way of arbitration. The tribunal considered arguments between OWH and RTI that turned on the terms of the Agreement, including:

1. whether RTI was entitled to rely on the Relevant Sanctions Event terms in the Agreement as suspending its obligation in March 2022 (meaning no Event of Default would have arisen by RTI's non-payment of the margin calls); and, if not,

2. whether RTI was entitled under the Agreement to instead rely on Illegality as a superior event to an Event of Default (thereby precluding termination).

The tribunal found in favour of OWH and awarded €213,770,661.77 against RTI (the **Award**). It did not consider whether the payment of the Margin Calls would have in fact breached articles 11 or 46A of the Jersey Sanctions Law.

OWH instituted proceedings before the Jersey Court to enforce the Award. RTI resisted enforcement, relying on the public policy exception at Article 46A of the Jersey Sanctions Law.

Decision on the public policy exception

Pro-enforcement v public policy exception

The Court made it clear that the well-established approach is to adopt a pro-enforcement approach to arbitral awards.

As there was no previous Jersey authority on the public policy exception to the enforcement of arbitral awards it looked to English case. It identified that 'the English courts have adopted a very restrictive approach to the public policy exception.', and found it equally

applicable in Jersey.

It considered the introduction of Article 46A into the Jersey Sanctions Law, and whether an award made contrary to Article 46A could fall within the public policy exception:

- it was introduced to strengthen Jersey's ability to implement UN and UK sanctions;
- it applies not only to payments under a transaction which is governed by Jersey law but also to payments by a Jersey company or from Jersey in respect of transactions governed by some other proper law;
- public interest extends to consideration of international public policy;
- to allow enforcement of an award (or foreign judgment) which had not considered whether the defence under Article 46A is available would be wholly inconsistent with the important public policy objective of upholding and enforcing international sanctions;
- the Jersey Courts should refuse to enforce an award granted by a tribunal which had not considered Article 46A, in circumstances where the defence was available.

Does Article 46A of the Jersey Sanctions Law have retrospective effect?

Given the Margin Calls were made February to March 2022 but Article 46A was not introduced until 8 June 2022, the Court looked at whether Article 46A of the Jersey Sanctions Law had retrospective effect.

The Court found it did not. In accordance with well-established general principles it concluded that Article 46A applies only to acts carried out after the Article came into force (no contrary intention had been expressed).

It held that it was not open to the Court to invent an Article 46A defence, where otherwise a liability would exist, merely because the defence exists in the UK or because the FATF (Financial Action Task Force) Recommendations require it.

Outcome for RTI

The Court found that RTI's application to set aside the order granting leave to enforce the Award failed. Enforcement would not be contrary to Jersey public policy as all the acts relied upon by RTI occurred before 8 June 2022.

The Jersey position going forward

The Court did find that for acts carried out after Article 46A was introduced, there could be no civil liability in respect of such an act if, at the time of the act, the person carrying out the act reasonably believed that it was necessary to do so in order to comply with a sanctions obligation or prohibition. For acts carried out after 8 June 2022, enforcement of an arbitral award in Jersey should be refused if enforcement would be contrary to Article 46A.

In any event, in this case was an Article 46A defence made out on the facts?

The Court helpfully went on to consider whether, had an Article 46A defence been available, the facts would have allowed RTI to rely on it.

RTI would have needed to demonstrate that:

1. it believed that paying the margin call to OWH would make the funds available indirectly to VTB Russia as a Designated Person, so that it was necessary to act in breach of contract by not making the payment (RTI's subjective belief); and

2. that belief was reasonable (objective test of reasonableness).

The Court looked to the evidence and in particular the action taken in respect of OWH by BaFin (German financial regulatory authority) on the invasion of Ukraine by Russia (termed the **BaFin measures** in the Judgment), which included requiring OWH to put in place internal measures in order to prevent any payment to VTB Russia or to the VTB Group.

RTI's subjective belief

The Court found that, on balance, RTI did subjectively hold the required belief.

Objective test of reasonableness

The BaFin Measures

The Court observed that RTI was well aware of the BaFin measures and by 9 March 2022 OWH had suggested to RTI that the Margin Call payments could be made to an account of OWH opened with the Bundesbank.

It said the question that RTI should have considered was *'whether the BaFin measures and subsequent suggestion by OWH of payment to a special account held with the Bundesbank were sufficient to mean that payment to OWH would not result in funds being made available (directly or indirectly) to VTB Russia as a Designated Person under the Jersey sanctions legislation.'*

It took the view that *'particularly for a large commercial organisation such as RTI, a belief that such measures were insufficient would not be a reasonable belief unless proper steps were taken to investigate whether the measures would negate the risk of margin call payments being made available to VTB Russia.'*

The Court found that RTI was fully aware of the BaFin measures and it should have been obvious to RTI and its advisers that the BaFin measures raised the issue as to whether funds could safely be paid to OWH, without risking them becoming available to VTB Russia, because the BaFin measures were put in place to prevent it.

Consequently, it found the belief RTI held, that it was necessary to default in making the margin payments to avoid a breach of Article 11, was not objectively a reasonable one.

Illegality

The Court went on to consider whether RTI should have given a notice of Illegality which would mean that the failure to pay the margin payment would not amount to a breach of contract.

It concluded that, where RTI believed that it could not lawfully pay the margin calls because to do so would amount to a breach of Article 11 of the Jersey Sanctions Law, it could have given a notice of Illegality. As such, RTI's belief that it was 'necessary' to commit a breach of contract because of the Jersey Sanctions Law was not objectively a reasonable one.

Impact of the decision for Guernsey?

The wording of the equivalent provision in s30A of the Sanctions (Bailiwick of Guernsey) Law, 2018 is different from s.44 SAMLA and Article 46A of the Jersey Sanctions Law. It says:

'A person is not to be liable in damages or personally liable in any civil proceedings in respect of anything done, or omitted to be done, in compliance or purported compliance with any prohibition or requirement imposed by or under:

a. this Law, or

b. any sanctions measure referred to in section 3, unless (for the avoidance of doubt) the thing was done or omitted to be done in bad faith.

(2) Subsection (1) does not prevent an award of damages in respect of an act or omission on the ground that it was unlawful as a result of section 6(1) of the Human Rights (Bailiwick of Guernsey) Law, 2000.'

Notably, s.30A does not mention necessity or require a reasonable (objective) belief. The issue is yet to come before the Guernsey Court.

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