

Kluwer Arbitration Blog

Challenges Faced by Arbitral Institutions Amidst New Waves of Sanctions Against Russia

Stephan den Hartog (AZHA Avocats) · Wednesday, March 23rd, 2022

In late 2021, the Kluwer Arbitration Blog published a series of posts regarding issues faced by arbitral and financial institutions as a result of restrictions on transfers of funds under both primary and secondary sanctions programmes, and in particular on the potential effects of **asset freezes**, as well as on restrictions that form part of the United States' ("US") secondary sanctions regimes against **Iran** and against **Russia** (following the country's 2014 occupation and annexation of the Crimea region in Ukraine).

As a direct consequence of "**Russia's unprecedented military aggression against Ukraine**," the European Union ("EU"), the US, the United Kingdom ("UK"), Switzerland, Japan, Canada and a host of other countries have in recent weeks imposed extensive new sanctions and other restrictions on Russia as well as on the country's political and economic elite. With Ukraine waging a fierce resistance and no clear end to the military phase of this deplorable and tragic conflict in sight, it seems likely that wide-ranging sanctions against Russia, likened by Russian President Vladimir Putin to a "**declaration of war**," remain in place for the foreseeable future.

The sheer breadth of the restrictions, ranging from trade and financial sanctions across a wide array of sectors, to travel restrictions, airspace closures and the suspension of broadcasting activities of outlets under the direct or indirect control of Russian authorities, prevents a detailed overview, in a blog post, of the sanctions programmes that are currently in place. This entry rather aims to highlight some of the legal and practical issues that arbitral institutions may face as a result of recently imposed EU and Swiss sanctions against Russia.

Potential Effects of Asset Freezes on Arbitral Proceedings

Since Russian armed forces began their attack on Ukraine on 24 February 2022, the EU has designated no less than 877 individuals, including notably President Vladimir Putin, Prime Minister Mikhail Mishustin and Foreign Minister Sergey Lavrov, as well as 62 entities.¹⁾ As a result, all funds and economic resources within the EU belonging to, owned, held or controlled by such persons and entities have been frozen and no funds or economic resources may be made available, directly or indirectly, to them or

for their benefit.²⁾ In a similar fashion, Switzerland, the US, the UK and many other countries have designated hundreds of individuals and entities with political or economic ties to the Russian regime.

Asset freezes and restrictions on transfers of funds have the potential to directly affect any payment to or from an arbitral institution. If a party to an arbitration is (or is owned or controlled by) a designated person or entity whose assets are frozen pursuant to any of the applicable sanctions programmes, none of this party's assets in the sanctioning state(s) may be transferred, be it for purposes of paying a registration fee or an advance on costs, unless an authorisation is delivered by the competent authorities.

As noted in one of our previous [posts](#), sanctions programmes may indeed provide for exceptions on the basis of which a sanctioned person or entity involved in arbitration proceedings may be able to obtain, on a case-by-case basis, a specific authorisation (sometimes referred to as a "license") for the payment of registration fees and advances on costs. That said, no two sanctions programmes are identical and the architecture and specific terms of each must therefore be carefully considered.

For instance, under the relevant EU Regulation, an explicit carve-out is provided for the payment of legal services, allowing the competent authorities of Member States to authorise the release of frozen funds if they have determined that these funds are "*intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services.*"[fn Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, Article 4(1)(b)./fn]

While the Swiss *Ordonnance instituant des mesures en lien avec la situation en Ukraine* does not make any express reference to payments related to legal services, Article 15(3) empowers the State Secretariat for Economic Affairs to exceptionally authorise payments from blocked accounts and transfers of frozen assets if this is necessary in order, *inter alia*, to avoid hardship ("*prévenir des cas de rigueur*") (lit. a) or to honour an existing contract ("*honorer des contrats existants*") (lit. b). As the authors discussed in a previous [post](#), it has been argued that both exemptions could be understood as allowing the release of funds for the payment of a registration fee or an advance on costs.³⁾ There is, however, no official position on this, and it remains to be seen whether arbitration proceedings are generally regarded, by the authorities, as falling within the same category as, for instance, de-listing proceedings and local court proceedings.

Given the unprecedented proliferation of sanctions following Russia's invasion of Ukraine and the fast-growing number of designated persons and entities across a wide range of jurisdictions, arbitral institutions would be well advised to regularly investigate, throughout the proceedings, whether any of the parties to an arbitration is (or is owned or controlled by) a person or entity specifically targeted by a sanctions programme.

Indirect Consequences of Measures Imposed Against Russia

Even if funds originate from an account that is not frozen, significant practical issues might still be encountered.

First, the EU and Switzerland (as well as the US and several other countries) have introduced measures prohibiting the supply of specialised financial messaging services to certain Russian banks, thereby effectively disconnecting such banks from SWIFT, hence from the international financial system.⁴⁾

Second, in an attempt to support the ruble, the Russian government has banned all Russian residents (*i.e.* Russian individuals and entities, as well as foreign citizens living in Russia under a residency permit) from exporting any foreign currency and/or monetary instruments in an amount exceeding the equivalent of USD 10'000.⁵⁾

Finally and in any event, one cannot exclude, considering the fragmented and ever-expanding nature of the complex web of Russia-related sanctions, that banks may prefer to altogether abstain from conducting or facilitating any transactions with Russian counterparties. They may prefer not handling any funds (be it in US dollars, in euros or in Swiss francs) that may be linked to Russia, even if no designated person or entity is involved, that is, even if accepting funds would not imply any obligation to freeze these assets or to notify the competent authorities.

In fact, both the EU and the Swiss sanctions programmes largely prohibit the acceptance of deposits exceeding EUR 100'000 or CHF 100'000, respectively, from Russian nationals, individuals residing in the Russian Federation or entities established in the Russian Federation, regardless of whether such individuals or entities are designated.⁶⁾ In light of the arbitration costs of large proceedings, an advance on costs exceeding an amount of EUR 100'000 or CHF 100'000 is hardly unimaginable and even if the relevant authorities may provide an exemption on grounds similar to those that would justify the release of frozen assets, this limitation may create yet another obstacle for arbitral institutions and their banks.

Potential Implications of the Rules on the Exclusive Jurisdiction of Russian Courts

Due consideration should also be given to the 2020 amendments to the Russian Commercial Procedure Code. Pursuant to these statutory changes, Russian commercial courts claim to have, under certain circumstances, exclusive jurisdiction over disputes involving sanctioned persons as well as over disputes arising from sanctions imposed on Russian individuals and entities. Given the wide discretion that Russian courts enjoy, **they might consider that the provisions apply even if there is a valid dispute resolution clause** providing for arbitration or for the exclusive jurisdiction of a foreign court, if such clause is considered to have become "*incapable of being performed*" due to the imposition of sanctions. The amended law also allows a sanctioned party to apply to a Russian court for an injunction prohibiting the other party from initiating or pursuing proceedings before an arbitral tribunal or a foreign court.

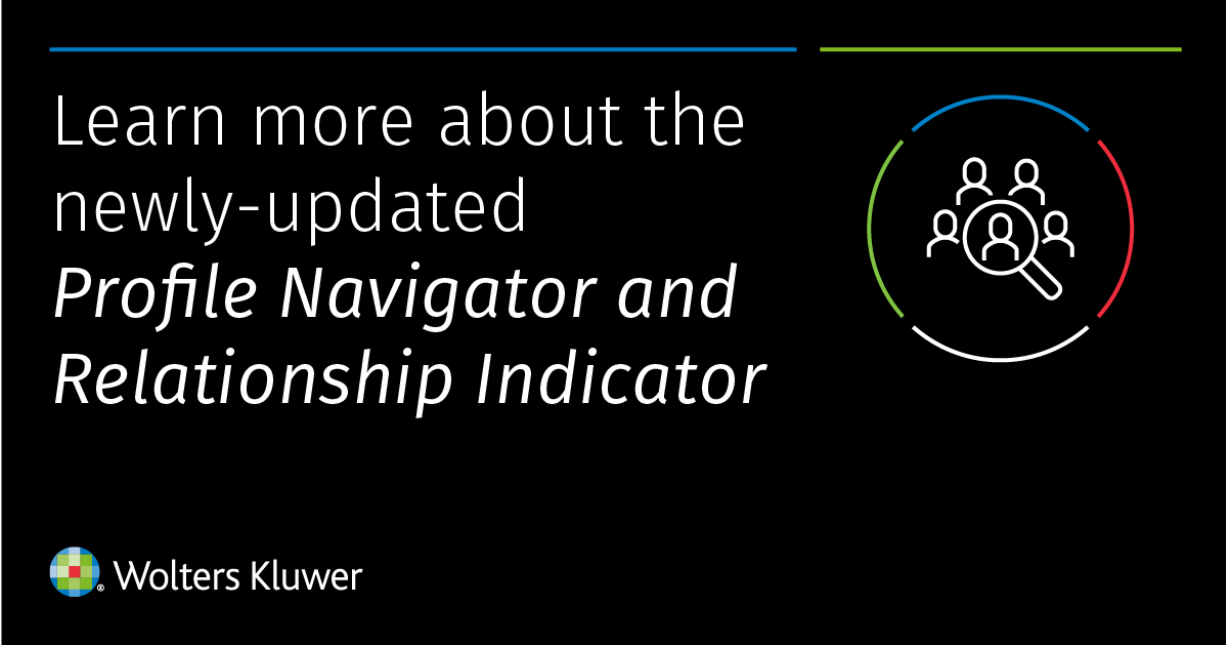
The consequences of these amendments are of course primarily relevant for parties that need to enforce rights against, or resolve disputes involving, a sanctioned Russian party. Arbitral institutions, however, cannot ignore the risk of increasing instances in which sanctioned parties from Russia ignore valid arbitration agreements for tactical considerations or attempt to transfer disputes from a pre-agreed forum to Russian state courts.⁷⁾

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References

- ¹¹ See the website of the European Council for an overview of the restrictive measures imposed by the EU in response to the crisis in Ukraine. Under the header "Asset freezes and travel restrictions," the European Council regularly updates the total number of designated individuals and entities: <<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/>>.
- ¹² Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, Article 2. See Olivier Thormann/Anne-Claude Scheidegger/Nicolas Bottinelli/Robert Zimmermann/Alain Chablais, Séquestre, blocage et sanctions, in Giroud/Rordorf-Braun (eds), *Droit suisse des sanctions et de la confiscation internationales*, 2020, fn. 371; Mathias Audit, L'effet des sanctions économiques internationales sur l'arbitrage international, in Loquin/Manciaux (eds), *L'ordre public et l'arbitrage : actes du colloque des 15 et 16 mars 2013*, Dijon, 2014, p. 147.
- ¹⁴ For the EU, see Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Article 1(3). For Switzerland, see Ordonnance instituant des mesures en lien avec la situation en Ukraine du 4 mars 2022, Article 27.
- ¹⁵ Decree No. 81 "On Additional Temporary Economic Measures to Ensure the Financial Stability of the Russian Federation" of 1 March 2022.
- ¹⁶ For the EU, see Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Article 1(9). For Switzerland, see Ordonnance instituant des mesures en lien avec la situation en Ukraine du 4 mars 2022, Article 20.

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