

# Kluwer Arbitration Blog

## All Bark and No Bite? The Russian Supreme Court's Refusal to Grant an Anti-Arbitration Injunction to a Sanctioned Company

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In mid-2020, [changes were enacted](#) to the Russian Arbitrazh (Commercial) Procedure Code (“APC”) which established the exclusive jurisdiction of Russian Arbitrazh courts over cases where a Russian party is subject to sanctions or where the dispute has arisen out of sanctions. This raised [concerns](#) that sanctioned Russian parties would be able to easily avoid arbitration clauses they had entered into. However, the [Russian Supreme Court has recently found](#) that arbitration clauses with sanctioned Russian parties are only invalidated when sanctions render them incapable of being performed.

### Background: The June 2020 Changes to the APC

On 18 June 2020, [changes to the APC were enacted](#) allowing sanctioned Russian parties to bring a claim at their place of residence or incorporation, provided that the same dispute had not already been brought before a foreign court or before an arbitral tribunal seated outside of Russia (Article 248.1(3) of the APC). Sanctioned Russian parties were also given the right to apply for an anti-suit injunction – a form of relief previously unknown to Russian law – in relation to such proceedings in foreign courts or arbitrations (Articles 248.1(3) and 248.2 of the APC). Article 248.1(4) of the APC notes that the provisions of this article “also apply” when the arbitration agreement is “incapable of being performed” due to the application of sanctions to one of the parties.

### *Uraltransmash Case*

On their face, the jurisdictional provisions of the amended Article 248.1 of the APC are very broad. The decision of the Russian Supreme Court in the *Uraltransmash* case confirming the restrictive interpretation of this provision is thus welcome news.

In 2013, Uraltransmash, a Russian company, entered into a contract for the purchase of tramway cars with PESA Bydgoszcz (“PESA”), a Polish company. The Polish-law-governed contract contained an SCC arbitration clause. In May 2019, PESA commenced arbitration against Uraltransmash claiming over EUR 55 million in damages. Having initially participated in the

arbitration for over two years, Uraltransmash – whose parent company Uralvagonzavod has since 2014 been subject to EU sanctions – later applied to the Arbitrazh Court for the Sverdlovsk Region seeking an anti-arbitration injunction against PESA.

Uraltransmash argued that the fact that it was subject to EU sanctions was in itself sufficient to grant the injunction under Articles 248.1(3) and 248.2 of the APC. The Arbitrazh Court for the Sverdlovsk Region disagreed, [finding on 24 November 2020](#) that these provisions should be interpreted together with Article 248.1(4) of the APC, and that thus an anti-suit injunction may only be granted when sanctions render the arbitration agreement incapable of being performed.

With this in mind, the Arbitrazh Court noted that, despite the sanctions, Uraltransmash was able to fully participate in the SCC arbitration: it appointed a respected arbitrator, filed a number of submissions, appointed a Polish accounting expert witness and was advised by well-regarded Russian and Polish lawyers. The court was also unconvinced that the sanctions prevented Uraltransmash from paying advances on arbitrators' fees, or from making payments to PESA. It found that Uraltransmash was subject only to fairly limited sectoral EU sanctions and not to more stringent sanctions envisaging asset freezes and travel restrictions. The fact that Uraltransmash was also subject to US sanctions was deemed irrelevant. For these reasons, the court refused to issue the anti-suit injunction.

On appeal, on [10 March 2021](#) the higher instance Arbitrazh Court for the Urals District upheld the decision of the lower court, agreeing with its reasoning and endorsing its interpretation of Article 248.1 of the APC. The Arbitrazh Court for the Urals District also noted that a contrary interpretation of the APC provisions would render international commercial transactions unstable and unpredictable.

The Russian Supreme Court likewise agreed with this interpretation of the relevant provisions of the APC, [rejecting on 28 May 2021](#) an appeal in relation to the decisions of the lower courts.

While there is no system of binding precedent in Russia, it is nevertheless significant that the Russian Supreme Court adopted this stance in relation to the interpretation of the conditions for issuing an anti-suit injunction in relation to arbitrations involving sanctioned entities.

### **A Word of Caution: *Instar Logistics v Neighbors Drilling***

The Russian courts' decisions in *Uraltransmash* can be contrasted with an earlier decision of the Ninth Arbitrazh Appellate Court of Moscow in the case of *Instar Logistics v Neighbors Drilling* ([Case ? 740-149566/2019](#)). In that case, the claimant, who was subject to US sanctions, applied to the Russian courts to amend the ICC arbitration clause in its English-law-governed storage agreement with a US counterparty, citing the impossibility of performance of the arbitration clause due to the US sanctions with which the US respondent had to comply. While the claim was filed before the amendments to the APC had entered into force, the Ninth Arbitrazh Appellate Court on 10 February 2020 agreed with the decision of the lower court and held that the dispute should be heard in Russian courts. This decision was [confirmed on appeal by the Arbitrazh Court for the Moscow District on 6 July 2020](#) and by the [Russian Supreme Court on 12 October 2020](#). The fact that the US-incorporated respondent would have been unable to comply with an arbitral award against it due to US sanctions, somewhat bafflingly, was a key consideration (with the courts thus [confusing the enforceability of the arbitration clause and that of the resulting award](#)). In the view of

the Russian courts, this created a procedural “imbalance” between the sanctioned Russian claimant and the US respondent. Unlike the courts in *Uraltransmash*, the courts in *Instar Logistics* did not undertake a detailed analysis as to whether the sanctioned claimant – who had not attempted to commence arbitration – would have been able to participate in it.

## Conclusion and Implications

The *Uraltransmash* decision of the Russian Supreme Court limits the availability of anti-suit injunctions, as well as the avoidance of foreign arbitration clauses, to situations where the sanctions make the sanctioned entity’s participation in the arbitration impossible. This is undoubtedly a welcome development. As confirmed in [a joint article by the ICC, LCIA and SCC](#), sanctions do not prevent sanctioned Russian parties from participating in arbitrations before these institutions. To the extent that the APC provisions dealing with sanctioned entities are interpreted in such a restrictive way, the risk of Russian parties being able to successfully avoid foreign-seated arbitrations and obtaining anti-suit injunctions against them would thus be relatively low.

Nevertheless, the *Uraltransmash* decision is fact-specific, with the sanctioned entity in question having participated in the SCC arbitration for over two years without any difficulties. A risk remains that, should, for instance, a sanctioned entity claim it is unable to participate in a foreign-seated arbitration at an earlier phase, or should there be any purported enforcement difficulties as a result of sanctions as per *Instar Logistics*, Russian courts may adopt a less arbitration-friendly approach.

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