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Russian Sanctions Law Bares Its Teeth: The Russian Supreme Court Allows Sanctioned Russian Parties To Walk Away From Arbitration Agreements

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As previously reported, in mid-2020, changes were enacted to the Russian Arbitrazh (Commercial) Procedure Code ("**APC**") to establish 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 triggered concerns that sanctioned Russian parties would be able to easily avoid arbitration clauses they had entered into. As discussed in an earlier blog post, the way in which the relevant provisions of the APC were drafted gave rise to two possible interpretations: (1) whether *any* sanctioned Russian party can avail itself of these provisions, or (2) whether they only apply when sanctions effectively prevent the sanctioned party from participating in a foreign-seated arbitration. In May 2021, the arbitration community breathed a sigh of relief when the Russian Supreme Court embraced the latter, more restrictive approach. However, on 9 December 2021, the Judicial Panel on Economic Disputes of the Russian Supreme Court overturned the earlier Supreme Court decision and adopted an expansive approach to the interpretation of these provisions, thus allowing any sanctioned Russian party to walk away from contractually agreed arbitration and to obtain an anti-suit injunction against such arbitration from Russian courts.

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 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 states 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.

Earlier Decisions in the *Uraltransmash* Case

The interpretation of these provisions has been recently tested in the *Uraltransmash* case.

Uraltransmash, a Russian company, entered into a contract for the purchase of tramway cars with PESA Bydgoszcz ("**PESA**"), a Polish company, which contained an SCC arbitration clause. Uraltransmash's parent entity subsequently became subject to EU sanctions. In May 2019, PESA commenced arbitration against Uraltransmash, in which the latter participated. Uraltransmash subsequently applied to the Russian courts seeking an anti-arbitration injunction against PESA, arguing that the fact that Uraltransmash was subject to EU sanctions was in itself sufficient to grant the injunction under Articles 248.1(3) and 248.2 of the APC.

Several levels of Russian courts (including the Supreme Court, which in May 2021 refused to hear an appeal of the decisions of lower courts – denying *certiorari*, to adopt US legal terminology) disagreed with the expansive interpretation put forward by Uraltransmash, finding 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.

Reversal of the Supreme Court's Position

Uraltransmash filed a complaint on the Supreme Court *certiorari* denial to its Deputy Supreme Justice (as is possible to do under Russian law). On 21 September 2021, the Deputy Supreme Justice of the Supreme Court overturned the *certiorari* denial and directed the matter to be heard by the Supreme Court's Judicial Panel on Economic Disputes.

On 9 December 2021, the Supreme Court overturned the decisions of the lower courts in *Uraltransmash.* It endorsed an expansive interpretation of Article 248.1(4) of the APC, noting that *ipso facto* the application of sanctions against a Russian party already creates obstacles to its access to justice. In the Supreme Court's view, there was thus no need to present evidence of any practical difficulties preventing a sanctioned party from participating in an arbitration seated outside of Russia; the sanctioned party can simply unilaterally opt for the jurisdiction of Russian courts.

The Supreme Court cited the explanatory note to the APC amendments, which suggested that the legislative intention was to protect the interests of Russian parties subject to foreign sanctions, because such sanctions *de facto* deprive them of the opportunity to defend their rights before foreign fora. It concluded that the legislative intention was to establish that the mere fact of the imposition of sanctions against a party was sufficient to conclude that its access to justice was impeded.

The Supreme Court went on to suggest that the imposition of sanctions against Russian parties affects their rights, at least "reputationally", and thus *a priori* puts them in an unequal position to other parties to an arbitration. In the view of the Supreme Court, this justifies doubts as to the impartiality of a foreign arbitration and as to whether a sanctioned Russian party can get a fair trial in such circumstances.

In reaching this conclusion, the Supreme Court ignored *amicus curiae* submissions from the Vienna International Arbitration Centre and the Russian Arbitration Association advocating a more restrictive approach to the interpretation of Article 248.1(4) of the APC and explaining the absence of any legal restrictions on arbitrations with sanctioned parties in a number of popular seats of arbitration.

Despite these pronouncements, the Supreme Court refused to grant Uraltransmash an anti-suit injunction against PESA, because the arbitration between Uraltransmash and PESA had already concluded, an award having been rendered in May 2021.

Reactions and Implications

The latest Supreme Court decision in *Uraltransmash* has been met with concern by commentators. It is problematic on a number of levels. While not a binding precedent, the decision is likely to be highly persuasive to lower-level Russian courts in the future. It will mean that any sanctioned Russian party, regardless of any practical impact or lack thereof on its ability to participate in an arbitration, will be able to walk away from contractually agreed arbitration clauses and enjoin its counterparties from pursuing arbitration in accordance with such clauses.

Uraltransmash creates substantial uncertainty for parties dealing with all Russian counterparties, since it cannot be excluded that, after an arbitration agreement is entered into, the Russian party may become subject to sanctions (as indeed happened in the *Uraltransmash* case). Further, it gives Russian parties the option to selectively enforce or disregard arbitration clauses, depending on their interests in each particular case.

While not binding on arbitral tribunals seated outside of Russia, the enforcement of foreign awards against sanctioned parties obtained in breach of a Russian anti-suit injunction is likely to be deemed contrary to public policy by Russian courts. There is also a risk of conflicting foreign awards and Russian court judgments in circumstances where a sanctioned party chooses to remove proceedings to a Russian court, but the foreign arbitration proceeds regardless; again, such conflicting foreign awards are likely to be unenforceable in Russia.

These risks may be partially mitigated by opting for a seat of arbitration in a jurisdiction seen as less likely to impose sanctions against Russian parties (such as Singapore or Hong Kong), or by opting for arbitration with a seat in Russia. The latter option may not be acceptable to all foreign counterparties as it would expose the arbitration to the supervisory jurisdiction of Russian courts.

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