Kluwer Arbitration Blog

Paris Arbitration Week Recap: The Impact of Russian Sanctions on International Commercial Arbitration – From Arbitrability to Enforcement

Ioana Knoll-Tudor (Jeantet) · Wednesday, April 13th, 2022

As part of the 2022 Paris Arbitration Week, Jeantet organised a conference on *"The impact of Russian sanctions on international commercial arbitration: from arbitrability to enforcement"*. The panel was composed of Crina Baltag *(Associate Professor, Stockholm University; and Editor of the Kluwer Arbitration Blog)*, David Lasfargue *(Partner, Jeantet)*, Niamh Leinwather *(Secretary General, VIAC)*, Evgenyia Rubinina *(Partner, Enyo Law)*, Jacques-Alexandre Genet *(Partner, Archipel)* and was moderated by Dr. Ioana Knoll-Tudor *(Partner, Jeantet)*.

In light of the current situation in Ukraine, several states took sanctions against Russia, which, in turn, took a series of counter sanctions. The session addressed the issues described below.

The Origins of Economic Sanctions and an Overview of Their Effect on International Arbitration

Over the years, economic sanctions moved from focusing on external goals, such as preventing wars between states, to more internal goals, *e.g.*, concerns with human rights inside of a state. Since March 2014, the EU imposed economic sanctions against Russia for the illegal annexation of Crimea and Sebastopol, then in February 2020, as a consequence of the recognition by Russia of Donetsk and Lugansk and most recently following Russia's aggression of Ukraine.

The issue of arbitrability of a dispute involving economic sanctions emerged already in 1994[1)], when the Genoa Court of Appeal concluded that a national court had jurisdiction, not an arbitral tribunal, since sanctions touched upon the issue of public policy. This position has nevertheless evolved and in the recent years national courts have constantly confirmed that arbitral tribunals are competent to decide on the arbitrability of the matter.

Although, generally, arbitration is not prohibited by economic sanctions, there are significant consequences when it comes to the information the arbitral institution has to gather with respect to the parties. An illustration of this being Article 10 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which provides that the SCC can ask for additional information from the parties to understand at the outset of the proceedings if economic sanctions might have an impact on the matter.

Current Sanctions and Counter Sanctions

In 2022, the EU took four packages of sanctions: (i) full blocking sanctions on a large list of individuals and entities and blocking the assets of the CPR, (ii) prohibition to provide specialized financial messaging services to certain banks, i.e., no longer using SWIFT for certain banks, and to sale, supply, transfer or export bank notes to Russia, (iii) prohibition to invest and co-invest with the Russian investment funds and (iv) ban on exportation of certain products and trade restrictions, especially the luxury goods. As far as the US sanctions are concerned, the economic sanctions are similar, having the same targets.

In light of these sanctions, Russia developed a series of countermeasures, promptly releasing a list of "unfriendly States", which includes all the EU countries, as well as other countries supporting sanctions against Russia.

Among Russia's first reactions to sanctions was the issuance of the presidential decree dated 28 February 2022, through which it obliged residents involved in foreign economic activities to sell 80% of all the foreign currency they receive from non-residents. This measure is aimed at protecting the rouble and to avoid transfer of currencies abroad.

This was shortly followed by a draft presidential decree dated 9 March 2022 targeting entities with more than 100 employees and owned by shareholders from "unfriendly states" for more than 25%. The draft decree stated that if the executive bodies of the company stop managing the company, leading it to cease or terminate its activity or risking going bankrupt, then the board members or the state bodies could file a request with the court asking for the out in place of an external administration of the company. In this case, the shareholders will be obliged to resume the activity of the company and consequently ask for the cancellation of the proceedings; otherwise, the court might transfer the management of the company to an external administration, that is a public institution. This draft decree raised a lot of concern that an expropriation wave is under preparation. Nonetheless, for the time being, this is only a draft which has not been enacted yet.

How Arbitral Institutions, Notably VIAC, Deal With the Issue of Economic Sanctions

VIAC has a system of checking public websites, including the official website of the parties and entities involved in the arbitration, as well as internal database by using the screening-off and screening-on functions. Equally important, the parties, the arbitrators, but also the subject matter of the dispute play an important role in order to determine if it falls into the scope of the sanctions' regime. Additionally, VIAC requires the parties to provide more information on their identity, the related entities, and the ultimate beneficial ownership.

Checks are conducted at all relevant stages of the proceedings, particularly at the submission of the statement of claim and of the answer, since money transfers are involved and sanctions might have an impact on such payments.

In order to ensure compliance with economic international sanctions, administrative measures may be taken if (i) one of the parties is under sanctions regime, (ii) one of the parties or their related entity is a citizen of a country subject to sanctions, (iii) one of the related entities is listed under the sanction regime such as entities or individuals directly or indirectly owned, and who are controlling a party in the matter, if they are directly or indirectly owned by a party or they are affiliated in some way.

A worth mentioning novelty in the field is the new regulation that came into force in March 2022, namely article 5. a. a), §1 of the Council Regulation (EU) No 269/2014, which provides that it

should be prohibited to engage in any transaction directly or indirectly with a various list of legal entities provided under annex 19 of the same regulation.

Among the challenges this provision may pose in practice is the absence of a definition of the term *"transaction"*. The current interpretation of VIAC is that legal services are not considered a transaction and that is due to a violation of the right to be heard and the access to justice of the parties that it might trigger.

Russia's "Anti-Sanctions" Reforms of its Commercial Procedure Code

Pursuant to reforms of the Russian Commercial Procedure Code of June 2020, namely the introduction of Article 248, sanctioned parties (including Russian parties or foreign parties that are subject to sanctions against Russia) are allowed to bring a claim at their place of residence or incorporation, provided that this dispute has not already been brought before a foreign court or before an arbitral tribunal seated outside of Russia, even if the contract contains an arbitration clause or a foreign court dispute clause. In the event arbitration or proceedings before courts are commenced, there is the possibility to ask the Russian courts to order an anti-suit injunction against these proceedings.

Although the initial expectations of the arbitration community were that these provisions would be interpreted in a fairly narrow way, this was not the case.

The interpretation of the aforementioned provision was outlined by the Russian Supreme Court in the *Uraltransmash v Pesa* case (previously discussed here). Uraltransmash was subject to sectorial sanctions but was able to participate in an SCC arbitration. Despite this, it applied for an anti-arbitration injunction against the SCC arbitration in front of the Russian courts. The Russian Supreme Court overturned all the decisions of lowers courts interpreting Article 248 narrowly and held that the intention of the legislator was to enable all sanctioned parties to take advantage of this article because if a Russian party was subject to sanctions, it meant that it could not get justice before foreign courts or foreign seated arbitrations.

Further amendments have been proposed to the Russian Commercial Procedure Code, a relevant example being the proposal from November 2021 which, if enacted, would give Russian courts exclusive jurisdiction over claims against parties where it is alleged that the foreign counterparty receives a *de facto* benefit from sanctions, and where the foreign counterparty did not perform its contractual obligations as a result of the sanctions.

In terms of practical implications of these reforms, sanctioned Russian parties can choose where to bring their claim. Although in some cases it might be useful to bring these claims in Russia, the practical utility might be limited, due to uncertainties that may arise in connection to the extent to which the New York Convention might prevent the enforcement of such decisions, which were in breach of a valid arbitration agreement, outside of Russia.

The Impact of Sanctions on Enforcement in the Context of International Arbitration

The panel made first the difference between freezing of assets, which means that the funds remain in the hands of the debtor and seizure, which is a way of depriving the debtor of the property, with the funds being in the end turned over to the seizing creditor.

Economic sanctions may have two major consequences at the stage of enforcement of awards.

The first one is that award debtors are precluded from making any payments to sanctioned award creditors. The question of the interest on these amounts comes then into question, depending on the national law of the debtors. It might prove useful for creditors to put these amounts into an escrow account, in order to interrupt interests from running. The second one is that sanctioned award debtors are precluded from paying with their frozen funds.

In a recent ruling, the ECJ decided that a private creditor looking to obtain an interim measure on frozen funds, has first to refer to the national competent authorities. In most countries, the competent authority is the Ministry of Finance from which the creditor has to obtain a prior authorisation in order to possibly perform an attachment in the future. It can be concluded that the ECJ found a way to prevent in practice any interim measure being performed on frozen funds, since such a prior authorisation will be very difficult to obtain.

Difficulties will arise in practice while trying to enforce awards against targeted or listed Russian entities, as it is probable it will not be possible to enforce against frozen funds.

Conclusion

Sanctions and counter-sanctions raise a number of questions, for the procedural strategies of the parties, for the conduct of arbitration proceedings by arbitral institutions and also for the enforcement of the arbitral awards. With unprecedented economic sanctions taken against Russia and countersanctions taken by Russia, almost weekly, the arbitration community will continue to pay attention and reflect on the impact on these sanctions on arbitration procedures and enforcement.

References

?1 Fincantieri-Cantieri Navali Italiani SpA v Iraq (1994) Riv. Dell'arb 4 (1994) (Corte di Appello di Genova/Genoa Court of Appeal, Italy).

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