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The EU's Clarification on Access to Arbitration in its Seventh Package of Sanctions Against Russia: Trivial or Consequential?

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On 21 July 2022, the European Council adopted **Decision (CFSP) 2022/1271 amending Decision 2014/512/CFSP** and **Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine**. One of the amendments introduced by the European Council appears to have assuaged the concerns of arbitral institutions and arbitration practitioners alike.

As the Council explains in its Regulation (EU) 2022/1269, "[i]*n order to ensure access to justice, Decision (CFSP) 2022/1271* […] *allows an exemption from the prohibition to enter into any transactions with Russian public entities necessary to ensure access to judicial, administrative or arbitral proceedings*."

The said "*prohibition to enter into any transactions with Russian public entities*" is laid down in Article 5aa(1) of **Regulation (EU) No 833/2014** ("**Regulation 833/2014**"). This provision sets out that "[i]*t shall be prohibited to directly or indirectly engage in any transaction with: (a) a legal person, entity or body established in Russia, which is publically controlled or with over 50 % public ownership or in which Russia, its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX; (b) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex XIX; or (c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph*" (hereafter jointly referred to as "**Listed Entities**"). At the time of publication of this post, twelve entities appear in Annex XIX, including Rosneft and Gazprom Neft.

In June 2022, that is, before the adoption of Decision (CFSP) 2022/1271 and Council Regulation (EU) 2022/1269, the European Commission had already clarified that "[w]*ith regards to the provision of* […] *legal services, Article 5aa should be interpreted in light of the fundamental rights protected under the Charter, in particular the right of defence. This provision does not affect the provision of services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy as referred in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights*."[1)]

Further to Council Regulation 2022/1269, Article 5aa(3) of Regulation 833/2014, which lists transactions that are exempt from the prohibition set out in Article 5aa(1), now expressly stipulates that such prohibition shall not apply to "*transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014*" (Article 5aa(3)(g) of Regulation 833/2014, hereafter referred to as "**New Article 5aa(3)(g)**").

New Article 5aa(3)(g) Does Not Vitiate Other Restrictions of the EU Sanctions Program that May Affect Arbitration Proceedings and Arbitral Awards

The concerns that led to the amendment were undoubtedly valid.

Indeed, by prohibiting "any transaction" with publicly-owned or -controlled entities listed in Annex XIX to Regulation 833/2014 and other Listed Entities, Article 5aa(1) justifiably raised doubts as to whether attorneys, arbitrators and arbitral institutions were authorised to provide any of the services required to ensure these entities access to justice *inter alia* through arbitration proceedings, and whether attorneys, arbitrators and arbitral institutions were authorised to receive any kind of payment in relation to such services. Today, New Article 5aa(3)(g) makes it plain that transactions that are strictly necessary to ensure access to justice or for the recognition or enforcement of a judgment or an arbitral award, are exempt from the general prohibition laid down in Article 5aa(1).

New Article 5aa(3)(g) should however not be read in isolation from the rest of the EU sanctions program against Russia. The new provision itself stipulates that transactions that are strictly necessary to ensure access to justice are authorized only to the extent that they are "*consistent with the objectives of* [Regulation 833/2014] *and* ***Regulation (EU) No 269/2014*** [("**Regulation 269/2014**")]," both of which contain provisions that continue to affect not only the administration of arbitration proceedings but also the ruling by arbitrators on substantive claims and the enforcement of arbitral awards.

Legal and practical difficulties related to transfers of funds (including payments of registration fees and advances on costs) remain a staunch reality in all cases involving an entity that is both a Listed Entity under Article 5aa(1) of Regulation 833/2014 and an entity listed in Annex 1 to Regulation 269/2014, hence an entity whose assets are frozen as per Article 2 of the latter Regulation. This is, for instance, currently the case of *United Aircraft Corporation* and *United Shipbuilding Corporation*. In respect of such entities, no transfer of frozen assets may take place absent a license from the competent authority and the agreement of the banks involved.

Merits-wise, Article 11 of Regulation 833/2014 continues, of course, to prohibit the satisfaction of claims made *inter alia* by Listed Entities if such claims relate to transactions whose performance has been affected by measures imposed under the EU sanctions program against Russia.[2)]

Finally, at the enforcement stage, Article 5(1) of Regulation 269/2014 continues to provide that frozen funds of an entity included in Annex I (which might also happen to be a Listed Entity under Article 5aa(1) of Regulation 833/2014) may be released for purposes of satisfying an arbitral award only in situations in which the award was rendered before the entity in question was included in Annex I.

Surely, the introduction of New Article 5aa(3)(g) "*clarifies the intention of the legislator* […] *to isolate the target commercially and financially, not to deny publicly-owned or-controlled entities access to justice. But* [the above shows that] *the mere involvement of a sanctioned entity in arbitration proceedings* […] *is* […] *no shield against the restrictions imposed by the EU sanctions programme.*"[3)]

New Article 5aa(3)(g) Might However be Helpful to Interpret Some of the Other Restrictions Found in the EU Sanctions Program

While New Article 5aa(3)(g) does not vitiate restrictions, other than the general one set out in Article 5aa(1) of Regulation 833/2014, that may affect arbitration proceedings and arbitral awards, the new provision might be helpful to interpret some of these other restrictions.

For instance, New Article 5aa(3)(g) is arguably relevant when it comes to interpreting situations in which frozen assets may be released under Article 4 or under Article 5 of Regulation 269/2014.

Pursuant to Article 4(1)(b) of Regulation 269/2014, "[b]*y way of derogation from Article 2, the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources,* […] *after having determined that the funds or economic resources concerned are* […] *intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services*."

New Article 5aa(3)(g) – which, in accordance with the guidance provided by the European Council, is intended to safeguard "*the right of defence* […] *in judicial proceedings and the right to an effective legal remedy*"[4)] – gives further legitimacy to the view that Article 4(1)(b) covers not only payments of attorneys' fees and payments to arbitrators (which squarely fit into "*professional fees* […] *associated with the provision of legal services*") but also transfers of funds to arbitral institutions. All of these payments are, after all, necessary to truly guarantee access to justice.

At the post-award stage, Article 5 of Regulation 269/2014 sets out two slightly different regimes as regards the release of frozen funds to satisfy arbitral awards and court decisions. It allows the release of frozen funds to satisfy an award only if the latter was rendered before the unsuccessful respondent was included in Annex I, whereas it allows the release of frozen funds to satisfy a judicial decision irrespective of whether the respondent was included in Annex I before or after the decision in question was rendered.

Some authors have read this provision to imply that unlike local courts, arbitral tribunals should not hear or rule on claims in disputes involving entities listed in Annex I to Regulation 269/2014.

It is beyond the scope of the present entry to explain in detail why such position does not hold. Suffice it to note here that by placing judicial, administrative and arbitral proceedings on an equal footing as dispute resolution avenues even for cases involving sanctioned entities, New Article 5aa(3)(g) reinforces the view that Article 5 of Regulation 269/2014 – which relates strictly to enforcement issues – is not intended to reduce the scope of disputes that may be heard by arbitrators as compared to the scope of matters that may be heard by local courts.

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References

?1, ?4 **Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014, p. 211, question no. 5**.

?2 Article 11(3) only reserves the right *inter alia* of Listed Entities to judicial review of the legality of the non-performance of contractual obligations in accordance with Regulations 833/2014 and 269/2014.

?3 **Jack Ballantyne, *EU confirms arbitration carve-out in sanctions regimes*, GAR News, 26 July 2022**, quoting Mercédeh Azeredo da Silveira.

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