

Kluwer Arbitration Blog

Kyiv Arbitration Days 2022: How to Enforce against the Russian Federation?

Benjamin Siino, Mariia Tsarova (Gaillard Banifatemi Shelbaya Disputes) · Friday, April 21st, 2023

Although the COVID-19 restrictions have been lifted almost everywhere and in-person events have returned to full swing, [Kyiv Arbitration Days 2022 \(KAD\)](#), the most famous Ukrainian arbitration event, was still held online. The title of the conference – “After the war: The legal battles” – speaks for itself. While the war is still ongoing and Ukrainian soldiers are fighting Russia on the battlefields, the Ukrainian and international arbitration community is thinking about the legal battles they will face once the war in Ukraine is over. It is also no coincidence that one of the panel sessions was dedicated to enforcement of awards against the Russian Federation. With Russia’s history of non-compliance with arbitral awards and foreign judgments, this question becomes key. This post summarises the discussion held during this particular panel.

The session, which was brilliantly moderated by [Yuliya Atamanova](#), Partner at LCF Law Group (Ukraine), attracted several distinguished speakers from civil and common law jurisdictions, namely [Sebastian Lukic](#), Attorney at Law at Schoenherr (Vienna, Austria), who focused on the issues of sovereign immunity; [Benjamin Siino](#), Partner at Gaillard Banifatemi Shelbaya Disputes (Paris, France), who shared some insights into how the Russian Federation manages its property and uses various techniques to avoid enforcement; [James Hayton](#), Partner at LK Law LPP (UK), who spoke about enforcement against property of sanctioned Russian oligarchs; and [Gene M. Burd](#), Partner at FisherBroyles (USA, Washington), who explained some peculiarities of enforcing arbitral awards and foreign judgements from the U.S. perspective.

The Russian Federation’s Management of its Property

The first thing any enforcement practitioner wishing to enforce against the Russian Federation needs to understand is how the Russian Federation manages its property.

First, all Russian federal property is divided between property allocated to State enterprises (engaged in commercial activities) and institutions (engaged only in purely non-commercial activities), and the State Treasury of the Russian Federation. Given the current context, Russia’s creditors will obviously not be able to enforce their claims against the Russian State Treasury. Thus, the only option they are left with is to enforce against assets which are formally held by State enterprises but in reality belong to the Russian Federation.

These State enterprises (called “unitary enterprises”) are special vehicles created by the Russian Federation to manage its assets while retaining the ownership and strict control over such assets. Russian law distinguishes between federal State unitary enterprises (FSUEs) and federal treasury enterprises (FTEs). One of the main peculiarities of such enterprises is that they do not own property allocated to them by its owner, *i.e.*, the Russian Federation.

Therefore, the Russian Federation owns its property through entities – which do not own that property themselves – whose only purpose is to manage such property in the interests of the State. Yet, the Russian Federation always claims that these assets belong to separate legal persons, although it is the Russian Federation that owns them and decides on how to use them.

Second, Russia has unlimited control over its property and can allocate and re-allocate such property among State bodies and entities as it sees fit. The Russian Federation has already done so in the past as part of its strategy of shielding assets to avoid enforcement. In reaction to [enforcement proceedings](#) concerning the “receivables” of the Federal Space Agency Roscosmos attached in France by the majority shareholders in the former Yukos Oil company, the Russian Federation (in less than two weeks!) reorganised the Federal Space Agency Roscosmos into a newly created State corporation Roscosmos and transferred all its property to this corporation.

Third, the Russian Federation often uses various tools and techniques to create an appearance that State enterprises are the real “owners” of the Russian Federation’s assets, and it relies on such devices to challenge attachments conducted by creditors of the State. Each court will need to decide on a case-by-case basis whether the attached assets belong to the Russian Federation and, if so, whether to confirm the attachments and allow the enforcement. Therefore, despite being a rather challenging task, it is important to explain to foreign courts unfamiliar with Russian law concepts that although Russia may change the legal status of the attached assets, in reality it always remains their real owner.

Violation of *Jus Cogens* and Applicability of Sovereign Immunity

Another hurdle in enforcing against the Russian Federation is the issue of sovereign immunity. Sebastian Lukic touched upon three exceptions mentioned in the [2004 United Nations Convention on Jurisdictional Immunities of States and Their Property](#), highlighting the “commercial purpose” exception as being the most interesting from the enforcement perspective. However, the main discussion was focused on the question of whether there could be other exceptions from immunity, for instance for violations of norms of *jus cogens*. To put this differently: could a State be stripped from immunity if it breaches *jus cogens*?

In 2012, the International Court of Justice (the ICJ) answered this question in negative by ruling in [Germany v. Italy: Greece Intervening](#) that “under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict”.

It can be argued, however, that the situation today is different from the circumstances discussed in the 2012 ICJ decision. *First*, as the war in Ukraine continues, the Russian Federation keeps violating norms of *jus cogens*. *Second*, in the 2012 decision there was no question of whether Germany was using the (proceeds of) attachments to breach international law. In contrast, in the present case, Russia has been spending public funds and proceeds from State property (which can

be subject of attachment) to finance the ongoing war in Ukraine.

Interestingly, the 2012 ICJ decision came with an important qualification that the ICJ's conclusions were made based on "*customary international law as it presently stands*". In Sebastian Lukic's view, this should be interpreted as a note to the States which have the power to shape international law and change it, if necessary.

Enforcement Against Property of Russian Oligarchs

The panelists also discussed the possibility for the Russia Federation's creditors to enforce arbitral awards and foreign judgements against the property of sanctioned Russian oligarchs. The issue was addressed in great detail by James Hayton, who noted that the prospects of such idea were rather faint (the full presentation can be accessed [here](#)). Arguing before a judge that the property of Russian oligarchs is beneficially owned by the State and is merely being held by the oligarchs on its behalf would present a great challenge in most cases. Similarly, an *alter ago* argument would be even more difficult, if not impossible. Therefore, as the law stands today, there is no proper legal mechanism in place allowing the Russian Federation's creditors to enforce arbitral awards and foreign judgments against the assets of sanctioned Russian oligarchs.

At the same time, there have already been a number of proposals for reforms to the law to make things easier for Ukraine and for judgement and award creditors against Russia. As with the immunity issues, this matter depends on the will of the States and there is hope that they will find an appropriate solution.

Recovery of Damages Caused by the Russian Federation Aggression: the U.S. perspective

The session concluded with an overview of possibilities and challenges for recovery of damages caused by Russian aggression in Ukraine from the U.S. perspective presented by Gene M. Burd (the full presentation can be found [here](#)). In particular, he described the provisions of the [Foreign Sovereign Immunities Act](#) concerning the immunity exceptions. He also touched upon the impact of sanctions imposed by the United States before proceeding with the explanation of how various tools (such the [Torture Victims Protection Act](#), the [Alien Tort Statute](#), Iran cases, etc.) could be used as a legal ground for recovery in the United States.

All panelists noted that the issues of enforcement against the Russian Federation, especially in light of its wrongdoings in Ukraine, require serious public discussion and that arbitration conferences like KAD should be used as a platform for such debate.

**Endnote: The contributors have been representing the majority shareholders in the former Yukos Oil company in the enforcement proceedings discussed in the post.*


To make sure you do not miss out on regular updates from the *Kluwer Arbitration Blog*, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with horizontal lines above the main title.

This entry was posted on Friday, April 21st, 2023 at 8:08 am and is filed under [Enforcement](#), [Russia](#), [Sovereign Immunities](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.