

Arbitration clauses in contracts with Russian companies subject to sanctions: New clarifications of the Supreme Court of the Russian Federation



The Supreme Court of the Russian Federation upheld the right of a Russian company subject to sanctions to have a dispute with a foreign counterparty considered in a Russian state court, regardless of whether the respective contract contains an arbitration clause in favour of a foreign arbitration institution.

1. Background

A railcar supply contract was concluded in 2013 between a Russian company (the "Buyer") and a Polish company (the "Supplier"). The Buyer has the status of a strategic entity. When the Buyer entered the contract, however, it acted as an independent legal commercial entity which was not exercising the functions of a state authority and was not representing

the interests of the Russian Federation. The contract was a commercial supply contract between two business entities which was not related to the public interest or the interests of the Russian Federation.

The parties agreed that any disputes would be resolved at the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC").

Since 2014 the EU, the USA, Switzerland, Ukraine and Liechtenstein have introduced sanctions against the Buyer.

In September 2018, the Supplier filed a request for arbitration with the SCC, demanding the recovery of debt and fines exceeding EUR 55 million from the Buyer. The Supplier paid the arbitration fee on behalf of the Buyer as the latter had alleged its poor financial situation. The Buyer did not submit arguments that it was technically unable to pay the arbitration fee owing to the sanctions.

The SCC started considering the dispute in accordance with its rules.

The Buyer participated fully in the arbitration proceedings (appointed an arbitrator, submitted a statement of defence on the merits of the claims, filed a counterclaim, etc.)

The SCC issued an arbitral award based on the merits of the claims on 12 May 2021.

The Buyer had filed a petition in November 2018 in the Russian state court at its place of registration to have the arbitration clause contained in the contract declared invalid and unenforceable. The petition was dismissed by the court (case No. A60-62910/2018).

New provisions of the Russian Commercial Procedure Code entered into force in June 2020 (Articles 248.1 and 248.2), stipulating that Russian legal entities subject to foreign sanctions may litigate with foreign counterparties in a Russian state court, regardless of whether the respective contract contained an arbitration clause in favour of a foreign arbitration institution (or a foreign state court). If an arbitral award has already been issued, then Article 248.1 of the Russian Commercial Procedure Code will not obstruct the recognition and enforcement of the decision of the foreign court or the foreign arbitral award adopted further to the claim of a Russian party subject to sanctions. This provision is also applicable if this person did not object to the consideration of the dispute by a foreign court or an international commercial arbitration institution

located outside the Russian Federation, inter alia, it did not file a petition prohibiting the initiation or continuation of the proceedings in the foreign court or international arbitration institution located outside the Russian Federation.

In July 2020 the Buyer, based on the new provisions of the Russian Commercial Procedure Code, filed a petition with the Russian state court at its place of registration, requesting that it prohibit the Supplier from continuing proceedings in the SCC (an "Anti-Suit Injunction"); and in case of the non-performance of the court ruling to prohibit the continuation of proceedings – to recover approximately EUR 56 million in favour of the Buyer (case No. A60-36897/2020).

The Buyer's petition was dismissed by the court of first instance in November 2020 and by the court of cassation in March 2021. The courts held that there was no evidence attesting to facts that obstructed the Buyer's access to justice or prevented the Buyer from exercising its right to legal protection in the SCC.

2. Position of the Supreme Court of the Russian Federation

The Supreme Court disagreed with the conclusions of the lower-instance courts and stated the following [1]:

1. The goal of adopting the amendments to the Commercial Procedure Code of the Russian Federation was to establish guarantees to protect the rights and legitimate interests of certain categories of Russian citizens and Russian legal entities subject to restrictions introduced by foreign states, as the restrictions de facto deprive them of the ability to protect their rights in the courts of foreign states, international organisations or arbitration tribunals located outside the Russian Federation.
2. The actual introduction per se of sanctions against a Russian party in a dispute in an international commercial arbitration institution outside the Russian Federation serves as sufficient grounds for concluding that the access of the Russian party to justice is limited.
3. A unilateral expression of will expressed in a procedural form is sufficient for the transfer of a dispute to the jurisdiction of Russian courts.
4. There is no mandatory need to prove the impact of sanctions on the enforceability of an arbitration clause. On the contrary, the wording of the law emphasises that proving this fact is optional.

5. The introduction by foreign states of restrictions (bans and personal sanctions) on Russian persons impairs their rights, at the very least from a reputational perspective, and thereby deliberately places them on an unequal status with other persons. In such circumstances, doubts that a dispute with a person located in a state that introduced restrictions will be considered on the territory of the foreign state that also introduced restrictions in compliance with the guarantees of a fair trial are entirely justified, inter alia, when it comes to the impartiality of the courts, which constitutes one of the components of access to justice.

6. Under this approach, there is no material infringement of the rights of the claimant (the foreign company) to legal protection, as the claimant can turn to a Russian state court for legal protection.

7. An anti-suit injunction is only a relevant and effective interim measure before [judicial] actions have been completed. Once they have been completed, injunctive relief is no longer enforceable, does not provide the applicant with legal protection and as a result loses all meaning.

As the proceedings in the SCC had already been completed on the date of the consideration of the case in the Supreme Court of the Russian Federation (December 2021) and an arbitral award had already been issued in May 2021, the Supreme Court, with due account of the actual circumstances, dismissed the petition for an Anti-Suit Injunction.

3. Consequences for foreign companies

Before filing a claim with a foreign arbitration institution, we advise foreign companies to check whether the respondent has been included in the US sanctions list and/or the sanctions list of European countries.

If such restrictions have been introduced in respect of the respondent (Russian company), then the company should assess in advance the consequences related to the possible issue of an anti-suit injunction by a Russian state court further to the petition of the Russian company (the "Petition"). During the consideration of the Petition in a Russian court, the foreign company may participate in the court sessions and submit its objections.

If the Petition is satisfied, the claim of the foreign company against the Russian respondent can be considered in a Russian state court, regardless of whether the respective contract contains an arbitration clause (or clause on contractual jurisdiction) in favour of a foreign forum.

[1] Ruling No. 309-ES21-6955 (1-3) of the Judicial Panel for Economic Disputes of the Supreme Court of the Russian Federation dated 9 December 2021 in case No. A60-36897/2020

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