



First case-law on exclusive jurisdiction of Russian courts over disputes involving companies placed under foreign sanctions



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During the conference “Commercial disputes with participation of persons under sanctions. Lessons for Russia and EU” which took place online on 17 February 2022 under the auspices of the Russian Committee for International Relations (RSMD) and the Department of international cooperation of the Kutafin Moscow State Law university, a number of participating Russian lawyers indicated that Russian companies, which had become a target of foreign sanctions, faced problems when turning to international commercial arbitration courts.

The main problem reported was the payment of fees for handling cases in international arbitral venues, since foreign banks rejected payments by entities and persons under sanctions. Russian lawyers explained that in theory persons under foreign sanctions had access to justice, however, this was in

fact limited. In 2015, in the aftermath of the Crimea crisis and sanctions, international arbitral institutions, including the Stockholm Court of Arbitration and the Court of Arbitration of the International Chamber of Commerce had issued a declaration confirming the intent to overcome the difficulties Russian parties were confronted with when turning to foreign or international arbitral commercial courts. There were no formal restrictions on access to justice, but the fact remained that the payment of fees was possible only subject to a special approval of competent European authorities.

Another problem experienced by Russian entities was the hiring of foreign lawyers for representation in court and the appointment of arbitrator(s), as some refused to work for sanctioned entities.

As a remedy to the challenges met by sanctioned Russian companies, new provisions on the exclusive jurisdiction of



the Russian courts over disputes involving persons and entities under foreign sanctions were introduced into Russian legislation. More particularly, new Articles 248.1 and 248.2 of the Russian Arbitrazh Procedure Code were adopted on 08 June 2020 by federal law no. 171-FZ “On making amendments to the Arbitrazh Procedure Code aiming to protect persons and legal entities from restricting measures of foreign countries, unions or alliances of foreign countries, or of state or interstate establishment of a foreign country, union or alliance”.

Article 248.1 provides for the exclusive jurisdiction of the Russian courts over

- disputes where a party is a person under sanctions of a foreign country, union or alliance;
- disputes where a ground consists of restricting measures of a foreign state, union or alliance or their establishments against Russian persons or legal entities.

Part 2 of the article includes within the definition of persons under sanctions of foreign states both Russian citizens and legal entities, as well as foreign legal entities, which fall under the restrictions concerned pursuant to sanctions against Russian citizens or entities.

Such affected persons may seek the resolution of relevant dispute by seizing the Russian arbitrazh court of the place of their registration/place of residence if the case is not yet under review by a foreign court or international commercial arbitration outside of Russia; otherwise, they may ask the Russian arbitrazh court to ban the filing of a lawsuit or the continuation of proceedings in the foreign venue.

Further, part 4 of the same article provides that the above measures are applicable even to cases where the parties agreed by contract on a foreign jurisdiction or an international arbitration outside of Russia. According to the text, this provision is applicable where the clause or contractual provision cannot operate because of the restrictions affecting a party's access to justice.

At the same time, the above provisions do not preclude the enforcement of the

decision of a foreign court or international arbitration sought by the person affected by sanctions, or in cases where such sanctioned party had not objected to the proceedings in the foreign court or international arbitration outside of Russia, including the objection consisting of requesting the Russian arbitrazh court to issue a ban on resolving the dispute outside of Russia.

The following Article 248.2. of the Code lays down the procedure and requirements for seeking the ban on a foreign lawsuit or proceedings. This complex subject was discussed in a recent article.

The new legislation does not cover all possible details and the court seized will assess evidence and interpret the law in each individual case. Although case-law is not officially a source of law in Russia, it is persuasive, and the decisions of the Russian Supreme Court and its interpretation of the law are in substance binding on all lower courts.

Since the adoption of the amendments recalled above on the exclusive jurisdiction over disputes involving parties affected by foreign sanctions, a few cases were adjudged and provided some interpretation of relevant law. Some of these are discussed below.

1. Competence of Russian Arbitrazh courts over cases in connection with sanctions

The Arbitrazh Court of the Moscow region as cassation instance in case A40-201344/2020 held that the lawsuit initiated by Russian company Sovfrakht for payment of damages against foreign persons shall be adjudged by the Russian courts based on Articles 248.1. and 248.2 of the Arbitrazh Procedure Code.

The first instance and appeal courts had declined jurisdiction on the grounds that the defendant was a natural person, and the dispute was not connected with his commercial activities. The cassation instance court referred to subparagraph 7.1) of part 6 of Article 27 of the Arbitrazh Code, affirming the jurisdiction of the

Russian arbitrazh courts over disputes referred to in Article 248.1. irrespective of the nature and identity of the parties (natural persons, entrepreneurs, legal entities or organizations).

2.No need to prove difficulties in access to justice in foreign jurisdictions

In case A60-36897/2020, Ural Transport Machinery Construction Company JSC (Ural Company) had requested the banning of the attribution of a dispute with a Polish company to the Stockholm Court of Arbitration. The Russian Supreme Court adjudged the case by decision no.309-ЭС21-6955 dated 09 December 2021.

The agreement of the parties had chosen the Stockholm Court of Arbitration for the adjudging of disputes, and the Polish company had filed a lawsuit against the Russian party in that venue. The Ural Company filed a request to the Russian Arbitrazh Court based on Articles 248.1. and 248.2 of the Arbitrazh Procedure Code. The claim was rejected by first and appellate instances on the strength of part 4 of Article 248.1.

The first instance court became aware that the Ural Company had de facto participated in the proceedings before the Stockholm Court of Arbitration and had hired highly qualified lawyers to represent it. The court furthermore held that the party requesting a ban on foreign jurisdiction over a dispute shall need to prove the circumstances creating obstacles to its access to justice and making the operation of the agreed dispute resolution clause impossible.

The reasoning of the arbitrazh court was as follows.

The requirement of part 2 of Article 248.2. to provide evidence of the actual circumstances supplying grounds for the exclusive jurisdiction of the Russian arbitrazh courts is applicable to both situations

-that described in part 1 of Article 248.1. of the absence of specific dispute resolution clause, where there is no need to prove the impossibility to meet such (non-existing) requirement; and

-that described in part 4 of Article 248.1., where a dispute resolution clause was agreed, and at stake are the circumstances, which made the operation of such clause impossible, due to the existence of restricting measures affecting access to justice.

The appellate court upheld the judgement of first instance court, and the Russian party challenged its decision before the Judicial Chamber for Commercial Disputes of the Supreme Court of the Russian Federation.

The Supreme Court reversed the decisions of the lower courts and held that the existing restrictions *per se* created obstacles to the access to justice by the Russian party, and constituted sufficient grounds for applying the rule on the exclusive jurisdiction of the Russian courts. It furthermore explained that in such a case the only element needed to produce the transfer of jurisdiction to a Russian arbitrazh court was the expression of the unilateral will of the Russian party to prevail itself of the procedure laid down in Article 248.2.

The court moreover referred to subparagraph 4 of part 2 of Article 248.2. pointing out that providing evidence of the effect of sanctions on the operation of a dispute resolution clause was optional. Thus, the main fact needing to be proved as grounds for requesting the Russian courts to retain exclusive jurisdiction over the dispute, is existence of foreign restricting measures applicable to either party.

However, the decision of the Supreme Court in that case denied the transfer of the case to the jurisdiction of the Russian courts, but the reason for this was that, by the date of hearing before the Supreme Court the case before the Stockholm Court of Arbitration was already concluded.

3.Sanctions are differently construed for the purpose of exclusive jurisdiction and as a ground for termination of a contract

Case A40-155367/2020 is another example of application of the Russian exclusive jurisdiction rule based on

Article 248.2. of the Russian Arbitrazh Code.

Russian company's Tsargrad media account had been blocked by Google on the grounds of sanctions imposed against the major owner of the company, Mr Malofeev. The Russian media company a suit before the Russian arbitrazh court arguing that foreign sanctions against the beneficial owner of the company could not constitute grounds for terminating a service contract with the company.

Irrespective of dispute resolution clause contained in the Google Terms of use, both first and appellate instance courts held that the dispute fell under the exclusive jurisdiction of the Russian courts as the applicant was a Russian legal entity affected by foreign sanctions due to the holding of a 50% participation in its capital by a sanctioned Russian person. Similar to the previous case, the courts referred to Articles 248.1. and 248.2. of the Russian Arbitrazh Code. In its joint decision on the cases concerned (rulings nos. 09AP-35329/2021, 09AP-35336/2021, 09AP-35341/2021, 09AP-35345/2021, 09AP-35346/2021) dated 20 December 2021 the court of appeal cited the earlier decision on the case A60-36897/2020.

The court also held that the only legal issue in the case was the assessment of whether the foreign sanctions could be the grounds for termination of a contract from the point of view of Russian public policy. The court moreover rejected argument that the first instance court had forced Google to perform what amounted

to an offence in the jurisdiction of incorporation of the company.

Further, the court argued that public law does not extend outside of the country; as a result, sanctions enacted by the US or the EU does not create rights and/or obligations for Russian entities and persons. In support of this argument, the court referred to the general principle of international law, underlying the Declaration on Inadmissibility of Interventions in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (accepted at the 20th Session of UN Organization General Assembly by Resolution 2131 on 21 December 1965).

At the same time, the appellate court held that Google LLC incorporated in the US, Google Ireland Limited incorporated in Ireland and Russian company Google LLC bore joint liability for the groundless termination of the agreement with Tsargrad, and imposed a penalty on the Google companies, which doubles every week until access to the account and services is restored.

Russian entity Google LLC filed an appeal by cassation, whose hearing is scheduled for 17 March 2022.

With the new sanctions imposed by a number of foreign jurisdictions in connection with the Ukraine crisis, one may expect a fresh wave of case-law on the application of the exclusive jurisdiction of the Russian courts, and the precedents previously discussed may serve as initial guidance in respect of the likely stance of the case-law.



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