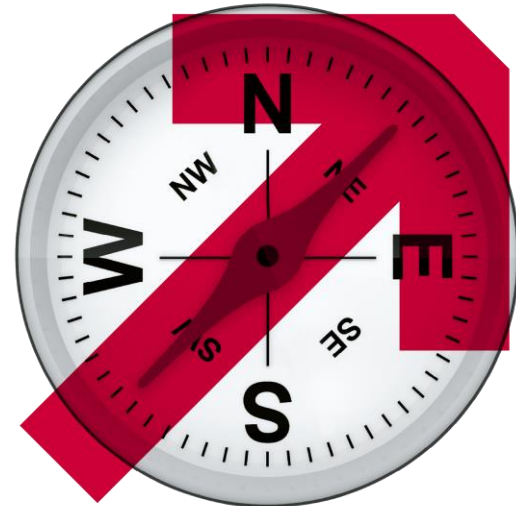


CIL - ILA Seminar on Conflicts of law, sanctions and commercial disputes: Russia, Myanmar and beyond

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Julie Raneda

julie.raneda@swlegal.sg



On the impact of blocking statutes, such as Russian authority from prior to the current situation, whereby the Russian courts claim exclusive jurisdiction over sanctioned parties, and have granted antisuit injunctions to enforce that exclusive jurisdiction

Legal Background

- **Background:** in summer 2020, Russian legislative bodies adopted amendments to the Commercial Procedure Code of the Russian Federation (CPC)
- **Exclusive jurisdiction of the Russian courts**
 - over disputes involving individuals and legal entities affected by the sanctions (Article 248.1 CPC)
 - when the parties' agreement providing for adjudication/administration of the dispute outside of Russia is unenforceable due to the application of sanctions which preclude access to justice (Article 248.1(4) CPC)
- **Prohibition of initiation or continuation of proceedings** before foreign state courts or international arbitral tribunals in disputes involving individuals and legal entities subject to the sanctions (Article 248.2 CPC)

Case No. A60-36897/2020, *Ural Transport Engineering Plant v. Rail Transport Systems PESA* (1)

- In accordance with the Supply Agreement, the Supplier (PESA) had to provide the Russian Buyer (Ural) with streetcars in exchange for monetary consideration. The Russian Buyer allegedly refused to comply with its payment obligations under the Supply Agreement that contained an **SCC arbitration clause**.
- A series of parallel cases were initiated: SCC arbitration, litigation seeking declaration of the arbitration clause to be unenforceable (Article 248.1 CPC), litigation seeking anti-suit injunction (Article 248.2 CPC)
- Initially, the Russian lower courts found that the Russian Buyer was *not* precluded from accessing justice abroad. Factors considered included:
 - ability to pay the arbitration fees and expenses
 - ability to get qualified legal assistance
 - ability to travel abroad
 - arbitrators' independence and impartiality

Case No. A60-36897/2020, Ural Transport Engineering Plant v. Rail Transport Systems PESA (2)

- On 9 December 2021, the Supreme Court of the Russian Federation overturned the decisions of the lower courts and found that sanctions that have been imposed on a party *de facto* create obstacles to access of justice
- Extension of the interpretation of Article 248.1(4) CPC: the mere fact of sanctions puts the Russian party in an unequal position with other parties and can no longer guarantee a fair trial. Hence it is not required to show whether and how access to justice was rendered more difficult by sanctions.
- Consequences:
 - any sanctioned Russian party can walk away from arbitration clauses
 - substantial uncertainty for parties dealing with Russian counterparties

Case No. A40-72905/2022, *TALMER v. DELL* (1)

- DELL LLC (Russian subsidiary) entered into a framework partnership agreement with TALMER (Russian system integrator and IT solutions provider) under which TALMER agrees to distribute Dell products (hardware, software, and related IT products and services) in Russia
- The parties' agreement included a clause that refers their disputes to **the courts of England**
- Contrary to this agreement, TALMER filed a claim in the Commercial (Arbitrazh) Court of Moscow on 11 April 2022

Case No. A40-72905/2022, *TALMER v. DELL* (2)

- On 17 June 2022, the Commercial (Arbitrazh) Court of Moscow found that it had jurisdiction under Article 248.1 of the CPC
- The court analyzed the sanctions adopted by U.S. Bureau of Industry and Security i.e. Rule No. 220215-0048 that tightened export control measures for equipment and software supplied to the Russian Federation as well as similar measures adopted by the EU Council Regulations No. 2022/328 of 25 February 2022 and No. 2022/699 of 3 May 2022
- The court **expanded the interpretation of Article 248.1 of the CPC**, applying it to situations where the sanctions affect the subject-matter of the contract
- On 6 October 2022, the appeal court vacated the lower court decision due to the settlement of the parties, but it did not review the merits of the case

Impact of the Russian countermeasure on arbitration proceedings

- **Possible reaction of the Arbitral Tribunal to anti-suit injunction:**
 - Singapore-seated tribunal
 - Other examples
- **Risks:**
 - impossibility to enforce an arbitral award in Russia in case Russian courts have exclusive jurisdiction of the case (with limited exceptions) (Article 244 CPC)
 - conflicting decisions
 - a penalty may be imposed by the Russian court if the anti-suit injunction was breached (should not exceed the amount of the claim in the foreign court/arbitration)
- **“Available mitigation strategies” (?)**

Thank you

Julie Raneda

julie.raneda@swlegal.sg

Schellenberg Wittmer / Attorneys at Law
www.swlegal.ch

Schellenberg
Wittmer