

URALTRANSMASH V. PESA: SUPREME COURT RULES ON ARBITRATION INVOLVING A RUSSIAN SANCTIONED PERSON

In case [A60-36897/2020](#) the Russian Supreme Court has given its first interpretation of provisions of the Arbitrazh Procedure Code which took effect in 2020, aimed at protecting sanctioned persons from arbitration and litigation outside Russia.

OVERVIEW OF THE LAW ON PROTECTION FROM SANCTIONS

On 8 June 2020, Federal Law No. 171-FZ¹ (the "**Law on Protection from Sanctions**") was enacted, amending the Arbitrazh Procedure Code of the Russian Federation (the "**APC**")². The amendments enter into force on 19 June 2020.

The changes envisage that:

- Russian individuals and entities sanctioned by a foreign state, and also foreign individuals and entities that are subject to secondary sanctions ("**Sanctioned Persons**"), may initiate proceedings in the Russian courts, even when they are parties to a clause referring such disputes to arbitration in an arbitration institution or to litigation in a court outside Russia. To be able to apply to a Russian court, the prorogation clause or arbitration clause must be "*unenforceable*" due to the imposition of sanctions that "*impede access to justice for that [Sanctioned P]erson*"³.
- A Sanctioned Person can apply to a Russian court for an injunction against its counterparty prohibiting the latter from initiating or continuing proceedings against the Sanctioned Person in a foreign court/international commercial arbitration outside Russia (an "**injunction**"). What is more, the court can award the Sanctioned Person a sum that is to be recovered from the person who failed to comply with the injunction. The amount cannot exceed the amount of the person's claim plus legal costs⁴.
- In cases where the Sanctioned Person has "*opposed the dispute involving it being heard by a foreign court or in international commercial arbitration*", including if the Sanctioned Person has "*sought an injunction prohibiting the initiation or continuation of proceedings*" pursuant to the relevant provisions of the APC, this can prevent the foreign judicial decision / international commercial arbitration award against the Sanctioned Person from being recognised and enforced in Russia⁵.

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- Review of the Law on Protection from Sanctions
- Facts of the case in *Uraltransmash v. PESA*
- The positions of the courts
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¹ Federal Law No. 171-FZ On the Incorporation of Amendments to the Arbitrazh Procedure Code of the Russian Federation in Order to Protect the Rights of Natural Persons and Legal Entities in Connection with Restrictive Measures Imposed by a Foreign State, an Association and/or Union of States, and/or a Governmental (Intergovernmental) Institution of a Foreign State or Association and/or Union of States, dated 8 June 2020.

² APC, Articles 248.1 and 248.2.

³ APC, Art. 248.1, para. 4.

⁴ APC, Art. 248.2, para. 10.

⁵ APC, Art. 248.1, para. 5.

The provisions of the Law on Protection from Sanctions are rather vague and give rise to many questions. In particular, it is unclear how exactly the "*unenforceability*" of a prorogation clause or arbitration agreement entered into by a Sanctioned Person is manifested, or what can be deemed to "*impede access to justice*".

This has now been answered by the Russian Supreme Court.

FACTS OF THE CASE

In 2018, the Polish company Pojazdy Szynowe PESA Bydgoszcz SA ("**PESA**") initiated an arbitration in the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**") against Ural Transport Mechanical Engineering Plant JSC ("**Uraltransmash**"). PESA was seeking to recover an amount under a contract for tram cars that PESA had supplied to Uraltransmash.

In July 2020 (i.e., shortly after the Law on Protection from Sanctions was enacted), Uraltransmash applied to the Arbitrazh Court of the Sverdlovsk Region for an injunction prohibiting PESA from continuing the SCC proceedings, citing foreign sanctions that were affecting Uraltransmash⁶; Uralvagonzavod Research and Production Corporation named after F.E. Dzerzhinsky JSC ("**Uralvagonzavod**"), being the majority shareholder holding over 99% of the shares in Uraltransmash, had already tried unsuccessfully to have the arbitration clause declared invalid and unenforceable⁷).

In the course of the case Uraltransmash argued that it was subject to sanctions imposed by the United States (i.e. the SDN list), the European Union and other European countries (prohibition to buy or sell securities issued after 12 September 2014; prohibition to provide new loans or credits with maturity of more than 30 days; prohibition to sell military or dual-use products).

Uraltransmash contended (at least before the Russian Supreme Court) that for the purpose of obtaining an injunction barring the continuation of international arbitral proceedings "*it is not necessary to prove that the applicant has actual difficulties in exercising the right to judicial protection, at least in the foreign state that is imposing [the sanctions]*"; for an injunction to be granted it is sufficient to prove merely that sanctions have been imposed on the Sanctioned Person.

THE POSITIONS OF THE COURTS

The court of first instance⁸ [ruled](#) against Uraltransmash. The court of cassation⁹ [concurred](#) with the court of first instance. The courts held that Uraltransmash had actively taken part in the arbitration and had not encountered actual difficulties in exercising its right to judicial protection.

On 2 December 2021, the Economic Disputes Chamber of the Supreme Court [rejected](#) Uraltransmash's application for an injunction, citing the fact that the arbitral proceedings had already concluded and a final award had already been rendered by the time the Supreme Court was considering the case. However, the judicial panel did determine that Uraltransmash's rights had been infringed, based on the following findings:

- Within the meaning of the provisions of the APC¹⁰, the imposition of foreign sanctions in itself impedes access to justice for a Russian party. From the wording of the relevant provisions of the APC¹¹ it follows that it is not necessary for a Sanctioned Person to prove the effect of the sanctions on the enforceability of the arbitration clause.
- In the case under examination, the claimant (PESA) was located in a sanctioning state (Poland), and the dispute was heard in the territory of a sanctioning state (Sweden). In such a situation, there are reasonable doubts as to whether the Sanctioned Person's right to due process is observed, and, among other things, the impartiality of the courts.

⁶ Case [A60-36897/2020](#).

⁷ Case [A60-62910/2018](#).

⁸ Arbitrazh Court of the Sverdlovsk Region.

⁹ Arbitrazh Court of the Urals District.

¹⁰ APC, Art. 248.1, para. 4.

¹¹ APC, Art. 248.2, para. 4.2.

The Supreme Court also indicated that if an injunction were granted, the claimant (PESA) would have to take steps to terminate the arbitral proceedings. But after such termination the claimant would not lose the right to judicial protection and could bring a claim against the Sanctioned Person in Russian court.

IMPLICATIONS OF THE SUPREME COURT RULING

In our view, the position taken by the Supreme Court raises a number of questions that could affect (i) how arbitration and prorogation agreements are currently concluded with Sanctioned Persons; and (ii) parties' strategy in the event of a dispute.

If a non-sanctioning jurisdiction is chosen as the seat of arbitration, will a Sanctioned Person not be able to neutralise the arbitration or prorogation agreement?

Unfortunately, the Supreme Court's position is not entirely clear. It remains to be seen what the Supreme Court would decide if an arbitration were to take place in a non-sanctioning jurisdiction (e.g., if the seat of an arbitration administered by a foreign arbitral institution were to be Russia or a non-sanctioning foreign state). On the one hand, the Supreme Court took into account the fact that sanctions were in effect against the Sanctioned Person at the place of the proceedings (i.e., Sweden). Furthermore, Uraltransmash apparently argued that precisely because Sweden is imposing sanctions on it, Uraltransmash does not need to prove that its right to judicial protection was actually impeded. In other words, it was the place of the proceedings that the Supreme Court saw as the problem. On the other hand, the Supreme Court found that the legislators did not intend that Sanctioned Persons would have to prove that the enforceability of the arbitration clause was affected by the sanctions. That could mean the place of the proceedings is irrelevant, and it is the mere fact that sanctions have been imposed on the Sanctioned Person which is important.

Does the Supreme Court's position affect arbitration clauses referring disputes to Russian arbitral institutions?

The position taken by the Supreme Court does not appear to affect arbitration agreements that refer disputes to permanent Russian arbitral institutions.

Does the Supreme Court's position have retroactive effect?

The case heard by the Supreme Court showed that the aforementioned mechanisms of protection of a Sanctioned Person are applicable to prorogation agreements and arbitration agreements entered into, *inter alia*, before 19 June 2020 (i.e., the date the relevant statutory provisions entered into force).

What risks are there for claimants when it comes to recognition and enforcement of a foreign arbitral/judicial award outside Russia?

If a Sanctioned Person obtains an injunction in Russia, the claimant in whose favour the foreign arbitral award/judgment is rendered may bear the risk of failure to comply with the Russian judicial act and, among other things, the risk that it could be ordered to pay an amount equal to the amount of the claims awarded – at least in those jurisdictions that recognise Russian court judgments.

Should you need any arbitration or prorogation clauses to be reviewed, we would be happy to advise. Please feel free to contact the authors of this briefing or your regular contact person at Clifford Chance.

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