Reading articles

The Future of Commercial Arbitration with Russian Parties in the World of Sanctions

Before you read the article, discuss these questions

1. Which law governs Russian parties in disputes between businesses?
2. What is the difference in meaning of the term ‘arbitration’ in Russia in Anglo-saxon countries?
3. What are the rules of arbitration in Russia?

Understanding main points

Read the text and answer these questions.

1. Which law governed Russian parties to resolve disputes before the sanction period?
2. What may happen to dispute resolution preferences in RF?
3. What does EU and US law claim pursuant to Russian persons?
4. Under what circumstances do arbitrators have the authority to give effect to sanctions?
5. What affects the outcome of arbitration?
6. Under what circumstances can an arbitrator be impartial when considering disputes involving Russian parties?
7. What are the grounds for setting aside an arbitral award?
8. What are Russian parties likely to insist on?
9. Why is the seat of arbitration significant ?
10. What are the conclusions of the authors?

Understanding expressions

Learn the vocabulary

ubiquitous enforcement – повсеместное правоприменение

influx of foreign lawyers – приток иностранных юристов

backdrop of an overhaul – на фоне пересмотра

legal treatment – юридическая интерпретация

to bring a claim – подать иск

indemnity – гарантия покрытия ущерба, платежеспособность

onus of proving – бремя доказывания

natural or legal persons – физические и юридические лица

have the authority to give effect - иметь полномочия осуществить

pursuant to - согласно

to impose liability on – возложить ответственность на

to be inconsistent with sanctions – противоречить санкциям

to set aside – отменить, отступить

to mitigate against the risks – смягчить риски

Governing law – применимое право

to disregard – игнорировать

substantive law – материальное право

to have an indelible impact on – иметь необратимое влияние на

Law Business Research Ltd
87 Lancaster Road, London W11 1QQ, UK

The Future of Commercial Arbitration with Russian Parties in the World of Sanctions

Dmitry Kurochkin and Francesca Albert of Dechert consider the impact on international commercial arbitration with Russian parties following the imposition primarily by the EU and US of financial and trade sanctions on a number of Russian parties.

Over the course of the past 20 years dispute resolution with Russian parties has largely involved international arbitration mainly for reasons of neutrality and *ubiquitous enforcement* made possible by the New York Convention. The rules of arbitration commonly chosen are those of institutions such as the London Court of International Arbitration (LCIA), the International Chamber of

Commerce (ICC), and the Stockholm Chamber of Commerce (SCC). Also, in part due to the *influx of foreign lawyers* in the Russian market, the law selected to govern contracts has generally been English law.

The question today is how sanctions recently imposed will affect arbitrations brought under existing contracts, and arbitration clauses to be included in future contracts. Against the backdrop of an overhaul of arbitration law in Russia affecting predominantly domestic arbitration, the impact of sanctions may witness a sweeping change in dispute resolution preferences both for Russian and foreign parties.

The *legal treatment* of the impact of sanctions on contracts (whether as a legal norm or an event of force majeure, frustration, impossibility, material change of circumstances or otherwise) lies outside the scope of this article. Below we consider only the procedural aspects of a dispute arising out of a contract with a Russian party affected by sanctions.

Existing contracts

It should be noted at the outset that under EU and US law no sanctioned Russian person or entity or indeed any Russian person or entity can *bring a claim* on the basis of a breach of contract due to sanctions. Article 11 of Council Regulation (EU) No. 833/2014 of July 2014 (Regulation 833) provides in relevant part:

No claims in connection with any contract or transaction the performance of which has been affected… including ***indemnity*** *or any other claim of this type, such as a claim for compensation or a claim under a guarantee… shall be satisfied if they are made by* [sanctioned persons/entities, any other Russian person or entity or any person or entity acting through or on behalf of Russian persons or entities whether sanctioned or not].

The onus of proving that Regulation 833 does not prohibit a claim is on the person bringing the claim, that is, a Russian party or party acting on its behalf. Equally however, Article 11(3) provides that the prohibition on bringing such claims: *is without prejudice to the right of* ***natural or legal persons****, entities or bodies referred to above to judicial review of the legality of the non-*

performance of contractual obligations in accordance with the foregoing EU Council Regulation.

Meanwhile, article 13 of Regulation 833 provides that it applies, among others, within the territory of the EU to any EU national, to any legal person or entity incorporated under the laws of the EU (whether in the EU or not) and to any legal person or entity in respect of which business is done in the EU.

Despite the provisions of Regulation 833 prohibiting claims being brought by Russian parties on the basis of sanctions, it is unlikely that a tribunal or institution will refuse to consider a claim just because one of the parties has been sanctioned regardless of the nationality of the arbitrators or the seat of the arbitration. Arbitrators *have the authority to give effect* to sanctions if they are satisfied the sanctions serve a valid purpose, there is a close connection between the sanctioning state and the contract and if the benefits of giving effect to sanctions outweigh the effects of disregarding the sanctions. Arbitrators will also need to consider the threat of penalties for a party who performs a contract *pursuant to* an award but in breach of sanctions.

Issues such as the seat or place of arbitration, the nationality of arbitrators or the governing law of the contract may directly affect the outcome of an arbitration. For example, a Chinese arbitrator sitting in Singapore is arguably not subject to Regulation 833 and may potentially *disregard* it without fear of penalty for himself. However, if the resulting award needed to be enforced in Italy, it would likely be unenforceable whereas if the award were to be enforced in Dubai, it would likely have a much greater chance of being enforced. Also of relevance and not entirely clear, is the question of whether if in the circumstances described above, the contract was governed by the law of a state which has not imposed sanctions on Russia, that would increase the likelihood of a successful claim.

In relation to disputes under existing contracts, when choosing an arbitrator the parties should consider whether the nationality of the arbitrator may be an obstacle to his independence. Members of a "neutral" tribunal (that is, a tribunal composed of members who are not nationals of a state that has imposed

sanctions) sitting in a "neutral" jurisdiction (a jurisdiction which has not imposed sanctions on Russia) are less likely to have to consider sanctions when considering whether *to impose liability on* either a sanctioned party or a party prevented from performing its obligations due to restrictions on dealing with its sanctioned counterparty. Such arbitrators will also not be influenced by the threat of any personal liability they may incur under their national law or the law of the seat for making an order that *is inconsistent with* the sanction regime.

Individuals nominated as arbitrators will need to assess their own position with regard to sanctions and, particularly, whether they are restricted from taking an appointment as an arbitrator.

Any perceived lack of independence or impartiality (which is a prerequisite to acting as arbitrator under most institution rules), due to the impact of sanctions, may for Russian parties serve as a basis for seeking to challenge an arbitrator.

Parties may seek to renegotiate the seat of arbitration (and indeed the governing law) in existing arbitration clauses though agreement can be difficult to reach once a dispute has arisen. The seat of arbitration determines the "nationality" of the award and the courts with supervisory jurisdiction over the arbitration including where the award may be *set aside* under local arbitration laws. Under the UNCITRAL Model Law, which has been adopted by many states including Russia, one of the grounds for setting aside an arbitral award is that the award contradicts the public policy of that state. Though it remains to be seen how this will be approached, courts in countries that have adopted sanctions against Russia are likely to consider sanctions part of the mandatory law of that state and therefore part of that country's public policy. This could result in awards disregarding sanctions being set aside.

Future contracts

When concluding future contracts, *to mitigate against the risks* of unfair arbitration (real or perceived), personal liability of arbitrators, setting aside and bars to enforcement, the usual questions to be considered when drafting any arbitration clause should now be given special attention, namely the following:

- Which law should govern the contract?
- Under which institution rules should any arbitration take place?
- What should be the seat of the arbitration (since this will have an impact on setting aside any award)?
- Should there be any restriction imposed on the nationality of arbitrators?
- Where will any award need to be enforced?

We briefly discuss each of these in turn.

Governing law is important primarily because if it is the law of the country applying sanctions against Russia, the sanctions will be considered part of the relevant legislation, and thus have a direct impact on the merits of the case. In practice, this means that Russian parties are likely to insist on Russian law to govern their contracts rather than English law, which has been favoured since the fall of the Soviet Union.

With the Russian economy now seeking to diversify towards the East, South East Asia and the Middle East are likely to play a greater role in offering alternative choices for international arbitration in the future. Singapore has strengthened its position as a preferred venue for international arbitration in Asia with the issuance of the new SIAC Arbitration Rules. Other alternative dispute resolution centers include the Hong Kong International Arbitration Centre (HKIAC), the DIFC and the LCIA Arbitration Centre in Dubai.

The seat of arbitration will also be of importance because the law of the place of arbitration governs the procedure of the arbitration and constitutes the *substantive law* determining the arbitrability of the dispute and the breadth of public policy where a party seeks to set aside an award. Russian parties will now in all likelihood *seek to resist* arbitrations seated in countries that have imposed sanctions on them in favour of what are perceived to be more neutral jurisdictions.

Parties may also agree that arbitrators originating from or residing in states that have imposed sanctions on Russian parties should not be appointed.

As for enforcement, Russian parties will need to consider whether they will be able to enforce their awards in countries that have not imposed sanctions on Russia.

Conclusion

Recent press reports already indicate the sea change we may witness in coming years.

For example, it has been reported that Rosneft, the largest Russian oil producer, when negotiating future contracts with foreign parties, will propose dispute clauses providing for arbitration either in Russia or in other countries that have not imposed sanctions on Russia.

Further, the General Counsel of Rostec (a Russian state corporation specialising in high-tech industrial products for the civil and defence sectors) is reported to have said in a recent interview that it will be seeking alternatives to the LCIA for the resolution of its disputes.

It is perhaps not surprising that Russian state owned companies have adopted this course which, in part, coincides with directives that predate the sanctions from the Russian state advising against foreign arbitration and courts in general. It remains to be seen whether Russian private companies will follow suit although assuming Russia related sanctions stay in place for the foreseeable future, which is not unlikely, such sanctions are likely to have *an indelible impact* on dispute resolution with Russian parties.

On your own

1. Do you agree with the conclusions of the text?
2. Give a summary of the article