

EU confirms arbitration carve-out in sanctions regime

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26 July 2022



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Arbitral institutions have welcomed a clarification by the European Union that transactions with Russian state-owned entities are exempt from its sanctions regime where they are strictly necessary to ensure access to arbitral proceedings.

A new package of measures [adopted](#) by the Council of the EU on 21 July clarifies that there is an exemption for transactions that are required to “ensure access to judicial, administrative or arbitral proceedings in a member state, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a member state”.

In a [joint statement](#) today, six European arbitral institutions said the clarification “safeguards the rule of law and ensures access to justice for parties”.

The EU originally imposed sanctions against Russia in 2014 in response to its annexation of Crimea, but has considerably strengthened the measures since March this year after Russia’s full-scale invasion of Ukraine.

Article 5aa of the 2014 [regulation](#) as [amended](#) in March this year prohibited transactions with certain “publicly controlled or owned” Russian entities including Gazprom and Rosneft – with exemptions for trading fossil fuels and raw materials such as copper and iron.

A number of arbitral institutions expressed concern about the potential impact of the measures on administering arbitrations involving sanctioned Russian parties and requested clarification from the EU. They included the Vienna International Arbitration Centre, the German Arbitration Institute (DIS), the Milan Chamber of Arbitration (CAM), the Swiss Arbitration Centre, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and the Arbitration Institute of the Finland Chamber of Commerce.

The EU already issued guidance in June clarifying that the article 5aa prohibition should be interpreted in light of the fundamental right to an “effective legal remedy” under article 6 of the European Convention on Human Rights, saying it “does not affect” the provision of legal services strictly necessary to ensure for defence in judicial proceedings.

In the new measures published yesterday, the Council explained that the prohibition against transactions with sanctioned entities will be “slightly amended to ensure access to justice”. The exemption is subject to such transactions being consistent with the objectives of the overall sanctions regime.

“Arbitral institutions play an essential and irreplaceable role in upholding the rule of law, ensuring access to justice, safeguarding the integrity of arbitral proceedings and guaranteeing the impartial and equal treatment of parties,” the six institutions say in their joint release.

Stefano Azzali, CAM director general, says the amendment “aims at providing companies with effective means to enforce their legal rights against companies under sanction, perfectly in line with the intention of the EU legislation”.

DIS chair **Stefan Kröll** says that “effective access to justice is often dependent on the availability of arbitration proceedings, which is the position underlying the clarification by the EU. For the same reason, looking ahead it would be important to remove any practical obstacles to the implementation of arbitral and judicial proceedings by and against sanctioned entities.”

Richard Happ, president of the DIS council, observes that the clarifications are likely aimed at removing obstacles to sanctioned parties entering into contracts with institutions to administer cases and also with their appointed arbitrators.

He says it has sometimes been “extremely difficult to get the process going” when a case starts with accepting fees or – as an institution – arbitration costs, from a sanctioned entity. He adds: “What use is it having counsel available if you cannot start the proceeding itself?”

Even under the revised regulation, which retains a requirement for full compliance with the sanctions directives, Happ says “convincing” banks to accept funds from sanctioned entities may continue to be “difficult and time consuming”.

Other restrictions remain

Mercédeh Azeredo da Silveira of AZHA Avocats in Geneva points out that other restrictions remain in the related regulations, including a prohibition against the satisfaction of claims made by sanctioned entities if they relate to transactions whose performance has been affected by measures imposed under the EU sanctions programme. Meanwhile she notes that at the enforcement stage, the release of frozen funds subject to an arbitral award is only allowed where it has been rendered before the relevant entity was listed as sanctioned.

Azeredo da Silveira adds: “Ultimately, the amendment simply clarifies the intention of the legislator: to isolate the target commercially and financially, not to deny publicly-owned or-controlled entities access to justice. But the mere involvement of a [sanctioned] entity in arbitration proceedings – which require transfers of funds and often raise substantive issues in relation to prohibited transactions – is of course no shield against the restrictions imposed by the EU sanctions programme.”

Charles Claypoole of Latham & Watkins observes that complications also remain as a result of recent Russian legislation that allows local courts to injunct foreign arbitrations against Russian entities where their access to justice is [impeded](#) as a result of sanctions.

Timur Aitkulov, who set up Moscow boutique Aitkulov & Partners after leaving Clifford Chance last year, says the previous sanctions regime had prevented many Russian public and private companies from filing and continuing arbitration claims within the EU.

He says many Western law firms “did not want to be involved” with such clients, citing, among other things, the additional difficulties associated with obtaining a licence to allow it to receive payment from a sanctioned entity.

Aitkulov adds that practitioners should seek clarification from the EU or national regulators on whether the exemptions extend to lawyers who are advising sanctioned entities on “potential disputes” as well as active proceedings.

The EU’s latest measures include new restrictions on Russia’s state-owned Sberbank and on gold exports. The bloc says the sanctions are “imposing a direct cost on Russia for its aggression and hurting Russia's economic ability to wage war”.

Today, the EU also agreed a gas rationing plan for the winter months to protect itself from Russian supply issues. The sharp reduction in supplies from Russia has already forced German energy company Uniper to seek a bailout from the German government. As a condition of the €15 billion bailout announced yesterday, Uniper will have to [withdraw](#) an Energy Charter Treaty claim against the Netherlands.

Documents

EU regulation 833/2014



EU regulation 2022/1269 (21 July 2022 amendment)



EU regulation 2022/428 (15 March 2022 amendment)



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