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EU responds to Russia's anti-suit injunctions with transaction ban

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As part of its 14th package of sanctions, the EU has adopted measures designed to counteract the increasing prevalence of claims being brought in Russian courts pursuant to Russian laws conferring exclusive jurisdiction over disputes involving sanctioned parties. In this ArbitrationLinks post, we take a look at the EU's measures.

Background

As we previously [reported](#), in 2020, Russia introduced new provisions in its Arbitration Procedure Code (Article 248). The amendments ensure that the Russian courts have exclusive competence in disputes with the participation of persons in respect of which sanctions are applied or in disputes of one Russian or foreign person with another Russian or foreign person if the basis for such disputes is sanctions. Moreover, the Russian courts have viewed these provisions as overriding any agreement the parties have made as to jurisdiction or arbitration if the sanctions create obstacles to access to justice; and this will be assumed to be the case if a party is subject to sanctions imposed by the state in which proceedings are to take place.

Said law also provides that such Russian entities and persons subject to foreign sanctions may apply to a Russian State Court to obtain an "anti-suit injunction".

Recently, this legislation has been invoked on numerous occasions before the Russian courts (see generally [here](#)), to bring substantive proceedings there, and also obtain anti-suit injunctions. National courts in other jurisdictions have sometimes been asked to respond by way of countermeasures (see, for example, [here](#)) as have arbitral tribunals.

One effect of Article 248 is that it is increasingly placing EU companies under pressure to face claims in Russia, which they would otherwise be prohibited from satisfying due to EU sanctions.

The EU's countermeasure: a transaction ban

In its continued response to Russia's ongoing aggression against Ukraine, the European Union has adopted its 14th sanctions package. This latest set of measures aims to bolster the EU's sanctions regime by preventing their circumvention. For further details, please refer to the [recent press release](#) of the Council.

One of the measures that is being introduced is a new Article 5ab of the amended Regulation 833/2014, which prohibits any direct or indirect transactions with persons and entities that have initiated claims before Russian courts on the basis of Article 248 or similar legislation, and in connection with any contract or transaction the performance of which has been affected by the EU regulations imposing sanctions (i.e., Regulation 833/2014 and Regulation 269/2014). This prohibition extends to a broad range of potential legal actions, including but not limited to injunctions, orders, reliefs, judgments, or other decisions pursuant to Article 248 or equivalent legislation.

Consequently, the newly introduced Article 5ab would subject companies which make use of Article 248 to a transaction ban.

To enforce this measure effectively, the package introduces a mechanism to compile a list of companies subject to transaction bans for interfering with arbitration and court proceedings (Annex XLIII of Regulation 833/2014).

Lastly, there are several exceptions to the transaction ban. These exceptions include transactions essential for buying, importing, or transporting pharmaceuticals, medical supplies, agricultural products, and food.

Additionally, the exceptions cover activities necessary to access judicial, administrative, or arbitral proceedings in a Member State. They also include the recognition or enforcement of judgments or arbitration awards issued in a Member State, and in certain cases, pursuing compensation for damages.

Assessment

By prohibiting transactions with entities that have, pursuant to Article 248 or similar, engaged in legal proceedings in Russian courts against EU persons, the EU seeks to ensure that its sanctions are not circumvented through judicial means. It remains to be seen, however, whether this will deter Russian entities from relying on Article 248. Indeed, for entities that are already subject to (EU) sanctions, in particular entities that are sanctioned and who are effectively excluded from doing business with EU persons and entities, this may not provide much additional discouragement from taking legal action in Russia.

As a result, it seems that EU entities may continue to face litigation in Russia based on Article 248 and our earlier assessment remains true, i.e. affected entities will need to make strategical calls, including whether to participate in potential Russian Court proceedings, whether to pre-emptively (or defensively) commence arbitration proceedings, whether to seek anti-suit injunctions from national courts and/or arbitral tribunals and whether to utilise expedited procedure and/or emergency arbitrator provisions, where available. These various options are, in many respects, complementary and can potentially be co-ordinated and used in succession, depending on the status of the proceedings and particular assets at risk.