DISPUTE RESOLUTION JOURNAL®

A Publication of the American Arbitration Association®-International Centre for Dispute Resolution®

January-February 2025 Volume 78, Number 5

Dispute Resolution Journal®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

Volume 78, Number 5 January-February 2025

DISPUTE RESOLUTION JOURNAL®

The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®)

ISSN 1074-8105 (print) and 25733-606X (digital).

Article Submissions

Direct editorial inquiries and send materials for publication to: Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to arbitrators and mediators, attorneys and law firms, in-house counsel, corporate officers, government agencies and their counsel, senior business executives, and anyone interested in dispute resolution.

Subscriptions

Digital and print subscriptions to the Dispute Resolution Journal are available for purchase through the AAA-ICDR's online store, https://aaaeducation.org/bookstore.

Reprint Permissions

Please send requests to reproduce Dispute Resolution Journal articles to the AAA-ICDR's Publications Department Elizabeth Bain, Director of Publications, at baine@adr.org.

ISSN 1074-8105 (print) and 25733-606X (digital).

The cover of this journal features the painting *Close Hauled*, a drawing by Rockwell Kent, 1930, electrotype on paper.

Publishing Staff
Director of Publications: Elizabeth Bain
Production Editor: Sharon D. Ray
Cover Design: Sharon D. Ray

Cite this publication as:

Dispute Resolution Journal® (The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®))

Editorial Office
American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

POSTMASTER: Send address changes to American Arbitration Association-International Centre for Dispute Resolution, 120 Broadway, 21st Floor, New York, NY 10271

To reach Customer Service:

Elizabeth Bain
Available 8:00 AM-5:00 PM Eastern Time
(401) 431-4837
baine@adr.org

Russia: Investment Protection and Arbitration—Part III

Volodymyr Yaremko, Vadym Miller, and Vladlena Lavrushyna[1]

In the first part of this article, published in the September-October 2024 issue of *Dispute Resolution Journal*, the authors discussed the options that foreign investors with assets and operations in Russia have available to them and how different options may impact their investment protection and chances of bringing credible arbitration claims. In the second part, published in the November-December 2024 issue of *Dispute Resolution Journal*, the authors focused on the mandate, functions, and operational framework of the Register of Damage for Ukraine and highlighted key points for potential users of the Register. Here, the authors discuss the jurisdictional battleground in disputes with sanctioned Russian persons.

In a wave of recent decisions, including in proceedings involving a number of Western banks, Russian courts have disapplied the contractual dispute resolution clauses and taken jurisdiction over international disputes. The Russian courts have proceeded to issue a variety of orders against the non-Russian parties, including orders prohibiting them from pursuing claims outside Russia, fines for so doing, and the immediate attachments of the non-Russian parties' assets. The Russian courts have taken this action, relying on amendments to the Arbitrazh Procedural Code of the Russian Federation (APC) introduced through Articles 248.1 and 248.2 of the APC (the APC Amendments) in 2020.

[1] The authors, attorneys with Mayer Brown International LLP, may be contacted at vyaremko@mayerbrown.com, vlavrushyna@mayerbrown.com, and vmiller@mayerbrown.com, respectively.

Dispute Resolution Journal® | January-February 2025, Vol. 78, No. 5, pp. 473-479.

ISSN 1074-8105 (print) | ISSN 25733-606X (digital).

These recent decisions highlight the increasing pressures faced by international companies with operations or assets in Russia when devising and pursuing their dispute resolution strategy. Discussed below are the risks posed by the growing reliance by sanctioned Russian companies on the APC Amendments, the recent fourteenth sanctions package against Russia, and their potential impact on disputes strategy.

APC Amendments—What Do They Say?

Articles 248.1 and 248.2 of the APC were introduced through the Federal Law N 171-FZ[2] dated 8 June 2020 in order to "protect the rights of natural and legal persons in connection with restrictive measures introduced by foreign states or unions." In summary:

- Article 248.1 of the APC provides for the exclusive jurisdiction of the Russian courts in certain circumstances, including in relation to disputes involving Russian entities that are subject to foreign restrictive measures, such as sanctions.
- Article 248.1 empowers the affected entity to submit the relevant dispute to be resolved in the Russian Arbitrazh (Commercial) Court and to petition the court, in accordance with Article 248.2 of the APC, to issue an injunction prohibiting the initiation or continuation of proceedings in foreign courts or international arbitration.
- Article 248.2 sets out the details and procedural requirements applicable to the injunction petition, which includes a requirement that any choice of forum agreement applicable to the dispute providing for jurisdiction of foreign courts or arbitration tribunals is inoperable. The Arbitrazh Court is also empowered to collect damages for breach of the injunction.

[2] http://publication.pravo.gov.ru/Document/View/0001202006080017?index=1.

The amount of damages is capped at the level of any sums claimed by the non-complying party in the corresponding foreign court or international arbitration proceedings.

- Article 248.1(1) of the APC states that the above provisions apply only in circumstances where the parties have not agreed to subject their disputes to the jurisdiction of foreign courts or international arbitration. However, Article 248.1(4) of the APC provides an exception where such an agreement is incapable of being performed because one of the parties is subject to restrictive measures that "obstruct such party's access to justice."

When Is a Choice of Forum Agreement Deemed Inoperable?

The APC Amendments do not particularise the kind of obstacles to access to justice or the degree to which they must impede the Russian party's access to justice to constitute sufficient grounds for an applicable choice of forum agreement to be deemed inoperable.

This issue was clarified by the Russian Supreme Court in December 2021.[3] It held that it was not necessary for the petitioning party to demonstrate how the restrictive measures have impacted, or may impact, its access to justice. The Supreme Court stated that the imposition of restrictive measures ipso facto prejudices the affected party's rights, at a minimum, reputationally, and thereby places that party at a disadvantage. The Supreme Court added that in such circumstances there were justified doubts that the affected party would get a fair hearing by an impartial tribunal. As a result, the very fact that restrictive measures have been imposed with respect to a party is, in itself, sufficient to conclude that the affected party faces obstacles to access to justice and, consequently, the choice of forum agreement becomes inoperable.

[3] https://kad.arbitr.ru/Card/99ce7aa2-7f06-4615-baa5-94473b980771.

Rise in Litigation in Russia and Parallel Proceedings

The combination of the APC Amendments and their broad interpretation by the Russian Supreme Court has led to a number of Russian companies subject to sanctions submitting their disputes to be resolved in Russian courts and not before the contractually agreed forum.

Claims based on the APC Amendments have also led to a number of parallel proceedings and conflicting decisions when the sanctioned entities' counterparties initiated court and arbitration proceedings pursuant to the contractually specified choice of forum agreements. In several cases, state courts outside Russia have also issued anti-suit injunctions ordering the sanctioned Russian parties to cease proceedings in Russia, including in relation to petitions for injunctions under Articles 248.1 and 248.2 of the APC.

Further EU Sanctions

This issue has gained renewed importance in light of the introduction of the fourteenth round of EU sanctions that, among other things, prohibit transshipment of Russian LNG and the provision of goods, services, and technology for the completion of Russian LNG projects under construction, such as Arctic LNG 2 and Murmansk LNG. These and other new measures, in particular with respect to Russian LNG, create potential for further disputes with Russian counterparties and similar jurisdictional clashes relating to the forum for their resolution.

It is notable that the latest EU sanctions package contains provisions specifically targeting the use of Article 248.

First, the new Article 5ab of EU Regulation No. 833/2014[4] (introduced via EU Regulation No. 2024/1745)[5] provides for a

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.229.01.0001.01.ENG#:~:text=COUNCIL%20REGULATION%20%28EU%29%20No%20833%2F2014%20of%2031%20July,of%20Russia%27s%20actions%20destabilising%20the%20situation%20in%20Ukraine.

[5] https://eur-lex.europa.eu/eli/reg/2024/1745/oj.

mechanism through which a transactions ban can be imposed on entities that rely on Article 248 of the APC or equivalent Russian legislation to obtain an injunction, judgment, or similar relief "in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed" under various EU sanctions.

Second, the new Article 11a of EU Regulation No. 833/2014 (also introduced via EU Regulation No. 2024/1745), as well as the new Article 11a of EU Regulation No. 269/2014[6] (introduced via EU Regulation No. 2024/1739)[7] entitle EU citizens and EU-incorporated or EU-constituted legal persons, entities, or bodies to recover, in judicial proceedings before EU courts, damages incurred as a consequence of claims lodged with courts in third countries "in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed" under various EU sanctions, provided the applicant does not have effective access to the remedies under the relevant jurisdiction.

Impact of APC Amendments and Additional EU Sanctions on Dispute Resolution Strategy

The routine application of the APC Amendments, as interpreted by the Russian Supreme Court, constitutes further risks for businesses with assets or contractual relationships in Russia, namely:

- *Risk of Complex Parallel, Multi-Jurisdictional Proceedings*. Even if a party follows the contractual dispute resolution mechanism, there is an increased likelihood that it will find itself embroiled in parallel proceedings in Russian courts and other fora and potentially face an unfavourable anti-suit injunction.

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0269.

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1739.

- *Enforceability Issues Both Inside and Outside Russia*. It is doubtful whether Russian court judgments or injunctions issued contrary to the choice of forum agreements would be widely enforced outside Russia. Even where an award or judgment is obtained pursuant to the contractually agreed forum, where the counterparty is subject to sanctions (often the case in the context of the APC Amendments), effective enforcement of an award or judgment outside of Russia is likely to be complicated and involves obtaining licences from the relevant authorities. Adding more complexity to the situation, it is also unlikely that any award or judgment issued in foreign fora in parallel with the Russian judgment, or contrary to an injunction issued by the Arbitrazh Court, would be enforceable in Russia. Affected parties could therefore find themselves facing an apparent deadlock between legal systems, with contradictory and likely mutually unenforceable decisions of courts and arbitral tribunals.
- *Risk of Asset Seizures in Russia and Beyond*. The Russian-based assets of a party in dispute with a person who invokes the Article 248 procedure may be vulnerable to seizure either as a protective measure or pursuant to the execution of a final judgment. In addition, if a party commences or continues proceedings outside Russia in breach of an anti-suit injunction issued pursuant to Article 248 of the APC, it could be ordered to pay damages to the opposing party, which could further expose its assets in Russia. The potential vulnerability of assets located outside Russia should also be considered. The possibility of enforcement of a Russian decision against assets in jurisdictions viewed by Russia as "friendly" and/or with which there are relevant international legal cooperation agreements in place cannot be ruled out, and there is currently no settled court practice as to how the Article 248 judgments would be approached.

As to the fourteenth sanctions package against Russia, while the transaction ban sends a message to prospective users of Article 248 of the APC, it remains to be seen whether it will effectively deter future attempts to circumvent choice of forum agreements, especially given that Article 248 of the APC has often been utilised by entities that are already subject to comprehensive EU sanctions.

Conclusion

In light of the additional risks and complications that may arise if Article 248 is triggered, the handling of existing, or potential, commercial disputes relating to Russia requires careful strategic consideration and effective planning.