

# Sanctioned Russian entity may unilaterally amend dispute resolution clause (Ninth Appellate Commercial Court, Moscow)

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In *Case A40-149566/2019*, the Ninth Appellate Commercial Court (Moscow) upheld a lower court's decision to grant an application to replace an ICC arbitration clause with a Russian state court jurisdiction clause due to US sanctions.

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The Ninth Appellate Commercial Court in Moscow has upheld a lower court's decision to replace an International Chamber of Commerce (ICC) arbitration clause with a Russian court jurisdiction clause due to US sanctions.

A US company, Neighbours Drilling International Limited (NDIL), failed to provide consideration to Russian company, Instar Logistics (IL), for storage services rendered under an agreement containing an ICC clause. A few years later, IL was put on the US sanctions list that prohibited any banking transactions in its favour. Subsequently, IL notified NDIL of its complaint regarding outstanding debt and offered to submit the dispute to the jurisdiction of the Russian courts. NDIL did not respond.

IL then applied to the Russian court to have the ICC clause replaced with a Russian court jurisdiction clause on the basis of Article 451 of the Russian Civil Code (amendment of agreement due to significant change of circumstances).

The court granted the application, finding that the ICC clause was unenforceable due to US sanctions. In particular, the court stated that any arbitral award against NDIL would be unenforceable in any country except Russia. The court's reasoning was that sanctions prevent any banking transactions in favour of IL through US correspondent bank accounts. The court also considered that since the storage services contract was to be performed in Russia, the dispute must be resolved under Russian procedural rules (*Article 36(4), Russian Commercial Procedural Code*).

Therefore, the court found that the only place in the world where IL can effectively protect its rights, is Russia. Failure to grant the application would put NDIL in an advantaged position requiring IL to bear all losses without any effective remedy.

The court's reasoning appears to be flawed: instead of considering whether it was possible to adjudicate the dispute under the ICC rules, the courts analysed where the award could potentially be enforced. However, applying this logic, an ICC award would also be enforceable in Russia, therefore the unenforceability of the award should not have constituted a ground to replace the ICC arbitration clause.

Even though this case may be appealed to the cassation courts, the approach taken by the Moscow appellate court is consistent with the draft law authorising sanctioned Russian entities to unilaterally change dispute resolution clauses (see *Legal update, Russian State Duma passes draft law to give sanctioned Russian entities rights to unilaterally change dispute resolution clauses*).

Case: *Case A40-149566/2019 (10 February 2020)*.

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