

Non-sanctioned party has right to prove that a sanctioned party faces no obstacles to access to justice in foreign proceedings (Commercial Court of Moscow)

by *Practical Law Arbitration*, with *Kulkov, Kolotilov & Partners*

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In *Case No A40-228223/2022*, concerning a dispute over a prohibition to initiate and continue arbitration abroad against a sanctioned party, the Commercial Court of Moscow stated that the second party to the dispute is entitled to prove that there is no obstacle to access to justice for the sanctioned party.

Maxim Kulkov (Managing Partner) and Anastasia Khalyavina (Paralegal), Kulkov, Kolotilov & Partners

In a dispute involving a prohibition to continue arbitration abroad against a sanctioned party, the Commercial Court of Moscow has stated that the non-sanctioned party to the dispute is entitled to prove that the sanctions do not prevent access to justice for the sanctioned party.

In 2021, Finnish company BAFO cc Oy (BAFO) sent a notice of arbitration to CONCERN TITAN-2 JSC (TITAN-2) regarding the violation by TITAN-2 of a contract containing an arbitration clause. Subsequently the arbitration was commenced under the ICC Rules.

TITAN-2 attempted to pay the arbitration fee through two Finnish banks, but both refused to make the payment due to the sanctions imposed by the EU on TITAN-2. Relying on this fact, TITAN-2 applied to the Commercial Court of Moscow requesting an order prohibiting TITAN-2 from continuing the arbitration under article 248.2 of the Russian Federation Commercial Procedure Code (CPC), and the imposition of a penalty on BAFO should it violate the order.

The court granted TITAN-2's application. It stated that sanctioned parties only needed to prove the imposition of sanctions against them, although the opposing party had the right to demonstrate that the sanctioned party's access to justice was not, in fact, hindered by the sanctions. The court also imposed a penalty equal to the amount of the arbitration claim (approximately EUR1.1 million) should the order be violated.

This approach broadly follows the Russian Supreme Court's position in *JSC Uraltransmash v PESA (Case No A60-62910/2018)*, under which the mere fact of sanctions against the Russian party was considered sufficient to conclude that the foreign forum could not objectively consider a dispute involving such a party. Subsequently, the lower courts have perceived this position as an irrebuttable presumption of the impact of sanctions on access to justice. However, in this case, although the court applied the formalist approach formulated by the Russian Supreme Court, it pointed to the possibility for the non-sanctioned party to rebut that presumption. BAFO has until 12 July 2023 to file a cassation appeal.

Case: [Case No #40-228223/2022 \(12 May 2023\)](#).

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