

# Russian courts justify refusal to enforce arbitral award in favour of "unfriendly" parties by reference to counter-sanctions decrees

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This article discusses the decisions of the Russian courts in *Case No A32-47144/2022*, which refused recognition and enforcement of a LCIA arbitral award, issued in favour of a party from a jurisdiction that had imposed sanctions on Russia. In refusing to recognise the award, the Russian courts invoked counter-sanctions decrees issued by the Russian President, as well as the incorporation of the award creditor in an "unfriendly" jurisdiction. The decisions are a worrisome example of utilising counter-sanction regulations to prevent "unfriendly" parties from enforcing otherwise valid awards in Russia.

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## Russian courts refuse to enforce LCIA award on public policy grounds

A dispute arose between a Swiss company, Louis Dreyfus Company Swiss SA (Louis Dreyfus), and a Russian company, Infotech Novo LLC (Infotech), which was referred to LCIA arbitration seated in London, in accordance with the parties' agreement. On 8 February 2022, the tribunal issued an award in favour of Louis Dreyfus, which then applied to have the award recognised and enforced against Infotech in Russia.

However, at first instance, the Commercial Court of the Krasnodar Region (Krasnodar Court) in *Case No #32-47144/2022* refused to recognise the award. In its decision of 18 July 2023, the court invoked public policy considerations based on certain counter-sanctions decrees, as well as citing the alleged lack of notification of the arbitration to Infotech and Louis Dreyfus' lack of a Russian bank account, as grounds for dismissing the application.

Louis Dreyfus appealed. However, in a judgment of *16 October 2023*, the Commercial Court of the North Caucasus Circuit (Cassation Court) upheld the decision of the Krasnodar Court in relation to public policy and refused to recognise the award, although it rejected the Krasnodar Court's other reasoning. In particular, the Cassation Court noted in relation to the alleged lack of notice that Infotech had participated in the arbitration. Also, the lack of a Russian bank account was not a proper ground on which to deny recognition and enforcement of an award, since Louis Dreyfus could open one after obtaining a writ of execution.

In addition to the Krasnodar Court's reasoning based on the Decrees, the Cassation Court indicated that enforcement of the award would also be contrary to Russian public policy because it would violate the principles of equality and good faith (see Violation of equality and good faith conduct principles).

## Counter-sanctions decrees as expression of Russian public policy

In refusing to recognise and enforce the award on public policy grounds, both the Krasnodar Court and the Cassation Court referred to four counter-sanctions decrees, issued by the Russian President (Decrees):

- Decree No 81, dated 1 March 2022, which restricted certain transactions (including the provision of loans, real estate transactions and securities transactions) with parties from jurisdictions that had imposed sanctions on Russia (Unfriendly Parties).
- Decree No 95, dated 5 March 2022, which established a special procedure for performance under loans and derivatives entered into with the Unfriendly Parties.
- Decree No 252, dated 3 May 2022, which introduced personal sanctions against certain named foreign individuals.
- Decree No 254, dated 4 May 2022, which principally addressed the payment of share dividends to Unfriendly Parties.

The courts held that, taken together, the Decrees constituted a new embodiment of Russian public policy, under which the performance of obligations owed to Unfriendly Parties was restricted. In the courts' judgment, the restricted obligations, whose performance was prohibited by the Decrees, included recognition and enforcement of an arbitral award issued in favour of an Unfriendly Party.

## Decrees should not apply to the recognition of arbitral awards

The courts' reasoning, in holding that the Decrees render recognition and enforcement of arbitral awards in favour of Unfriendly Parties unlawful, is flawed for the following reasons:

- The Decrees do not expressly regulate the performance of obligations owed to an Unfriendly Party under a writ of execution issued by a Russian court. Indeed, the Russian bailiff service, which is responsible for executing such a writ, was itself of this view, in its non-binding opinion on the proper interpretation of Decree No 95.
- The courts did not find that Infotech's obligations under the award fell under the scope of the Decrees, which are specific to certain types of transactions and dealings, and do not purport to regulate all transactions with Unfriendly Parties.
- In any event, compliance with the Decrees would be relevant only at the execution stage, when Infotech's (enforced) compliance with its obligations under the award enforcement stage crystallised. Therefore, they could not have guided the courts on the principal issue of award recognition.

## Significance of award creditor's home jurisdiction

*Case No A14-13590/2022* is another example of the Russian courts refusing to enforce an arbitral award by reference to the Decrees. In that case, the Commercial Court of the Central Circuit quashed the decision of the lower court to enforce an award issued by an International Commercial Arbitration Court (ICAC) tribunal, in favour of a UK-incorporated company.

As the ICAC is a Russian arbitration institution, it is clear that, in both this and the Louis Dreyfus decisions, for those courts supporting this broad interpretation of the Decrees, it is not the location of the administering arbitral institution, nor the seat of arbitration, but the nationality of the award creditor to whom the obligations are owed, that is significant.

Indeed, the Russian courts have continued to recognise and enforce arbitral awards rendered abroad where the disputing parties are both Russian, even where the tribunal is seated, or the institution is headquartered, in an "unfriendly" jurisdiction. For example, the Commercial Court of the City of Moscow recently recognised and enforced an award issued by a tribunal in Latvia (*Case No #40-241039/22*), while the Commercial Court of the North-Western Circuit, considering enforcement of another award rendered by the same tribunal, also did not raise any public policy concerns (*Case No #56-111582/2022*).

Therefore, it is clear that award creditors will receive differential treatment according to their nationality, which is not justified by the Decrees, despite the courts' reliance on them. Even if the Decrees were viewed as applying to arbitral awards rendered in favour of Unfriendly Parties, at best, they apply to the execution, not the recognition and enforcement, of those awards.

## Violation of equality and good faith conduct principles

As discussed, in addition to reliance on the Decrees, the Cassation Court held that recognition and enforcement of the Louis Dreyfus award would breach public policy because it would violate the Russian law principles of equality and good faith conduct. The Cassation Court reached this conclusion on the grounds that:

- Louis Dreyfus is incorporated in Switzerland, which is on the Russian government's list of "unfriendly" jurisdictions, and Louis Dreyfus had itself "unreasonably" suspended its business operations in Russia, meaning that it had committed "unfriendly" acts.
- Infotech was deprived of the opportunity to do business in Switzerland due to sanctions (however, the Cassation Court did not give any specifics), whereas Louis Dreyfus is free to operate in Russia, which would lead to a breach of the principle of equality.
- The arbitration only arose as a result of sanctions, which prevented Infotech from performing its obligations under the contract with Louis Dreyfus.

In fact, it was implicit in the Cassation Court's judgment that Louis Dreyfus acted in bad faith by commencing arbitration against Infotech, while exiting Russia itself.

However, the Cassation Court did not explain how the equality principle applied in this case, given that the dispute arose, and indeed the award was rendered on 8 February 2022, before sanctions were imposed on Russia.

## Echoes of the "Peppa Pig case"

In the notorious *Case No #28-11930/2021*, known as the "Peppa Pig #ase", a Russian first instance court dismissed a claim by a UK-incorporated company for compensation for the infringement of its intellectual property rights by a Russian company. On the basis that the claimant was an Unfriendly Party, the court held that its application was an abuse of rights.

On appeal by the UK claimant, the *appellate court quashed the decision* and granted the claim. At the time, the appellate court's decision was hailed as shutting off the "abuse of rights" argument. However, the handling of Louis Dreyfus' attempts to enforce an arbitral award, suggests that this approach by the Russian courts may persist, albeit in more subtle forms.

## Conclusion

The approach to the recognition and enforcement of the Louis Dreyfus award in Case No #32-47144/2022 represents an unwelcome development in the Russian courts' treatment of awards issued in favour of Unfriendly Parties. However, the limited number of decisions available means that it may be premature to view this as an established trend.

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