

Russian Supreme Court rules that foreign arbitrators may be impartial

INTRODUCTION

The landscape of arbitration is constantly changing. There are some rulings that have shaped the doctrine of arbitration and have been widely commented and analyzed (e.g. *Dutco* or *Enka v Chubb*). There is another ruling that may have the same impact, however not because of its merits, but because of the controversy it has generated.

In its decision of 26 July 2024 (Case No. 304-ES24-2799, No. A45-19015/2023), the Supreme Court of the Russian Federation annulled an arbitral award against a company domiciled in Russia on the grounds that it was contrary to Russian public policy (*ordre public*), because it was issued by arbitrators who were citizens of Ukraine, the United Kingdom and Denmark.

BACKGROUND

A German company applied to the Russian courts for recognition and enforcement of a foreign FOSFA arbitration award in the Russian Federation. The first instance and second instance courts granted enforcement, but the Russian company against which the award was enforced lodged a cassation appeal to the Supreme Court of the Russian Federation. The Supreme Court upheld the cassation appeal and overturned the previous judgements.

IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

General Standard No 1 of the IBA Guidelines on Conflicts of Interest in International Arbitration states that every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.

This is a common requirement imposed on arbitrators and can be found in the rules of arbitral institutions as well as in national arbitration laws. It is also included in the UNICTRAL Model Law. Independence refers to the objective and external manifestation of the relationship between the parties, counsel and co-arbitrators, whereas impartiality generally refers to the subjective standard and state of mind [1].

The concept of impartiality and independence, or rather the lack thereof, may be understood differently in different jurisdictions. Certain situations may be considered to give rise to justifiable doubts as to one's impartiality and independence in one jurisdiction but not in another.

THE SUPREME COURT OF THE RUSSIAN FEDERATION'S VIEW ON PUBLIC POLICY AND IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS

The Supreme Court relied on Art. V (2) (b) of the New York Convention, and found that the enforcement of the award would be contrary to the public policy of the Russian Federation.

The Supreme Court found that there was also a violation of the principle of objectivity and impartiality of arbitrators which forms part of Russian *ordre public*. The Supreme Court considered that the fact that restrictive measures were introduced against the Russian Federation by foreign states for political reasons could create doubts that the guarantees of a fair trial, including those relating to the impartiality

of the court, which is one of the elements of access to justice, will be respected on the territory of the foreign state.

The Supreme Court then referred to the fact that the arbitrators were citizens of Ukraine, the United Kingdom and Denmark, and that these countries are considered as unfriendly with the aim of causing damage to the Russian Federation, Russian companies and individuals. The Supreme Court further held that unless there is evidence to the contrary, the lack of impartiality and objectivity in the consideration of the case by the FOSFA arbitral tribunal should be presumed considering the composition of the tribunal. The Supreme Court also noted that the courts did not consider the Russian company's arguments on the violation of its rights of defiance, as it had no information on the procedure and ways to appeal against the FOSFA arbitration decision and the decision had not been sent to it. The company invoked that it was unable to receive legal assistance in the United Kingdom, as foreign banks refused payments related to the Russian Federation, which deprived the company of the opportunity to exercise its procedural rights in the consideration of the case in the FOSFA Arbitration.

The Supreme Court found this to be a serious violation of substantive and procedural law, which led to the annulment of previous decisions.

WHAT THIS MEANS

The decision of the Supreme Court of the Russian Federation could have a significant impact on international arbitration. The view expressed therein, that there should be a presumption of lack of objectivity on the part of arbitrators domiciled in states considered hostile to Russia, may affect not only pending arbitrations but also future ones. It remains to be seen how other courts and tribunals will react to the rationale adopted by the Russian Supreme Court, but it certainly cannot be ignored by parties involved in disputes against Russian-based entities.

If the reasoning set forth in the commented decision were to be upheld, it could create serious risks and challenges in recognizing and enforcing foreign arbitral awards in Russia that were issued by foreign arbitrators.

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