

## VIAC Note on Sanctions

### I. Introduction

Since 23 February 2022, the European Union (**EU**) has issued several packages of sanctions against Russia. These sanctions, binding for all operators within the EU, provide for freezing of assets of selected entities and individuals and significant restrictions to trade between the EU and Russia and partially to entities and individuals in Belarus.

While the measures adopted by the EU may pose certain challenges for international arbitrations involving Russian or Belarussian parties, the administration of arbitration proceedings with sanctioned parties is not excluded at VIAC *per se*. VIAC has a strict and thorough sanctions procedure in place to ensure that arbitrations are administered in compliance with any applicable sanctions taking into consideration the parties right to have access to justice and right to be heard. The impartiality and independence of proceedings at VIAC remains unaltered irrespective of party nationality. Sanctioned parties will be treated equally and are not prevented from agreeing on arbitration under the Vienna Rules.

The purpose of this note is to simply address some general questions that arise in relation to the administration of arbitration and sanctions. This note only addresses sanctions in the EU. While VIAC will try to keep this document up to date in relation to the ongoing developments, we cannot guarantee the accuracy of this note at any time. The information provided in this note does not, and is not intended to, constitute legal advice. It is for general informational purposes only. It outlines in broad terms, the current legal status of arbitral proceedings at VIAC and is subject to change. It does not relate to a specific case. Parties should obtain legal advice in the relevant jurisdiction with respect to any specific legal matter. All liability with respect to actions taken or not taken based on the content of this note are hereby expressly disclaimed.

If you have specific questions, please direct them to [office@viac.eu](mailto:office@viac.eu) and we will do our utmost to address them.

### II. How do sanctions affect arbitration proceedings at VIAC in practice?

#### a. How is my arbitration at VIAC affected by sanctions?

Arbitration proceeding *per se* are not affected by sanctions. VIAC arbitrations are possible with parties of all nationalities, and they will be treated equally. Some additional steps may be necessary in the respective arbitration. VIAC will do its utmost to assist parties, party counsel and arbitrators to navigate these questions.

**b. How are sanction checks carried out at VIAC?**

VIAC addresses compliance and sanction matters at the outset of any proceeding and at all relevant stages of the proceedings (see more detail below). VIAC will inform parties when and if compliance verifications including sanctions checks are carried out. When conducting sanction checks, VIAC does not discriminate in relation to party nationality and is vigilant of its confidentiality obligations.

**c. Who is the subject matter of such sanction checks?**

VIAC requires parties to provide information on the identity of the parties, including the nationalities of the parties, the identity of all related entities in the dispute between the parties, and additional information regarding ultimate beneficial ownership of the parties or related entities.

**d. When does VIAC carry out sanction checks?**

The checks are made at all relevant stages of the proceedings, including, but not limited to

- the filing of the Statement of Claim (when the registration fee is transferred) and the Answer to the Statement of Claim,
- the making of any and all payments, e.g. advance on costs, additional advances that may be required at a later stage of the proceedings,
- when payments are made to arbitrators,
- the return of any potential leftover advance to the parties
- at any time during the proceedings if VIAC has to comply with any requests for authorization to the relevant regulatory authorities, e.g. the OeNB, and
- at any time during the proceedings at VIACs own discretion or upon request from VIAC's bank.

**e. How are payments affected by sanctions?**

VIAC may have to request formal clearance from the Central Bank of the Republic of Austria (Österreichische Nationalbank (ÖNB)) to make or receive payments from sanctioned parties. This may result in delays at the respective stage of the proceedings.<sup>1</sup>

If a party is affected by an asset freeze, the ÖNB can grant exemptions. Art. 4 para. 1b of Regulation Nr. 269/2014 foresees that the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after

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<sup>1</sup> VIAC cannot foresee whether banks will apply additional compliance restrictions.

having determined that the funds or economic resources concerned are intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services. VIAC thus assumes a general exception for legal services and that the principle of access to justice applies but cannot guarantee, that the authorities will grant approval for such payments.

### III. Challenges faced by arbitral institutions due to the implementation of sanctions

#### a. Administration of arbitral proceedings - Art 5aa Council Regulation (EU) No 833/2014<sup>2</sup>

As part of the fourth sanction package of 15 March 2022, a new provision was added and an "absolute transaction prohibition" was introduced for all persons listed in the relevant annex. It was unclear at the time whether the term "any transaction" covered the administration of arbitral proceedings and therefore VIAC alongside other institutions (the SCC Arbitration Institute (SCC), the Finland Arbitration Institute (FAI), the German Arbitration Institute (DIS), the Milan Chamber of Arbitration (CAM), and the Swiss Arbitration Centre) requested clarification from the European Commission.

On 21 July 2022, the EU adopted a seventh package of sanctions, which clarified the scope of the prohibition in Article 5aa. In particular, transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, were exempted in para 3 of Art 5aa.

The joint statement of the above-mentioned arbitral institutions can be read here.

#### b. Provision of services - Art 5n Regulation Council Regulation (EU) No 833/2014

Art 5n Regulation Council Regulation (EU) No 833/2014 dated 3 June 2022 included a prohibition to provide, directly or indirectly, accounting, auditing, including statutory audit, bookkeeping or tax consulting services, or business and management consulting or public relations services to the Government of Russia; or legal persons, entities or bodies established in Russia.

On 6 October 2022 the following exceptions to this provision were added in paras 5 and 6 to safeguard arbitration:

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<sup>2</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.



*5. Paragraphs 1 and 2 shall not apply to the provision of services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy.*

*6. Paragraphs 1 and 2 shall not apply to the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, or for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, provided that such provision of services is consistent with the objectives of this Regulation and of Council Regulation (EU) No 269/2014 (\*5).*

**c. Enforcement of arbitral awards - Article 5(1) of Regulation (EU) No 269/2014**

Article 5(1) of Regulation (EU) No 269/2014 authorizes local regulators to release frozen funds or economic resources to comply with or enforce judicial, administrative, or arbitral decisions. However, unlike judicial and administrative decisions, the scope of this regulation is limited concerning arbitral awards.

Such awards are only valid if rendered before the date the person / entity was sanctioned. Thus, while the arbitration proceedings themselves are made possible through the derogation granted in Article 4.1(c) of Regulation (EU) No 269/2014, the impact of such derogation is negated by Article 5(1)(a) of the same regulation when an arbitral award is rendered against a party after that party's inclusion in the list.

VIAC alongside other institutions (the SCC Arbitration Institute (SCC), the Finland Arbitration Institute (FAI), the German Arbitration Institute (DIS), the Milan Chamber of Arbitration (CAM), the Swiss Arbitration Centre, Netherlands Arbitration Institute (NAI), Arbitration Court attached to the Czech Chamber of Commerce and the Agrarian Chamber of the Czech Republic (CAC), the Madrid International Arbitration Centre (CIAM), the Belgium Center for Arbitration and Mediation (CEPANI), and the Permanent Arbitration Court at the Croatian Chamber of Economy (PAC CCE)) is currently seeking clarification from the European Commission on this matter.

**d. Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures**

The Commission is currently preparing a draft Directive concerning the definition of criminal offenses and penalties for violating the sanction regimes. This proposal introduces an exemption from the reporting obligation, specifically for client-attorney relationships within judicial proceedings.

However, there is no explicit provision providing for arbitrators and counsel involved in arbitral proceedings. If adopted as is, this draft could potentially subject arbitrators and counsel to prosecution for failing to report information

that becomes known to them during arbitral proceedings. This would have a significant and detrimental impact on arbitral proceedings and is concerning.

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