

Disputes Involving Sanctioned Persons Can Now Fall Within Exclusive Jurisdiction of Russian Courts

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Tomorrow, on June 19, 2020, a federal law¹ on amendments to the Russian *Arbitrazh* (Commercial) Procedure Code (the “APC Amendments”) enters into force. It may significantly affect the place of, and procedure for, dispute resolution involving Russian and foreign persons.

Under the APC Amendments, the exclusive jurisdiction of Russian state courts includes disputes involving Russian and foreign persons subject to foreign sanctions (restrictive measures), as well as disputes arising from foreign sanctions against Russian persons.

In addition, the APC Amendments now directly set out, in respect of such disputes, that a Russian state court may issue anti-suit injunctions against proceedings in a foreign court or international commercial arbitration seated outside Russia.

Sanctions disputes falling within the exclusive jurisdiction of Russian courts

The APC Amendments bring the following disputes within the exclusive jurisdiction of Russian state *arbitrazh* (commercial) courts:

- disputes involving Russian citizens, Russian legal entities or certain foreign legal entities subject to foreign sanctions (restrictive measures); and
- disputes between a Russian or foreign person and another Russian or foreign person if such disputes arise from foreign sanctions (restrictive measures) imposed against Russian citizens and legal entities.

Save as set out above, the APC Amendments are not limited to any specific jurisdiction or category of sanctions, nor are they limited to any type of sanctions disputes. Taking into account the general jurisdiction of Russian *arbitrazh* (commercial) courts, such sanctions disputes should include commercial and business disputes.

¹ Federal Law No. 171-FZ on Amendments to the *Arbitrazh* (Commercial) Procedure Code of the Russian Federation to Protect Rights of Individuals and Legal Entities in Connection with Restrictive Measures Imposed by a Foreign State, Association and/or Union of States and/or State (Interstate) Body of a Foreign State or Association and/or Union of States dated June 8, 2020 (available [here](#) in Russian).

Sanctioned persons whose participation in a dispute triggers the exclusive jurisdiction of Russian courts

To apply the new provisions on the exclusive jurisdiction of Russian courts, the APC Amendments set out two categories of sanctioned persons:

- Russian citizens and Russian legal entities subject to foreign sanctions (restrictive measures); and
- foreign legal entities subject to foreign sanctions (restrictive measures) as a result of the application of foreign sanctions imposed on Russian citizens and legal entities.

We believe that the first category clearly applies to Russian citizens and legal entities subject to any types of foreign sanctions, as discussed in more detail in the next section. The scope of the second category is less clear. We believe the second category will cover foreign entities that are owned or controlled by sanctioned Russian citizens and legal entities. For example, under the “50% rule” of the U.S. Department of Treasury’s Office of Foreign Assets Control, U.S. blocking and sectoral sanctions apply not only to the person included in the relevant U.S. sanctions list but also to any entity that is directly or indirectly 50% or more owned in the aggregate by one or more such sanctioned persons. The UK has introduced a similar rule in its post-Brexit sanctions regime, which applies asset freezes to any entities majority owned or controlled by a designated person. Further, EU capital market restrictions extend to (i) non-EU legal entities in which a person included in the relevant EU sanctions list owns more than 50%, and (ii) any legal entity acting on behalf or at the direction of such sanctioned person or a person on the relevant EU sanctions list.

The second category may also be broad enough to include foreign legal entities included in U.S. sanctions lists as a result of the application of certain U.S. secondary sanctions. For example, under Section 228 of the Countering America’s Adversaries Through Sanctions Act, secondary sanctions can be imposed on any non-U.S. person that knowingly facilitates a significant transaction for or on behalf of any person sanctioned pursuant to US sanctions against Russia.

Such persons may refer their sanctions disputes to a Russian *arbitrazh* (commercial) court at their place of residence (location) and may apply to the Russian court to issue an injunction against initiating or proceeding with a dispute in a foreign court or international commercial arbitration seated outside Russia.

Foreign sanctions triggering the exclusive jurisdiction of Russian courts

The APC Amendments broadly describe foreign sanctions as restrictive measures imposed on Russian persons and foreign legal entities by foreign states or foreign

interstate associations (unions). This broad definition should cover sanctions imposed by the U.S., the European Union, the UK, Canada, Australia, Ukraine and other countries if such sanctions deprive Russian citizens and legal entities of access to justice outside Russia, but will not cover sanctions imposed by the United Nations. The APC Amendments do not distinguish among types of sanctions and should include not only the harshest sanctions in the form of blocking U.S. sanctions or freezing EU sanctions, but also sectoral sanctions of the U.S. and EU. It will cover not only primary sanctions imposed against Russian citizens and legal entities, but also secondary sanctions imposed on any non-Russian legal entity if such sanctions were imposed under a sanctions program administered by foreign states with respect to Russia.

How does the exclusive jurisdiction of Russian courts affect dispute resolution and arbitration clauses?

The exclusive jurisdiction of the Russian state courts with respect to sanctions disputes may be changed by an international treaty to which Russia is a party or a private agreement to refer such disputes to a foreign court or to arbitration. However, the dispute may still be referred to a Russian state court if the agreement to refer such dispute to a foreign state court or an arbitration tribunal seated outside Russia becomes unenforceable due to imposition of foreign sanctions (restrictive measures) on one of the parties to the dispute, hampering such party's access to justice.

Can sanctions disputes still be referred to a foreign court or international arbitration?

Although the APC Amendments describe the jurisdiction of the Russian state courts with respect to sanctions disputes as "exclusive", they also state that sanctioned persons may refer a sanctions dispute to the Russian state courts if there is no parallel dispute pending in a foreign state or international commercial arbitration seated outside Russia. It should follow that litigation in a the foreign forum can continue if a sanctioned person has not been deprived of access to justice in the pending proceeding and a Russian court has not issued an anti-suit injunction in relation to the proceeding.

Another crucial provision states that the fact that a dispute falls within the exclusive jurisdiction of the Russian state courts would not preclude the recognition and enforcement in Russia of a judgment of a foreign court or a foreign arbitral award if the sanctioned person did not raise any objections against the dispute being considered in the foreign court or international arbitration. That would include circumstances where such person did not apply to a Russian court for an anti-suit injunction in respect of the dispute adjudicated outside of Russia.

When can an anti-suit injunction against foreign proceedings issue?

If proceedings related to a sanctions dispute falling within the exclusive jurisdiction of the Russian state courts have already been or may be initiated in a foreign court or

international commercial arbitration seated outside Russia, the sanctioned person may apply to a Russian *arbitrazh* (commercial) court for an anti-suit injunction. In other words, such a person can seek to obtain a court order forbidding the party or parties to the dispute from initiating or proceeding with the dispute.

The APC Amendments also provide that a sanctioned person may apply to the Russian court to recover monetary compensation from anyone violating the injunctions of the Russian court. The amount of compensation may not exceed the amount of the claim in the foreign proceeding and legal costs and expenses incurred by the party to the dispute. Russian courts, when issuing such judgments, must be guided by principles of justice, proportionality and the prohibition on any party from benefitting from illegal or unjust behavior.

Considerations when assessing the risks of transfer of disputes arising from current and future contracts to a Russian court

When seeking to assess and mitigate the risks of an unexpected transfer to a Russian court of an ongoing or potential contractual or non-contractual dispute, we recommend consulting with legal counsel who specialize in sanctions matters and dispute resolution.

In particular, it is of paramount importance to consider the following key issues:

- whether your existing or future contractual and non-contractual disputes fall within the category of sanctions disputes to which the APC Amendments would apply, or may fall within such category in the future;
- whether your contract contains a valid and enforceable provision referring disputes to a foreign state court or international arbitration seated outside Russia, and whether there is a risk that such jurisdiction or arbitration provision would be declared unenforceable or invalid by a Russian court in the future;
- whether the parties to your contract or non-contractual relationship fall within the category of sanctioned persons covered by the APC Amendments, or may fall within such category in the future;
- what effective measures may be taken to preclude or mitigate the negative consequences of an application by a counterparty to a Russian court seeking to hinder the consideration of a dispute in the agreed foreign forum or initiating parallel proceedings in the Russian court in relation to the same dispute;
- what contractual provisions and commercial disincentives you may negotiate to mitigate any unjust behavior of your counterparties;

- if you are a Russian company subject to sectoral or other sanctions, whether your existing contractual representations and warranties would be breached when the APC Amendments become effective.

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Please do not hesitate to contact us with any questions.

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