

Amendments to the Russian Arbitrazh Procedure Code on Sanctions-Related Disputes

June 29, 2020

On June 19, 2020, the amendments to the Russian Arbitrazh Procedure Code (the “**Amendments**”) entered into force.¹ The Amendments provide for (i) exclusive jurisdiction of Russian state arbitrazh courts over certain disputes involving sanctioned persons and disputes arising from imposition of sanctions, and (ii) anti-suit injunction that allows a sanctioned person to preclude the other party from starting or continuing foreign court or arbitration proceedings. The Amendments are the response to the issues faced by Russian entities and individuals who are unable to arbitrate or litigate outside Russia because of various “*restrictive measures*” introduced by foreign states.

Summary of the Amendments

In short, the Amendments granted Russian state arbitrazh courts exclusive jurisdiction, unless otherwise provided for by the applicable international treaty, arbitration or prorogation agreement, to consider the following disputes:

- disputes involving Russian entities and individuals that are subject to restrictive measures introduced by foreign states and sanctioned foreign entities, if the restrictive measures were imposed on them due to foreign sanctions against Russian entities and individuals (the “**Sanctioned Persons**”); and

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¹ Federal Law No. 171-FZ of June 8, 2020, “On Amending the Arbitrazh Procedure Code of the Russian Federation in Order to Protect the Rights of Individuals and Legal Entities in Connection with the Restrictive Measures Introduced by a Foreign State, State Association and (or) Union and (or) State (Inter-State) Institution of a Foreign State or State Association and (or) Union.”



- disputes between Russian and/or foreign persons arising from the restrictive measures imposed on the Russian individuals or legal entities by foreign states.

Further, the above provisions also apply if there is an agreement referring the dispute to a foreign state court or international commercial arbitration outside Russia, but it is unenforceable due to application of restrictive measures with respect to one of the parties involved in the dispute which constitute “*obstacles in the access to justice*” for such party.

The Amendments allow the Sanctioned Persons:

- to refer a dispute to a Russian state arbitrazh court provided that there is no identical dispute between the same parties and on the same subject matter and grounds pending before a foreign state court or international commercial arbitration outside Russia;
- if the applicable dispute resolution provisions cannot be enforced by the Sanctioned Persons or if they are unable to protect their interests in a foreign forum due to sanctions, to apply to a Russian state arbitrazh court for an anti-suit injunction preventing the other party from initiation or continuation of the proceedings in a foreign state court or international commercial arbitration outside Russia.

The Sanctioned Persons who have obtained an anti-suit injunction are also entitled to seek compensation of up to the entire amount of the claim in the foreign proceedings and legal expenses if the other party fails to comply with the anti-suit injunction.

The Amendments further clarify that the recognition and enforcement in Russia, of foreign arbitral awards, or, court decisions are still possible if the Sanctioned Persons initiated proceedings in a foreign state court or international commercial arbitration outside Russia or did not object to the jurisdiction of the foreign court or arbitral tribunal, including by

applying to a Russian state arbitrazh court for an injunction.

Practical Implications of the Amendments

The Amendments raise a lot of questions as to their interpretation and practical application. Some of them have been discussed in the online seminar “Sanctions-Related Amendments to the Russian Arbitrazh Procedure Code: (Self-)Defence or (Counter)Attack?” held by the Russian Arbitration Association 40:

- The Amendments apply to agreements to arbitrate “outside Russia” and the scope of such agreements may be read to mean both arbitrations seated outside Russia and arbitrations administered by foreign institutions in Russia, including permanent arbitration institutions, that have been granted the authorization by the Ministry of Justice. As a result, to be on the safe side and to avoid application of the Amendments, the parties may prefer to choose Russian arbitral institutions as a dispute resolution forum;
- The Amendments are drafted broadly to apply to any restrictive measures introduced by foreign states and may include in addition to sanctions any other measures (e.g., visa denial). It is yet to be seen how Russian courts will interpret what “restrictive measures” mean;
- The Amendments did not establish any clear criteria which the Russian state arbitrazh courts should take into account when assessing enforceability² of an arbitration clause or other dispute resolution clause involving Sanctioned Persons, including which obstacles in the context of sanctions could qualify as the “obstacles in the access to justice”. The recent court practice suggests that such provisions may be generally interpreted broadly.³

² Article 148(1)(5) of the Russian Arbitrazh Procedure Code.

³ See, Resolution of the Ninth Arbitrazh Appellate Court No. 09AP-80251/2019-GK in case No. A40-149566/2019 dated February 10, 2020. The court decided that the ICC arbitration clause is unenforceable as the claimant, a

Russian company subject to U.S. sanctions, would not be able to enforce an arbitral award against the defendant, a Russian branch of a U.S. company, due to bank transfer restrictions introduced as a result of sanctions. The Resolution has been appealed to the cassation court and will be considered at the end of June 2020.

- The enforceability of anti-suit injunctions granted by the Russian state arbitrazh courts in other countries may be questionable as generally there is only a limited number of countries where decisions of the Russian courts may be enforced based on the international treaties. Moreover, foreign courts may refuse to recognize and enforce such injunctions based on public policy or other grounds;
- The Amendments do not expressly allow their retroactive application to the dispute resolution agreements entered into before June 19, 2020. Since it may be argued that the Amendments improve the position of the Sanctioned Persons, the Sanctioned Persons are likely to take a position that the Amendments shall apply retroactively;
- The Amendments may have further negative impact on the investment climate in Russia. Most likely, to avoid additional uncertainty, the parties will try to exclude contractually the application of the Amendments in case one of them becomes a Sanctioned Person and include additional remedies to protect their interests if such Sanctioned Person in any event decides to rely on the Amendments.

If you have any questions, or if you wish to discuss the Amendments further, please feel free to contact your usual contacts at the firm.

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