

Russia Seeks to Protect Sanctioned Entities From Claims in Foreign Courts or Arbitral Institutions

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On June 8, 2020, amendments to the Russian Arbitration Procedure Code (the APC Amendments)¹ were signed into law that, in certain cases, allow a person subject to foreign sanctions to refer a dispute to the Russian arbitrazh (commercial) court and to seek an injunction to prohibit foreign court or arbitration proceedings on grounds that any contractually agreed dispute resolution mechanism involving a foreign court or foreign arbitral institution is unenforceable. The APC Amendments become effective on June 19, 2020.

Disputes and Sanctioned Persons Captured by APC Amendments

The APC Amendments apply to any dispute involving a sanctioned person, or where the grounds of the dispute are foreign sanctions against a sanctioned person.

Under the APC Amendments, such disputes are subject to the exclusive jurisdiction of Russian arbitrazh courts, except in the circumstances described below.

The APC Amendments state expressly that the Russian courts do not have exclusive jurisdiction over a dispute where:

- a. the parties to the dispute have agreed that a foreign court or an international arbitration court located outside of Russia has jurisdiction over disputes between them; or
- b. an international treaty to which Russia is a party provides otherwise.

Sanctioned persons covered by the APC Amendments comprise Russian entities or individuals that are the subject of “restrictive measures” (“ограничительные меры”) (*i.e.*, sanctions) imposed by a non-Russian authority, as well as non-Russian entities that are subject to foreign sanctions targeted at Russian individuals and entities.

The new rules make no distinction between the type of sanction and thus would apply to entities and individuals that are the subject of sectoral sanctions imposed by the U.S., European Union and other countries, as well as those whose assets are blocked or frozen (*e.g.*, on the Office of Foreign Assets Control’s Specially Designated Nationals and Blocked Persons List).

Protections Available to Sanctioned Persons

To the extent that a dispute is subject to Russian court jurisdiction under the APC Amendments, a sanctioned party would be permitted to:

- a. refer the dispute to the Russian court (unless the dispute is already subject to proceedings in a foreign court or international arbitral institution); and
- b. apply for an injunction to prohibit the initiation or continuation of proceedings against the sanctioned person in a foreign court or under the rules of an international arbitration court located outside Russia.

Where foreign proceedings have been initiated and the Russian court grants an injunction in favor of the sanctioned party to prohibit such proceedings, the Russian court is entitled to award damages against the nonsanctioned party if it fails to comply with the order. The damages are equal to the amount claimed under the prohibited proceedings plus the sanctioned party’s legal expenses.

¹ Federal Law No. 171-FZ, dated June 8, 2020.

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Although the APC Amendments provide that an agreement between parties to resolve disputes in a foreign court or under foreign arbitration rules would prevail over Russian court jurisdiction, this is subject to one critical caveat.

The amendments allow a sanctioned party to refer a dispute to the Russian court, and to seek an injunction to prohibit foreign court or arbitration proceedings, on grounds that the contractually agreed resolution mechanism involving a foreign court or arbitral institution is “unenforceable, for the reason that one of the parties to the dispute is subject to foreign sanctions which creates obstacles barring such person from access to justice.”

The APC Amendments do not block recognition and enforcement of foreign court orders or arbitral awards where the sanctioned party did not object to the foreign court or arbitration procedure and did not apply for an injunction to prohibit foreign proceedings.

The APC Amendments do not distinguish between arbitration agreements that provide for arbitration with a seat in Russia and foreign arbitrations generally. On a conservative interpretation, a sanctioned person’s ability to proceed before the Russian arbitrazh court may also extend to a Russian-seated arbitration agreement under the rules of a foreign arbitral institution.

Even though they have been approved to administer certain Russian corporate disputes, the Hong Kong International Arbitration Centre and the Vienna International Arbitral Centre will constitute foreign arbitral institutions for the purposes of the APC Amendments.

Risks and Recommendations

The new right of a sanctioned person under the APC Amendments to claim unenforceability of a foreign arbitration agreement, and to seek an injunction in the Russian court to prohibit foreign proceedings, could create significant risk and uncertainty for any party contracting with a sanctioned person, to the extent that future disputes arise.

Companies in the process of negotiating agreements with sanctioned persons should consider including additional contractual prohibitions that seek to prevent the sanctioned party from exercising such a right, supported by appropriate contractual remedies to disincentivise breach of those contractual restrictions.

With respect to existing contracts with sanctioned parties, companies should assess the risks and seek amendments to include additional contractual protections where necessary.