

ONPOINT / A legal update from Dechert's Moscow Office

Russia Has Introduced a Law Seeking to Protect the Rights of Sanctioned Russians

President Vladimir Putin signed a bill on June 8, 2020 designed to provide legal recourse, in certain cases, to Russian (and foreign) persons who have been sanctioned by foreign states. The bill was officially published as Federal Law No. 171-FZ, setting out amendments to the Arbitrazh Procedure Code of the Russian Federation (the "Foreign Sanctions Law"). The Foreign Sanctions Law will come into force on June 19, 2020.

The Foreign Sanctions Law grants exclusive competence to the Russian arbitrazh (commercial) courts ("the Arbitrazh Court") over disputes involving a party who has been sanctioned by a foreign state and over disputes involving a Russian and/or foreign party if such dispute arises between such Russian and/or foreign party and restrictive measures against the Russian party is the basis of the dispute.

The aim of the Foreign Sanctions Law is to protect Russian individuals and companies who have been impacted by foreign sanctions and who are therefore potentially unable to receive adequate protection in foreign forum due to their status.

Under the Foreign Sanctions Law,

1. Where no international treaty to which Russia is a party exists and the parties have not explicitly agreed that a foreign state court or foreign arbitral tribunal shall have jurisdiction over a matter, the Arbitrazh Court will have exclusive competence over:

a. disputes involving a party ("**Sanctioned Persons**") who is subject to restrictions by a foreign state, a state association and/or union and/or a state (interstate) institution of a foreign state or a state association and/or union ("**Foreign Sanctions**"); and

b. disputes between Russian persons or Russian and foreign persons or between two or more foreign persons provided that such disputes arose as a result of the Foreign Sanctions being imposed against a Russian citizen or legal entity.

Sanctioned Persons may include:

a. a Russian citizen or legal entity on whom the Foreign Sanctions have been imposed;

b. a non-Russian legal entity against whom Foreign Sanctions have been imposed because of its affiliation with a sanctioned Russian citizen or legal entity.

2. Where parties have already selected the forum to resolve disputes (whether the forum is a foreign court or foreign arbitration), the Arbitrazh Court may still have exclusive competence over such disputes if the selected jurisdiction cannot be fulfilled due to the imposition of Foreign Sanctions against one of the parties, which would, arguably, impede access to justice for such party.

These provisions are far from clear and are likely to lead to controversy and litigation. First, no guidance is provided as to what needs to be shown before a finding could be made by the Arbitrazh Court that the jurisdiction agreement "cannot be fulfilled" due to the imposition of Foreign Sanctions against one of the parties, nor what would be treated as impeding a party's access to justice.

The Foreign Sanctions Law does contain provisions apparently limiting the right of Sanctioned Persons to apply to the Arbitrazh Court to cases where there is no dispute being considered by a foreign state court or a foreign arbitral tribunal involving the same parties, subject matter and grounds. However it is not clear whether that provision is subject to contentions being made that the Sanctioned Person's access to justice in the foreign court or arbitration is being impeded because of the existence of sanctions.

The result is uncertainty as to the approach that the Arbitrazh Court will take to requests to assume jurisdiction in cases where (for example) foreign litigation or arbitration has already commenced in accordance with a choice of jurisdiction agreement, or for that matter where the Sanctioned Person has already taken steps within it. If applications are made to the Arbitrazh Court to seize jurisdiction in such cases, it may spark a race to obtain anti-suit injunctions, and inevitably any proceedings that continue in the Arbitrazh Court will raise questions as to the enforceability outside of Russia of any judgment that such court may ultimately grant.

3. On the subject of anti-suit injunctions, the Foreign Sanctions Law provides that Sanctioned Persons can apply to the Arbitrazh Court for such an injunction to prevent the initiation or continuation of proceedings by a foreign court or foreign arbitral tribunal. In such a case, the Arbitrazh Court can issue an "*anti-suit injunction*" and determine monetary compensation (a penalty), which may be claimed if there is a violation of any injunction granted. The compensation cannot exceed the total amount of the claim considered by the foreign court or foreign arbitral tribunal and legal expenses incurred by the party to the dispute. It would seem unlikely that any anti-suit injunction granted by the Arbitrazh Court, or any compensation awarded in the event of a breach of it, would be enforced outside Russia if there had been a pre-existing jurisdiction agreement in favour of courts or arbitrations outside Russia.

4. Foreign court decisions or arbitral awards involving Sanctioned Persons will be enforceable in Russia provided that the Sanctioned Person initiated the relevant claim or, alternatively, did not raise any objections to such proceedings (for example, by applying for an "*anti-suit injunction*" to the Arbitrazh Court).

The Foreign Sanctions Law has been criticized by the business and legal community as the law:

- allows one of the parties to disregard a pre-agreed choice of forum and transfer the proceedings to the territory of the Russian Federation if it is considered that the existence of sanctions would impede the affected party's access to justice if such party were held to the original choice of forum; and

- appears to leave open the possibility of it being argued that the Arbitrazh Court should seek to block a foreign proceeding even if it is already underway in accordance with the pre-agreed jurisdiction agreement between the parties.

The Foreign Sanctions Law could have a chilling impact on commercial relations involving cross border transactions with Russian parties, at least in cases where the foreign party either has assets in Russia or may wish to enforce any judgment/award in Russia, as foreign parties may be unwilling to risk the possibility that a dispute would become complicated by the Arbitrazh Court seeking to involve itself in the dispute and thus undermine any proceedings, whether commenced or otherwise, in the pre-agreed jurisdiction.

Companies should take into account this possibility and, at a minimum, seek to ensure that all contracts provide for clear choices of forum and governing law.

This update was authored by:



Laura M. Brank

Partner

Moscow
T: +7 499 922 11 00
Washington, D.C.
T: +1 202 261 3484
laura.branc@dechert.com



Andrew Hearn

Partner

London
T: +44 20 7184 7466
andrew.hearn@dechert.com



Jeremy B. Zucker

Partner

Washington, D.C.
T: +1 202 261 3322
jeremy.zucker@dechert.com



Maryana Batalova

Associate

Moscow
T: +7 499 922 11 08
maryana.batalova@dechert.com



Tatiana Shlenchakova

Associate

Moscow
T: +7 499 922 11 68
tatiana.shlenchakova@dechert.com

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