

Newsletter

First application by Russian courts of novel legislation on the extension of Russian courts' jurisdiction over the sanctions disputes

December 14, 2020

Dear Ladies and Gentlemen,

As we informed you previously, on 19th June 2020, Federal Law No. 171-FZ, dated 8th June 2020, ("**Law**") introducing some critical amendments, aimed at protection of the Russian-sanctioned entities, entered into force. These amendments were made to the Russian Arbitrazh Procedure Code, which governs litigation in state commercial courts.

Please find a brief summary and analysis of this novel legislation at the following [link](#).

Further, given the extraordinary nature of the Law, we also decided to share an overview of the first court practice on its application. At the same time, we would like to draw your attention to the fact that, due to the recent adoption of Law, the approaches of the courts, in respect of the issues raised in practice, cannot be considered as final and well-established.

1. Unenforceability of arbitration agreements due to the barriers of access to justice

- [*Instar Logistic v Nabors Drilling Innovation*](#)

Even before the Law was adopted, in the *Instar Logistic v Nabors Drilling Innovation* case (No. A40-149566/2019), Russian courts had found that they had jurisdiction over the dispute, due to the inclusion of the claimant on the Specially Designated Nationals and Blocked Persons List (USA), which from the courts' perspective, constituted barriers for the Russian-sanctioned company's access to justice and led to unenforceability of the arbitration agreement.

The Supreme Court of Russia has recently upheld the position of the lower courts, taking into account provisions of the Law, which had already entered into force by that time. Interestingly, the Russian Supreme Court noted that, if the restrictive measures against the claimant are lifted, the defendant would not be deprived of its opportunity to justify the enforceability of the original dispute resolution agreement.

- [*Uralvagonzavod v PESA I*](#)

In this case (No. A60-62910/2018), which also commenced before the adoption of the Law, the court of cassation remitted its statement of claim for establishing unenforceability of the arbitration agreement. By doing so, the court of cassation instructed the court of first instance to re-assess the claimant's arguments about barriers of access to justice, due to the EU sanctions. These arguments were very similar to those raised in *Instar Logistic v Nabors Drilling Innovation* (payments block, inability to hire qualified representatives, etc.).

However, the court of first instance, in a new trial, considered these arguments and refused to hold the arbitration agreement to be unenforceable. The court's reasoning was that the claimant was under sectoral sanctions (not personal sanctions, as in *Instar Logistic v. Nabors Drilling Innovation*, which are more severe in restrictions, [ALRUD Comment](#)) that only prohibit conclusion of certain transactions with the claimant. At the same time, the contract, in which the disputed arbitration agreement was included, did not fall under the list of forbidden transactions.

Moreover, according to the court's observations, the claimant actively participates in foreign arbitrations, presents evidence, etc., its interests are represented by a well-known law firm and there was no

submitted evidence of any payment block. In this connection, the court concluded that the claimant had not proved the restriction of its access to justice, and dismissed its claims.

Please kindly note that this is the trial court's judgment that can be overruled by the higher courts. In addition, one should not make any firm conclusions from two cases, which surely cannot be considered as a trend in court practice. Nevertheless, these two cases, *Instar Logistic v. Nabors Drilling Innovation* and *Uralvagonzavod v PESA* raise the question of differentiation of the impact of personal and sectoral sanctions, on access to justice.

2. Russian anti-suit injunctions

- [*Uralvagonzavod v PESA II*](#)

It also should be noted that in parallel court proceedings (No. A60-36897/2020), which were commenced immediately after the Law entered into force, Uralvagonzavod filed an application for granting anti-suit injunctions, prohibiting PESA to continue its arbitration proceedings in the SCC. However, the court of first instance recently dismissed this application, on the same basis as the court of first instance, in the case *Uralvagonzavod v PESA I*.

Moreover, the court of first instance stressed out that the mere fact of sanctions' introduction, in respect of a Russian person, and the existence of foreign arbitration proceedings, is not sufficient to grant anti-suit injunctions, provided for by the Law; the applicant must prove unenforceability of the relevant arbitration agreement, due to the concrete barriers of access to justice.

3. Operation of the Law in Time

As we mentioned previously, the Law does not provide for any provisions regarding its operation in time. Therefore, the question of whether it will apply to prorogation, or arbitration, agreements, concluded before or after its effective date, is controversial.

In this regard, one can argue that, according to the Russian Arbitrazh Procedure Code judicial proceedings in arbitrazh (state commercial) courts as a rule follow federal laws in force during the resolution of the dispute and the consideration of the case.

Therefore, one can assume that the Law of a procedural nature applies to an arbitration, or prorogation, agreement, regardless of whether such agreement was concluded before, or after, the Law became effective: the criteria is whether the Law was effective at the time of consideration of the relevant dispute, or not.

This thesis was confirmed by the courts of cassation in two recent cases:

- [*Russia Today v Barclays Bank PLC*](#)

In this case (No. A40-107039/2019), the court of cassation dismissed the claimant's references to the provisions of the Law, indicating, inter alia, that, at the time of the case consideration, by the courts of first and appellate instances, the Law has not yet entered into force.

- [*Uralvagonzavod v PESA I*](#)

As was mentioned above, the court of cassation remitted the statement of claim for establishing unenforceability of the arbitration agreement, in this case. The court of cassation also indicated that provisions of the Law should be taken into account in the new trial, since they had already entered into force.

ALRUD Team will be glad to assist you with all necessary actions if required.

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