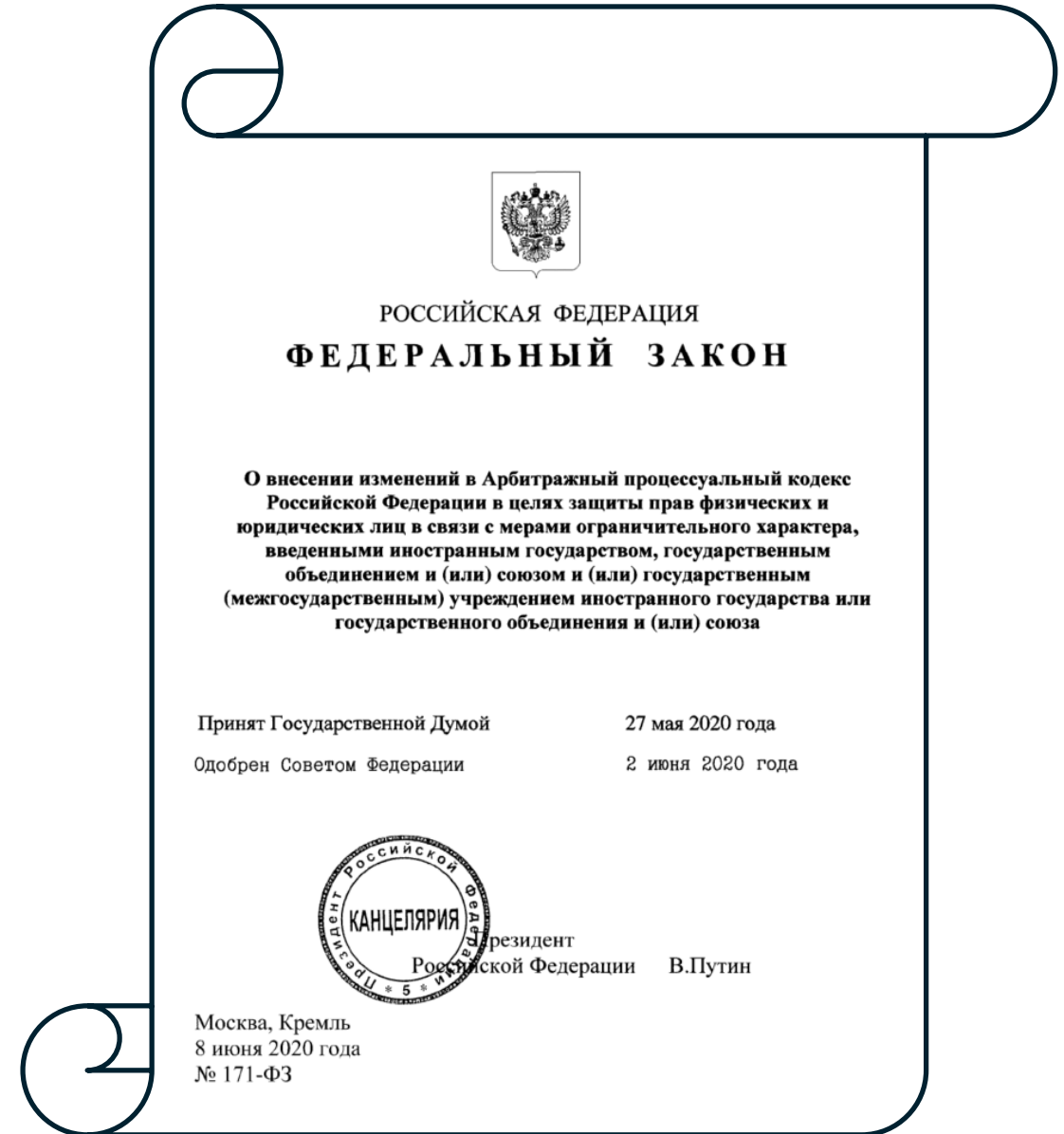


What is the New Law?

Russia introduced a new Federal Law No 171 on 8 June 2020

Federal Law "*On amendments to the Arbitrazh [Commercial Court] Procedural Code of the Russian Federation in order to protect the right of individuals and legal entities in connection with restrictive measures introduced by a foreign state, state association and (or) union and (or) state (interstate) institution of a foreign state or state association, and (or) union*"



The New Articles do not mention 'sanctions' but refer to "measures"

The word 'sanctions' does not appear in the New Articles.

Instead the New Articles refer to "*measures of a restrictive character*" (the "**Measures**") that are applied by a foreign state in its widest sense, namely by a "*foreign state, state association and (or) union and (or) state (interstate) institution of a foreign state or state association, and (or) union*" (the "**Foreign State**").

Question: Could "measure of a restrictive character" be interpreted wider than just sanctions, particularly considering the wide ranging description of Foreign State?

The New Articles for the Code

Article 248¹ of the Code has the title: "*The exclusive jurisdiction of the arbitrazh courts in Russia in respect of disputes with participation of parties, in respect of whom measures of a restrictive character are introduced.*" (**Article 1**)

Article 248² of the Code has the title: "*Prohibition on the commencement or continuation of proceedings in respect of disputes with the participation of parties, in respect of whom measures of a restrictive character are introduced.*" (**Article 2**)

Article 248¹ of the Code - to apply in absence of alternative agreement:

Clause 1 of Article 1:

*"Unless otherwise agreed by international treaty involving Russia or by agreement of the parties", in accordance with which agreement the resolution of disputes involving such parties is "within the competence of foreign courts, international commercial arbitrations, located outside of the territory of Russia [i.e. by way of ("**Foreign Proceedings**")]...."*

Tip: make sure to provide an express dispute resolution clause in your agreement

Questions: What is meant by arbitrations located outside of the territory of Russia? How would this apply to arbitrations administered by foreign arbitral institutions such as LCIA or ICDR, which are seated in Russia?

Article 248¹ of the Code - provides jurisdiction to Russian courts

Clause 1 of Article 1:

"... the following matters shall be within the exclusive competency (jurisdiction) of the arbitrazh courts (the commercial courts) of Russia:..."

Question: What are the consequences of the use of the word 'exclusive' in this provision?

Article 248¹ of the Code - applies to following matters:

Clause 1 of Article 1:

" ...

1) *Concerning disputes involving parties, in respect of whom [Measures] are being applied;*

... "

Questions: Why is this not limited only to Measures against Russian parties? Does the dispute need to be somehow connected to measures or simply involve a party affected by Measures? How central must the role of the party affected by the Measures be to the dispute?

Article 248¹ of the Code - applies to following matters:

Clause 1 of Article 1:

"...

2) *Concerning disputes between one Russian or foreign party with another Russian or foreign party, if the basis of such disputes are Measures in respect of citizens of Russia or Russian legal entities."*

Questions: Could this apply to a dispute between two non-Russian parties? Why use of the term citizen of Russia instead of Russian individual? How close does the dispute have to be connected to Measures?

Article 248¹ of the Code - Who are the persons subject to Measures?

Clause 2 of Article 1:

"... persons in respect of whom Measures are being applied, include:

- 1) citizens of Russia or Russian legal entities in respect of whom Measures are applied;*
- 2) foreign legal persons in respect of whom Measures are applied AND the basis for the application of such Measures are Measures in respect of citizens of Russia or Russian legal parties."*

Comment: This appears to identify the relevant persons as inclusive of foreign legal persons associated with Russian persons and sanctioned together with such Russian persons.

Article 248¹ of the Code – rights of persons subject to Measures

Clause 3 of Article 1:

"persons identified in Clause 2 of Article 1 are entitled to:

- 1) *Apply for the resolution of a dispute to its local arbitrazh court on the condition that there is not under consideration by way of Foreign Proceedings, a dispute between the same parties about the same subject matter and in respect of the same claims;*
- 2) *..."*

Article 248¹ of the Code – rights of persons subject to Measures

Clause 3 of Article 1:

"persons identified in Clause 2 of Article 1 are entitled to:

1) ...

2) *Submit in the manner set out in Article 248² of the Code a request for the prohibition of commencement or continuation of a dispute in Foreign Proceedings. (Seek an anti-suit injunction)"*

Article 248¹ of the Code – applies where obstruction of access to justice

Clause 4 of Article 1:

"This Article also applies if an agreement of the parties, in accordance with which the resolution of disputes is allocated to the competency of Foreign Proceedings, is unperformable due to the application of Measures in respect of one of the parties to the dispute, which create obstructions for such party's access to justice."

Questions: What does unperformable mean? What level of obstruction is required?

Article 248¹ of the Code – does not prevent enforcement in Russia

Clause 5 of Article 1:

"This Article does not prevent the recognition and enforcement of decision of foreign court or foreign arbitration award, which

were made in respect of claims by a party identified in Clause 2 of Article 1, or

if this party did not object to the determination of the dispute by way of Foreign Proceedings with its participation, including that it did not seek an anti-suit injunction."

Questions: What level of participation in the foreign proceedings is required? What level of objection is required? What if the foreign court considers and determines against the objection?

Article 248² of the Code

Clause 1 of Article 2:

"A party in respect of whom proceedings are commenced by way of Foreign Proceedings in respect of disputes identified in Article 1 or if there is evidence that such a proceeding will be commenced, has the right to apply to its local arbitrazh court in Russia with an application for the prohibition on the commencement or continuation of such proceeding by way of Foreign Proceedings."

Article 248² of the Code

Clause 2 of Article 2:

"The Application should contain:

...

3) Information about the claims, which may be made or are already made in the Foreign Proceedings;

4) circumstances, confirming the exclusive jurisdiction of the Russian courts, including circumstances (if they exist), which confirm that the agreement of the parties for the resolution of the dispute by way of Foreign Proceedings cannot be performed by the party to the dispute;..."

Article 248² of the Code

Clause 6 of Article 2:

"The Arbitrazh court will notify parties, involved in the case, about the time and place of the court hearing in the way, set out by the Code.

The non-attendance of the identified parties, which received the proper notification is not a barrier for the consideration of the application."

Article 248² of the Code

Clause 10 of Article 2:

"The Arbitrazh court on the basis of principles of justice, proportionality and the unacceptability of the gaining of benefit from illegal or unconscionable behaviour at the request of the applicant is entitled to order for the applicants benefit a financial amount, that can be sought from the party in respect of whom the anti-suit injunction is made in the event that such party fails to comply with the court order.

The value of the amount that can be ordered by the arbitrazh court should not exceed the value of the claims, made in the Foreign Proceedings and the litigation costs of the party."

Many questions, including...

How will Measures be interpreted?

How will the Russian courts react to existing Foreign Proceedings?

How will the subjective test of obstruction of access to justice work?

Will the New Articles restrict enforcement of foreign decisions against sanctioned parties?

How will Russian antisuit injunctions work?

Why is this important?

It may have wide-reaching application and consequences.

It allows for a great degree of interpretation, which means plenty of work for lawyers:

- (i) at the stage of drafting new agreements:
 - with Russian parties; or
 - which may be affected by anti-Russian sanctions; and
- (ii) at the stage of an actual or imminent dispute, which is or may be somehow affected by anti-Russian sanctions.

Thank you

Artem Doudko FCI Arb

Osborne Clarke LLP

#TheArtOfManagingRisk

