

# Arbitration Agreements with Russian Parties—Growing Risks for Foreign Litigants

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## BACKGROUND

In June 2020, Russia enacted amendments to the Arbitrazh (Commercial) Procedure Code that grant Russian courts exclusive jurisdiction over certain disputes involving foreign sanctions (the “Amendments”). The Amendments allow the courts to assume jurisdiction over disputes covered by an arbitration agreement, or to issue an anti-suit injunction to restrain arbitration proceedings, where the agreement becomes unenforceable as a result of “obstacles in access to justice” created by sanctions.<sup>1</sup>

In early cases involving the application of the Amendments, Russian courts exercised restraint and adopted a narrow reading of the provisions, requiring the applicant to prove that sanctions impaired its ability to access justice in the contractually agreed forum. The courts thus declined to accept that the mere imposition of sanctions on the applicant was sufficient to render an arbitration clause unenforceable.

In subsequent cases, however, Russian courts have interpreted the Amendments broadly, allowing Russian parties affected by sanctions to walk away from the contractually agreed forum based on the mere assertion that sanctions would impair their access to justice. The courts expressed doubts as to the impartiality and fairness of proceedings in jurisdictions that imposed sanctions against Russia, concluding that the rights of sanctioned persons can only be enforced effectively in Russia.

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<sup>1</sup> See our previous update on the Amendments [here](#).

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## The Amendments Pose Risks to Arbitration Agreements in Russia

This court practice undermines the efficiency of Western-seated arbitration agreements with Russian parties, especially since the radical expansion of the sanctions regime against Russia in recent years.

Russian litigants have successfully deployed the Amendments to transfer disputes to Russian courts, and/or obtained anti-arbitration injunctions to restrain foreign arbitral proceedings in ‘unfriendly States’, in dozens of cases affected by sanctions.

Russian courts also awarded compensation to sanctioned entities for breach of anti-suit injunctions by foreign parties, in some cases up to the full value of claims in foreign proceedings subject to the injunctions.

For counterparties who have exposure to Russian jurisdiction, these developments are highly problematic.

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## Recent Developments Portend Further Expansion of the Amendments

Recent decisions of Russian courts suggest a further, likely significant, enlargement of the scope of the Amendments, potentially creating challenges for any agreements to foreign-seated arbitration affected by sanctions, including in countries that have not imposed sanctions on Russian parties.

### ***Linde v. RusChemAlliance* (Case No. A56-129797/2022)**

In *Linde v. RusChemAlliance*, the Arbitrazh Court of Saint Petersburg and Leningrad Region, a first instance court, found an HKIAC arbitration clause unenforceable on the basis that, among other things, Hong Kong is not a neutral forum for sanctions-related disputes—even though Hong Kong imposed no sanctions on Russian parties.

The dispute concerned a contract between RusChemAlliance (“RCA”), a Russian company, and Linde GmbH (“Linde”), a German construction company, for the engineering, procurement and construction of an LNG plant in Russia. The contract was governed by English law and provided for HKIAC arbitration in Hong Kong, with hearings to be held in Stockholm, Sweden.

When the European Union imposed sanctions affecting the performance of the contract, Linde suspended work on the project. RCA sought to terminate the contract and claimed the return of the advance payments. Linde declined to return the payments,

and RCA brought proceedings in the Arbitrazh Court of Saint Petersburg and Leningrad Region, seeking recovery of the unreturned advances and damages.

The court assumed jurisdiction over the dispute despite the presence of the HKIAC arbitration clause. According to the court, because Hong Kong's legal system is largely based on the legal system of England and Wales and because British and European judges (bound to apply sanctions by virtue of their nationality) play an important role in Hong Kong's judiciary, there were "objective doubts" over Hong Kong's neutrality as a place for resolution of sanctions disputes. Moreover, since the hearing was to take place in Stockholm, there were "objective restrictions" on the legal representatives that RCA could use in the arbitration and on payment for their services.

The court therefore found the arbitration clause unenforceable due to "obstacles in access to justice" created by the application of sanctions. The court resolved the dispute on the merits, finding in favor of RCA and awarding substantial damages to the company. The decision is under appeal.

In the meantime, RCA also initiated separate proceedings before the Arbitrazh Court of Saint Petersburg and Leningrad Region (Case No. A56-13299/2024), seeking an anti-suit injunction against Linde with respect to, among other things, pending HKIAC arbitration and related proceedings before the High Court of the Hong Kong Special Administrative Region. RCA asked the court to award it compensation of over €1.5 billion in the event that Linde fails to comply with the court's order. On 15 April 2024, the Russian court granted RCA's application in part, issuing an anti-suit injunction with respect to the HKIAC and certain other proceedings but declining to grant compensation.

### ***VTB v. VTB Bank (Europe) SE (Case No. A56-103943/2023)***

In *VTB v. VTB Bank (Europe) SE*, the same court found another HKIAC clause unenforceable due to sanctions and issued an anti-suit injunction to restrain a non-sanctioned party from pursuing proceedings in Hong Kong.

The dispute concerned a claim by VTB (Russia) to recover a debt from its former subsidiary VTB Bank (Europe) SE under a derivatives agreement. The agreement was subject to English law and provided for HKIAC arbitration in Hong Kong.

When VTB Europe defaulted on its obligations under the agreement as a result of sanctions imposed by the German regulator (Germany being the bank's place of incorporation), VTB brought proceedings in the Arbitrazh Court of Saint Petersburg and Leningrad Region, seeking recovery of the debt.

The court assumed jurisdiction over the dispute despite the presence of the HKIAC arbitration clause. According to the court, because VTB Europe's inability to pay the debt was caused by sanctions, and since VTB Russia was unable to secure qualified legal representation in Hong Kong, there were sufficient grounds to assume jurisdiction over the dispute. According to the court, VTB Europe failed in its obligation to show how the arbitration clause could be given effect in Hong Kong despite the various sanction restrictions imposed on VTB Russia.

Furthermore, to protect VTB Russia from "substantial harm" that would ensue if the case were allowed to proceed to arbitration and to ensure that the claim is resolved in Russia, the court also granted an anti-suit injunction to prevent VTB Europe from pursuing any arbitration or court proceedings abroad.

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## Implications for Foreign-Seated Arbitration Agreements in Russia

These decisions suggest that Russia's concern over the application of sanctions to Russian companies in "unfriendly" foreign jurisdictions is expanding. Foreign companies with contractual relationships with Russian parties and those continuing to operate in Russia will be exposed to the risk of injunctions and other measures in Russia seeking to restrict access to justice in non-Russian jurisdictions.

While the implications of these developments on proceedings outside Russia will likely be limited—English courts, for example, have given short shrift to the attempts to frustrate otherwise valid arbitration agreements on the basis of the Amendments (as discussed previously [here](#))—foreign companies with operations and/or assets in Russia may be at risk of these tactics and should therefore consider how best to protect their arbitration rights.

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## Options to Mitigate Risks

The optimal strategy will principally depend on the existence and location of assets that may be at risk (within or outside Russia).

Anti-suit injunctions from foreign courts may offer relief in some cases. While such injunctions are generally not enforceable in Russia, sanctioned entities may nonetheless choose to comply with them to avoid the risk of being found to be in contempt of a foreign court.

In *RusChemAlliance v. UniCredit Bank* (Case No. A56-74595/2023), for example, another proceeding relating to RCA's efforts to obtain the unreturned advance payments in Russia in reliance on the Amendments, RCA indicated it would comply with an interim anti-suit injunction issued by the English court to restrain RCA from continuing proceedings in Russia in breach of the arbitration agreement until it considered UniCredit Bank's anti-suit injunction application. In light of that position, the Russian court suspended the proceedings. Following the English court order granting the final anti-suit injunction,<sup>2</sup> the Russian court extended the stay pending RCA's appeal of the English court order. On 23 April 2024, the UK Supreme Court dismissed RCA's appeal.<sup>3</sup>

Anti-suit relief may also be available from an arbitral tribunal. While such relief is unlikely to be effective against sanctioned parties—arbitrators lack powers to enforce their orders—it may be “converted” into a court order under the laws of some jurisdictions. In England, for example, s.42 of the Arbitration Act 1996 allows courts to order a party to arbitration to comply with a direction made by a tribunal where it failed to do so within the prescribed time limit. Once granted, such an order can be enforced against a recalcitrant party or its assets in the country.

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Please do not hesitate to contact us with any questions.



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<sup>2</sup> See *Unicredit Bank GmbH v. RusChemAlliance LLC* [2024] EWCA Civ 64.

<sup>3</sup> See *Unicredit Bank GmbH v. RusChemAlliance LLC*, Case ID: 2024/0015, at <https://www.supremecourt.uk/cases/uksc-2024-0015.html>. The Russian court will consider the impact of the UK Supreme Court decision on the proceedings in Russia on 6 May 2024.



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