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## Legal implications for businesses of countersanctions violations: key takeaways from the Russian Supreme Court

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The Russian Supreme Court issued long-awaited *review*\* covering application by *Arbitrazh* (commercial) courts of countersanctions rules and regulations. The Review covers the following main issues:

- The validity and legal consequences of **transactions** violating Russian countersanctions,
- **Procedural aspects** of disputes involving the application of Russian countersanctions,
- **Intellectual property** protection in the context of Russian countersanctions,
- **Exemptions from liability** for non-performance of obligations due to foreign sanctions,
- **Jurisdiction of Russian courts** in sanctions-related disputes,
- **Customs rules** for goods subject to Russian countersanctions.

These topics are covered in more detail in our alert.

### Transactions circumventing Russian countersanctions are null and void

- The Supreme Court confirmed that transactions aimed at circumventing Russian countersanctions are void from the outset, regardless of whether the parties acted in good faith. Such transactions include:

1. Sale of real estate to a Russian entity controlled by a person from an "unfriendly" state, if prior approval from the Government Commission was not obtained (Section 1);

2. Transactions intended to establish foreign control over a strategic enterprise without prior Government Commission approval (Section 2);

3. Violations of the special procedure for fulfilling obligations under the countersanctions regime, including splitting payments to transfer more than RUB 10m (approx. EUR 114k) per month, and assignment of claims (Sections 3–5).

- The Supreme Court clarified that assignment of a claim is allowed if the underlying obligation is not subject to the countersanctions regime (Section 6).

### Procedural aspects of disputes involving Russian countersanctions

- The court may, on its own initiative, assess whether an assignment of a claim is valid if the claim arises from an obligation subject to the countersanctions regime (Section 7).
- A violation of the countersanctions regime may qualify as a newly discovered circumstance (Section 8). This means a final court judgment may be reopened and reviewed on that ground.
- The court will refuse to approve a settlement agreement if it was concluded to circumvent the countersanctions (Section 9).

### Intellectual property and Russian countersanctions

**A key point of the review is that special economic measures do not limit the protection of exclusive rights of foreign companies.**

- The special payment mechanism (type "O" accounts) applies to all obligations owed to right holders from "unfriendly" states, including obligations arising from unauthorised use of intellectual property (Section 10).
- The special payment mechanism does not apply to right holders that continue to operate in Russia and fulfil their contractual obligations. The right holder bears the burden of proving these circumstances (Section 11).
- Compulsory licensing may be granted if a right holder abuses its intellectual property rights or otherwise acts in clear bad faith (Section 12).

between a U.S. manufacturer of an original medicinal product and a Russian generic manufacturer. The courts found that the volumes of the original product supplied to the Russian market were insufficient and held that such limited supply amounted to an abuse of intellectual property rights. In practice, this creates a presumption of bad faith on the part of right holders from "unfriendly" states that have reduced their supplies to Russia or significantly increased their prices, especially in the pharmaceutical sector. As a result, in compulsory licensing disputes, the burden of proof shifts to the "unfriendly" right holder, who must justify its pricing and show that the reduced supply is not sanctions-related.

## Exemption from liability due to foreign sanctions

- The following parties may be exempt from liability, including liability for damages:

1. A broker – for failing to execute a client's instructions relating to foreign securities, if the failure results from sanctions imposed on a Russian stock exchange that the broker could not prevent or overcome (Section 13);

2. The payer's bank – for failing to execute a payment order, if the transfer was blocked due to sanctions of which the bank was unaware and could not reasonably have known (Section 14).

In both cases, the Supreme Court clarified that foreign sanctions may constitute force majeure only where they objectively prevent performance of the relevant obligation.

## Cross-border aspects of sanctions-related disputes

- A Russian court may not refuse to hear an application for an anti-suit injunction in disputes involving persons subject to foreign sanctions solely because the contract contains an arbitration clause (Section 15).
- Visa restrictions preventing Russian nationals from participating in court proceedings in an "unfriendly" state limit their right of access to justice (Section 16). In such cases, the Russian party may apply to a Russian court for an anti-suit injunction or bring a claim on the substance of the dispute.
- Even if an arbitration clause exists, Russian courts retain jurisdiction over a dispute if it arises from foreign sanctions or if one of the parties faces obstacles in accessing justice abroad (Section 17).
- Courts should consider the actual place of performance of the contract (Section 18). If the contract is performed in Russia, Russian courts have jurisdiction.
- When considering recognition and enforcement of a foreign arbitral award issued in an "unfriendly" state, Russian courts must assess it for compliance with Russian public policy. If the arbitral tribunal consists of arbitrators from "unfriendly" states, their lack of impartiality and independence is presumed (Section 19).
- Enforcement of an arbitral award in favour of an entity incorporated in an "unfriendly" jurisdiction may contradict Russian public policy (Section 20).
- A Russian court may impose a monetary penalty for violating an anti-suit injunction by starting or continuing proceedings before a foreign court or arbitral tribunal (Section 21).

## Customs issues

- Commercial imports of goods subject to the countersanctions regime are only allowed under the customs transit procedure. Attempts to declare such goods as goods of the Eurasian Economic Union (EAEU) in order to import them into Russia constitute an abuse of rights (Section 22).

\* *In Russian*

## Contacts

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