
DISPUTE RESOLUTION JOURNAL®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

September-October 2024

Volume 78, Number 3

Editor's Note: It's Mandatory

Victoria Prussen Spears

Application of Mandatory Law in U.S. Arbitration

John Siffert, Steven Skulnik, and Brett Mead

U.S. Supreme Court Unanimously Rules Federal Arbitration Act Requires Federal Courts to Issue a Stay, Where Requested, When Lawsuits Involve an Arbitrable Dispute

Ryan R. Adelsperger, Elizabeth J. Dye, Max A. Winograd, and Robert L. Sills

Key Decisions on Federal Arbitration Act Section 1: Impact on Arbitration Agreements

Robert H. Pepple, Jonathan Assia, Brock J. Seraphin, Alejandro Castro, and Gabriel A. Mendoza

Recent Arbitration-Related Decisions in the U.S. Court of Appeals for the Fifth Circuit

Odean L. Volker

When Will ADR Provisions in Dispute Resolution Clauses Not Be Enforced by English Courts?

Mark Stefanini and Jeremy Holden

Russia: Investment Protection and Arbitration—Part 1

Volodymyr Yaremko, Vadym Miller, and Vladlena Lavrushyna

How to Avoid a Pyrrhic Victory in International Arbitration—Part II

Matthew Townsend and Jonathan Tsang; Antonia Birt, Finlay Donaldson, and Alice Jones

Arbitration of Patent Disputes: A Comparison of the Law in the United States, Switzerland, and Australia—Part II

Turki Alkaladi

Dispute Resolution Journal®

A Publication of the American Arbitration Association®-
International Centre for Dispute Resolution®

Volume 78, Number 3

September-October 2024

- 221 Editor's Note: It's Mandatory**
Victoria Prussen Spears
- 225 Application of Mandatory Law in U.S. Arbitration**
John Siffert, Steven Skulnik, and Brett Mead
- 239 U.S. Supreme Court Unanimously Rules Federal Arbitration Act Requires Federal Courts to Issue a Stay, Where Requested, When Lawsuits Involve an Arbitrable Dispute**
Ryan R. Adelsperger, Elizabeth J. Dye, Max A. Winograd, and Robert L. Sills
- 243 Key Decisions on Federal Arbitration Act Section 1: Impact on Arbitration Agreements**
Robert H. Pepple, Jonathan Assia, Brock J. Seraphin, Alejandro Castro, and Gabriel A. Mendoza
- 249 Recent Arbitration-Related Decisions in the U.S. Court of Appeals for the Fifth Circuit**
Odean L. Volker
- 257 When Will ADR Provisions in Dispute Resolution Clauses Not Be Enforced by English Courts?**
Mark Stefanini and Jeremy Holden
- 265 Russia: Investment Protection and Arbitration—Part 1**
Volodymyr Yaremko, Vadym Miller, and Vladlena Lavrushyna

271 How to Avoid a Pyrrhic Victory in International Arbitration—Part II

Matthew Townsend and Jonathan Tsang; Antonia Birt, Finlay Donaldson, and Alice Jones

285 Arbitration of Patent Disputes

A Comparison of the Law in the United States, Switzerland, and Australia—Part II
Turki Alkaladi

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President

Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President

Meyerowitz Communications Inc.

BOARD OF EDITORS

STACY A. ALEXEJUN

Partner

Quarles & Brady LLP

ALBERT BATES JR.

Partner

Troutman Pepper Hamilton

Sanders LLP

THEO CHENG

Arbitrator and Mediator

ADR Office of Theo Cheng LLC

WADE CORIELL

Partner

King & Spalding LLP

SASHE D. DIMITROFF

Partner

Baker & Hostetler LLP

ELIZABETH A. EDMONDSON

Partner

Jenner & Block LLP

DAVID E. HARRELL JR.

Partner

Locke Lord LLP

B. TED HOWES

Partner

Mayer Brown LLP

PATRICK R. KINGSLEY

Partner

Stradley Ronon Stevens &

Young LLP

TIMOTHY K. LEWIS

Senior Counsel

Blank Rome LLP

GREGORY R. MEEDER

Partner

Holland & Knight LLP

ELIZABETH ZAMORA MERAZ

Partner

Nixon Peabody LLP

KEVIN O'GORMAN

Partner

Norton Rose Fulbright US LLP

NATHAN D. O'MALLEY

Partner

Musick Peeler

DHARSHINI PRASAD

Partner

Willkie Farr & Gallagher (UK) LLP

L ANDREW S. RICCIO

Partner

Baker & McKenzie LLP

LISA M. RICHMAN

Partner

McDermott Will & Emery LLP

ZEYNEP GUNDAY SAKARYA

Partner

Squire Patton Boggs (US) LLP

CHIRAAG SHAH

Partner

Morrison & Foerster LLP

ERIC P. TUCHMANN

Chief Legal Officer

American Arbitration Association

LAURA K. VEITH

Partner

K&L Gates LLP

DANA WELCH

Arbitrator

Welch ADR

FREDA L. WOLFSON

Partner

Lowenstein Sandler LLP

LOUISE WOODS

Partner

Vinson & Elkins RLLP

DISPUTE RESOLUTION JOURNAL®

The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®)

ISSN 1074-8105 (print) and 25733-606X (digital).

© American Arbitration Association-International Centre for Dispute Resolution. All rights reserved under the U.S. Copyright Act. No part of this publication may be reproduced, reprinted, stored in a retrieval system, or transmitted in any form or by any means, including but not limited to digital, electronic, mechanical, recording, or photocopying, without prior written permission.

The Dispute Resolution Journal is © 2024 American Arbitration Association, Inc. All rights reserved. No part of the Dispute Resolution Journal may be reproduced, transmitted or otherwise distributed in any form or by any means, electronic or mechanical without written permission from the American Arbitration Association, Inc. Any reproduction, transmission or distribution of the material herein is prohibited and is in violation of US and international law. American Arbitration Association, Inc., expressly disclaims any liability in connection with the articles contained in the Dispute Resolution Journal or its contents by any third party. The views expressed by authors in these articles are not necessarily those of the American Arbitration Association, Inc. The American Arbitration Association, Inc., assumes no responsibility for the content and materials contained in these articles. The information provided in these articles do not, and is not intended to, constitute legal advice; instead, all information, content, and materials are for general informational and educational purposes only. Information in these articles may not constitute the most up-to-date legal or other information. Use of, and access to, these articles or any resources contained within the articles do not create an attorney-client relationship between the readers, authors, contributors, contributing law firms, or the American Arbitration Association, Inc. Do not consider these articles to be a substitute for obtaining legal advice from a qualified attorney licensed in your state.

Article Submissions

Direct editorial inquiries and send materials for publication to: Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to arbitrators and mediators, attorneys and law firms, in-house counsel, corporate officers, government agencies and their counsel, senior business executives, and anyone interested in dispute resolution.

This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering dispute resolution, legal, accounting, or other professional services or advice in this publication. If dispute resolution, legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

Subscriptions

Digital and print subscriptions to the Dispute Resolution Journal are available for purchase through the AAA-ICDR's online store, <https://aaaeducation.org/bookstore>.

Reprint Permissions

Please send requests to reproduce Dispute Resolution Journal articles to the AAA-ICDR's Publications Department Elizabeth Bain, Director of Publications, at baine@adr.org.

ISSN 1074-8105 (print) and 25733-606X (digital).

The cover of this journal features the painting *Close Hauled*, a drawing by Rockwell Kent, 1930, electrotype on paper.

Publishing Staff

Director of Publications: Elizabeth Bain

Production Editor: Sharon D. Ray

Cover Design: Sharon D. Ray

Cite this publication as:

Dispute Resolution Journal® (The Journal of the American Arbitration Association®-International Centre for Dispute Resolution® (AAA®-ICDR®))

Editorial Office

American Arbitration Association

120 Broadway, Floor 21

New York, NY 10271

POSTMASTER: Send address changes to American Arbitration Association-International Centre for Dispute Resolution, 120 Broadway, 21st Floor, New York, NY 10271

To reach Customer Service:

Elizabeth Bain

Available 8:00 AM-5:00 PM Eastern Time

(401) 431-4837

baine@adr.org

Russia: Investment Protection and Arbitration—Part 1

Volodymyr Yaremko, Vadym Miller, and
Vladlena Lavrushyna¹

In this first of a series, the authors discuss the options that foreign investors with assets and operations in Russia have available to them and how different options may impact their investment protection and chances of bringing credible arbitration claims.

In a business advisory, dated February 23, 2024, the U.S. government warns businesses and individuals of serious legal, financial, and reputational risks entailed in maintaining operations in Russia (the Advisory).² It highlights that by staying in Russia, foreign investors may face penalties—including economic sanctions, export controls, and import restrictions—imposed by the United States and its allies and partners, and risk becoming involved in Russia’s military actions against Ukraine and violations of international law.

In light of the Advisory, it is important for foreign investors with assets and operations in Russia to know the options available to them and how different options may impact their investment protection and chances of bringing credible arbitration claims. This theme is the focus of Part 1 of this new series, titled “Russia: Investment Protection and Arbitration.”

¹ The authors, attorneys with Mayer Brown International LLP, may be contacted at vyaremko@mayerbrown.com, vlavrushyna@mayerbrown.com, and vmiller@mayerbrown.com, respectively.

² The Advisory has been issued by the U.S. Department of State, the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Labor. In addition to Russia, the Advisory covers the Russia-occupied territories of Ukraine.

Purpose of the Advisory

While appreciating that the choice of whether and how to continue operations in Russia, suspend such operations, or exit the Russian market is ultimately up to the businesses, individuals and organizations, through the Advisory the U.S. government seeks to (1) highlight the operational, legal, economic, and reputational risks associated with their Russian business operations and relationships, and (2) urges them to undertake heightened compliance due diligence and human rights due diligence to evaluate potential involvement in violations and identify ways to mitigate associated risks.

Closer Look at the Legal Risks

The Advisory acknowledges that while the “serious risks” stemming from operating in Russia may be mitigated by rigorous due diligence, “substantial risk is likely to remain.” Key legal risks which investors should be aware of include:

- Russian legislation (post-invasion) allowing regional governments to nationalize assets of businesses from “unfriendly states”;³
- A decree by the Russian president of March 3, 2023, enabling external management by the Russian State in businesses failing to perform State defense contracts during martial law, essentially leading to partial nationalization; and
- Other recently enacted legislation restricting dividend payments, fund transfers, and sales of interests in fuel and energy sectors for businesses affiliated with “unfriendly states.”

³ According to the Federal Law No. 127-F3, dated June 4, 2018, “On Measures to Influence (Oppose) Unfriendly Acts by the United States of America and Other Foreign States,” the “unfriendly states” are defined as foreign States “committing unfriendly actions against Russian Federation, citizens of Russian Federation or Russian legal entities.”

Non-resident businesses selling their assets in Russia face further burdensome rules, including a requirement for approval from a government commission and an imposition of a discount on assets sold to Russian investors. Recent regulations also require a mandatory asset valuation, a 50 percent discount on sales, and a 10 percent contribution to the State budget from the sale proceeds. In the circumstances, foreign businesses are expected to rarely sell Russian assets to third-country investors as investors have been, and will continue to be, cautious in light of tightening sanctions and rising geopolitical tensions.

There has been a notable increase in new and prospective cross-border commercial and investment disputes involving Russia and foreign investors, including in the banking, food and beverage, oil and gas, manufacturing, technology, and transport sectors (among others). In the current unpredictable legal landscape, and with Russia being bound by over 60 Bilateral Investment Treaties (BITs), including with what the Russian authorities describe as “unfriendly states” (such as the United States and EU member states, as well as Japan, Canada, Switzerland, Republic of Korea, Ukraine, and the United Kingdom), foreign businesses and individuals operating in Russia should carefully consider the manner in which they conduct business in Russia and assess its impact on their investment protection prospects.

Options for Foreign Investors with Assets/Operations in Russia

At a high level, foreign investors with assets and operations in Russia currently have three primary options open to them. They could:

1. Maintain operations in Russia and fully comply with the existing regime.
2. Opt to sell their business under the imposed rules, for example, to Russian investors.
3. Refuse to participate in the existing regime and explore the possibility of selling their business to third-country (non-Russian) investors.

The path chosen by businesses may not only have major commercial, financial, and reputational implications, but could significantly influence their prospects of safeguarding property rights in potential investment arbitration against Russia, as well as the level of compensation payable in any arbitration.

In the first scenario, if a business opts to remain in the Russian market and continue operations under the existing regime, its grounds to claim a violation by Russia of substantive protections under the applicable BIT could be severely weakened. While engaging with the existing legal regime does not entirely preclude the possibility of initiating investment arbitration, it significantly constrains the basis for future investment claims. It may be difficult to pursue investment claims in circumstances where the wronged party ostensibly agreed to operate within the legal and business framework that it would argue had the effect of infringing its rights. It is noteworthy that the Advisory states that such businesses could also be perceived as directly or indirectly supporting Russia's war effort due to legislation that forces them to directly support Russia's military and are hence "at risk of being implicated in Russia's violations of international law and human rights abuses."

In the second scenario, when a business sells its assets under Russian regulations, the prospects for protecting its investment are slightly higher. At the same time, adhering to the legal framework and the restrictions currently in effect in Russia (thus arguably providing implied consent to their application) could diminish the likelihood of obtaining compensation in an investment claim. However, companies that comply with the regime imposed by Russia might nevertheless argue that they acquiesced under pressure and are challenging the regime's compatibility with the international investment protection standards outlined in the applicable BITs.

In the third scenario, where businesses refuse to comply with the Russian regime, or if third-country investors take over the assets, the likelihood of successfully protecting investments through arbitration rises significantly. However, this comes at a cost of facing an increased risk of (1) retaliatory State action and/or (2) asset expropriation by the Russian authorities. A credible claim of expropriation may arise if Russia either denies

the transfer of shares to non-Russian investors or fails to provide fair market value (or any) compensation when expropriating the foreign company's assets. Further, since Russia discriminates between investors from "friendly" or "unfriendly" states and its regulations specifically target "unfriendly states" and associated organizations, investors could argue that this is contrary to the fair and equitable treatment standard found in almost all of Russia's BITs. Other types of BIT claims are also foreseeable in the circumstances, but the precise nature of the claims will depend on the provisions of the relevant BIT.

Conclusion

Whether international businesses choose to maintain operations in Russia, sell to Russian investors, or explore a transfer of assets to non-Russian entities, these decisions (and their timing) will materially impact their ability to safeguard investment rights in potential international arbitration (or other) proceedings involving Russia.