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# Investment Treaty Arbitration

## Russia



# Investment Treaty Arbitration

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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## BACKGROUND

### Foreign investment

#### What is the prevailing attitude towards foreign investment?

Russian legislation has been amended by a huge number of new rules significantly changing the regulatory environment since the introduction of sanctions affecting the Russian economy. By the president's decree, the definition of 'unfriendly states' was introduced with respect to states that imposed sanctions against Russia and is now actively used in various legislative acts.

As regards the protection of investors, Russia is a party to numerous bilateral and multilateral investment treaties and the national legislation provides for a wide range of guarantees for foreign investors. However, one should bear in mind that the practice of the Russian courts on these matters is not always consistent and the perspective of the enforcement of investment treaty awards rendered against Russia on its territory is still uncertain.

*Law stated - 19 September 2023*

#### What are the main sectors for foreign investment in the state?

The Central Bank of Russia has refrained from providing updated data on foreign direct investment (FDI) with respect to the time periods following 2022. The latest available official statistics of the Central Bank of Russia on this matter was published on 29 August 2022 in relation to 2021. The main sectors for FDI in 2021 include the following sectors (all given numbers are approximate):

- mining and quarrying (17 per cent, US\$32 billion invested);
- manufacturing industry (17.1 per cent, US\$32 billion invested);
- wholesale and retail trade, and repair, of motor vehicles (27 per cent, US\$50 billion invested);
- financial and insurance activities (21.6 per cent, US\$41 billion invested);
- professional, scientific and technical activities (5.9 per cent, US\$11 billion invested); and
- real estate (3.4 per cent, US\$6.4 billion invested).

*Law stated - 19 September 2023*

#### Is there a net inflow or outflow of foreign direct investment?

According to the Central Bank of Russia's official statistics dated 29 August 2022, the net inflow of FDI in 2021 was about US\$189 billion, while the outflow equalled US\$149 billion. Thus, the total inflow in 2020 of FDI equalled US\$40 billion. However, it is noteworthy that the net inflow of FDI in Russia decreased by 9 per cent in a year (US\$207 in 2020 versus US\$189 in 2021).

The total inflow of FDI in the share capital equalled US\$42 billion, the total inflow of debt instruments equalled US\$850 million, the total outflow by means of merger and acquisition equalled US\$2.8 billion. In total, US\$38 billion was reinvested.

Official statistics, while somewhat limited in their representation due to their emphasis on the location of the investor's incorporation rather than the ultimate beneficiaries, show that the key sources of FDI in Russia as of early 2022 included:

- Cyprus (33.3 per cent);

- Bermuda (12 per cent);
- the United Kingdom (7.6 per cent);
- the Netherlands (6.7 per cent);
- Bahamas (4.8 per cent);
- France (4.5 per cent); and
- Germany (4 per cent).

*Law stated - 19 September 2023*

### **Investment agreement legislation**

Describe domestic legislation governing investment agreements with the state or state-owned entities.

Russian national law provides for the extensive regulation of investment agreements with the state or state-owned entities. There were no major changes for the past year.

### **Public-private partnership**

Public-private partnerships are regulated by Law No. 224-FZ dated 13 July 2015 'On the public-private partnership, municipal-private partnership in the Russian Federation and amendments to certain legislative acts of the Russian Federation'. A public-private partnership is a special form of cooperation between a private partner (investor) from one side and a state or municipal partner from the other side. The law provides for 23 objects of cooperation including but not limited to:

- public transport except for the subway;
- objects on production, transfer and distribution of electricity; and
- hunting infrastructure facilities.

### **Concessions legislation**

Concessions legislation consists of Law No. 115-FZ dated 21 July 2005, 'On concession agreements'. This law establishes a prohibition for foreign investors to act as concessionaires if the concession agreement's object is:

- real estate connected with the Armed Forces of the Russian Federation; or
- a technical means of ensuring the operation of information technology facilities, heat supply facilities, centralised systems of hot water supply, cold water supply or water disposal, as well as individual facilities of such systems.

*Law stated - 19 September 2023*

## **INTERNATIONAL LEGAL OBLIGATIONS**

### **Investment treaties**

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

### **Bilateral investment treaties**

Russia has effective bilateral investment treaties (BITs) with a multitude of states (according to the information obtained from the Ministry of Economic Development) including, for example, with:

- Austria (signed on 8 February 1990, entered into force on 1 September 1991);
- Belgium and Luxembourg (signed on 9 February 1989, entered into force on 18 August 1991);
- the United Kingdom and Northern Ireland (signed on 6 April 1989, entered into force on 3 July 1991);
- Denmark (signed on 4 November 1993, entered into force on 26 August 1996);
- Serbia and Montenegro (based on the Yugoslavia BIT) (signed on 11 October 1995, entered into force on 19 July 1996);
- Mongolia (signed on 29 November 1995, entered into force on 26 February 2006);
- the United Arab Emirates (signed on 28 June 2010, entered into force on 19 August 2013); and
- Iran (signed on 23 December 2015, entered into force on 6 April 2017); and

BITs signed with some states have not become effective because one or both of the contracting parties have not yet completed relevant domestic procedures. Some examples are:

- the United States (signed on 17 June 1992, did not enter into force);
- Croatia (signed on 20 May 1996, did not enter into force);
- Cyprus (signed on 11 April 1997, did not enter into force);
- Tajikistan (signed on 16 April 1999, did not enter into force);
- Ethiopia (signed on 10 February 2000, did not enter into force);
- Thailand (signed on 17 October 2002, did not enter into force);
- Algeria (signed on 10 March 2006, did not enter into force);
- Nigeria (signed on 24 June 2009, did not enter into force);
- Guatemala (signed on 27 November 2013, did not enter into force); and
- Morocco (signed on 15 March 2016, did not enter into force).

## Multilateral treaties with investment provisions

Russia is not a party to multilateral investment treaties, but it is a party to the following multilateral treaties that contain investment provisions:

- the Eurasian Investment Agreement (signed on 12 December 2008, entered into force on 11 January 2016);
- the Free Trade Agreement between the Eurasian Economic Union and Vietnam (signed on 29 May 2015, entered into force on 5 October 2015);
- the Treaty on Eurasian Economic Union (signed on 29 May 2014, entered into force on 1 January 2015);
- the Belarus–Kazakhstan–Russia Agreement on Services and Investment (signed on 9 December 2010, entered into force on 1 January 2012);
- the Common Economic Zone Agreement (signed on 19 September 2003, entered into force on 20 May 2004); and
- the European Communities–Russia Partnership and Cooperation Agreement (signed on 24 June 1994, entered into force on 1 December 1997).

*Law stated - 19 September 2023*

If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Russia does not have any overseas territories. Several Russian BITs that were concluded with foreign states provide for the possible extension to overseas territories. However, this option was not used by the parties to these BITs.

*Law stated - 19 September 2023*

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

According to the official website of the Ministry of Economic Development and the information published by the United Nations Conference on Trade and Development, neither amendments nor additional protocols affecting treaties, to which Russia is a party, were introduced.

*Law stated - 19 September 2023*

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Russia has never unilaterally terminated any investment treaty. However, on 17 April 2018, Russia officially confirmed its intention not to be considered a signatory to the Energy Charter Treaty.

With respect to the terminated India–Russia BIT, its provisions will remain in effect until 27 April 2032.

Currently, the Russian parliament is considering bill No. 255995-8 concerning the denunciation of BITs with ‘unfriendly states’. It is important to note that, since the beginning of 2023, the bill, unlike many other bills, has not progressed even to the initial stage within the State Duma’s first reading.

*Law stated - 19 September 2023*

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Russia has entered into the following multilateral treaties with investment provisions that overlap with the BITs:

- the Eurasian Investment Agreement (in which there is a membership overlap with the BIT with Kazakhstan, and the treaties continue to operate in parallel);
- the Free Trade Agreement between the Eurasian Economic Union and Vietnam (in which there is a membership overlap with the BIT with Vietnam, and the treaties continue to operate in parallel);
- the Treaty on Eurasian Economic Union (in which there is a membership overlap with the BITs with Armenia, Kazakhstan, and the treaties continue to operate in parallel);
- the Belarus–Kazakhstan–Russia Agreement on Services and Investment (in which there is a membership overlap with the BIT with Kazakhstan, and the treaties continue to operate in parallel);
- the Common Economic Zone Agreement (in which there is a membership overlap with the BITs with Kazakhstan, Ukraine, and the treaties continue to operate in parallel); and
- European Communities–Russia Partnership and Cooperation Agreement (in which there is a membership overlap

with the BITs with Austria, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Netherlands, Romania, Slovakia, Spain, Sweden, the United Kingdom, Belgium and Luxembourg, and the treaties continue to operate in parallel).

*Law stated - 19 September 2023*

### **ICSID Convention**

#### **Is the state party to the ICSID Convention?**

Russia signed the ICSID Convention on 16 June 1992 but has not ratified it.

*Law stated - 19 September 2023*

### **Mauritius Convention**

#### **Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?**

Russia is not a party to the Mauritius Convention.

*Law stated - 19 September 2023*

### **Investment treaty programme**

#### **Does the state have an investment treaty programme?**

Russia does not have an investment treaty programme.

*Law stated - 19 September 2023*

## **REGULATION OF INBOUND FOREIGN INVESTMENT**

### **Government investment promotion programmes**

#### **Does the state have a foreign investment promotion programme?**

There is no codified investment promotion programme as such. However, the importance of attracting foreign investments is upheld in the Resolution of the government of the Russian Federation, dated 29 September 1994, No. 1108 'On Intensifying the Attraction of Foreign Investments in the Economy of the Russian Federation'.

Pursuant to this Resolution, the Advisory Council for Foreign Investments was established. The Advisory Council is based on a direct dialogue between the heads of investor companies and the Russian government with a focus on creating a favourable investment climate in the country.

In March 2022, the Russian government adopted the Resolution No. 437. The government has expanded investor opportunities under the Special Investment Contracts (SPIC 1.0) instrument. It was explained that this measure would support Russian industry and increase the sustainability of the economy in the face of sanctions pressure.

Resolution No. 437 has amended the rules for concluding special investment contracts. They provide for the renewal of the SPIC 1.0 mechanism, as well as the possibility of revising the terms of existing contracts. Investors will be able to extend the terms of such contracts if restrictive measures taken by foreign partners have affected the implementation of investment projects.

In addition, the requirements for projects for which SPIC 1.0 will be concluded have been relaxed. In particular, mandatory requirements for exports of industrial products and diversification of supplies are eliminated.

*Law stated - 19 September 2023*

### **Applicable domestic laws**

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The central domestic law that governs foreign investments is Federal Law No. 160-FZ, dated 9 July 1999 'On Foreign Investments in the Russian Federation' (the Law on Foreign Investments). It guarantees foreign investors the right to invest and to receive revenues and profits from such investments and sets forth the general terms for foreign investors' business activities in Russia.

For example, the Law on Foreign Investments stipulates that the legal treatment of foreign investors may not be less favourable than that of domestic investors and that the property of a foreign investor shall not be subject to compulsory seizure, including nationalisation except in cases and on the grounds established by federal law or an international treaty.

Apart from the Law on Foreign Investments, there is Federal Law No. 39-FZ, dated 25 February 1999 'On investment activities in the Russian Federation carried out in the form of capital investments'. Generally, this Law determines the legal and economic foundations of investment activities carried out in the form of capital investments in Russia and also establishes guarantees of equal protection of the rights, interests and property of subjects of investment activities carried out in the form of capital investments, regardless of the form of ownership.

In 2020, Federal Law No. 69-FZ, dated 1 April 2020 'On the Protection and Encouragement of Investment in the Russian Federation' (the Law on Protection of Investments) was adopted. The Law on Protection of Investments provides that Russian companies implementing investment projects in Russia (including foreign-owned companies) may enter into agreements for the promotion and protection of investments with Russia or its constituent entities. In exchange for the company's commitment to invest over a certain threshold, the legal and regulatory regime applicable to such companies may be stabilised, including with respect to taxes, customs duties and certain regulatory matters.

*Law stated - 19 September 2023*

### **Relevant regulatory agency**

Identify the state agency that regulates and promotes inbound foreign investment.

Under article 23 of the Law on Foreign Investments and article 4 of the Law on Protection of Investments, the government of Russia performs several functions in this regard. It controls foreign investors, determines which investment projects should have priority, develops, and fulfils federal programmes aimed at attracting foreign investments.

In accordance with the Decree of the President of the Russian Federation No. 79 of 28 February 2022, a subcommittee of the Government Commission for Monitoring the Implementation of Foreign Investments in the Russian Federation (the Government Commission) was established. The main purpose of this state body is to control all foreign investment in business entities of strategic importance for ensuring the defence of the country. In this respect, the commission shall approve transactions that might establish control by a foreign investor over the business entities of strategic importance.

According to various recent regulations, Russian residents may only carry out the following transactions with prior

approval by the Government Commission:

- granting rouble-denominated loans and credits in favour of residents of unfriendly states under loan agreements;
- transfers of ownership of securities and title to immovable property to residents of unfriendly states;
- transfers of ownership of securities and title to immovable property acquired from residents of unfriendly states by other foreign persons after 22 February 2022;
- provision of foreign currency by residents in favour of non-residents under loan agreements;
- transfers of foreign currency to the residents' own accounts with banks and similar financial institutions abroad; and
- transfers of own funds without opening a bank account by electronic means of payment provided by foreign financial services providers; and others.

Further, on 8 September 2022, the President issued Decree No. 618, which provides that transactions with shares in Russian limited liability companies involving residents of unfriendly states can only be carried out with prior approval by the Government Commission.

The Ministry of Economic Development also performs several functions related to foreign investments; in particular, coordination of federal public bodies aimed at attraction of foreign direct investments, cooperation with international organisations and work under federal investment programmes as well as under long-term grant programmes.

*Law stated - 19 September 2023*

## Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

No particular state body is stipulated by the applicable Russian law. In June 2021, the Prosecutor General's Office was authorised to represent Russia in international arbitral and court proceedings.

In practice, the following state bodies are usually served with notices of an investment dispute:

- the Ministry of Foreign Affairs;
- the Ministry of Justice;
- the Ministry of Economic Development;
- the Ministry of Finance;
- the Administration of the President; and
- the Prosecutor General's Office.

*Law stated - 19 September 2023*

## INVESTMENT TREATY PRACTICE

### Model BIT

Does the state have a model BIT?

Russia used to have a model BIT; however, it was replaced by the regulations and general guidelines on the conclusion of BITs. In 1992, the Russian government issued Resolution No. 395 on the conclusion of agreements between the government of Russia and the governments of foreign states on the promotion and mutual protection of capital investments. This resolution introduced the model BIT that consisted of 10 articles and was framed in very broad

terms. Then, in 2001, it was replaced by the new model BIT that provided more guidance.

On 30 September 2016, the Russian government issued Resolution No. 992, replacing the model BIT 2001 with the set of general approaches to the conclusion of BITs (2016 Guidelines). The new resolution laid out recommendations as to the contents of future BITs rather than set out the text of a model BIT.

*Law stated - 19 September 2023*

### Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

The Ministry of Foreign Affairs of Russia has an archive containing the treaty preparatory materials, but it is not publicly available.

*Law stated - 19 September 2023*

### Scope and coverage

What is the typical scope of coverage of investment treaties?

In terms of the definition of 'investor', one would find a typical clause in most Russian bilateral investment treaties (BITs), which extends to a natural person, a legal entity or entities not possessing the status of juridical persons. A natural person should be a citizen of a contracting party and be legally capable under its respective legislation to carry out investments. The 2016 Guidelines put a great emphasis that investors' investments shall be associated with or aimed at generating profits and having substantial economic activities. Several BITs specifically highlight the necessary requirement that the investor shall have its 'seat' within the territory of the relevant contracting party.

The 2016 Guidelines restrict the scope of protection to investments made after the BIT's entry into force. Russian BITs include a broad and non-exhaustive definition of eligible assets. Typically, the definition of investment expressly includes shares and other forms of participation in legal entities. The 2016 Guidelines also provide that BITs shall not apply to services provided for the purposes of performing state functions by governmental bodies of the state party or legal entities authorised to perform such duties by a state party. Most Russian BITs explicitly require investments to be made in accordance with the contracting party's laws. In terms of whether indirectly controlled investments are protected the 2016 Guidelines are silent. The majority of Russian BITs follow the same approach. However, several BITs, such as the Kuwait–Russia BIT and the Russia–Sweden BIT, expressly cover investments made through an intermediary entity incorporated in a third country.

*Law stated - 19 September 2023*

### Protections

What substantive protections are typically available?

### Fair and equitable treatment

The 2016 Guidelines do not establish that the Russian BITs should contain a fair and equitable treatment (FET) clause. Nevertheless, it provides for a prohibition of arbitrary treatment, stipulating that laws and other regulations shall be applied reasonably, impartially and objectively. In general, most of the Russian BITs include a FET clause with a standard wording such as: '[e]ach Contracting Party shall accord fair and equitable treatment to investments made by

investors of the other Contracting Party in its territory’.

Only the Armenia–Russia BIT and Russia–Ukraine BIT do not envisage FET provisions, as well as the Morocco–Russia BIT (not in force).

## Expropriation

The 2016 Guidelines provide extensive guidance on the matter of expropriation. For instance, Russian BITs shall provide a general prohibition of expropriation unless the following conditions are met:

- the existence of public interest;
- full compliance with the procedure prescribed by the legislation of the contracting party;
- carried out in a non-discriminatory manner; and
- with the prompt payment to the investor of adequate and effective compensation for the damage caused by the expropriation.

Most of the Russian BITs provide that compensation for the expropriated property shall be paid ‘without undue delay’. However, there are some variations. For example, the Canada–Russia BIT states that compensation shall be made within two months of the date of expropriation, while the Italy–Russia BIT establishes a period of three months. The 2016 Guidelines provide that, if such compensation is delayed, investors shall be entitled to interest at a market rate.

## Full protection and security

Most BITs with Russia contain full protection and security provisions with a standard provision varying slightly from treaty to treaty.

*Law stated - 19 September 2023*

## Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Most disputes that involve Russia are commonly administered by the Permanent Court of Arbitration (PCA) under the UNCITRAL Rules and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under the SCC Rules. This is because the 1992 model BIT and most of the BITs concluded in the 1990s, gave the investor the choice between arbitration under the SCC Rules and ad hoc arbitration under the UNCITRAL Rules.

Several BITs that were concluded in the 2000s provide that the dispute could be resolved within the International Centre for Settlement of Investment Disputes (ICSID) or ICSID Additional Facility arbitration; however, there have been no disputes thus far involving Russia through this mechanism. Several Russian BITs provide only for an ad hoc arbitration with no particular rules stipulated. The 2016 Guidelines provide that both institutional and ad hoc arbitration can be used, but do not mention the specific arbitral institution.

*Law stated - 19 September 2023*

## Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

The 2016 Guidelines provide for the complete regime of confidentiality, stating that neither a party to the dispute nor an arbitral tribunal may disclose any information concerning the dispute, including the award, without the written consent of both parties to the dispute. Moreover, the 2016 Guidelines state that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not apply.

In many PCA-administered cases with Russia, parties opt to keep the proceedings confidential, although some limited information about the cases is publicly reported. However, a number of proceedings were conducted publicly and the respective arbitral awards have been published (eg, *Hulley Enterprises v Russia*, *Pugachev v Russia* and *RosInvest v Russia*).

*Law stated - 19 September 2023*

## Insurance

Does the state have an investment insurance agency or programme?

To protect Russian investors, the Russian Export Credit and Investment Insurance Agency (EXIAR) was established in 2011. The main purpose of EXIAR is to provide insurance services to Russian investors when exporting Russian goods (works, services) against commercial and political risks and investing outside the territory of Russia.

Further, Russia is a party to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA). Under the MIGA framework, Russian companies and nationals can protect their investments from political risk with the insurance tools if certain conditions are met.

*Law stated - 19 September 2023*

## INVESTMENT ARBITRATION HISTORY

### Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

Russia has been involved in approximately 30 arbitration proceedings. The most large-scale investment treaty arbitration proceedings may be divided into the following groups.

### **Multiple Ukraine-related arbitrations: (*Ukrenergo v Russia*; *DTEK v Russia*; *Naftogaz and others v Russia*, etc)**

These arbitrations were initiated pursuant to the Ukraine–Russia bilateral investment treaty (BIT) after a series of actions by the Russian authorities in Ukraine and Crimea since 2014. Seats of arbitration vary and include Paris, Geneva, the Hague and Stockholm. The claimants contend that Russia breached its obligations under the BIT by taking measures that deprived the claimants of their property, primarily in Crimea. For example, in *Aeroporto Belbek LLC and Mr Kolomoisky v The Russian Federation*, it was alleged that Russia deprived the claimants of their rights to operate a passenger terminal for commercial flights at the Belbek Airport in Crimea. In *JSC CB PrivatBank v The Russian Federation*, JSC CB PrivatBank contended that Russia had breached its obligations under the Ukraine–Russia BIT by taking measures that prevented them from operating their banking business in Crimea. In *Naftogaz and others v*

Russia, the claimant alleged that Russia had illegally seized its assets in Crimea. This case was resolved in April 2023 by the arbitral tribunal ordering Russia to pay US\$5 billion in compensation. Ukraine is now seeking enforcement before US courts.

### **Yukos-related arbitrations: (<em>Hulley Enterprises v Russia</em>;<em> Veteran Petroleum v Russia</em>; <em>Yukos Universal v Russia</em>, etc)**

The claims in these arbitrations arose out of a series of actions allegedly undertaken by Russia against Yukos Oil Company (a major oil company) between 2003 and 2006, including arrests, large tax assessments and liens and the auction of the main Yukos facilities among others, which allegedly led to the bankruptcy of the company and was assessed by the claimants as unlawful expropriation. The arbitrations were administered by the Permanent Court of Arbitration (PCA) and in 2014 led to the awards of US\$50 billion, which still remains the highest amount awarded against Russia. Since 2014, Russia has been challenging the awards in the Dutch courts. In 2016, the Hague District Court set aside the awards due to the tribunal's lack of competence, in particular, because Russia has not ratified the Energy Charter Treaty, based on which the investors' claims were raised. In 2020, this judgment was reversed by the Hague Court of Appeal and the arbitral awards were upheld. However, In November 2021, the Dutch Supreme Court quashed the judgment of the Hague Court of Appeal and remanded the case for a new consideration to the Amsterdam Court of Appeal to consider the argument of the Russian Federation regarding the procedural fraud committed by the claimants. By its decision of June 2022, the Hague Court of Appeal reinstated certain attachments against Russian assets located in the Netherlands.

*Law stated - 19 September 2023*

### **Industries and sectors**

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Investment arbitrations involving Russia have concerned multiple industries, such as:

- gas and oil (Naftogaz and others v Russia; Luxtona v Russia; Veteran Petroleum v Russia; Yukos Universal v Russia; Hulley Enterprises v Russia; Yukos Capital v Russia; RosInvest v Russia);
- finance and insurance (Oschadbank v Russia; Privatbank and Finilon v Russia);
- construction (Rafikovich Amalyan v Russia; Berschader v Russia);
- energy supply (PJSC DTEK Krymenergo v Russia; Ukrenergo v Russia);
- real estate (Aberon and others v Russia);
- wholesale and retail trade (Stabil and others v Russia);
- manufacturing (Cesare Galdabini v Russia);
- transport (Aeroport Belbek and Kolomoisky v Russia); and
- services (Sedelmayer v Russia).

Some disputes, such as Pugachev v Russia, cover multiple sectors; in this case, the sectors involved were real estate, manufacturing, mining and quarrying.

*Law stated - 19 September 2023*

### Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Resolution No. 992 provides for the default mechanism for the appointment of the arbitral tribunal, stating that three arbitrators shall be appointed to the ad hoc arbitral tribunal. Further, the 2016 Guidelines stipulate that the parties may agree on a list of arbitrators to rely on when appointing the arbitrators.

*Law stated - 19 September 2023*

### Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

In most cases, Russia tends to defend itself against investment claims with the help of external counsel, predominantly foreign law firms that specialise in investment arbitration. However, after the Russian–Ukraine conflict emerged, many foreign law firms have refused to act on behalf of Russia.

There were cases when Russia only filed objections against the tribunals' jurisdiction without participating in the further proceedings, and then was more actively engaged in the proceedings to challenge the awards and resist their enforcement.

Previously, the state's internal counsel for investment disputes was the Ministry of Justice. The situation has changed in 2021, and these functions have been transferred to the Prosecutor General's Office.

Also, in 2015, Russia established the International Centre for Legal Defence, which plays a special role in the coordination of investment arbitration proceedings against Russia. The centre is organised in the form of a non-commercial autonomous organisation and is supervised by the administration of the President.

*Law stated - 19 September 2023*

## ENFORCEMENT OF AWARDS AGAINST THE STATE

### Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The Russian Federation, being a successor of the USSR, is the party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which came into force on 22 November 1960) and the 1961 European Convention on International Commercial Arbitration (which came into force on 7 January 1964).

*Law stated - 19 September 2023*

### Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

Russia does not comply voluntarily with investment treaty awards and tends to initiate the challenge proceedings in

most cases. The most publicly known and widely discussed case is *Hulley Enterprises Limited (Cyprus), Yukos Universal Limited (Isle of Man), Veteran Petroleum Limited (Cyprus) v The Russian Federation*.

Since then, both parties have been involved in a number of challenges and enforcement proceedings all over the world.

- In 2014, the claimants' petition to recognise the arbitration awards was filed with the US District Court for the District of Columbia. Russia applied to dismiss the petition on the basis of the lack of the subject matter jurisdiction and foreign sovereign immunity. In April 2022, the six-year stay was lifted.
- In 2015, the investors initiated enforcement proceedings in England and Wales. In 2016, because of the defendant's challenge of the English court's jurisdiction as well as the setting aside proceedings in the Netherlands, the High Court of England and Wales court stayed the proceedings. The stay was lifted in October 2022. The High Court is expected to hold another hearing in October 2023, at which the former shareholders will argue that Russia cannot claim state immunity as the Dutch courts have already ruled against Russia on that issue.
- In France, in 2015, *Hulley Enterprises Limited* and *Veteran Petroleum Limited* seized receivables of the Russian Space Agency Roscosmos connected with the contracts with Arianespace. The French first instance court found the seizure unlawful and cancelled it. This decision was upheld by the Paris Court of Appeal.

Another long-standing enforcement proceeding is *Sedelmayer v Russia*. The award was rendered by the Stockholm Chamber of Commerce (SCC) in 1998. Despite a relatively small awarded sum (approximately US\$2.3 million plus interest), Russia refused to comply and appealed the award to the Swedish court. Mr Sedelmayer, in turn, initiated enforcement proceedings and attempted to seize the Russian assets in Germany and Sweden, facing strong opposition from Russia at each stage. Although he was successful in his actions, he spent more than 10 years on enforcement efforts, which still was not enough to recover the full sum awarded.

*Law stated - 19 September 2023*

## Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Russia, in most cases, resists enforcement of arbitral awards by all available means, including by appealing to courts of the seat of arbitration.

The most well-known examples are the Yukos cases. Russia appealed the PCA arbitral awards rendered in 2014 with the Dutch courts. The Supreme Court has honoured the Russian Federation's appeal in cassation on the issue that the Yukos shareholders have committed procedural fraud in the arbitral proceedings that has been wrongly dismissed by the Court of Appeal on procedural grounds.

Another example of Russia resisting an unfavourable arbitral award is its appeal against the award issued in a Geneva-seated arbitration in favour of Yukos shareholders. Russia's argument to the effect that the Russian parliament had not ratified the Energy Charter Treaty, which underlay the arbitral tribunal's jurisdiction, failed to convince the Swiss court. As a result, in October 2022, the Swiss Federal Court dismissed Russia's application.

A successful example for Russia is the setting aside of the SCC award against RosInvest. The dispute arose out of the collapse of the oil company Yukos and the SCC tribunal awarded RosInvest US\$3.5 million plus interest. Nevertheless, Russia decided to appeal and, on 5 September 2013, the Svea Court of Appeal overturned almost all the findings of the award.

In two recent cases related to Crimea, *PJSC Ukrnafta and Stabil LLC and Others*, Russia appealed final awards on the

basis of the tribunals' lack of competence to the Swiss Supreme Court. In 2019, the court upheld the awards.

However, in another Crimea-related case, the Paris Court of Appeal annulled a US\$1.1 billion award issued in favour of Ukrainian state-owned bank Oschadbank, holding that the bank's investments before 1992 were not covered by the bilateral investment treaty (BIT). Nevertheless, in December 2022, the French Court of Cassation reinstated the award.

*Law stated - 19 September 2023*

### Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

The main legal obstacle hindering the enforcement of awards is the state's sovereign immunity. Under Federal Law No. 297-FZ, dated 3 November 2015 'On Jurisdictional Immunities of a Foreign State and Foreign State Property in the Russian Federation', the foreign state enjoys jurisdictional immunities in respect of itself and its property. As for the immunity of the Russian Federation in general, one can assume a highly protective approach. For instance, by the systematic interpretation of the Russian Constitution (articles 4 and 15), the sovereignty of Russia extends over its entire territory and the Constitution has supreme legal force, hindering the enforcement of the unfavourable awards.

Russia refers to this concept on a regular basis in foreign courts or domestic ones claiming that it did not waive its immunity from legal actions as well as attachments.

As opposed to the cases involving the enforcement against Russia, in the case concerning the enforcement against Ukraine ( OAO Tatneft v Ukraine ) there is a precedent the Russian courts found that Ukraine waived its immunity. In that case, Tatneft filed an application to the Commercial Court of Moscow City to enforce the PCA award. The Commercial Court of Moscow City denied the application with reference to state immunity (Case No. A40-67511/2017). This ruling was overturned by the cassation court: it concluded that Ukraine waived its immunity by signing the respective BIT and sent the case for a new trial. Ultimately, the PCA award was enforced by the Commercial Court of Stavropol Region (Case No. A63-15521/2018).

As regards the public policy grounds stipulated in article 36(2)(2) of the Law on International Commercial Arbitration, while there were no cases in the Russian courts related to the enforcement of investment treaty awards against Russia, there is some controversial case law related to the enforcement of commercial awards against the state-owned entities. In one such case, the Russian courts denied enforcement of the London Court of International Arbitration award stating that because:

*'the respondent's ultimate beneficiary is the Russian Federation, enforcement of the award would harm the state's budget as the result of transferring of funds to accounts of foreign companies. (Case No. A40-117326/2018.)'*

Separately, the Constitutional Court of Russia has recently become involved in the consideration of the issues of the enforcement of foreign arbitral awards against Russia.

First, responding to the request of the Ministry of Justice, the Constitutional Court clarified that despite Russia's international treaty obligations, some foreign judicial acts or awards are unenforceable on the territory of Russia if their substance contradicts the Russian Constitution.

Second, in 2020, the amendments have been introduced to the Constitution of Russia. According to article 125(5.1)(b) of the Russian Constitution, the Constitutional Court is now authorised to decide on whether acts of international institutions comply with the Constitution and public policy, as well as the possibility of the enforcement in the territory

of Russia of judgments and awards of international and foreign adjudicating bodies and arbitral tribunals. In accordance with article 104.5 of the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation', the respective request may be filed by the president, the government, the Supreme Court and the General Prosecutor's Office.

*Law stated - 19 September 2023*

## UPDATE AND TRENDS

### Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

In recent years, Russia has become more active in the sphere of investment disputes, particularly in response to the continuous proceedings in the Yukos cases, as well as a series of investment arbitrations under the Ukraine–Russia bilateral investment treaty (BIT).

In *SCM Group v Russia* initiated in 2023, Ukrainian businessman Rinat Akhmetov is demanding compensation from Russia for all losses incurred as a result of the said expropriation of his assets (including Azovstal Iron and Steel Works in Mariupol).

ExxonMobil has officially notified Russian authorities that it will initiate investment arbitration if they do not allow the company to dispose of its interest in a multibillion-dollar oil and gas project.

Likewise, Fortum, Finland's majority state-owned energy company, has threatened Russia with an investment treaty claim worth several billion euros after its operations in the country were seized under a presidential decree.

Also, Ukrainian state entity Energoatom has made a statement that it intends to bring a US\$3 billion investment treaty claim against Russia over the alleged expropriation of the Zaporizhzhia nuclear power plant and other assets in the eastern part of Ukraine.

Meanwhile, Ukraine's parliament is considering legislation to terminate the country's BIT with Russia.

Further, Russia has implemented a series of protectionist regulations that should be considered by potential investors.

On 17 January 2023, the President of the Russian Federation signed Decree No. 16 that prevents minority shareholders from 'unfriendly states' from voting at shareholder meetings in companies operating in the energy, machinery manufacturing and trade sectors.

On 27 March 2023, the Ministry of Finance of Russia clarified that persons from 'unfriendly states' who sell shares in Russian companies are to make contributions to the federal budget in the amount of 5 per cent to 10 per cent of the assets' market value depending on the circumstances.

On 25 April 2023, Decree of the President of the Russian Federation No. 302 of 25 April 2023 introduced external administration (to be performed by the Federal Agency for State Property Management) in respect of movable and immovable property in Russia, shares and other proprietary rights in Russian companies that were owned by persons from 'unfriendly states'.

On 3 May 2022, the President of the Russian Federation signed Decree No. 252, which established the application of special economic measures against certain entities, individuals and organisations controlled by them. In compliance with this Decree, the Russian government introduced a list of sanctioned persons and obtained the power to issue temporary licenses to perform transactions with sanctioned persons. The above measures include a prohibition for Russian persons to, inter alia, make financial operations, perform obligations and enter into transactions with sanctioned persons and persons controlled by them.

On 25 April 2023, the President of the Russian Federation signed Decree No. 302 that provided that temporary

administration may be introduced in respect of movable and immovable properties, shares and other proprietary rights of persons from 'unfriendly states'. Pursuant to this Decree, a list of properties was adopted containing the properties in respect of which temporary administration was introduced. Since then, the temporary administration was introduced over the Russian subsidiaries of four foreign companies – Fortum (Finland), Unipro (Germany), Danone (France) and Carlsberg (Denmark).

On 4 August 2023, the President of the Russian Federation signed Law No. 422-FZ, which will be effective from 1 February 2024 entailing the freezing or blocking of assets owned by foreign individuals subject to Russian sanctions. This law amended Federal Law No. 281-FZ, dated 30 December 2006 'On Special Economic Measures and Compelling Measures'.

In particular, it introduces the concept of a 'blocked person' and widens the array of restrictions applicable to foreign countries, entities and citizens. A 'blocked person' is designated by the decision of the President of the Russian Federation based on the suggestions of Russia's Security Council to apply special economic measures.

Further, the scope of potential special economic measures has been broadened to encompass the following actions:

- freezing or blocking assets held by individuals designated as blocked persons; and
- imposing a prohibition or limitation on financial transactions involving the assets of the blocked persons, as well as assets connected to their interests.

Before the list of special economic measures allowed for the potential inclusion of measures to prohibit transactions, but it did not explicitly authorise the freezing or blocking of assets.

At the same time, Russian investors, including those not subjected to sanctions, encountered a range of limitations in foreign jurisdictions. These constraints encompassed actions such as asset freezing, the retraction of previously granted guarantees, travel bans, the prohibition of making funds and economic resources available and other limitations. As a result, this situation could potentially lead to legal claims by Russian investors against these respective states, which is also a hot topic nowadays. For instance, recently, Acron Group, which is controlled by Russian billionaire Viatcheslav Kantor, accused Poland of a 'gross violation' of international and national law and threatened it with international arbitration after its minority holding in Polish state-controlled company Grupa Azoty was placed under temporary administration.

*Law stated - 19 September 2023*

## Jurisdictions

	<b>Belgium</b>	Linklaters LLP
	<b>Canada</b>	Wasel & Wasel
	<b>Egypt</b>	Shahid Law Firm
	<b>France</b>	Laborde Law
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Kazakhstan</b>	GRATA International
	<b>Malaysia</b>	Cecil Abraham & Partners
	<b>Romania</b>	STOICA & Asociații
	<b>Russia</b>	BGP Litigation
	<b>Switzerland</b>	Schellenberg Wittmer
	<b>United Kingdom</b>	Quinn Emanuel
	<b>USA</b>	Quinn Emanuel
	<b>Uzbekistan</b>	Putilin Dispute Management