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Optional Jurisdiction Clauses

The Russian courts in a number of judgments (which are related to the same case) (the "**Judgments on the Effectiveness of Optional Jurisdiction Clauses**") upheld the effectiveness of optional jurisdiction clauses in international financing agreements.¹

A standard optional jurisdiction clause usually provides that the creditor has the right to choose courts or arbitration for settlement of disputes under finance agreements. This clause usually states that any dispute arising out of the agreement must be referred to and finally resolved by arbitration as set forth in the agreement. However, at the creditor's option the dispute may be litigated in a court of its choice having jurisdiction.

Prior to the Judgments on the Effectiveness of Optional Jurisdiction Clauses, the validity of optional jurisdiction clauses had been questioned in a number of court judgments as contradicting Russian law for the following reasons:

- (a) the Russian Arbitration Procedural Code² states that a court should not hear a dispute if the agreement provides for a valid arbitration clause, and the counterparty objects to submission of the dispute to the court;
- (b) risk that a court may refuse to uphold the arbitration clause in the agreement because the optional jurisdiction clause might be considered to be evidence of the parties' failure to agree on arbitration; and
- (c) concern about the validity of the optional jurisdiction clause due to public policy considerations, since the borrower and the creditor have unequal rights in relation to resolution of disputes.

The Judgments on the Effectiveness of Optional Jurisdiction Clauses have clarified the situation. The courts held that the optional jurisdiction clause does not contradict the Russian Arbitration Procedural Code.

It follows from the Judgments on the Effectiveness of Optional Jurisdiction Clauses that:

- (a) in relation to the issue set forth in item (a) above, the optional jurisdiction clause is valid under the Russian Arbitration Procedural Code;

¹ Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/11967-09 dated 21 December 2009; Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/11983-09 dated 22 December 2009; Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/13340-09 dated 23 December 2009; Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/13327-09 dated 25 December 2009; Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/13190-09 dated 28 December 2009; Decree of the Federal Arbitration Court for the Moscow District No. KG-A40/14014-09 dated 12 January 2010.

² Article 148 (5) of the Arbitration Procedural Code of the Russian Federation.

- (b) In relation to the issue set forth in item (b) above, the validity of the arbitration clause was not challenged by the parties and, therefore, the issue of the parties' failure to agree on dispute resolution was not directly addressed in the Judgments on the Effectiveness of Optional Jurisdiction Clauses;
- (c) in relation to the issue set forth in item (c) above, the parties may agree that the creditor has the right to choose jurisdiction, even if the borrower does not have the same right, since the creditor is the party which bears the financial risks under the agreement, and the optional jurisdiction clause facilitates the enforcement of its rights under the agreement in the relevant jurisdiction (although the court did not address the public policy consideration issues); and
- (d) the parties may agree that any party (or only the creditor) has the option to submit a claim under the agreement to the court, thereby excluding the application of the arbitration clause in the same agreement.

Please note that under Russian law the Judgments on the Effectiveness of Optional Jurisdiction Clauses may be appealed to the Supreme Arbitration Court of the Russian Federation. Further, Russian courts considering similar cases are not obligated to follow prior court judgments. Therefore, no assurance may be given that any court will come to the same conclusion in the future, and the above-mentioned risks, although substantially mitigated, remain under Russian law.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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