Dear Committee Members:

We are pleased to present to you this edition of the Eurasia/Russia Committee Newsletter.

In this edition, we are pleased to continue with our new series of interviews with remarkable judges, jurists and lawyers from the Eurasia/Russia region. We are delighted to have Honorable Arsen Mkrtchyan, Chief Judge of the Civil Court of Appeals of the Republic of Armenia, as our guest responder. This edition also contains a comprehensive coverage of Russia related sanctions, written by Gwendolyn Jaramillo, Partner at Foley Hoag LLP & Co-Chair of the firm’s International Business Practice Group and head of its Trade Sanctions and Export Controls Practice, and Shrutih Tewarie, Senior Associate in Foley Hoag LLP’s Litigation Department and a member of the firm’s Trade Sanctions and Export Controls Practice. It also features an article about new approaches of Russia’s Federal Antimonopoly Service to the analysis of transactions in digital markets, co-authored by Ksenia Tarkhova, Associate, ALRUD Law Firm, Vladislav Alifirov, Attorney, ALRUD Law Firm, and Alexander Nazarov, Junior Attorney, ALRUD Law Firm, and an article about party or tribunal-appointed experts under the draft Prague Rules on the taking of evidence in international arbitration, written by Tigran Ter-Martirosyan, Director, Berkeley Research Group, London.

We would like to thank our contributors to the current edition! We encourage the Committee members worldwide to contribute to the upcoming editions of the Newsletter and suggest new topics for coverage.

Sincerely,

Diana Tsutieva, Vice Chair (DTsutieva@foleyhoag.com)
Michael Skopets (mskopets@milchev.com)
Ann Sultan (asultan@milchev.com)
1. **What are your current responsibilities as the Chief Judge?**

As the Chief Judge for the Civil Court of Appeals, I ensure the normal operations of the Court, as well as supervise the operation of the Staff, represent the Court in relations with other bodies, grant leaves to the judges of the Court, apply to the Supreme Judicial Council and the General Assembly and its Commissions on issues related to ensuring the normal operation of the Court, submit relevant reports to the Disciplinary Commission in matters involving violations of the rules of conduct by judges, and exercise other powers vested by the law. In the Court of Appeals, there are five panels consisting of three judges. As a judge, I preside over court proceedings, either alone or as part of a panel of judges.

2. **What do you like most about serving as the Chief Judge of the Civil Court of Appeals?**

What I like most is the wide range of responsibilities and directions of activities that I undertake. For instance, currently, I am engaged in the formation of the uniform judicial practice, and in this regard, the various departments of the Court have undertaken a respectable amount of efforts towards this aim. I find it crucial that a judicial panel should be informed of the judicial acts adopted by another judicial body and the legal positions expressed therein, which will promote the stability of the judicial power and ensure its predictability.

3. **Which talent and/or skill do you consider the most important in the legal profession and your specialty?**

It’s actually hard to mention one. In my opinion, every lawyer should constantly improve the quality of his writing, develop skills of legal interpretation, as well as fact-finding skills, and, of course, have a great sense of responsibility and willingness to accept and overcome career challenges.

4. **What books/publications/articles would you recommend for professional development to any lawyer?**

Well, it varies, depending on different stages of one’s professional trajectory. Legal literature is very diverse, which allows to accommodate any interest and get the necessary information. I would recommend lawyers to read judicial acts – they are the prism of real events and they reflect the legal consequences of everyday life.

5. **What advice would you give to someone just starting out in the legal field?**
I would advise not to lose simplicity and stay true to his/her own principles while striving for perfection in the legal profession.

6. What other career might you have chosen?

Anyway, I see myself in the legal profession. Though I did work in the executive field for some period of time, nevertheless I have chosen the difficult and responsible duty of being a judge, as I appreciate its paramount role.

7. Who are your favorite writers?

I used to have various preferences depending on my age: it varies from Richard Bach to Shakespeare, Kafka to Bulgakov. In particular, I have always been fond of reading the works of classical philosophers, such as Plato, Aristotle, Marcus Aurelius, and Kant.

8. Which historical/public figure do you respect the most?

Benjamin Franklin. He once said: “Do not fear mistakes. You will know failure. Continue to reach out.” As his quote reveals, he succeeded after all through many challenges, mistakes and failures and became one of the history’s greatest men due to his hard work and tenacity.

9. What is the best way for you to spend time away from Law?

Definitely, sport activities. Healthy lifestyle supports constructive thinking, which is mandatory for a lawyer.

10. What is your motto?

Give some time to the time or give time sometime. The pretext can vary, time heals, it changes everything... Anyone can choose what is suitable.
OFAC’s April 6 Sanctions Against Russian Oligarchs & Related Entities, Senior Russian Government Officials and State-Owned Entities

As reported in our last newsletter, on April 6, 2018, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) imposed sanctions against seven Russian oligarchs, 12 companies owned or controlled by these oligarchs, 17 senior Russian government officials, a state-owned Russian weapons-trading company, and its subsidiary, a Russian bank. The sanctions were issued under Executive Order (E.O.) 13661 and E.O. 13662, authorities codified by the Countering America’s Adversaries Through Sanctions Act (CAATSA), as well as E.O. 13582.

Effect of the Sanctions

The April 6 sanctions have had wide-ranging effects for both U.S. and foreign persons.

U.S. persons are generally prohibited from dealing with any of the individuals and entities that have been targeted by the April 6 sanctions. In addition, U.S. persons also cannot transact with any entities that are owned 50% or more, directly or indirectly, by one or more of the sanctioned entities or individuals because these entities are also sanctioned pursuant to OFAC’s “50% rule.”

Further, pursuant to Section 228 of CAATSA, non-U.S. persons can also face sanctions for knowingly facilitating “significant transactions, including deceptive or structured transactions, for or on behalf of” the individuals or entities that were the subject of the April 6 sanctions. Under Section 226 of CAATSA, which amends the Ukraine Freedom Support Act of 2012, foreign financial institutions can also face “a prohibition on the opening, and a prohibition or the imposition of strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account.”

For the purposes of determining whether transactions are “significant,” OFAC considers the following non-exhaustive set of factors: “(1) the size, number, and frequency of the transaction(s); (2) the nature of the transaction(s); (3) the level of awareness of management and whether the transaction(s) are part of a pattern of conduct; (4) the nexus between the transaction(s) and a blocked person; (5) the impact of the transaction(s) on statutory objectives; (6) whether the transaction(s) involve deceptive practices; and (7) such other factors as the Secretary of the Treasury deems relevant on a case-by-case basis.”
General Licenses Related to the April 6 Sanctions

Given the widespread holdings of the Russian oligarchs and entities that were the targets of the April 6 sanctions, these sanctions have had a far-reaching effect on a number of industries around the world, including aluminum and mining. In fact, one of the most prominent targets of the sanctions included UC RUSAL, a Russian public limited company, which produces almost 10% of the world’s aluminium.

To minimize immediate disruptions caused by the April 6 sanctions, OFAC issued (and re-issued) several general licenses granting additional time for the wind-down of relationships and transactions with certain of the key companies targeted by sanctions. Several of these General Licenses are set to expire on November 12, 2018.

OFAC’s June 11 Sanctions Against Individuals & Entities Associates with Russia’s Federal Security Service

One June 11, OFAC imposed sanctions on five Russian entities and three Russian individuals that had ties to Russia’s Federal Security Service (FSB). The sanctions were issued under E.O. 13694 and Section 224 of CAATSA. The sanctions targeted individuals and entities that have contributed to Russia’s cyber activities and underwater capabilities through their work with the FSB, including through providing material and technological support to the FSB. The U.S. government first blocked the FSB pursuant to E.O. 13757 on December 29, 2016 under U.S. sanctions measures targeting “individuals and entities determined to be responsible for or complicit in malicious cyber-enabled activities.”

Department of State’s August 8 Imposition of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions

Following a determination that the Russian government was behind the recent use of a nerve agent in the United Kingdom to assassinate two UK citizens, the U.S. State Department announced on August 8, 2018 that it would be imposing new sanctions on Russia pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act). The CBW Act requires the imposition of sanctions following a determination by the President that a foreign country “has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals.”

Initial Sanctions

Initial sanctions under the Act are expected to take effect upon publication of a notice in the Federal Register on or around August 22, 2018. As set forth under the Act, such initial sanctions under the CBW Act are to include, inter alia, limits on arms sales and financing of arms, denial of U.S. government credit or other financial assistance, and a prohibition on the export of certain goods or technologies.
The initial sanctions can be waived if the President determines that such waiver is in the “national security interests of the United States” or that there has been a “fundamental change in the leadership and policies” of Russia. Further, the State Department has announced that it is making a number of “carve-outs” to these sanctions, including waiver for “the provision of foreign assistance,” “sanctions with respect to space flight activities,” “safety of commercial passenger aviation,” and “purely commercial end users for civilian end uses;” along with potential other activities.

**Additional Sanctions**

Additional, more significant sanctions are possible unless, within three months after making the determination under the CBW Act, the President certifies to Congress that Russia (A) “is no longer using chemical or biological weapons in violation of international law or using lethal chemical or biological weapons against its own nationals”; (B) “has provided reliable assurances that it will not in the future engage in any such activities;” and (C) “is willing to allow on-site inspections by United Nations observers or other internationally recognized, impartial observers.” The additional sanctions will include three or more of the following:

A. **Multilateral development bank assistance:** The U.S. government “shall oppose … the extension of any loan or financial or technical assistance to that country by international financial institutions.”

B. **Bank loans:** The U.S. government “shall prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities or products.”

C. **Further export restrictions:** The U.S. government shall “prohibit exports to [Russia] of all other goods and technology (excluding food and other agricultural commodities and products).”

D. **Import restrictions:** “Restrictions shall be imposed on the importation into the [U.S.] of articles … that are the growth, product, or manufacture of [Russia].”

E. **Downgrading of diplomatic relations:** The President shall use his constitutional authorities to downgrade or suspend diplomatic relations between the [U.S.] and [Russia].”

F. **Presidential action regarding aviation:** The U.S. can take steps “to suspend … the authority of any foreign air carrier owned or controlled, directly or indirectly, by that government to engage in foreign air transportation to or from the [U.S.]”

**OFAC’s August 2018 North Korea Sanctions Target Russian Entities, Vessels, and Individual**

On August 15 and 21, OFAC issued sanctions under the North Korea Sanctions Regulations pursuant to [E.O.13810](https://www.gpo.gov/fdsys/pkg/FR-2018-08-14/pdf/2018-18105.pdf) against three individuals, six vessels, and three entities that were deemed to be involved in facilitating illicit shipments on behalf of North Korea. Even though the sanctions were aimed at North Korea, amongst the entities and individuals that were sanctioned were Russia-based Profinet Pte Ltd. (Profinet) and its Director General, Russian national Vasili Aleksandrovich Kolchanov. Profinet was found to have provided port services on at least six separate occasions to DPRK-flagged vessels carrying thousands of metric tons of refined oil products even after its employees knew of oil-
related sanctions on North Korea. In addition, Kolchanov was personally found to be involved in North Korea-related deals and interactions with North Korean representatives in Russia.

**Congressional Hearings on Potential Additional Russia Sanctions**

On August 21, 2018, the U.S. Senate held multiple hearings on the relationship between the United States and Russia to consider additional sanctions on Russia. The hearings followed revelations by Microsoft that it had detected and seized websites that were created in recent weeks by hackers linked to Russian military intelligence, targeting Republican-linked policy institutes. Congressional pressure on President Trump’s administration to take a stringent stance on Russia remains strong, signaling that additional sanctions are possible in the near future.

**Russian Response to Recent Sanctions**

In response to Russia-related foreign sanctions, including in particular the April 6 sanctions issued by OFAC, on June 4, Russia adopted a new law that allows the Russian President to retaliate for foreign sanctions. The law sets out several measures the Russian President may impose on the United States and other foreign states involved in committing “unfriendly acts” against Russia and on entities controlled or affiliated with such states, including:

1. Termination or suspension of “international cooperation” between Russia or Russian entities and entities of those foreign states;
2. Prohibition or restriction of the import of products and/or raw materials into Russia from those foreign states (with specific products and materials to be designated by the Russian government);
3. Prohibition or restriction of the export from Russia of products and/or raw materials to the foreign states (with specific products and materials to be designated by the Russian government);
4. Prohibition or restriction of access to public procurement for entities of the foreign states;
5. Prohibition or restriction of entities from the foreign state from participating in privatization of state or municipal property, or from providing services for the organization of sale of federal property in Russia; and
6. Other measures as the President may deem necessary.

Russia is also considering a separate bill that would impose criminal liability for compliance with U.S. and other foreign sanctions imposed against Russian entities and individuals. The law would expose companies complying with Russia-related U.S. or EU sanctions to criminal liability in Russia. Even though a second reading for the bill had been scheduled for May 17, 2018, following criticism of the bill by the Russian and foreign business communities, the reading has been postponed to allow for further discussion and consultation with those persons and entities affected by the bill.
New Approaches of FAS Russia to the Analysis of Transactions in Digital Markets


Throughout the last year, the topics of globalization in the markets and digitalization of the economy were extensively discussed within the governmental authorities and business community in Russia. The main subject of the discussions that were held is promotion of competition in the “digital era”.

The Federal Antimonopoly Service (“FAS Russia”) has found its pivotal role in the development of new regulation geared towards the digital economy and has jumped with two feet into the examination and the elaboration of new mechanisms.

The new developments primarily concern merger-control regulation, where the focus has shifted from traditional markets to regulation of the inherent elements of modern digital markets, such as digital platforms, network effects and big data. Such a shift in the enforcement practice of FAS Russia was triggered by a number of global transactions in innovative digital markets. Thus, in order to keep abreast of the times, FAS Russia needs to follow new approach and take into account all peculiarities of the considered elements of digital markets.

For example, in the Bayer/Monsanto case, FAS Russia applied a new method for analyzing the effects of the transaction on the markets. Rather than adopting the “traditional” approach, FAS Russia stressed several times that the transaction actually had nothing to do with the markets (for example, the market for seeds or crop protection products), where the parties did have overlaps in Russia and even on a global level. Instead of analyzing the effects of the transaction in the overlapping markets, the competition authority decided to focus on evaluation of knowledge, innovations, platforms, algorithms and technologies possessed by both companies that might enable them to influence the market conditions, create entrance barriers to other participants and dictate terms for further development of the agro-industrial complex for future decades. To mitigate the identified concerns, the competition authority decided to use a set of entirely new legal mechanisms such as: (i) the transfer of technologies possessed by the parties to the Russian participants, instead of traditional behavioral or structural remedies, and (ii) the institution of independent trustees to monitor the transfer of technologies and compliance with the obligations imposed on the parties.

Another example is the Uber/Yandex case, where FAS Russia considered the transaction between two main taxi aggregators in the Russian market and issued a conditional decision. Although taxi aggregators do not render transport services as such, they organize trips by connecting drivers with passengers, and have serious market power, due to the number of drivers and users of their
applications. Therefore, in this case, FAS Russia estimated network effects\(^1\) as a factor of market power of the parties to the transaction.

While considering the above-mentioned transactions, FAS Russia faced a number of practical difficulties, the most notable of which were: (i) a relatively short term for consideration of complex transactions; (ii) a lack of specific knowledge regarding digital markets and necessity to engage experts in the consideration process; and (iii) difficulties in exchanging information among the competition authorities considering similar cases in other jurisdictions to conduct a comprehensive analysis. All those difficulties shall be considered further in detail:

1. **Short term for consideration of complex transactions**

The Competition Law provides for a three-month consideration period in total, made up of two phases (an initial 30-day phase and an extension of two additional months). Theoretically, the above-mentioned term could be prolonged up to nine months, to secure implementation of preliminary conditions, upon fulfilment of which, FAS Russia clears the transaction. However, the cases when the competition authority has applied such mechanisms are rare.

The consideration of large-scale transactions in digital markets, due to the complexity of their analysis, takes much more time in other jurisdictions. Thus, it is proposed by FAS Russia to extend the consideration period, for mergers with competition concerns, to ensure the required level of expertise and detailed elaboration of the market analysis.

2. **Lack of specific knowledge and necessity to engage experts in the consideration process**

With respect to the experts' involvement, such a measure is associated with the digitalization of the markets and the economic relations becoming more complicated. For the competition authority, it means that the standard of expertise required for comprehensive analysis is growing exponentially. Therefore, FAS Russia has either to expand its staff significantly, so that specialists can work on a variety of issues, or involve experts in very specific areas, on a case-by-case basis.

3. **Necessity to ensure the exchange of information among the competition authorities and experts**

As for the exchange of information, the mechanism of waivers of confidentiality, provided voluntarily, was used during the consideration of both of the above-mentioned transactions.

\(^1\)It is proposed to define network effects as “dependence of customer value of the product on (i) a number of network users (direct network effects), or (ii) increase of customer value for one network group, in the case of increase of a number of network users of another network group and vice-versa (indirect network effects/network externalities).”
However, currently, FAS Russia is considering the proper legal mechanism for securing waivers and ensuring the exchange of information and cooperation among competition authorities worldwide and for granting access to interested authorities and experts to the confidential data.

The difficulties revealed and approaches applied by FAS Russia to the analysis of the above-mentioned and other transactions in digital markets served as a basis for forthcoming significant changes in legislation – the so-called “Fifth Antimonopoly Package”. The professional community and government officials are currently actively debating the amendments suggested.

Party or Tribunal-Appointed Experts – the Prague Rules Perspective

By Tigran Ter-Martirosyan, Director, Berkeley Research Group, London

The draft Prague Rules on the taking of evidence in international arbitration were released in April 2018 (the “Prague Rules”) by a working group consisting primarily of lawyers based in Russia and the CIS, and the Central and Eastern Europe (CEE) region. The Prague Rules introduce an inquisitorial approach to the taking of evidence, which is generally accepted in civil law jurisdictions, including many countries in Eurasia. In contrast to the IBA Rules, which are closer the common law approach, the Prague Rules aim to limit the time and costs involved in the arbitration by (a) reducing document production, (b) introducing new guidelines to limit the use of multiple fact and expert witnesses and their cross-examination, (c) empowering the arbitrators to take a proactive role in managing the proceedings without the risk of being challenged by the parties. The Prague Rules entitle a tribunal to take an active role in establishing the facts of the case, to request document production, to decide on fact witnesses to be called for cross-examination, and to appoint expert witnesses on disputed matters. The manner in which experts are appointed under the Prague Rules is addressed in further detail below.

Despite the requirements for expert witnesses to be impartial, objective, unbiased, and uninfluenced by the parties and the dispute itself, there is an on-going debate in the international arbitration community as to whether party-appointed experts (an accepted practice in the common law jurisdictions) are neutral and unbiased with respect to the instructing parties. An alternative view is that tribunal-appointed experts may obviate these potential neutrality issues, and a corresponding mechanism for appointing experts is reflected in the draft Prague Rules. There are pros and cons for each option, and the parties need to consider the relevant aspects of a particular case to decide which type of expert to use.
First, the presence of party-appointed experts may require a tribunal to engage more deeply in the subject matter and to understand the rationale for and the strengths and weaknesses of multiple expert opinions to make its own decision. The alternative is to effectively delegate the quantum decision to a single tribunal-appointed expert whose opinion is not necessarily challenged by other experts. While the latter may be viewed as an efficient solution, it is subject to a caveat concerning the expert’s assumptions and professional judgement. For example, in a shareholder dispute, share valuation experts typically need to consider the impact of a minority shareholder status on the value of his or her shares, known in valuation theory as a minority discount. Because there is neither a single generally accepted estimate of such a discount nor rules or methodologies to precisely calculate it for each individual case, this question becomes one of professional judgement for the valuation expert. Party-appointed experts may rely on different considerations or have divergent views on specific circumstances of the case (e.g. provisions of shareholder agreements), and might thus arrive at potentially different conclusions, which the tribunal can weigh based on cross-examination or witness conferencing (‘hot-tubbing’) of those experts. On the other hand, a tribunal-appointed expert’s opinion may inherently be skewed in favor of one or another consideration of the evidence (e.g. the shareholder agreements), and the tribunal may have no basis to doubt the expert’s opinion and find it difficult to challenge it.

In addition, a tribunal’s decision-making may sometimes be constrained by the fact that party-appointed experts may not fully engage with each other’s arguments, and the extent of disagreement between the experts may be so wide that a non-expert would find it virtually impossible to reach a conclusion on the subject matter. Such scenarios may either be resolved by witness conferencing, with a view to narrow the extent of disagreement or identify the key factors affecting the disagreement, or by the tribunal’s appointment of its own expert to advise the tribunal on the subject matter based on the opinions of the party-appointed experts.

Finally, one aspect of an arbitration that may be affected by the choice of party-appointed or tribunal-appointed experts is the arbitration’s cost, which the Prague Rules “will help the parties and tribunals to reduce”. However, choosing the route of a tribunal-appointed expert would not necessarily result in a materially lower cost of the arbitration, given that the expert would still have to consider the documents and arguments submitted by both parties and be cross-examined by both parties. Furthermore, the parties would likely still prefer to appoint their own expert advisors to assist counsel in reviewing the work of the tribunal-appointed expert and his or her cross-examination. For example, the draft Prague Rules do not preclude the parties from appointing their own experts and submitting their expert reports in the proceedings, in which case the arbitration would end up with three (or more) experts instead of one. In fact, the court appointed expert approach has, for example, been possible in the English court proceedings for some time now, but it is not often adopted in practice for the reasons discussed in this article.
Overall, while the Prague Rules seek to promote the use of tribunal-appointed experts to ensure quicker and more efficient arbitration proceedings, it remains to be seen whether these aims can be achieved in practice. The extent of adoption of the Prague Rules by parties and lawyers from a common law background also remains unclear. The final version of the Prague Rules is expected to be released in December 2018.

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We appreciate your comments and suggestions regarding the contents of this Newsletter. If you would like to contribute or have any questions, please feel free to contact Editorial Board members: Diana Tsutieva, Vice Chair (DTsutieva@foleyhoag.com); Michael Skopets (mskopets@milchev.com); Ann Sultan (asultan@milchev.com)

The Eurasia/Russia Committee unites ABA members around the world who are interested in the countries of the Eurasian region: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

The Committee focuses on issues relevant to the region and, through its activities, promotes dialogue and cooperation between legal professionals in business, academic, non-profit, and government spheres.

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