BIRCH

Legal alert from the dispute resolution practice

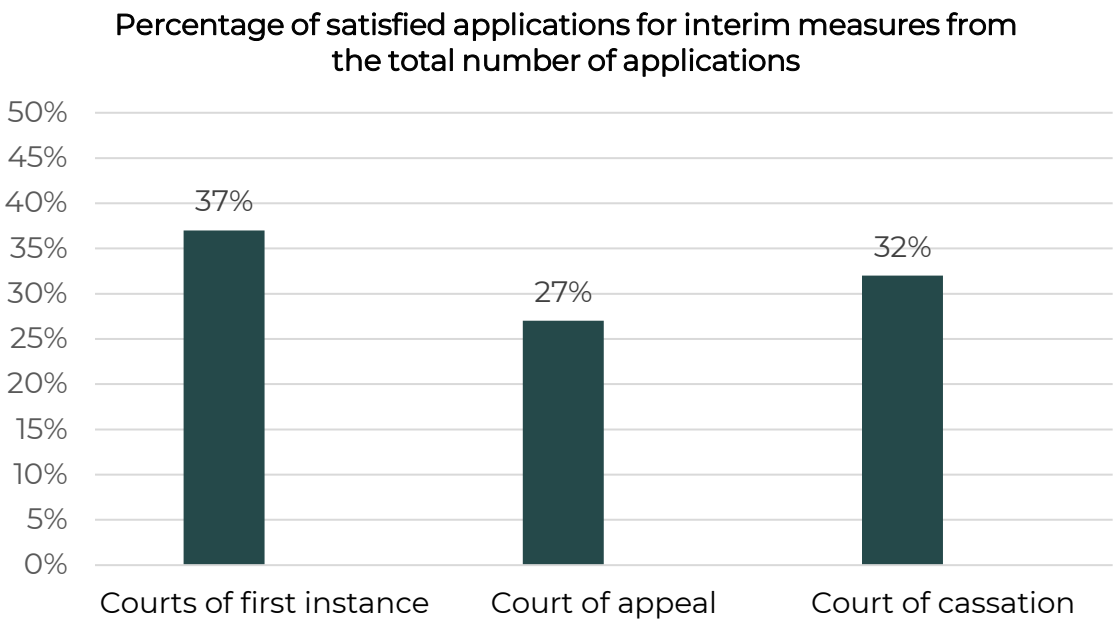
Interim measures

Statistics from the Judicial Department of the Supreme Court of the Russian Federation for the first half of 2024

We suggest starting with the dry but interesting statistics we prepared based on data provided by the Judicial Department of the Supreme Court of the Russian Federation[1].

Our general conclusion based on the results of analyzing these statistics from the court can be formulated as follows: courts rarely grant applications for interim measures, only in every third case. Furthermore, this is only according to the general court statistics for all of Russia; in our experience, it is even more difficult to obtain interim measures in the Arbitrazh Court of Moscow.

Applicants who apply for interim measures in the court of first instance have the best chances of them being granted. As the figure below shows, the chances of the courts of appellation or cassation instances granting interim measures are lower.

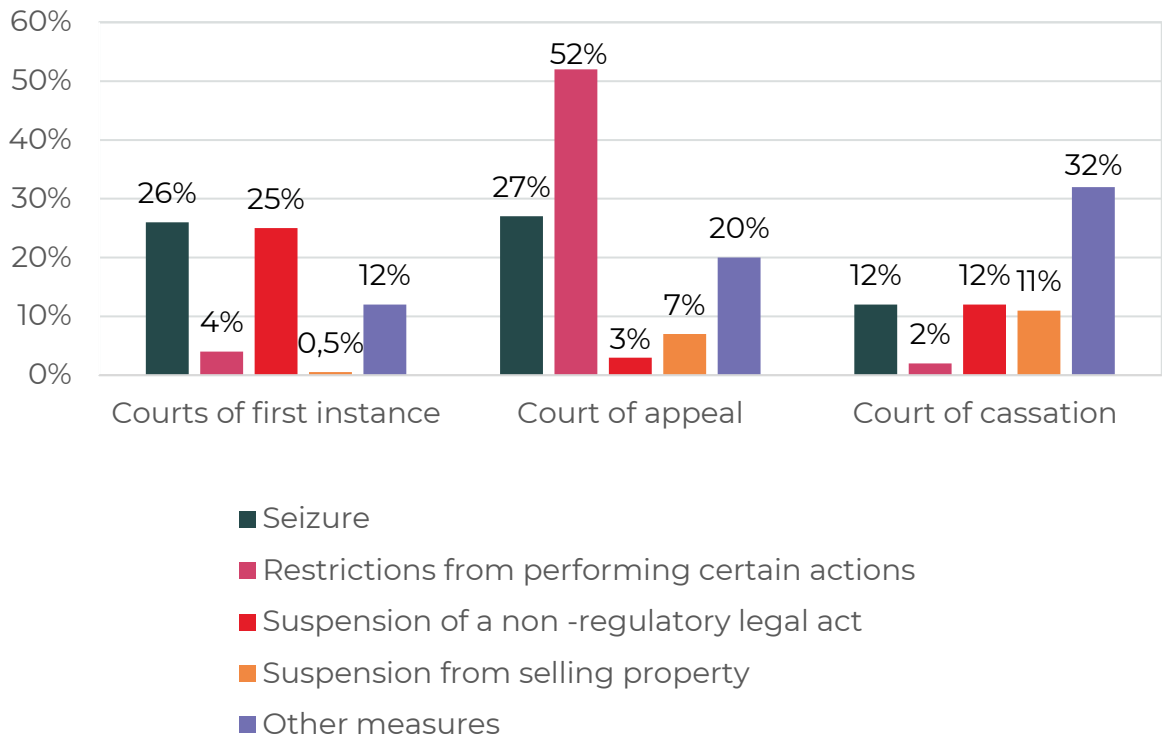


The courts impose interim measures both directly provided for in Article 91 of the Commercial Procedural Code of the Russian Federation and other measures not specified in the law.

Most often, the courts impose the following interim measures:

1. Restrictions from performing certain actions
2. Seizure
3. Suspension of a non-regulatory legal act

Most common interim measures



Tendencies in court practice in 2024

A lower standard of proof when deciding on the adoption of interim measures does not mean that the applicant is completely exempt from presenting evidence in support of his arguments.

In court practice, there is an approach according to which a lower standard of proof applies to the applicant when deciding on the adoption of interim measures: the applicant needs to present only the most minimal amount of evidence confirming the need to adopt interim measures.

Meanwhile, in the court practice of 2024, we often observed situations when courts, including in sanctions disputes, refused to apply interim measures, since the applicants did not meet the burden of proof. For example, they provided outdated financial statements of the defendants or publications of dubious media (Telegram channels), did not provide evidence that there were real risks of concealment or loss of property by the defendants, etc.

Examples of such an approach can be found in the cases of GOK Denisovsky and Inaglinsky v. Joy Global UK Limited[2], Property Relations Committee of St. Petersburg v. Filo LLC[3], JSC Siloviye Mashiniy v. KCB LLC[4] and PJSC Bank Financial Corporation Otkritie v. Goldman, Sachs & Co LLC, Goldman Sachs Group, Inc., and Goldman Sachs International[5].

In such disputes, applicants mainly refer to paragraph 15 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 01.06.2023 No. 15, in which the Supreme Court of the Russian Federation indicated that in order to apply interim measures, the applicant only needs to substantiate the possibility of the consequences specified in Part 2 of Article 90 of the Commercial Procedural Code of the Russian Federation arising.

According to some applicants, such clarifications by the Supreme Court of the Russian Federation mean that the applicant may not provide any evidence at all supporting the fact that failure to apply interim measures may complicate or make the execution of the court order impossible, and the court, by virtue of the reduced standard of proof established by the Supreme Court of the Russian Federation, must apply interim measures by virtue of the very fact of the applicant's application to the court with property claims against the defendant.

Meanwhile, the courts refuse to apply interim measures if the applicant has failed to meet even lower standards of proof. For example, if such applicant has not provided evidence of a decrease in the debtor's property estate, the debtor's transfer of property abroad, the debtor's conclusion of transactions aimed at concealing property, etc.

Example:

In a dispute[6], initiated by PJSC Bank FC Otkritie, in which the court fully satisfied the claims of the Russian person, the latter was still unable to obtain interim measures. The courts of three instances, as well as the Supreme Court of the Russian Federation, came to the conclusion that the applicant did not provide indisputable evidence of the threat of impossibility or difficulty of execution of the court order.

In a dispute[7] between LP Project LLC v. Loomi Polar LLC, the courts of three instances also refused to impose interim measures, since the plaintiff did not provide evidence confirming that failure to adopt the requested interim measures could complicate or make the execution of the court order impossible and that the plaintiff could suffer significant damage.

In other words, the courts believe that a subjective fear of the impossibility or difficulty of executing a future court order alone is not sufficient for the court to apply interim measures[8]. The courts directly indicate the need to provide “real” evidence of the threat of non-enforcement of a court order[9].

[8] See, for example: Resolution 9AAC dated 26.02.2024 in case No. A40-195134/2023, left unchanged by the Resolution of the Moscow District Arbitrazh Court dated 11.06.2024

[9] See, for example: Ruling of the Arbitrazh Court of Moscow dated 15.05.2024 in case No. A40-87009/24; Ruling of the Arbitrazh Court of Moscow dated 24.09.2024 in case No. A40-122135/2024; Ruling of the Arbitrazh Court of Moscow dated 12.02.20224, Resolution 9AAC dated 29.05.2024, Resolution of the Moscow District Arbitrazh Court dated 14.10.2024 in case No. A40-302798/2023

In cases involving foreign individuals, Russian applicants often cite information found in the media as a justification for taking interim measures against foreigners. However, the courts are critical of this[10] and indicate that such information must either come from the foreign defendants themselves or its reliability must be established in some other way[11]. Otherwise, such information is of a general nature and cannot count as evidence within the meaning of the CPC[12].

The courts are also critical of references to court practice that allegedly demonstrate the need to apply interim measures. The courts indicate that when considering a dispute, they *"take into account the specific circumstances of each case and the evidence presented by the parties, on the basis of the study and assessment of which the court order is adopted"*[13] .

Thus, it will not be possible to obtain interim measures in court "automatically" when filing a claim with the court, nor will it be possible to obtain them when providing the court with irrelevant or unverified data.

If the applicant really cares about the adoption of interim measures, then this issue must be approached responsibly: through the study of the publicly available financial statements of the debtor in order to clearly show the court the decrease in the latter's property estate, verifying in available sources whether the debtor has made any unprofitable transactions recently, and whether he has withdrawn property from Russia, etc.

Interim measures when resolving issues of bringing persons to subsidiary liability: court practice is not established

Thus, for some courts, the very fact that a person has filed a claim for subsidiary liability is sufficient grounds for taking interim measures.

Example:

In the case[14] on the bankruptcy of Vympelsetstroy LLC, the district court overturned the decisions of the lower courts and imposed interim measures, finding that the existence of a statement of bringing the person to subsidiary liability and the fact that he alienated his daughter's apartment several years ago were sufficient grounds for imposing measures.

Opposing positions have also been upheld such as in the case[15] on the bankruptcy of Financial Technologies LLC, the district court directly indicated that the mere fact of filing an application for subsidiary liability is not sufficient for the adoption of the stated interim measures.

If the practice is ambiguous in matters of taking interim measures at the stage of filing an application for subsidiary liability, then in those situations where a person has already been brought to subsidiary liability, the courts will almost certainly impose interim measures on his property.

Example:

In the case[16] on the bankruptcy of JSC Energostroy-M.N., the court indicated that if there are proven grounds for holding a person liable for subsidiary liability, there is a high probability that the persons controlling the debtor will continue to act in bad faith, which will cause damage to creditors.

A similar approach was demonstrated by the courts in the bankruptcy cases of Finstroyregistratsiya LLC[17] and MegaStroyPolis LLC[18] .

Courts may refuse or, on the contrary, adopt interim measures if their adoption/non-adoption may result in harm to third parties

Example:

In the dispute[19] Department of City Property of Moscow v. LLC Alternativa, the court took interim measures in the form of a ban on the registration of transactions with a real estate property, the reconstruction of which was carried out in the absence of the necessary permits, since the court considered that the real estate property potentially poses a threat to the life and health of citizens, and its alienation would lead to a violation of the rights and interests of an indefinite number of persons.

In the case[20] on the bankruptcy of Sidnev A.I., the court overturned the interim measures in the form of a ban on restricting the supply of electricity, since it established that the debtor does not carry out technical maintenance of the equipment and that the restriction on the supply of gas is necessary to ensure safety and prevent a man-made disaster.

Courts may refuse to issue interim measures if their application may result in the disruption of the debtor's normal business activities

If the interim measures are too burdensome for the person and prevent him from carrying out his normal business activities, for example, fulfilling obligations to counterparties or paying wages to employees, the courts refuse to impose interim measures or significantly reduce their amount.

Example:

In the dispute[21] RIKO LLC v. RSMP LLC, the district court agreed with the appeal decision to lift the arrest from a significant amount of money, since it found that the defendant is an active legal entity and has obligations to pay the wages of employees, pay taxes and fees, monthly payments under the land lease agreement, and maintaining the interim measures in full could significantly hinder the implementation of business activities.

A similar position is reflected in the dispute[22] Volzhskaya Interregional Environmental Prosecutor's Office v. Trading House “CSK” LLC. The court of first instance indicated that the imposition of interim measures would violate the balance of interests of the parties, since it would lead to the defendant's failure to fulfill its obligations to creditors.

Meanwhile, in court practice, there are examples of the opposite approach where courts refuse to cancel interim measures indicating that the negative property consequences for the debtor from the adoption of interim measures are themselves covered by entrepreneurial risk and cannot serve as grounds for the cancellation of interim measures, especially if the debtor has not proven the impossibility of conducting normal business activities under the conditions of the adopted interim measures.

Example:

see the dispute[23] GK-Sibir LLC v. Rusdragmet.

Peculiarities of the application of interim measures in relation to joint debtors

In 2024, the Russian courts considered many disputes in which Russian companies filed claims not only against the immediate foreign debtor but also against other companies in the group (including Russian ones) on a joint and several basis in order to increase the chances of actual recovery.

This trend has given rise to many contradictions in court practice, including in matters of adopting interim measures.

Clause 23 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 01.06.2023 No. 15 establishes that in the event of filing an application for interim measures against joint debtors, the property of each of the co-defendants may be seized in an amount corresponding to the amount of the stated claim.

Court practice shows that the courts actively apply the position of the Supreme Court of the Russian Federation and seize the property of all co-defendants.

Example:

See the dispute[24] regarding the joint recovery of damages initiated by VTB Bank PJSC where the court imposed an arrest on the cash, shares, stakes and real estate of each of the debtors in the amount of the stated claims.

In the case[25] on the bankruptcy of Medoptservice LLC when considering the issue of bringing persons to subsidiary liability, the courts also did not limit themselves to interim measures in relation to one of the defendants. The court of first instance seized the property, cash and other personal property of each of the defendants in the amount of the same sum of money.

A similar approach was applied by the courts, for example, in the bankruptcy cases of Zauralskaya Niva LLC[26], on the bankruptcy of RyazanKabel LLC[27], and on the bankruptcy of Territorial Network Company LLC[28].

In practice, this approach leads to the fact that with the stated claims, for example, of one million euros, the court can actually arrest four million euros in the accounts of each of the four joint debtors.

This problem is only exacerbated at the stage of enforcement actions of bailiffs. Often, bailiffs send out arrest orders in a "fan-like manner", which leads to double or even triple arrests of funds from one of the joint debtors.

For example, each of the two joint debtors has three bank accounts in three different Russian banks.

It is very likely that the bailiff will send six arrest orders in relation to each of these accounts to credit institutions, which will be forced to execute such orders. As a result, a situation may arise in which an amount six times greater than the amount of the claim will be arrested!

Yes, excessive seizures of funds can be cancelled through the court, but this takes a lot of time, so we recommend immediately mitigating such risks should they arise, for example, by depositing the claim amount into the court deposit[29] (an unconditional basis for the refusal/cancellation of interim measures), voluntarily informing the bailiff about the accounts where the debtor has funds covering the amount of the claim, and conducting negotiations with procedural opponents within the framework of which they can be offered alternative and less painful means for the debtor to secure their property interests.

Example:

In our practice there was a case when, having contacted representatives of the other party, we were able within a few days to agree on replacing critical interim measures for our client with a pledge of securities belonging to him, which became an acceptable compromise for both parties.

An equally effective way to replace or cancel interim measures in court may be to demonstrate to the court the financial indicators of the defendant company, which will prove that the size of the defendant's assets significantly exceeds the amount of the claim, and therefore there is no risk of non-enforcement of the court order[30].

Is the imposition of Western sanctions against the applicant an absolute basis for imposing interim measures on the property of foreign defendants?

Approach 1

The imposition of Western sanctions against the applicant is the basis for taking interim measures

In the case of Lapointek Ventures Limited and LLC International Logistics Partnership v. Commerzbank[31], the court concluded that the foreign defendant's ability to enforce a court order abroad is limited by sanctions, which indicates the impossibility of enforcement of a probable court order in favor of the applicant abroad. In this regard, the court granted the applicant's request for interim measures.

At the same time, the court noted that the interim measure requested by the plaintiff (seizure of funds) does not have any negative consequences for the defendant: this measure does not affect the property obligations of the defendant but prevents real possible negative economic consequences for the plaintiff by preserving the defendant's right to conduct business activities but at the same time not giving a preferential right to benefit during the period of validity of the interim measures[32].

Approach 2

The imposition of Western sanctions against the applicant is not a basis for the application of interim measures

In the case Rosbank v. Ing Bank Eurasia[33], according to the Russian plaintiff, his rights to judicial protection were limited by the prohibition on filing claims against foreign defendants, since the limitation period under English law is 6 years, and 2.5 years have passed since the sanctions were imposed. Meanwhile, the court refused to apply interim measures, since it considered that failure to take interim measures could not hinder or make impossible the execution of a future court order.

In the case of Pipe Metallurgical Company v. PSI Metals GmbH[34] the appellate court upheld the refusal order of the court of first instance and found that the applicant’s reference to the sanctions imposed on him did not indicate the impossibility of enforcing the court order either in the territory of the Russian Federation at the expense of the defendants’ property or at the expense of the property and funds located in Germany in the manner prescribed by international agreements on the mutual enforcement of court orders.

Procedural aspects in the adoption of interim measures: innovations of 2024

The decision to adopt interim measures cannot be appealed

On 05 January 2024, amendments to the Commercial Procedural Code of the Russian Federation came into force, which also concerned interim measures. The new version of Part 7 of Article 93 of the Commercial Procedural Code of the Russian Federation excludes the right to appeal a ruling on the imposition of interim measures.

A person participating in the case now has the right to apply only with a motion to cancel interim measures. Accordingly, only a ruling on the refusal to cancel interim measures can be appealed in the appellate procedure.

The new rules are already being actively applied by the courts. For example, in the dispute[35] Akida Trading Limited v. Mostrade Danismanlik Ticaret Limited Sirketi and Mustafa Yigit Zeren, the district court agreed with the position of the appeal to terminate the proceedings in the case on appealing the ruling on securing the claim, since the right to appeal this ruling is not provided for by the Commercial Procedural Code of the Russian Federation.

A similar position is set out, for example, in the bankruptcy cases of Tron-Stroy LLC[36] and Capital LLC[37].

The court cannot change the interim measures on its own initiative

In two cases, lower courts changed the interim measures (rather than canceling or denying the application) on the application for cancellation of interim measures, which resulted in the district court overturning the decisions.

In the case[38] on the bankruptcy of Smart Futver LLC, the district court, in overturning the decisions of the lower courts, noted that the courts had not actually considered the application to cancel the interim measures but had independently changed the applicant's demand to replace one interim measure with another, which contradicts the rules of procedural law.

The district court made a similar conclusion in the case[39] on the bankruptcy of ANT Network LLC.

Key contacts for more information

Evgeny Oreshin
Partner, Attorney at law
Dispute Resolution

M: +7 903 777 9825
evgeny.oreshin@birchlegal.ru

Artem Kirpu
Associate, Attorney at law
Dispute Resolution

artem.kirpu@birchlegal.ru

Maria Zub
Junior Associate
Dispute Resolution

maria.zub@birchlegal.ru

Nikita Rogozhin
Junior Associate
Dispute Resolution

nikita.rogozhin@birchlegal.ru

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