Russian Arbitration Law 2016: key issues

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This article examines the key issues arising under the Russian Arbitration Law which came into force on 1 September 2016.

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Introduction

On 29 December 2015, the Russian President, Vladimir Putin, signed the new Laws N 382-FZ "On Arbitration" and N 409-FZ "On Amendments to Certain Legislative Acts" (collectively, Arbitration Law). The Arbitration Law entered in force on 1 September 2016 and introduced several significant amendments, including to the:

- Procedure of the establishment of arbitral institutions.
- Arbitrability of corporate disputes.
- Status of arbitrators.
- Co-operation between state courts and arbitral institutions.

The principal aims of the legislative amendments were to decrease the number of so-called "pocket" arbitral institutions, that are dependent on one of the parties, and to prevent unfair use of arbitration as a way of legitimising parties' illegal interests. Before the amendments came into force, any legal entity could create its own domestic arbitral institution and use it for its own private purposes.

Procedure for establishment of permanent arbitral institutions

According to the state courts' statistics, 270 permanent arbitral institutions operated in Moscow and 231 in Saint-Petersburg before the arbitration reform. The Arbitration Law provides for a one year transition period, during which the existing arbitral institutions will continue to operate before their activity will be terminated. Starting from 1 September 2017, all arbitral institutions created under the previous regulation must suspend activity, unless they obtain a licence from the government.

The new procedure states that only non-commercial organisations can now establish a Permanent Arbitral Institution (PAI) (*Article 44(1), Arbitration Law*).

In order to establish a PAI, a non-commercial organisation must file the relevant application with the Council for the Development of Arbitration (Council). The Council is responsible for considering requests and providing the government with a recommendation as to whether or not permission should be granted (*Article 44(4), Arbitration Law*).

Applications should be accompanied by:

- The draft arbitration rules.
- A list of arbitrators, together with their written consent.
- Other documents specified in the Regulation "On a Council for Development of Arbitration" adopted by the Ministry of Justice.

If an application complies with the formal requirements, the Council can recommend its approval to the Government. Decisions in this respect are to be made by a majority of the Council members.

The Arbitration Law also deals with the composition of the Council, appointment of the Chairman of the Board, his deputies, and the Secretary of the Board.

Impact of new establishment procedure for institutions on international arbitration

The Arbitration Law clarifies that prominent foreign arbitral institutions that are recognised worldwide as reputable institutions, also have a right to apply to the Council for a licence to administer arbitrations with a Russian seat (*Article 44(12), Arbitration Law*). Registration requirements are not applicable to international institutions.

At the same time, the Arbitration Law does not state the criteria on which members of the Council shall determine the status of an international arbitral institution. Further, the Arbitration Law does not clarify whether an institution that is not as recognised worldwide could apply to the Council for a licence.

However, absence of a licence does not mean that international arbitral institutions are prohibited from administering disputes in Russia; such proceedings would be considered as ad hoc (the Arbitration Law imposes certain limitations for ad hoc proceedings, as discussed in *Impact of new provisions of state courts involvement on international arbitration*, below).

If the dispute is arbitrated outside Russia, the Arbitration Law does not provide any requirements for international arbitration institutions, except for corporate disputes (see *Arbitrability of corporate disputes*, below).

Arbitrability of corporate disputes

Significant amendments introduced by the Arbitration Law affect the arbitrability of corporate disputes. For at least five years before these amendments, Russian state courts have held that corporate disputes are not arbitrable, despite no Russian legislation containing any restrictions in this respect.

The state courts' attitude has its roots in *Maximov v NMLK* (*Case No. A40-35844/2011*), where the Supreme Commercial Court widely interpreted the provisions of Article 225.1 of the Commercial Procedure Code, the aim of which was to demarcate jurisdiction between state courts.

However, Russian law does not provide for a definition of a corporate dispute, and accordingly, an interpretation of Article 225.1 resulted in numerous court judgments denying jurisdiction for arbitration of any corporate dispute, even where such dispute was not corporate in its legal nature (for example, disputes arising out of share purchase agreements).

The Arbitration Law aims to draw a line between arbitrable and non-arbitrable disputes. For this reason, some arbitration practitioners are optimistic that the new law will change the Russian state commercial courts' negative attitude to the arbitrability of corporate disputes. However, the Arbitration Law has also met with criticism from some arbitration practitioners, who consider that the new laws still substantially restrict the arbitrability of corporate disputes.

Under the Arbitration Law, corporate disputes can be submitted to arbitration if certain criteria are met:

- **The arbitration agreement is concluded after 1 February 2017** (*Article 13(7), Federal Law (No. 409-FZ)*).
- **Only a PAI has the right to consider corporate disputes** (*Article 45(7), Arbitration Law*). Submission of corporate disputes to ad hoc arbitration is expressly prohibited.
- **The PAI is required to adopt special rules on corporate disputes** (*Article 45(7), Arbitration Law*). In this regard, the Russian Arbitration Association (RAA) recently published draft RAA Corporate Arbitration Rules for discussion among members of the professional community.

The Arbitration Law also allows for the incorporation of an arbitration clause in a company's articles of association, provided the number of shareholders does not exceed 1,000 and the company is not a public joint stock company (*Article 7(7), Arbitration Law*). In other words, corporations on the Russian stock market do not have a right to include an arbitration agreement in the company's charter.

The Arbitration Law provides for two exceptions where no special corporate rules are required as long as such disputes do not affect the rights of third parties (*Article 45(7), Arbitration Law*):

- Disputes arising from activities of shareholder registrars.
- Disputes over shares (interest in charter capital) ownership.

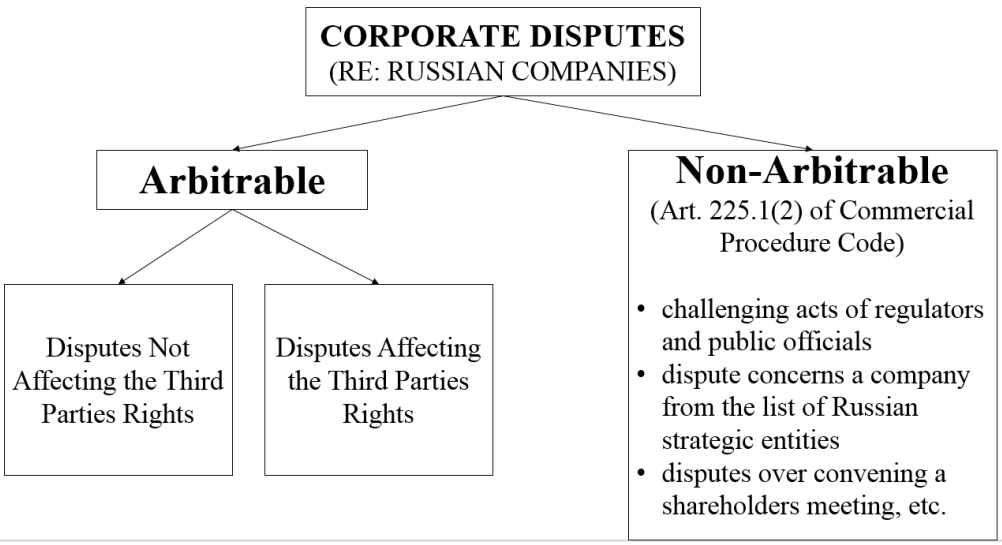
Other corporate disputes that affect the rights of third parties can only be considered under the above-mentioned requirements. The non-exhaustive list of such disputes includes:

- Disputes concerning the establishment, re-organisation and liquidation of a legal entity.
- Shareholders' claims on reimbursement of damages caused to a company.
- Disputes regarding the appointment or election of a company's management bodies.
- Challenging decisions of a company's management bodies.

The Arbitration Law also sets out a list of non-arbitrable corporate disputes, which includes:

- Disputes concerning a convening of general shareholders' meetings.
- Disputes regarding notarisation of transactions in respect of participation interests in Russian limited liability companies.
- Disputes related to challenges to the acts, resolutions, and actions (or inactivity) of public and municipal bodies, private entities performing public-law functions, and public officials.
- Disputes concerning "strategic" Russian companies, unless such disputes arise under a transaction that required approval in accordance with the Strategic Investments Law.
- Disputes relating to mandatory tender offers in accordance with the Federal Law No 208-FZ on Joint-Stock Companies of 26 December 1995.
- Disputes over exclusion of participants in legal entities.

The diagram below demonstrates the division of corporate disputes according to their arbitrability.



Impact of new arbitrability rules on international arbitration

International arbitral institutions can administer corporate disputes involving Russian legal entities only if three criteria are met:

- If such arbitral institution has a right to perform arbitration activities in Russia.
- If such arbitral institution approved special rules on the hearing of corporate disputes.
- If the case has a Russian seat. However, this is unclear due to the absence of clarity in the Arbitration Law; some arbitration practitioners consider that corporate disputes can be arbitrated outside Russia.

Arbitral proceedings involving corporate disputes outside Russia

However, the provisions of the Arbitration Law do not ultimately prohibit the ability for corporate disputes involving Russian legal entities to be arbitrated outside Russia. If the award can be enforced outside Russia, or if parties are sure that the award would be enforced voluntarily, they may still arbitrate a corporate dispute in a non-Russian jurisdiction. In this case parties should take into account that they will most likely face difficulties in enforcing such awards in Russia.

Increase of state court's involvement

Certain provisions of the Arbitration Law are directed at increasing the role of state courts in the appointment of arbitrators, jurisdiction of arbitral tribunals and evidence assistance.

Arbitrator appointment

In accordance with the Arbitration Law, if a party does not appoint an arbitrator within a month of receiving a notice from another party, or if two arbitrators do not appoint the third one, each of the parties can apply to a competent (state) court to make an appointment (*Article 11(3), Arbitration Law*).

It is unclear in the case of multiple claimants or respondents whether the competent court appoints the tribunal in full, or just one arbitrator for each party. If state courts choose to adopt the latter approach, it could leave room for a *Dutco* scenario (see *Siemens AG and BKMI Industrienlagen GmbH v Dutco Consortium Construction Co (Cass. ass. plen. Jan. 7, 1992)*). In that case, the ICC appointed an arbitrator for two claimants, while the respondent appointed his own arbitrator. The French Court of Cassation held that such appointment violated the claimants' procedural rights and consequently violated the French *ordre public*. Either way, parties by mutual agreement may exclude the involvement of state courts in the procedure of appointment of arbitrators. A PAI would then deal with the issues itself.

Addressing the court on tribunal jurisdiction

Under the Arbitration Law a party has the right to address the state court to dispute the tribunal’s jurisdiction within one month after the arbitral tribunal declares its competency to consider the case (*Article 16(3), Arbitration Law*). The parties whose arbitral agreement provides for administration of arbitration by a PAI can exclude such possibility by agreement.

Evidential assistance

Notably, the Arbitration Law grants parties to arbitration, administered by a PAI, the right to address the state court in order to assist with obtaining evidence. Relevant amendments are introduced in the Commercial and Civil Procedural Codes (*Article 63.1 and 74.1*).

Impact of new provisions of state courts' involvement on international arbitration

Rules on state court involvement apply both to domestic and international arbitration proceedings where Russian law serves as *lex arbitri*. There is one exception: if international arbitration proceedings held in Russia are not administered by a PAI or international arbitral institution that has a licence to perform arbitration activity, such proceedings would be considered as ad hoc. In this case, parties do not have the opportunity to apply to state courts for assistance with obtaining evidence.

Parties to an ad hoc arbitration are also deprived of the opportunity to waive the possibility of applying to state courts regarding the appointment of arbitrators or disputes as to the arbitral tribunal's jurisdiction (parties to arbitration administered by a PAI could agree to leave appointment and jurisdiction issues to the discretion of a PAI).

Furthermore, parties to ad hoc proceedings cannot agree that the arbitral award will be final, meaning that parties cannot waive the right to challenge the arbitral award in state courts.

New requirements for arbitrators

The Arbitration Law provides for several restrictions for arbitrators. An individual cannot serve as an arbitrator in the following cases:

- If an individual is under the age of 25 years, is incapacitated or his legal capacity limited.
- If an individual has an unspent outstanding criminal record.
- If an individual conducted activity as a judge, lawyer, notary, inspector, prosecutor or other law enforcement officer and such activity has been terminated due to offences incompatible with the professional activity.

(*Article 11(8-10), Arbitration Law*.)

The Arbitration Law also states that an individual cannot be included in the list of arbitrators in more than three PAIs (*Article 47(3), Arbitration Law*).

The Arbitration Law also:

- Requires a law degree for at least one of the arbitrators in the panel. Where the panel consists of three arbitrators, the presiding arbitrator may not be a qualified lawyer only where one of the other arbitrators possesses a law degree (*Article 11(6), Arbitration Law*).
- Provides for arbitrators' immunity from civil claims (except for civil lawsuits brought in the course of criminal proceedings) (*Article 51, Arbitration Law*). Therefore, arbitrators will not be subject to civil claims unless the criminal court proves fraudulent actions or any other criminal offence.
- Allows retired judges to act as arbitrators. Notably, before the amendments, retired judges were not permitted to take part in arbitration proceedings.

Impact of new requirements on international arbitration

Although the Arbitration Law is silent in this respect, the dominant point of view among practitioners is that the above-listed requirements are also applicable for foreign arbitrators in Russia.

The Arbitration Law also does not clarify whether the requirement not to act as an arbitrator in more than three PAIs applies to international arbitral institutions conducting arbitrations in Russia. However, practitioners assume that the Arbitration Law does not have extraterritorial effect in this regard. Further, nothing in the Arbitration Law refers to the consequences or sanctions for non-compliance with that requirement.

Conclusion

It is difficult to give an unambiguous assessment of the consequences of the arbitration reform in Russia. On the one hand, state control over arbitration has substantially increased, as demonstrated by the more complicated procedure for establishment of PAIs and the growing influence of state courts on arbitral proceedings. The fact that foreign arbitral institutions are obliged to obtain a licence to perform arbitration activity in Russia might have a negative impact on the popularity of Russia as a seat for international arbitration.

On the other hand, the Arbitration Law finally recognises the right of arbitral institutions to administer corporate disputes in Russia. The amendments in this regard have already been positively received by Russian arbitration practitioners.

In any event, it seems clear that the dominant Russian arbitration institutions (for example, International Commercial Arbitration Court and Maritime Arbitration Commission at the Russian Federation Chamber of Commerce and Industry) will benefit from the new Arbitration Law, which grants them a privileged position compared with foreign and other domestic arbitral institutions.

A more definitive assessment will only be possible after a few years of application and interpretation of the new Arbitration Law by Russian state courts.

Resource information

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