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The Reform of the Russian Arbitration Law: The Arbitrability of Corporate Disputes

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Under sec 1 of the RF Law on International Commercial Arbitration 5338-1 of 07.07.1993, disputes arising from civil, including corporate, relationships may be referred to international commercial arbitration, unless otherwise provided by law. However, there is no such restriction provided.

In some cases, such as *Novolipetsk Still Mill (NLMK) v. Nikolay Maksimov* (*Decrees of the RF Supreme Court of 09.04.2015 No. 305 ES15 1789 and of the Commercial Court of Moscow District of 17.12.2014 No. A40-26424/11-83-201*), the commercial courts granted the annulment of awards, and found corporate disputes to be non-arbitrable in accordance with sec 33 (1) 2 and 225-1 of the RF Commercial [*Arbitrazh*] Procedure Code, which provide for the exclusive jurisdiction of commercial courts to hear corporate disputes. However, both of these provisions should apply only if a statement of claim is filed before a state – general or commercial – court. This provision does not rule out in any way a possibility of recourse to arbitration.

In commercial practice, arbitration clauses are often used in corporate agreements involving a foreign party, e.g. share purchase agreements (SPA) or joint venture (JV) agreements, and arbitral tribunals established their jurisdiction over claims arising from such agreements. Since there is a possibility that commercial courts in Russia would annul an award based on sec 225-1, there was a need for the new law that would expressly provide a possibility to contract for arbitration for corporate disputes.

On July 1, 2015, the Duma adopted two Draft Federal Laws addressing the arbitrability of corporate disputes in the first reading:
(i) Law on Arbitration in the Russian Federation, which shall generally apply to domestic arbitrations and, where specially designated, to international arbitrations ("**Arbitration Law**"), and (ii) Law on Amendments to the RF State Commercial Procedure Code, the mentioned RF Law 5338-1 ("**Amendment Law**").

The Amendment Law clearly distinguishes between 3 categories of corporate disputes:
(i) corporate disputes which are *per se* non-arbitrable,
(ii) corporate disputes which are arbitrable, subject to the following four conditions:
– the seat of arbitration must be in Russia,
– the arbitration must be institutional,
– the arbitration agreement needs to be signed by all the shareholders and the company, and

– special rules for resolving corporate disputes need to be provided by an administering arbitration institution, and
(iii) corporate disputes which are arbitrable and exempt from the two last requirements of co-signing of the arbitration agreement and required special rules (including disputes regarding ownership of shareholdings and securities registration).

Non-Arbitrable Corporate Disputes

The proposed exhaustive list of the corporate disputes which cannot be arbitrated due to the prevailing public interest considerations, includes the disputes over:
– activities of a notary with regard to the notarization of a limited liability company (OOO) share transaction;
– the contesting decisions of governmental authorities, such as a refusal to register a company;
– strategic companies, such as an airport or a leading mass media company, especially connected with a statutory pre-approval for its acquisition;
– convening a general meeting of shareholders;
– the repurchase of stocks by a non-public joint-stock company (AO);
– the expulsion of a shareholder from a company, and
– the takeover of and other disputes relating to a public company since its articles, unlike OOO's and non-public AO's ones, are prohibited to refer their stockholders' disputes to arbitration.

A part of the list is in line with the prevailing perception that disputes of a public law nature may not be referred to arbitration. Prohibition to arbitrate the remaining disputes is based on the conservative standpoint, according to which arbitrators, as legal experts, are unfit to decide commercial issues, as to whether to call the general meeting, exclude a member or determine the price of the shares transferred. For example, in Sweden and Finland disputes concerning squeeze outs are subject to statutory arbitration.

Requirements for the Arbitrability of Corporate Disputes in Russia

1) The Localization of Corporate Disputes in Russia: No Choice of Preferred Forum

The seat of an arbitration tribunal resolving a corporate dispute must be in Russia.

The main reasons for this rule are the localization of the disputes involving Russian beneficiaries hidden behind foreign holding companies, and the necessity to address the negative consequences of trade sanctions for the administration of disputes involving Russian entities. Another primary explanation given for this rule may be that some minority shareholders will not be able to participate in a costly and time consuming oral hearing within the foreign arbitral proceedings, and thus be actually deprived of a possibility to protect its rights.

The Arbitration Law, however, does not provide a possibility for choosing a neutral or other preferred jurisdiction as the arbitration seat, which is a standard option for arbitration-friendly jurisdictions across the world.

2) Only Institutional Arbitration Allowed

Corporate disputes may not be referred to an *ad hoc* arbitration.

It is true that businesses prefer institutional rather than *ad hoc* international arbitration since

corporate disputes are complex by their nature, but must be resolved and effectively enforced within the shorter time limits. However, it would be a misconception to say that *ad hoc* arbitration is unsuitable for this area. Namely, majority of domestic corporate arbitrations in Germany, Austria and South Africa are conducted *ad hoc*.

Numerous *ad hoc* investment arbitration clauses agreed by Russia in bilateral investment treaties (BITs) will not be affected by this provision. Most Russian BITs envisage an optional right for an investor to submit a dispute to an *ad hoc* arbitration tribunal. Some Russian BITs favor *ad hoc* arbitration set up under the UNCITRAL Rules (France, India), or even without designating any applicable rules (Germany, the Netherlands, Switzertland), as the sole modus for the binding resolution of investment disputes. The provisions of these BITs, as the provisions of international treaties, shall overrule the Arbitration and Amendment Law rules regarding the use of *ad hoc* arbitration.

3) Arbitration Agreement Signed by All Shareholders

Most corporate disputes may only be referred to arbitration provided that all the shareholders, the company, and other parties who are acting as claimants or defendants have signed the respective arbitration agreement. The consent is required since the award must be binding on all the shareholders (*res judicata*).

Alternatively, according to the Arbitration Law, arbitral clauses might unanimously be included by the shareholders into the company's articles (bylaws arbitration). Unlike some other countries (Germany, Italy), an arbitration clause is rarely provided in Russian company's articles.

4) Special Arbitration Rules for the Settlement of Corporate Disputes

As a general rule, corporate disputes can only be resolved by an arbitral tribunal of an arbitration institution which has adopted and publicized arbitration rules for the settlement of corporate disputes. When they do not conform to the mandatory provisions stipulated by the Arbitration Law, the award could be set aside or not enforced by a Russian court.

This additional requirement applies to foreign arbitral institutions administering corporate disputes involving a Russian company.

However, usually arbitral institutions do not provide special procedural rules for the settlement of corporate disputes. The well known exception are the Supplementary Rules for Corporate Law Disputes 09 (SRCoLD) adopted by the German Institution of Arbitration (DIS), which have been enacted after the German Federal Court of Justice (Bundesgerichtshof) rendered a decision in 2009, which set the criteria for the arbitrability of corporate disputes (*BGH SchiedsVZ 2009*, 233; Schiedsfaehigkeit II). The SRCoLD may be adopted by reference in a corporate agreement or company's articles. One of the advantages of opting for the SRCoLD is that it can make drafting the detailed arbitration clauses obsolete since a short reference to the rules is all that is needed. It could be compared with the efficient use of the model company's articles approved by a competent state authority, which, a year ago, were introduced into the RF Civil Code by following an example of the modern Western company laws, such as the UK Company Act 2006.

However, the SRCoLD applies only to a restricted scope of disputes (the validity of LLC shareholders resolutions) reflected in statistics (a total of 10 proceedings between 2010 and 2014), while the Arbitration Law offers the application of special arbitration rules to practically all the

conceivable corporate disputes (apart of the SPA-related and stock registration disputes).

The SRCoLD obviously offers some solutions, which cannot be found in the Russian arbitration law or in the ICAC (MKAS) Arbitration Rules, such as the provisions on the joinder of shareholders, the consolidation of claims, and the appointment of arbitrators in multiparty arbitration. Meanwhile, the other leading arbitral institutions address topics covered by the SRCoLD in a broader context, as a part of their general arbitration rules, which apply to both corporate and other disputes (the ICC Rules 2012, the LCIA Rules 2014, or the Draft SCC Rules 2016).

In summary, it is a question whether the proposed changes will promote Russia as a serious competitor to other jurisdictions, and whether the discussed restrictions imposed on arbitrability only secure, or even oversecure, the compliance of corporate arbitral procedures with the standards determined for state court proceedings. The right balance should still be sought before the second reading.

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