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The Russian Arbitration Reform Reached Its New Development

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For the last several years, Russia has undergone arbitration reform initiated by the President in or around 2013. The reform is aimed at increasing the credibility of this dispute resolution mechanism in Russia and updating the framework regulating domestic and international arbitration by addressing many long known gaps.

The latest development occurred on 29 December 2015 when the President signed the Law on Domestic Arbitration in the Russian Federation (hereinafter – "the DCA Law") and the Law on amendments into related acts (together – "the Laws"). One of such acts to be revised is the Law on International Arbitration 1993 (hereinafter – "the ICA Law"). The amendments will come into effect in September 2016.

Among the most remarkable and potentially far going developments, which have implications for international arbitration, is the status of foreign institutions that administer proceedings in Russia and the associated issue of the status of *ad hoc* arbitrations, as well as the issues of arbitrability of corporate disputes that previously remained unsettled and created a number of problems in practice.

Arbitral Proceedings Involving Corporate Disputes

The Laws generally recognize the arbitrability of corporate disputes in Russia. Nevertheless, some categories (e.g. when a dispute concerns a company from the list of Russian strategic entities) are excluded from this rule and/or the Laws provide for a number of peculiarities for such arbitrations.

The DCA Law expressly provides for Russia as a mandatory seat of arbitrations related to disputes between shareholders of Russian legal entities irrespective of whether such shareholders are based in Russia or not.

Further, the DCA Law bans *ad hoc* arbitrations with respect to such type of disputes demanding that only arbitral institutions administer them. (The same restriction applies to a broader category of disputes in relation to management of Russian legal entities). In light of the amendments to the status of such institutions described below, this rule means that any arbitration clause under rules of a foreign institution might be challenged in the state courts as inoperative or invalid unless this institute obtains a license from the Russian Government.

It follows, however, from the DCA Law that foreign institutions, once licensed, might have advantage over domestic ones. The DCA Law directly stipulates that the rules of the former need not accord with the statutory requirements on the content of arbitration rules, which it also sets out. It appears that this exemption, if read literally, should also apply to the requirements for corporate arbitrations' rules which mainly mirror procedural rules applicable to litigation in state commercial courts, e.g., mandatory notification of other shareholders not participating in the arbitration and some other parties, as well as mandatory publication of information on the existence of the dispute. However, non-compliance with such statutory requirements during arbitral proceedings seated in Russia might cause problems at the enforcement stage. Practical effect of interaction of these provisions remains to be seen.

Both the DCA and ICA Laws state that an arbitration agreement shall be part of a charter of a Russian company and shall be applicable to all shareholders. However, both statutes are silent with respect to shareholders agreements which are regulated by the Russian Law on Joint Stock Companies and which may bind not all, but some of shareholders. It remains to be seen whether the courts will be liberal in interpreting this gap dealing with the enforcement of awards rendered under such agreements, and whether domestic institutions would tend to apply to them strict rules of the DCA Law on corporate disputes.

Licensing of Arbitral Institutions and *Ad Hoc* Arbitrations

Another relevant introduction is mandatory licensing by the Russian Government, which any arbitration institution must go through in order to operate at the territory of Russia. With respect to foreign institutions, such license is subject only to 'wide international recognition' requirement. It remains undefined by the Laws and shall be assessed by the Council on Arbitration Development to be established under the supervision of the Ministry of Justice. However, while the issue of reputation seems to be predictable, at least with respect to leading institutions popular among Russian users, the key point would be practicalities of the licensing procedure to be developed by the Government and the Ministry of Justice.

Unless the institution receives a license, arbitral awards rendered in its Russia-seated proceedings, as well as such proceedings themselves, would be treated as *ad hoc* decisions and *ad hoc* arbitrations. The point is that the Law provides for a number of limitations for *ad hoc* arbitrations, which increase the control of state courts over them and generally make them less preferable than institutional arbitrations.

This has some further implications in light of the fact that the Law puts *ad hoc* arbitration under a number of restrictive rules as described below.

First of all, as mentioned above, corporate disputes cannot be subject to *ad hoc* proceedings. Another important revision is that parties to *ad hoc* arbitration lose their right to waive the possibility for the setting aside of an arbitral award. Further, the Law grants only parties to institutional arbitration the right to waive the possibility to seek assistance from the state court in relation to the appointment and challenges of an arbitrators. In addition to this, arbitrators conducting *ad hoc* cases will be deprived of the right to seek assistance from the Russian court in evidence collection (however, this does not preclude parties to do the same).

Other Notable Novelties

The ICA Law became more aligned with the UNCITRAL Model Law on International

Commercial Arbitration (hereinafter – "the Model Law") in relation to the scope of application. As of now the ICA Law is limited to Article 1(3)(a) of the Model Law, where at least one of the parties has a foreign element, plus covering disputes related to international investments in Russia. After 1 September 2016, the ICA Law will also cover disputes where a substantial part of the obligations is to be performed abroad, or where the subject-matter of the dispute is most closely connected with a foreign state. However, the ICA Law still does not allow parties to apply the regime of international commercial arbitration by mere choice of a seat, as contemplated in Article 1(3)(b)(i) of the Model Law.

The amended ICA Law further clarifies that a foreign arbitral award, which does not require enforcement, is recognized in Russia automatically without any recognition proceedings. The same regime is introduced simultaneously with respect to foreign court decisions on commercial matters. Any interested person, even if it does not have any link to Russian jurisdiction, may apply for declaration to the contrary within one month after it became aware on an award or decision in issue.

The revised ICA Law transfers to courts the powers to assist parties in appointing arbitrators and to decide on challenges (as of now they belong to the President of the Chamber of Commerce and Industry of Russia). At the same time, parties are free to waive the right to apply for such assistance unless the proceedings are *ad hoc*. This rule might eventually result in a deadlock and moving a dispute to courts due to the inoperability of the arbitration agreement. However, the threshold is very high and seems to be more theoretical – for the deadlock to arise, an institution must fail to perform its functions and follow its rules.

The statutory immunity of arbitrators is another contribution of the reform. Under the DCA Law arbitrators in international and domestic arbitration are not subject to any civil liability unless they are held guilty for committing a crime. This rule goes further than generally accepted standard of civil liability of arbitrators for deliberate or bad faith acts.

At last the reform introduces long expected and hailed by professionals allowance for retired judges to act as arbitrators. This step should be of significant assistance for further development of pro-arbitration trends among the Russian judiciary.

There are other well accepted novelties, clarifications, and revisions introduced by the reform, such as a more clear delineation of non-arbitrable disputes and a helpful rule on the binding effect of an arbitration clause on both old and new parties to the original contract in cases of assignments. However, the main attention is still attracted by tightened regulation over administrative matters of arbitration institutions and increasing state control.

Overall, there are issues which remain to be carefully considered within next several years. It further remains to be seen how this new paradigm will be implemented in practice and whether the amended framework would avoid unnecessary complications and would contribute to the development of a transparent and predictable arbitration system in Russia.

The views and opinions expressed herein are those of the authors and do not necessarily reflect those of Egorov Puginsky Afanasiev & Partners, its affiliates, or its employees.

Authors also thank Evgeny Raschevsky for helpful and interesting discussions on the matters discussed in the post.

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This entry was posted on Thursday, January 7th, 2016 at 12:19 pm and is filed under Ad hoc arbitration, Arbitrability, Arbitration, Arbitration Proceedings, Corporate disputes, Enforcement, Russia
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