Kluwer Arbitration Blog

The Russification of Collective Arbitration: Mandatory Joinder Provisions for Arbitration Rules for Corporate Law Disputes

Rustem Karimullin (Karimullin Law Firm) · Thursday, February 11th, 2016

One of the peculiarities of the revised Russian Arbitration Laws of 29 December 2015 ("**Laws**"), entering into force on 1 September of this year, is an attempt to localize the on-shore settlement of corporate arbitral disputes involving domestic companies. Only an arbitration institution which has adopted, publicized online, and filed special rules for arbitration of corporate disputes with a regulatory authority is permitted to arbitrate such disputes. Generally, the rules should be valid as of their filing.

This requirement should also apply to foreign arbitral institutes, which "have a renowned international reputation", upon their receipt of a license for providing permanent arbitral institution's services.

Where the arbitration institution has administered a corporate dispute without the specialized rules duly enacted, the award might be challenged at an enforcement stage, or set aside by a Russian court. The use of rules which are inconsistent with the mandatory provisions might produce the same adverse effect.

What are those mandatory provisions which an arbitral institution should consider when enacting special rules to resolve corporate law disputes in Russia?

This post reveals their exhaustive list, accompanied by comments to their scope of application, and a comparison in content to the Supplementary Rules for Corporate Law Disputes 09 ("**DIS Rules**") adopted by the German Institution of Arbitration (DIS).

Mandatory provisions for corporate law specialized rules

The Arbitration Law s.45(8) sets out the following mandatory provisions, which must be included into special rules for resolving corporate law disputes:

1) a duty of an arbitration institution to send a written notification of a filed statement of claim, accompanied by its copy, to a legal entity, which is subject to a corporate dispute;

2) a duty of the arbitration institution to publicize information on the statement of claim;

3) a duty of the legal entity to further send a written notification of the filed statement of claim, accompanied by its copy, to:

(i) any legal entity's shareholder,

(ii) the legal entity's securities registry (if any), and/or

(iii) depositories;

all these duties under 1) to 3) should be completed within **three** days from obtaining the statement of claim by the obligor;

4) a right of any shareholder to join arbitral proceeding at any point of time by filing a written application with the arbitration institution, providing that the shareholder:

(i) becomes a party to the arbitral proceeding starting from the filing (joinder) date, and

(ii) accepts the arbitral proceeding *as it is*, without being authorized to raise any objections or challenge the procedural actions effectuated before the joinder date and, particularly, to challenge arbitrators for grounds already discussed;

5) a duty of the arbitration institution to inform on the progress of the arbitral proceeding by delivering any legal entity's shareholder, which has joined the proceeding and not explicitly waived to receive them, copies of all:

(i) written pleadings,

(ii) arbitral notifications,

(iii) procedural orders,

(iv) awards, and

(v) (*where the tribunal has so decided*) all other communications relating to the arbitration file;

6) the admissibility of a voluntary dismissal, confession of a claim, and settlement without consent of other legal entity's shareholders joined to the proceeding, except for a case:

(i) where a shareholder has raised written objections within thirty days of the tribunal's notification of those intended actions, and

(ii) the tribunal acknowledged its legitimate interest in the further proceeding.

Scope of Application

The provisions proposed for implementation into the corporate law arbitration rules prescribe a joinder of the shareholders, which have initially not been involved into proceedings as a party. The subject-matter scope of the joinder use is limited through the arbitrability of corporate disputes, which excludes disputes on securities registration or ownership to shareholdings, which can be arbitrated without any specialized rules [Discussed in more details in the post published at this blog, and available here].

The revised Laws do not supply any joinder or consolidation rules for other traditional multi-party activities, such as agency, maritime, (re-)insurance, construction, or contractual joint ventures.

However, it is not excluded that more general joinder and/or consolidation rules might appear through the enactment of the new Russian institutional rules, which might follow the solutions of the leading arbitration institutions (the ICC Rules 2012 Art.7, 10, the SCC Rules Art.11, the HKIAC Rules 2013 Art.27, 28). It would still be advisable to provide the tribunals with discretion on deciding whether to allow or not a joinder and/or consolidation.

Also, the institutional corporate rules might be seen as a form of non-class collective arbitration. "*Non-class*" should be stressed since the revised Laws explicitly exclude class action arbitration in Russia. The courts should still be exclusively competent to hear disputes on the protection of rights and legal interests of a group of persons, including the corporate disputes.

Comments to the Rules

The Russian joinder rules are to some extent similar to the DIS Rules. Although some of the Russian provisions are their verbatim adoption, the former ones sometimes use different legal language reflecting domestic procedural rules and jurisprudential traditions. For instance, three disclosure duties addressed in Arbitration Law s.45(8) resemble the wording of the RF Commercial Procedure Code s.225-4 for the litigation of corporate disputes.

Taking into account that *res judicata* effect is to be extended to all company shareholders, both set of rules presuppose their unanimous consent to the arbitration agreement. Accordingly, every shareholder should be informed in advance of the proceedings and, if he/she so desires, be able to join the proceeding since an award is final, regardless of whether or not he/she has actually participated in the arbitration.

The DIS Rules impose a duty on claimant and respondent to identify all the concerned shareholders. This is different than the approach taken by the Russian rules, under which neither party would be obliged to disclose them. In fact, a party might even not be aware of its co-shareholders, especially in a joint-stock company. The obtained statement of claim should first be delivered by an arbitration institution to the company that circulates the copies of it among the shareholders. The burden of responsibility for informing all the interested parties is shifted from the parties to their company.

The arbitral institution must also publicize online information on the filed statement of claim. Insofar, the Russian collective arbitration rules deviate from confidentiality principle embodied in the Arbitration Law s.21 to ensure that the potential parties are notified of the proceedings and able to decide whether to join it. At the end, lack of proper notice on the proceedings could result in a refusal of the enforcement of an award. Finally, short three-day deadlines are set out for the duties to resend the statement of claim and to disclose its filing online.

In contrast to the DIS Rules, the opt-in regime proposed by the Russian rules does not timely limit a joinder and, consequently, does not distinguish between a prompt and a later joined party's rights and responsibilities. Any company shareholder is entitled to join the proceeding involving the company at any time before the award is finalized. However, just as a later joined party under the DIS Rules, any newcomer under the Russian rules should accept the arbitral proceeding as it stands as of the date of filing its request for the joinder. In particular, he/she would not be entitled to raise any objections to actions done before the joinder.

Under the Russian law, a shareholder's failure to opt into the proceeding results in a waiver of a right to join the arbitration as a party and, especially, to object against the intended settlement.

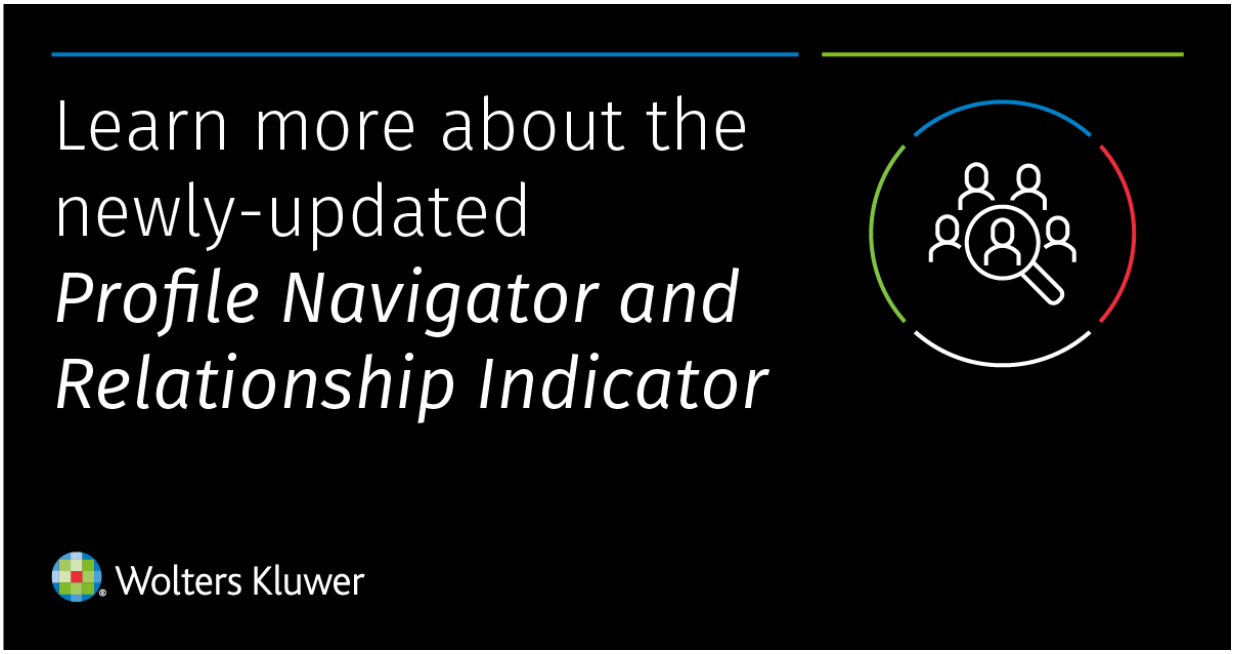
Also, the passive shareholder will not be informed on the progress of the arbitral proceeding, and it shall not receive the subsequent parties' pleas and arbitral correspondence. The DIS Rules provide, on the other side, for a disclosure even to non-joined shareholders.

Compared to the DIS Rules, the Russian statutory rules are silent on the issues of the appointment of arbitrators, parallel proceedings, and the allocation of costs between the parties in case of joinder. All those issues must be of particular concern for specific institutional rules to ensure that all proper procedures for collective arbitration are in place.

Conclusion

The statutory expansion of arbitration to corporate disputes has been inevitable for a long time. By declaring them arbitrable, the revised Laws have introduced provisions on joinder which are mandatory for implementation into specialized institutional arbitration rules. In this way, they have fixed a minimum standard, which needs to be fulfilled to ascertain legal certainty comparable to the rules on civil procedure. By involving all the company shareholders into the proceeding, the joinder should promote procedural fairness and strengthen the enforceability of collective arbitral awards.

Practice will show whether the end users prefer arbitration or litigation for resolving their collective corporate disputes. Also, it will be interesting to see how many local arbitral institutions will be able to solve this challenge by addressing all the aspects of collective arbitration in their specific rules and whether they, backed on the compulsory use of corporate law rules, will actually become a competitor to the leading international arbitration institutions in the area of the resolution of corporate disputes involving Russian businesses.



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