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The 2017 ICAC Corporate Dispute Arbitration Rules: Collective Redress in Action

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As of 1 February 2017 shareholders in a Russian company may refer their corporate law disputes to arbitration. Still, except for disputes from share purchase agreements or those involving securities registrars, having an arbitration clause in a company charter, a shareholders' agreement ("**SHA**"), or elsewhere which submits corporate disputes to arbitration is not enough. A mandatory part of such an arbitration clause is a designation of valid corporate arbitration rules which are issued by a permanent arbitration institution and duly filed with the RF Ministry of Justice. Otherwise, an arbitration agreement will be deemed incomplete and pathological.

In line with this development, on 1 February 2017, the International Commercial Arbitration Court ("**ICAC**", or abbreviated in Russian as "**MKAS**") at the RF Chamber of Commerce and Industry enacted the Arbitration Rules for Corporate Law Disputes ("**ICAC Corporate Rules**"). Although the ICAC Corporate Rules are rather detailed, they are to be applied along with the standard rules of the Russian leading international arbitration provider – the revised 2017 ICAC International Commercial Arbitration Rules (discussed here), or the 2017 ICAC Domestic Arbitration Rules, respectively (see the Russian versions of all the ICAC Rules here).

The ICAC Corporate Rules fully implemented the new mandatory legislative provisions, (discussed here). They also developed this reform further by adopting some additional provisions required for fostering legal certainty as provided in civil procedure rules on corporate disputes (e.g., rules on the *res judicata* effect of an award for all shareholders), and provisions which are supposed to guarantee smooth handling of multi-party arbitration (e.g., rules on the appointment of a tribunal and consolidation).

The following key features of the ICAC Corporate Rules are reviewed herein: the types of corporate disputes which are arbitrable, the scope of bylaw arbitration clauses, disclosure duties, tribunal formation, and rules on joinder and consolidation.

Arbitrable Corporate Disputes

The application of the ICAC Corporate Rules is available in a broad range of corporate disputes over a legal entity established in Russia. A dispute may relate to:

1. the formation, reorganization, and liquidation of an entity;
2. shareholders' claims for the recovery of damages incurred by the entity;

3. shareholders' claims in regards to void/voidable transactions involving the entity;
4. civil (but not employment) law relations with directors, especially regarding their appointment, dismissal, and liability;
5. agreements regarding corporate governance, including SHA;
6. securities issues;
7. decisions on the void resolutions of a corporate body;
8. disclosure of information to shareholders;
9. other arbitrable disputes (see the list of non-arbitrable corporate disputes here).

Also, when agreed by the parties, disputes arising from the formation and management of shareholding in an offshore company might be submitted for settlement under the ICAC Corporate Rules.

Corporate Bylaw Arbitration in Russia

According to a Russian statutory requirement (see more here), an arbitration clause for resolving corporate disputes can only unanimously be included by the shareholders into the company's charter.

Moreover, under the ICAC Corporate Rules, a default scope of operation of an arbitration clause included into the company's charter shall extend to:

> i) the company;
>
> ii) company's members, including prospective members, who have acquired a share in the company by its purchase or inheritance after its inclusion into the charter, and former shareholders, which remain bound by the arbitration clause which was valid during their shareholding;
>
> iii) directors, including prospective and retired directors, in relation to their corporate rights and obligations.

This provision may be relevant for a statement of claim, in which a claimant should generally identify any person who has an interest in the outcome of the dispute (interested person) known to it, i.e. a party to an arbitration agreement, whose rights or duties may be affected by an award.

Interestingly, executive directors usually do not sign any document reflecting their acceptance of the charter. Under the Russian Labor Code, a company and an executive director must sign an employment agreement, which, considering explicit non-arbitrability of all employment disputes, usually does not contain an enforceable arbitration clause. Thus, even where directors have constructive knowledge of the public charter's arbitration clause, this might not be taken into account by a Russian court. Also, some aspects of directors' mandate, such as their appointment or dismissal, and the recovery of harm caused by their activities to the company, are covered by both corporate and labor laws. Hence, parties should consider this when pursuing arbitration in Russia against executive directors who are not managing shareholders, or when they are commencing disputes against them which might simultaneously be qualified as labor law disputes.

Extensive Disclosure Duties

A proper service of notifications regarding arbitration proceedings is particularly important in corporate arbitration. An award has the *res judicata* effect for all shareholders, irrespective of their actual participation in proceedings.

For this reason, an ICAC corporate award should include information regarding all interested parties and it should be rendered in compliance with the following three statutory duties (described here):

(i) the ICAC needs to inform the company about the filed claim,
(ii) the ICAC needs to disclose this information online via its website, and
(iii) the company has to inform interested persons and the share registrar about the commenced proceedings.

In addition to the three disclosure duties, the company is obliged within 15 days upon receiving the claim to report to the ICAC Secretariat on notifications which they delivered to specific shareholders.

Moreover, in some cases, such as a challenge of the corporate decisions or the company's transactions, or the recovery of harm from shareholders, the claimant is required to notify its fellow shareholders and the company before commencing arbitration. Failure to take the respective reasonable measures may result in the dismissal of the case.

Appointing a Tribunal

Unlike under the 2017 ICAC International Arbitration Rules (see here), according to which a decision of the ICAC Appointment Committee is used as a fallback mechanism in case the group of claimants and/or the group of respondents cannot agree on their arbitrator, in corporate multi-party arbitration the following restriction on who can serve on the tribunal is imposed: arbitrators should be elected from the ICAC list of arbitrators and specialized in corporate law.

To ensure their participation in the appointment of the tribunal, the parties are advised to include a mechanism for the selection of arbitrators into the arbitration clause. A joinder application must be filed within 60 days from the ICAC online publication of the claim if it wishes to participate in the nomination of an arbitrator.

Joinder

Any shareholder or other interested person who is not initially involved as a claimant or a respondent may join arbitral proceeding at any stage. However, the joining party should accept the arbitral proceeding *as it is* and is not authorized to raise any objections as to the events before the joinder date. As a result of late joinder, the party might be deprived of a possibility to challenge an arbitrator, or to request the repetition of an arbitral hearing, or to file submissions within applicable deadlines.

Also, only after the joinder, an interested person is to be informed on the progress of the arbitral proceeding. Furthermore, upon the joinder, the joining party may file additional claims against the claimant or the respondent if such claims fall under the same arbitration agreement, and they are linked to the initial claim from the standpoint of substantive law. Finally, the joining party might reject a voluntary dismissal, confession of a claim, and settlement and, thus, block certain final dispositions of a matter. It is, therefore, highly advisable to join arbitral proceedings at the earliest

possible moment in the proceedings.

In the end, the award will be binding for all interested persons, irrespective of whether they actually joined the arbitral proceeding and actively participated. Even when they do not join, interested persons may apply for a certified copy of the award.

Obligatory Consolidation for Parallel Proceedings

Pending ICAC corporate cases with similar subject-matter must be consolidated and settled within a single proceeding. This prevents a scenario in which a company is subjected to multiple disputes based on the same events. The proceeding that were initiated first takes priority, in the sense that subsequently submitted claims are automatically considered as applications for joinder to the first proceeding. The Rules provide some examples to illustrate cases with similar subject-matter, such as claims for the recovery of damages caused to the company by the same respondent or by the same void transaction.

Summary

As an innovative and promising device, the ICAC Corporate Rules are opening the door to the legal feasibility of arbitrating corporate claims in Russia. Shareholders may benefit from the use of tailored-made arbitration rules, arbitrators' business expertise and language knowledge, the confidentiality of arbitration, and other efficient features of the ICAC Corporate Rules. Corporate arbitration in Russia, due to its limited use in the past, is not expected to be utilized to resolve shareholder claims on any widespread basis quite soon, but still it is clearly gaining new legitimacy as an alternative method for their handling through the enactment of the ICAC Corporate Rules.

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