

# Arbitration reform in Russia: a new start or the end of commercial arbitration

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**Cracow - 7 June, 2018**

## **Regulation:**

Laws of 29 December 2015:

- the Federal Law on Arbitration in the Russian Federation (Arbitration Law)
- Federal Law on Amendments to Certain Legislative Acts of the Russian Federation (Amendment Law and ICA Law as amended)

## **Key Aims of the Russian Arbitration Reform:**

- eliminating “pocket” arbitration institutions and bad-faith practices
- improving the overall quality of arbitration in Russia
- return disputes to the Russian Federation

### *Art. 1 - Scope of application*

“ ...

3. The parties may agree to refer to international commercial arbitration the disputes between the parties arising out of civil law relationships in the course of carrying out foreign trade and other types of international economic relations, if the place of business of at least one of the parties is abroad, or any place where a substantial part of the obligations out of the relationship of the parties is to be performed or the place with which the subject-matter of the dispute is most closely connected are located abroad, as well as disputes arisen in connection with making foreign investments in the territory of the Russian Federation or Russian investments abroad.

4. For the purposes of clause 3 of this article:

if a party has more than one place of business, the place of business is that which of most relevance to the arbitration agreement;

if a party does not have a place of business, reference is to be made to his permanent residence.

...”

## Key Areas of arbitration reform

- new rules on arbitration agreement
- arbitrability, including of corporate disputes
- special regulation on establishment and functioning of the permanent arbitration institutions (PAI)
- different regimes for institutional arbitration and ad doc arbitration
- licensing requirements for foreign arbitration institutions
- challenging and enforcement of awards
- support from Russian state courts

## New Rules on Arbitration Agreement

- An arbitration agreement shall be in writing
- Expressly provided that an arbitration agreement may be:
  - concluded in electronic form
  - included in the rules of a trading platform or clearing rules
  - included in the company's charters and corporate (shareholders') agreements (with a number of exceptions)

*Article 7 of the Arbitration Law, ICA Law*

- Issues to be agreed only by way of “*express agreement*” of the parties:
  - excluding the possibility of referring to the state courts for assistance with formation of a tribunal; challenging the tribunal's ruling on jurisdiction in the state courts
  - excluding the possibility of setting aside the final award
  - conducting arbitration without an oral hearing

## Arbitrability – General Rules

List of non-arbitrable disputes:

- bankruptcy cases
- disputes over the state registration of companies and individual entrepreneurs
- certain disputes over intellectual property rights
- public law disputes, including challenging decisions of state authorities
- class actions *and*
- disputes over privatisation and public procurement contracts

*Article 33 (2) of the Commercial PC, Article 22.1 (2) of the Civil PC*

## Arbitrability – Corporate Disputes

| <b>Non-arbitrable CD</b>   | <b>Conditionally arbitrable CD</b>   | <b>Arbitrable CD</b>   |
|--|--|--|
| <b>Exclusive jurisdiction of the Russian state courts</b>  | <b>By PAI subject to special requirements</b>  | <b>By PAI, no special requirements</b>   |
| <ul style="list-style-type: none"> <li>• Exclusion of shareholders from the company</li> <li>• Convening GMs of shareholders</li> <li>• Notarisation of share purchase transaction in LLCs</li> <li>• Challenging the resolutions and acts of state authorities with respect to issuance of stock</li> <li>• Disputes in respect of “strategic” companies</li> </ul> | <ul style="list-style-type: none"> <li>• Incorporation, reorganisation and liquidation of a company</li> <li>• Subscription for shares</li> <li>• Appointment, dismissal of directors, governance matters, challenging decisions of a company’s management</li> <li>• Shareholder’s claim for invalidation of company’s transaction</li> <li>• Shareholder’s claim for indirect damages caused by a company</li> </ul> | <ul style="list-style-type: none"> <li>• SPA related disputes</li> <li>• Title of shares in a Russian company</li> <li>• Debt enforcement against shares in a Russian company</li> </ul> |

## Special Regulation for PAI -1

- Permanent arbitral institutions may be established only by non-profit entities
- The right to perform the activity of a PAI (“license”/authorisation) is to be
  - granted by the Russian government (MoJ)
  - upon recommendation of Council for Improvement of Arbitration
- Requirement to adopt new rules and submit them to the MoJ
- PAI shall have a recommended list of arbitrators meeting also special qualification requirements
- ICAC and MAC at the Russian Chamber of Commerce and Industry are exempt from this requirement

### List of Arbitration:

- Not mandatory when the parties are appointing arbitrators
- Could be mandatory when arbitrators are appointed directly by an arbitral institution
- One list or separate lists for domestic/ international arbitration and/or arbitrating of the corporate disputes
- At least 30 arbitrators and thereof:
  - at least 1/3 – a Russian (or recognised in Russia) PhD degree in certain areas of law
  - at least 1/2 – experience of resolving civil law disputes as arbitrators or court judges of at least 10 years before the inclusion into the list
- Consent to be included into the list
- A restriction on the number of arbitral institutions where one can be included into such lists (no more than 3 institutions located in Russia)

### Restrictions applicable to *ad hoc* arbitration:

- parties and tribunals in *ad hoc* arbitrations do not have the right to apply to the Russian state courts for assistance in obtaining evidence
- corporate disputes cannot be heard in *ad hoc* arbitrations *and*
- parties to *ad hoc* arbitrations are not entitled to exclude:
  - (i) the application of the provisions of the Laws on the assistance of the Russian state courts with respect to the appointment and removal of arbitrators *and*
  - (ii) the possibility of challenging the awards

### Agreement of the parties available only in institutional arbitration:

- to exclude the referral to a state court in order to
    - challenge an award on jurisdiction
    - challenge a final arbitral award
- subject to concluding a direct (express) agreement on that*

## Foreign Arbitral Institutions

- Need to obtain the license for administering cases in Russia

### **License vs. No-License:**

- License to be issued if a foreign arbitral institution has a “widely recognized international reputation”
- rules for corporate disputes certified by the institution (in case it intends to administer corporate disputes)
- If no license has been obtained an arbitral award issued by a foreign arbitral institution in Russia will be considered as issued in *ad hoc* arbitration

## Challenging the Arbitral Award

- Right to file an application within 3 months
- Exclusive grounds for challenging:
  - incapability of a party to an arbitration agreement
  - a party was not duly notified of the arbitration or has not been given the possibility to present its case
  - the award is not covered by the arbitration agreement or exceed the scope of arbitration agreement
  - the arbitral tribunal or the arbitration procedure did not comply with the arbitration agreement or with the law
  - the dispute resolved by the arbitral award is not arbitrable
  - the arbitral award contradicts the public policy of the RF
- Agreement by the parties that the award is final:
  - waive explicitly their right to challenge the award issued in an arbitration administered by a PAI

## Enforcement of the Arbitral Award

- To file for enforcement within 3-year from the date the award came into force
- Recognition of foreign awards that require no enforcement:
  - applicable to foreign arbitral awards and foreign court judgments where recognition is provided for by an international treaty of the RF or a federal law
  - Automatic recognition without additional proceedings UNLESS
    - a concerned party files objections to the recognition within 1 month of having learnt of the respective award/judgment
    - the application is to substantiate the violation of the concerned party's rights and legitimate interests
- Application for enforcement to be filed at the:
  - debtor's place of stay or residence or
  - location of the debtor's property if the stay or residence is unknown

## Support from Russian State courts

- Before the Reform
  - largely limited to granting interim measures and recognising and enforcing awards (leaving aside challenging rulings on jurisdiction and awards)
- After the Reform
  - new mechanisms designed empowering the Russian state courts to assist tribunals and parties with: obtaining evidence *and* appointing and challenging arbitrators

## World-standard arbitration system

What should mean “world-standard arbitration system”?

- Liberal arbitration regulation & Pro-arbitral court system:
  - broad arbitrability of the disputes
  - no special or overloaded requirements as to the form of arbitration agreement
  - limited influence of the state on the arbitration proceeding
- Availability of a qualified and mature arbitration community:
  - none or minimum limitation of arbitrability & subject matter of arbitration agreements in interpretation by the state courts
  - interpretation of any lack in arbitration agreement in favor of its validity
  - effective mechanisms of improving the pro-arbitral judicial environment and effective court control
- Availability of reputable arbitration institutions:
  - significant number of world-class arbitrators & highly professional and experienced arbitrators, both domestic & international
  - motivations and mechanisms to become an arbitrator
  - self-regulation as a method to overcome effectively the abuses or misuses in arbitration

*Clear visualisation is a key to SUCCESS*

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## Thank you for your attention!

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