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New Russian arbitration laws

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Arbitration analysis: On 1 September 2016, laws 382-FZ and 409-FZ (the new arbitration laws) dated 29 December 2015, will enter into force and mark the culmination of years of reform in the Russian Federation. Anna V Grishchenkova, partner with KIAP attorneys in law, discusses changes to the Russian arbitration landscape.

What are the areas of focus?

The main focus of the reform was to improve domestic arbitration. Therefore, the new arbitration laws will impact domestic regulation of arbitration significantly. The new arbitration laws also update Russia's international arbitration laws in cases:

- under the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC)
- where Russia is the seat of arbitration
- regarding ownership of shares in Russian companies or real property based in Russia dealing with enforcement and recognition of arbitral awards in Russia

The most important changes brought about by the new arbitration laws are:

- obligatory licensing of arbitration institutions operating in the Russian Federation
- obligations of the ICAC and MAC to amend and publish their rules by 1 February 2017
- difference in regulation of institutional arbitration and ad hoc arbitration
- extensive rights of Russian courts to assist arbitration
- specific regulation of corporate disputes
- specific rules of enforcement of arbitral awards affecting records in the official registries of shares, stock and immovable assets

Obligatory licensing of arbitration institutions operating in Russia

In order to make domestic arbitration transparent, reputable and organised, the Russian legislator has introduced a mandatory licensing procedure for all domestic arbitration institutions (article 44 of law 382-FZ). The ICAC and MAC are exempt from this regime, and can both operate without special permission (provided they amend their rules in compliance with new laws and publish them online by 1 February 2017).

Permission to operate as a domestic arbitral institution in Russia is granted by the Russian Government based on the recommendation of the council of development of arbitration. The list of mandatory requirements that must be met for an arbitration institution to obtain permission is set out in law 382-FZ, art 44 and is significant. Among other things, the institution is obliged to show:

- the rules of the institution conform with Russian federal law
- the list of arbitrators is compiled in accordance with legal requirements (more than 30 arbitrators of certain age, education, professional background, etc)
- all information supplied about both the institution and its founders is truthful
- the structure of the institution supports a high standard of arbitration and the promotion of arbitration in Russia

Licensing is obligatory both for domestic and foreign institutions. However, it is far less onerous for a foreign arbitral institution to obtain the permission required to operate in Russia as the only prerequisite is a widely recognised international reputation. No other requirements, including requirements to list arbitrators, need to be present (law 382-FZ, art 44, para 8).

The failure of a foreign arbitration institution to get permission has important consequences for cases where Russia is chosen as a seat of arbitration. Russian courts will perceive such cases as ad hoc arbitration, not institutional arbitration (law 382-FZ, art 44, para 3). This means, for example, that foreign arbitral institutions lacking mandatory permission do not have jurisdiction in relation to corporate disputes regarding Russian companies.

Under the new arbitration laws, Russian courts are entitled to terminate the activity of both foreign and domestic arbitral institutions in Russia in cases where numerous serious violations of the law result in damage to parties or third parties and requests to cease violations have not been acted upon (law 382-FZ, art 48). The procedure of termination so far is not fully specified—with regard to foreign institutions, the court will presumably have a right to recall the previously granted permission to operate.

Difference in regulation of institutional arbitration and ad hoc arbitration

Historically ad hoc awards have enjoyed a lesser degree of confidence in Russian courts than awards made under institutional rules. Lawyers have to go to greater lengths to persuade Russian judges to enforce ad hoc awards. Russian legislators have also consistently stated that some ad hoc awards in Russia were used in hostile takeovers or transfer of property. This attitude has been formalised in the new arbitration laws.

One of the biggest differences in regulation of ad hoc and institutional arbitration under the new arbitration laws is that Russian courts will not assist ad hoc tribunals in obtaining evidence.

Further, corporate disputes related to Russian companies can be heard only by arbitral institutions. Therefore, ad hoc tribunals do not have jurisdiction over corporate disputes (see more below).

Extensive rights of Russian courts to assist arbitration

Pursuant to the new arbitration laws, competent Russian courts have the power to substantially assist pending arbitrations.

Though the power of Russian courts to assist arbitrations existed prior to the new arbitration law, it was more declarative than under the forthcoming regime. In order to make the court's powers more concrete and effective, the Russian legislator has amended procedural codes and specified how parties or the tribunal may apply for assistance and the time-frames for providing such assistance [law 409-FZ]. These amendments may result in real changes in this sphere.

Russian courts can assist arbitration by:

- granting interim measures

- appointing an arbitrator
- challenging an arbitrator (if otherwise is not directly agreed by the parties)
- terminating the mandate of an arbitrator who does not fulfill his or her duty within a reasonable time
- ruling on the competence of the arbitral tribunal (if otherwise not directly agreed by the parties)
- obtaining evidence (except for ad hoc arbitration)
- terminating the activity of an arbitral institution

Specific regulation of corporate disputes

Arbitrability of corporate disputes has been a controversial issue in Russia. The new arbitration laws provide specific rules for referring corporate disputes to arbitration (law 382-FZ, art 45, paras 7–9).

The corporate disputes that can be referred to arbitration are:

- disputes regarding:
  - foundation of a legal entity in Russia
  - governance or participation in a legal entity between founders, shareholders, and members of a legal entity
  - the legal entity itself

- claims of founders, shareholders, members of a legal entity against third parties, arising out of the activity of this legal entity

An arbitration agreement, applicable to all participants of the legal entity, can be included in a charter of that entity, unless the number of shareholders exceeds 1000 or the entity is a public stock-company. The seat of arbitration under such arbitration agreements shall be Russia.

Corporate disputes can be resolved only by institutional arbitration. In addition, to be entitled to handle corporate disputes, arbitral institutions (both domestic institutions and foreign institutions with permission to act in Russia) must have special rules for the resolution of corporate disputes. These rules shall contain the following provisions:

- obligation of the arbitral institution to notify the respective legal entity about the corporate dispute within three days of receiving the claim
- obligation of the arbitral institution to publish information online about receipt of the corporate claim within three days of such receipt
- obligation of the respective legal entity to notify all its members, shareholders and its registrar about the corporate claim within three days after receiving the claim
- right of every member of legal entity to join arbitral proceedings in the respective stage
- obligation of the arbitral institution to notify all members of the legal entity joined to the proceedings about the course of arbitration by sending all written pleadings and orders of the institution and the tribunal (unless the particular member refuses to obtain such information)
- waiver of the claim, acceptance of the claim and settlement of the case are possible without consent of all members of the legal entity joined to the proceedings (unless any member objects in written form and arbitral tribunal finds legitimate interest of such member to object)

The only exception is made for disputes regarding ownership of shares and stock and disputes with the registrar of shares, ie arbitral institutions are not obliged to have special rules to handle such disputes.

According to the new arbitration laws, such institutions like the International Court of Arbitration, the London Court of International Arbitration and so on will need to get permission to act in Russia and will be required to amend their rules accordingly to deal with corporate disputes. Whether or not they will do so is another question.

Specific rules of enforcement of arbitral awards affecting records in the official registries of shares, stock and immovable assets

To stop the existing practice of transferring rights for immovable property and shares through arbitral awards that are subject to challenge, the new arbitration laws introduce additional mechanisms of control.

The possibility of using an arbitral award as a ground for making records in special registries regarding change of ownership is prohibited under the legislation. Now, to make changes in public registries (such as registry of legal entities or registry of real property or registry of shares) parties should apply for enforcement of an arbitral award and to obtain a list of execution. Only a list of execution can be deemed as a proper ground for changes in respective registries. This makes the procedure of registration longer, but ultimately more reliable (law 382-FZ, art 43 and law 409-FZ).

Other changes in arbitration law

The new arbitration laws regulate other important issues related to domestic arbitration.

Arbitration agreements (law 382-FZ, art 7)

An arbitration agreement:

- shall be made in a written form. 'Written form' means by exchange of written documents, electronic communication, claim and defense, etc. All disputes in respect of the validity and enforceability of the arbitration agreement itself, unless otherwise directly agreed by the parties, will be subject to the arbitration agreement.
- survives on the transfer of rights under the main agreement and covers the relationship between previous and new creditor and debtor

Many aspects of arbitration, such as the language of arbitration, applicable law, number of arbitrators, rights of the competent court regarding the arbitration, are regulated by the law, thus, the parties should carefully consider terms of an arbitration agreement in case they intend to resolve the dispute differently.

Interim measures

Interim measures can be granted by an arbitration institution (before formation of the tribunal), by the tribunal itself, or a competent Russian court (law 382-FZ, arts 9, 17).

Legal expenses

Legal expenses are paid by the losing party proportional to the amount of the claim granted by the tribunal, unless the parties specifically agreed otherwise (law 382-FZ, art 22].

Legal responsibility of arbitral institutions and arbitrators

An arbitral institution is liable only for damages caused by intentional or grossly negligent breach of its responsibilities and is not liable for an arbitrator's actions—unless the rules of institution stipulate greater liability (law 382-FZ, art 50).

An arbitrator is immune from civil liability and can be liable only within a civil claim in a criminal case. However, the rules of an institution can provide the possibility of reducing the arbitrator's fees in cases of damages caused by actions of the arbitrator (law 382-FZ, art 51).

Challenge of an arbitration award

An arbitration award can be challenged by the parties, by the third parties affected by the award and by prosecutors in defence of rights of Russia and the rights of municipal bodies, in cases where they were not party to the dispute (law 409-FZ).

In conclusion, the new arbitration laws intend to make the arbitration process in Russia more transparent, modern, effective and reliable. Hopefully, we will see measurable results and changes in the near future.

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