

New Regulation of Arbitration in the Russian Federation

On 1 September 2016, two federal laws are to take effect, reshaping the legal framework regulating arbitration (including international commercial arbitration) in the Russian Federation: the Federal Law "On Arbitration in the Russian Federation"¹ ("**Law 1**") and the Federal Law On Incorporation of Amendments to Certain Legislative Acts of the RF in Connection with Enactment of the Law On Arbitration² ("**Law 2**") (together referred to as the "**Laws**").

The key amendments are as follows:

- To administer arbitration, specific authorisation by the RF Government will have to be obtained – a requirement that will also apply to foreign arbitral institutions (see section 1 below);
- Non-arbitrable disputes are expressly defined, and arbitration of certain categories of corporate disputes is permitted, subject to certain conditions being met (see section 2 below);
- New areas of interaction between arbitral tribunals and state courts are defined (see section 3 below);
- Some of the requirements applicable to the form of an arbitration agreement are changing, and parties will have broader discretion when entering into an arbitration agreement (see section 4 below).

Given the significance of the amendments, the Laws contain extensive (and unfortunately not always clear) transitional provisions (see section 5 below).

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¹ Federal Law No. 382-FZ of 29 December 2015 "On Arbitration in the Russian Federation".

² Federal Law No. 409-FZ of 29 December 2015 "On Incorporation of Amendments to Certain Legislative Acts of the Russian Federation and Recognition of Article 6(1)(3) of the Federal Law 'On Self-regulating Organisations' to Have Lost Force in Connection with Enactment of the Federal Law 'On Arbitration in the Russian Federation'".

It is noteworthy that the new regulatory framework for arbitration not only offers greater options for parties in the future, but in some instances it may impact existing arbitration agreements and ongoing arbitral proceedings. Therefore it is recommended that the potential impact of the new rules on existing relations be analysed and steps be taken, where possible, to mitigate any risks.

1. Requirement to obtain authorisation to administer arbitration

Law 1 introduces the concept of a "*permanent arbitral institution*", which means a "*subdivision of a non-profit organisation, performing the function of administering arbitration on a permanent basis*". Arbitral tribunals (i.e., panels of arbitrators) constituted under permanent arbitral institutions will have a number of advantages over *ad hoc* arbitral tribunals (among other things, only the former will be able to consider corporate disputes).

In order for an arbitral institution to be able to administer arbitration, the non-profit organisation under which it was created must obtain authorisation from the RF Government. Such authorisation will be granted on the basis of a recommendation of the Council for the Advancement of Arbitration, whose members will include representatives of government agencies, business associations, the legal community etc. The council will check, among other things, that the arbitral institution's rules and recommended list of arbitrators are consistent with the requirements of law³, and will assess the extent to which the reputation, scale and character of the activities of the non-profit organisation will enable the arbitral institution established under it to function effectively⁴.

Foreign arbitral institutions are eligible to obtain the status of a "*permanent arbitral institution*". The only criterion is that they must be "*of international repute*". Foreign arbitral institutions must obtain authorisation from the RF Government in order to, among other things, administer certain types of corporate disputes under Russian

regulation (in particular, disputes arising out of agreements on sale and purchase of shares in Russian companies),

irrespective of whether the seat of arbitration is in Russia or not, and to administer non-corporate disputes, the seat of arbitration of which is in Russia.

2. Delineation of non-arbitrable disputes; corporate disputes

Law 2 expressly defines certain categories of disputes that are not arbitrable. Non-arbitrable disputes include, among others, administrative and employment disputes, class action, bankruptcies/insolvencies, and disputes related to privatisation and public procurements (until such time as a special law is enacted⁵) (Article 33 of the Arbitrazh Procedure Code of the RF and Article 22.1 of the Civil Procedure Code of the RF, as amended by Law 2).

The procedure through which corporate disputes (i.e., disputes relating to the incorporation or management of a legal entity or participation in a legal entity) are heard has undergone significant changes. The new edition of Article 255.1 of the Arbitrazh Procedure Code of the RF distinguishes three categories of corporate disputes and the extent to which each category is arbitrable:

- Corporate disputes that are not arbitrable (category 1). This category includes disputes relating to:
 - refusal to register a legal entity;
 - convocation of general meetings of participants of a legal entity;
 - purchase and buy-back of shares by a joint stock company;
 - compulsory offers to purchase shares;
 - exclusion of participants from legal entities;
 - the activities of public notaries involving certification of transactions with stakes in the charter capital of limited liability companies; and
 - practically all types of disputes involving business entities of strategic importance for national defence and state security⁶;
- Corporate disputes that must be administered by a permanent arbitral institution seated in Russia in accordance with special rules on resolution of

³ The recommended list of arbitrators must include at least 30 people, at least a third of the arbitrators must possess a degree in their area of specialisation, and at least half must have at least 10 years' experience as judges or arbitrators in civil law disputes (Article 47(1) & (3) of Law 1).

⁴ Regulation on the Creation and Activities of the Council for the Advancement of Arbitration, approved by Order of the RF Ministry of Justice No. 165 of 13 July 2016.

⁵ Law 2 provides that disputes concerning public procurements to meet state and municipal needs may be referred to arbitration from the date a federal law takes effect which sets out the procedure for determining the permanent arbitral institution authorised to administer such disputes.

⁶ In accordance with Federal Law No. 57-FZ of 29 April 2008 "On the Procedure for Making Foreign Investments in Business Entities of Strategic Importance for National Defence and State Security".

corporate disputes adopted by that institution and subject to the condition that the legal entity, all of its participants and any other persons acting as the claimants or respondents have entered into the arbitration agreement⁷ (category 2). This category includes disputes relating to:

- establishment, reorganisation and liquidation of legal entities (with the exception of disputes concerning challenging non-normative acts, decisions and actions of government authorities);
- legal action brought by participants of a legal entity seeking compensation of losses, invalidation of transactions performed by the legal entity, and application of the consequences of their invalidity;
- constitution of a legal entity's management bodies and their liability;
- shareholder agreements relating to the management of a legal entity, including disputes arising out of corporate agreements;
- issuance of securities (with the exception of disputes associated with challenging non-normative acts, decisions and actions of government agencies);

- Corporate disputes, the only requirement applicable to which is that they must be administered by a permanent arbitral institution (category 3). This category of disputes includes disputes associated with the ownership of shares or participation interests in Russian companies, the establishment of encumbrances over them and the exercise of the rights conferred by them (including, among others, disputes associated with agreements on sale and purchase of shares or participation interests and enforced recovery against them), with the exception of disputes associated with the recording of shares and other securities by registrars.

3. Interaction between arbitral tribunals and state courts

At present, interaction between arbitral tribunals and state courts primarily involves the ordering of interim measures by state courts in support of arbitration, as well as

⁷ Arbitration agreements relating to corporate disputes may be included in a legal entity's charter (with the exception of public joint stock companies and joint stock companies in which there are 1,000 or more holders of voting shares). The inclusion of an arbitration agreement in a legal entity's charter must be approved by unanimous vote of all its participants (Article 7(7) of Law 1, Art. 7(8) of RF Law of 7 July 1993 No. 5338-1 "On International Commercial Arbitration" (the "ICA Law") an Article 255.1(3) of the Arbitrazh Procedure Code of the RF, as amended by Law 2).

consideration of requests to set aside or recognise and enforce foreign arbitral awards / issue writs of execution to enforce arbitral awards.

In accordance with the Laws, state courts will be able to assist tribunals seated in Russia and constituted under permanent arbitral institutions in obtaining evidence⁸, and in some cases they will also be vested with the authority to appoint arbitrators and consider motions on recusal⁹.

With effect from 1 January 2017, the time frame allotted for consideration of applications for recognition and enforcement of foreign arbitral awards will be reduced from three months to one month.

When considering applications for recognition and enforcement of foreign arbitral awards, state courts will be entitled to obtain explanations from the tribunal that rendered the respective award¹⁰.

If in the course of considering an application to have an arbitral award set aside a state court finds that procedural violations were committed (e.g., if one of the parties to the arbitration was not properly notified, an abuse of authority was committed, or the procedure was contradictory to the agreement between the parties or the law), it will now have the right to suspend proceedings for up to three months upon a party's request in order to allow the arbitral tribunal to remedy the violations¹¹.

The Arbitrazh Procedure Code of the RF (Article 245.1) and the Civil Procedure Code of the RF (Article 413) and the ICA Law (Article 35(3)) have also been appended with new provisions relating to the enforcement of foreign arbitral awards and judicial decisions in the Russian Federation which do not require enforcement¹². If the possibility of recognising such awards or decisions is enshrined in an international treaty, then the respective award or decision will be deemed recognised in the territory of the Russian Federation without any further proceedings, provided that no interested party initiates legal action in Russian court

⁸ Article 74.1 of the Arbitrazh Procedure Code of the RF, as amended by Law 2.

⁹ Articles 11 & 12 of the ICA Law, Articles 11 & 13 of Law 1.

¹⁰ Article 243(3) of the Arbitrazh Procedure Code of the RF, as amended by Law 2.

¹¹ Article 34(4) of the ICA Law, Article 232(5) of the Arbitrazh Procedure Code of the RF and Article 420(5) of the Civil Procedure Code of the RF, as amended by Law 2.

¹² These questions are currently regulated by Order of the Presidium of the Supreme Council of the USSR No. 9131-XI of 21 June 1998.

opposing it within one month from the moment that party became aware of the award or decision.

4. Conclusion of arbitration agreements and powers of the parties with respect to proceedings

The provision stipulating that arbitration clauses must be executed in writing remains in effect. However, different criteria for determining whether the written-form requirement has been met are established for international arbitration and Russian arbitration.

At present, an arbitration agreement providing for international arbitration must be set out in a document signed by the parties or concluded by exchange of communications. Under Law 2, this requirement has been replaced with the less stringent requirement that the arbitration agreement must be "*concluded in a form allowing the information contained in it to be documented or the accessibility of such information for subsequent use*"¹³.

Arbitration agreements providing for Russian arbitration must, as before, be concluded by exchange of communications between the parties enabling it to be reliably established that the document came from the other party¹⁴.

As discussed in section 2 below, special requirements apply to the conclusion of an arbitration agreement in relation to corporate disputes (including with regard to the parties to such agreements and the arbitration institution that can hear corporate disputes).

The Laws establish certain additional powers of the parties to a dispute that is being heard by a Russian arbitral tribunal constituted under a permanent arbitral institution. In particular, the parties can stipulate by their explicit agreement (i.e., by express statement set out in the arbitration agreement itself and not, for example, by reference to arbitration rules) that the arbitral award will be final and not subject to reversal¹⁵. Awards rendered in international arbitrations seated in Russia, on the other hand, may in any case be set aside if the dispute in relation to which they were rendered was not arbitrable or the award violates public policy¹⁶.

Law 1 (Article 7(10)) confirms judicial practice that an arbitration agreement remains in force in the event of substitution of a party to an obligation in relation to which the arbitration agreement was concluded.

5. Transitional provisions

(a) Obtaining authorisation to perform the functions of a permanent arbitral institution

According to the Law on Arbitration, the procedure through which non-profit organisations are to obtain authorisation from the RF Government enabling the permanent arbitral institutions constituted under them to administer arbitration is to be established by 1 December 2016¹⁷. The RF Government decree approving that procedure was passed on 25 June 2016 and will take effect on 1 September 2016; the procedure itself will become effective on 1 November 2016¹⁸. Once a year has passed since that procedure was established (i.e., from 1 November 2017), only permanent arbitral institutions constituted under non-profit organisations that have been authorised by the RF Government will be able to administer arbitration proceedings seated in Russia.

The International Commercial Arbitration Court and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation are exempted from the requirement to obtain authorisation from the RF Government.

Any disputes heard by arbitration seated in Russia administered by an arbitral institution that does not receive authorisation from the RF Government by 1 November 2017 will be treated as disputes heard by a Russian *ad hoc* arbitral tribunal¹⁹. If an arbitral institution that has not received authorisation from the RF Government nonetheless continues to administer such an arbitration proceeding (e.g., by appointing or disqualifying arbitrators), then the award will be deemed to have been rendered in breach of the procedural rules (Article 52(13) & (15) of Law 1) and therefore may be subject to reversal.

(b) Validity of arbitration agreements concluded earlier and potential impact of the amendments on ongoing arbitral proceedings

¹³ Article 7(3) of the ICA Law, as amended by Law 2.

¹⁴ Article 52(10) of Law 1.

¹⁵ Previously this was only possible for awards rendered by Russian arbitral tribunals.

¹⁶ Article 34(1) of the ICA Law, as amended by Law 2.

¹⁷ Article 52(10) of Law 1.

¹⁸ RF Government decree No. 577 of 25 June 2016 "On Approval of the Rules on Granting of the Right to Perform the Functions of a Permanent Arbitral Institution and of the Regulation on Depositing of the Rules of a Permanent Arbitral Institution".

¹⁹ Article 52(16) of Law 1; Article 13(21) of Law 2.

The provisions of the Laws are not sufficiently clear to establish what effect the Laws will have on existing arbitration agreements and arbitrations currently in progress.

In relation to corporate disputes, arbitration agreements can be entered into only from 1 February 2017. Agreements concluded before 1 February 2017 will be deemed unenforceable (Article 13(7) of Law 2).

However, it is stipulated that the validity of an arbitration agreement is to be determined in accordance with the legislation that was in effect on the date the agreement was concluded (Article 52(4) of Law 1). Arbitration agreements concluded before Law 1 enters into force cannot be deemed invalid or unenforceable merely because Law 1 establishes new rules (Article 52(5) of Law 1). It is assumed that this provision does not impinge upon the effect of the expressly opposite provision mentioned above (Article 13(7) of Law 2) concerning the unenforceability of arbitration agreements concluded before 1 February 2017 which cover corporate disputes.

Special provisions governing international arbitration also stipulate that arbitration agreements referring disputes to international arbitration will, as a rule, remain in force and cannot be deemed invalid merely by virtue of the fact that Law 2 establishes new rules (Article 13(13) of Law 2). However, Article 13(14) of Law 2 states that if the enactment of Law 2 results in the establishment of mandatory rules governing the referral of disputes to international arbitration which differ from those that were in effect when such an agreement was concluded, then it may be established "*by the legislative acts... amended by this law*" that such amendments render invalid or amend the terms and conditions of the arbitration agreement concluded earlier. Possibly this is a reference to the new rules set out in Articles 33 and 225.1 of the Arbitrazh Procedure Code of the RF concerning the arbitrability of disputes and the manner in which certain categories of disputes are to be heard, which could affect arbitration agreements that have already been concluded.

Arbitrations that commenced before the Laws take effect will continue to be governed by the old law, but the new law will apply to proceedings involving challenges to or enforcement of the awards rendered in such disputes (Article 52(7) of Law 1, Article 13(16) of Law 2). It is noted in particular that arbitral proceedings (including international commercial arbitration) in progress should be continued, and the awards rendered in those arbitrations cannot be set aside if the dispute in question becomes non-arbitrable as a

result of the entry into force of the Laws (Article 13(10) & (11) of Law 2). However, such awards may be set aside if the dispute in question was non-arbitrable under the law in effect as of the date when the arbitration commenced (Article 13(12) of Law 2).

(c) Conclusions regarding the transitional provisions of the Laws

Prior to the enactment of the Laws there was some uncertainty as to whether some types of corporate disputes (in particular, those arising out of agreements on sale and purchase of shares in Russian companies) were arbitrable or not.

The Laws have resolved that problem for the future: with effect from 1 February 2017, arbitration agreements can be concluded in relation to corporate disputes, subject to certain requirements being met.

As regards arbitration agreements that have already been concluded, the existing risk that such clauses might be ruled invalid with respect to disputes over agreements on sale and purchase of shares in Russian companies has been compounded with the new risk that arises from the express provision in Law 2 stipulating that such agreements are unenforceable if entered into before 1 February 2017.

The fate of arbitrations concerning agreements on sale and purchase of shares in Russian companies which are initiated before the Laws take effect to a lesser degree depends on the risk that the respective arbitration agreement might be found unenforceable, because that in itself will not constitute grounds for the arbitral award to be set aside or its enforcement denied (although it could serve as grounds for the initiation of parallel proceedings in Russian courts). However, the risk remains that such awards could be set aside for the reason that the dispute was not arbitrable at the moment when the proceedings commenced.

Arbitral proceedings administered by arbitration centres located abroad should also be mentioned. If such centres do not obtain authorisation from the RF Government to engage in activities as a permanent arbitral institution by 1 November 2017, then from the standpoint of Russian law they, among other things, will not be able to administer corporate disputes of category 3 (see section 2 above), irrespective of the seat of arbitration, or other disputes seated in Russia.

The analysis of amendments to the Russian legislation on arbitration set out above is not legal advice. To assess the impact of the amendments on your organisation's business, we recommend seeking specific legal advice.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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