

Client Update

Laws on Arbitration Reform in Russia Adopted

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On December 29, 2015, the Federal Law on Arbitration in the Russian Federation (the “Law on Arbitration”) and the Federal Law on Amendments to Certain Legislative Acts of the Russian Federation and Repeal of Article 6.1(3) of the Federal Law on Self-Regulating Organizations in Connection with the Adoption of the Federal Law on Arbitration in the Russian Federation (the “Associated Law”) were signed by the President of the Russian Federation (collectively, the “Laws”). The Laws will enter into force on September 1, 2016.

Debevoise & Plimpton lawyers were closely involved in drafting the Laws and in discussions of the drafts of the Laws that took place over almost two years prior to their official approval. Lawyers of Debevoise’s Moscow office were members of the working group set up by the Ministry of Justice of the Russian Federation to draft the Laws, whilst attorneys from Debevoise’s other offices were involved in the comparative analysis of the arbitration laws in various jurisdictions, the results of which formed the content of the Laws.

The Laws introduce significant changes to the way the arbitration process is regulated and to the creation and activities of arbitration institutions in Russia. The Laws are aimed to encourage the creation of new arbitration institutions in Russia and development of already-established institutions to provide impartial arbitration.

In particular, the Laws introduce:

- changes to the form of arbitration agreements;
- regulation of arbitrability and the procedure for arbitration of corporate disputes;
- appointment of state courts to assist with and supervise arbitration;

- regulation of the procedure for assistance in obtaining evidence;
- establishment of a procedure for the creation and functioning of permanent arbitration institutions;
- regulation of the functioning of foreign arbitration institutions in Russia; and
- establishment of requirements for arbitrators and arbitration panels.

Below, we briefly review the key provisions of the Laws.

LEGAL FRAMEWORK OF ARBITRATION PRIOR TO ADOPTION OF THE LAWS

Until the Laws enter into force on September 1, 2016, arbitration in Russia will continue to be governed by Law of the Russian Federation No. 5338-1 on International Commercial Arbitration dated July 7, 1993 (the “ICA Law”) and Federal Law No. 102-FZ on Arbitral Tribunals in the Russian Federation dated July 24, 2002 (the “Law on Arbitral Tribunals”), as well as Chapters 4 and 30-33 of the *Arbitrazh* Procedure Code of the Russian Federation (the “APC”) and Chapters 43-47 of the Civil Procedure Code of the Russian Federation (the “CPC”).

Even prior to the commencement of arbitration reform, criticism was levelled at the dual nature of regulation of international commercial arbitration and Russian arbitral tribunals, as well as the absence of certain important institutions in the existing law (such as authorities to assist and supervise Russian arbitral tribunals). There was also criticism of the inconsistencies among the above-mentioned legislative acts, such as the differing grounds for denial of enforcement of the decisions of foreign commercial arbitral tribunals in the ICA Law and the APC.

In addition, the practice of using “in-house” or “pocket” arbitral tribunals – that is, tribunals set up by large corporations to hear disputes between themselves and their contractors – has been considered a major defect of arbitration regulation. That practice as well as other defects of arbitration in Russia featured in a number of 2011-12 cases, including *Business Lada*¹, *First Excavator Company*², *LUKOIL-Energoseti*³, *Uralsib Leasing Company*⁴ and *Svarschik*⁵, which were widely discussed and fuelled the need for arbitration reform.

¹ Ruling No. 17020/10 of the HAC Presidium dated May 24, 2011.

² Ruling No. 1308/11 of the HAC Presidium dated June 28, 2011.

³ Ruling No. 16541/11 of the HAC Presidium dated May 22, 2012.

As a response to these criticisms, in December 2012, President Putin requested that the Russian government develop a set of measures to improve the arbitration process. The framework for reform was prepared by the Ministry of Justice of Russia with the participation of Debevoise lawyers and in consultation with the Ministry of Economic Development of Russia, the Chamber of Commerce and Industry of Russia (“TPP”), and the Russian Union of Industrialists and Entrepreneurs. That framework was then used as the basis for development of the draft Law on Arbitration and the Associated Law in January 2014, which were submitted to the Russian Duma in May 2015.

LEGAL FRAMEWORK FOR ARBITRATION FOLLOWING THE ADOPTION OF THE LAWS

The Law on Arbitration governs both international commercial arbitration and arbitration of domestic disputes in Russia, while the ICA Law remains in force, as amended by the Associated Law.

Changes to the form of arbitration agreements

The Law on Arbitration introduces changes to the formal requirements for arbitration agreements.

Under the new regulatory framework, an arbitration agreement may be concluded by an exchange of legal process documents, including a statement of claim and statement of defense (previously only envisaged in the ICA Law), or by its inclusion in the rules of a trading platform or clearing rules (previously only envisaged in the Law on Arbitral Tribunals). The requirement for conclusion of an arbitration agreement in electronic form has also been updated to allow execution by an exchange of messages via communication channels permitting authentication of the source of the document.

The Laws govern the procedure for concluding an arbitration agreement for the purpose of resolving corporate disputes in accordance with the relevant arbitration rules (see below). Such an agreement must be concluded by the legal entity itself, all shareholders⁶ of the legal entity, and other persons who are claimants or respondents in the dispute in question. Alternatively, the agreement

⁴ Order No. 8141/12 of the HAC dated August 16, 2012.

⁵ Ruling No. 1884/11 of the HAC Presidium dated June 14, 2011.

⁶ The term “shareholders” includes shareholders, members, founders, and any other participants of legal entities.

may be included in the articles of association of a legal entity by unanimous decision of its supreme governing body (other than for joint stock companies with 1,000 or more holders of voting shares or public joint stock companies).

Arbitrability and the procedure for resolving corporate disputes

The Associated Law sets forth a list of disputes that cannot be arbitrated, including:

- insolvency cases;
- disputes over refusal or avoidance of state registration;
- certain disputes on protection of intellectual property rights;
- class actions;
- disputes on privatization of state or municipal property; and
- contract disputes relating to procurement of goods or services needed to meet state or municipal needs.

The Associated Law seeks to provide for arbitrability of most corporate disputes. Consequently, under the new regulatory framework, only the following types of corporate disputes are now deemed non-arbitrable:

- disputes over the convocation of general meetings of participants of a legal entity;
- disputes arising from notarization of transactions involving interests in limited liability companies;
- disputes related to challenges to non-legislative acts, decisions, actions or omissions of state and municipal agencies, public authorities or government officials;
- disputes involving companies of significant importance to national defense and security (does not apply to disputes over the ownership of shares if their sale does not require approval);
- disputes related to (1) acquisition and buyback of outstanding shares by a company; (2) voluntary, mandatory and competitive tender offers; or (3) buyout of shares by a party that has acquired more than 95% of the shares of a public company; and
- disputes related to expulsion of shareholders of a legal entity.

Most corporate disputes that are considered to be arbitrable may only be resolved through arbitration administered by a permanent arbitration institution that has adopted rules on arbitration of corporate disputes.

The Laws also provide that certain corporate disputes can be heard in the absence of rules on arbitration of corporate disputes, such as:

- disputes over ownership of shares or interests in charter/share capital and over creation of encumbrances and exercise of the rights arising therefrom (other than disputes arising from activities of depositaries in connection with rights to securities or from division of inherited or joint marital property); and
- disputes arising from activities of shareholder registrars.

The rules on arbitration of corporate disputes must include the duty of the permanent arbitration institution to notify the legal entity in respect of which a corporate dispute has arisen that a claim has been filed and to send it a copy. The Law on Arbitration places a responsibility on the legal entity itself to notify all shareholders, the shareholder registrar, and/or the depositary and to provide them with a copy of the statement of claim. The shareholders of a legal entity may join the arbitration at any stage, but may not raise objections or challenge procedural action that took place prior to their joining.

We expect that existing arbitration institutions will soon adopt the rules on arbitration of corporate disputes. The Laws provide that arbitration agreements relating to corporate disputes may be concluded after February 1, 2017.

Authorities to assist with and supervise arbitration

Prior to the adoption of the Law on Arbitration, no authorities existed to assist and supervise arbitral tribunals in Russia (as provided by Article 6 of the UNCITRAL Model Law); for international commercial arbitration, such functions were performed by the President of the TPP. The law governed only the enforcement procedure and the procedure for challenging decisions of arbitral tribunals handed down in Russia. The new legislation invests commercial (*arbitrazh*) courts and courts of general jurisdiction with the relevant powers (depending on the type of dispute).

A competent court, which is a court located in the jurisdiction where the arbitration takes place, has the following powers to provide assistance and supervision to the arbitral tribunals:

- Appointment of an arbitrator on application of either party if the parties have not agreed on any specific procedure for appointment of arbitrators (for example, by the relevant body of the arbitration institution) and (1) the other party has not appointed an arbitrator within one month after receiving such request; (2) two arbitrators have not appointed a third one within one month; or (3) the parties have not agreed on the appointment of a single arbitrator. A competent court can also appoint an arbitrator if the procedure for the appointment is not observed by the parties, arbitrators, or a third party, including the arbitration institution.
- Hear a challenge to an arbitrator, if the party challenging the arbitrator petitions the court within one month after receiving notice that its challenge has been denied.
- Termination of the mandate of an arbitrator at the request of either party if the arbitrator does not recuse himself due to inability to participate in the proceedings or failure to take part in the proceedings for an unreasonably lengthy period, and there is no agreement between the parties to terminate the mandate of an arbitrator on such grounds.
- Decide whether the arbitral tribunal has jurisdiction, on application of either party.

The parties to an arbitration proceeding administered by a permanent arbitration institution may by express agreement, remove from a competent court the right to exercise the above-listed powers.

The Laws also establish a procedure for granting of interim relief by an arbitral tribunal and pre-action attachments and injunctions by a permanent arbitration institution (if provided for in the arbitration agreement). However, the regulatory framework that existed prior to the reform, which did not provide for enforcement of orders of both domestic and foreign arbitral tribunals granting interim relief, has not changed.

Assistance of state courts in obtaining evidence

The Associated Law introduces amendments to the APC and the CPC regarding the procedure for the application of an arbitral tribunal (but not an ad hoc arbitral tribunal), or a party to arbitration which has received a corresponding request from an arbitral tribunal, seeking assistance in obtaining evidence from a state court. The competent court in this instance is a court located in the same jurisdiction as the requested evidence.

The request must be fulfilled within 30 days of receipt and may be denied only on the grounds set forth in the Associated Law, specifically:

- assistance in obtaining such type of evidence is not contemplated by the procedural legislation governing evidence gathering by state courts;
- fulfilment of the request may violate the rights or lawful interests of third parties not involved in the proceedings;
- the dispute is not arbitrable; and
- the request requires access to state, proprietary, commercial, banking, or other secrets protected by law.

A court decision denying the request for assistance in obtaining evidence cannot be appealed.

Creation and functioning of permanent arbitration institutions

Pursuant to the Law on Arbitration, permanent arbitration institutions must be created exclusively by non-commercial organizations and may only operate on the basis of an act of the Government of the Russian Federation. The relevant approval is to be issued in accordance with the recommendations of the Council on the Development of the Arbitration Process, to be established by the Ministry of Justice of Russia. In addition to meeting the formal criteria (e.g., compliance of the rules of the permanent arbitration institution with the law, existence of a recommended panel of arbitrators, and accuracy of information), the non-commercial organization must also meet reputational requirements, taking into account nature and scale of its operations and identities of its founders and members. The International Commercial Arbitration Court and the Maritime Arbitration Commission of the Chamber of Commerce and Industry of the Russian Federation are exceptions to this rule and do not require a government act to continue their operations, but still have to comply with the criteria stipulated in the Law on Arbitration.

The Law on Arbitration prohibits establishment of permanent arbitration institutions by certain noncommercial organizations (such as government corporations and barristers' chambers).

The law also prohibits the activities of permanent arbitration institutions in cases of conflicts of interest, i.e., hearing of disputes in which one of the parties is (1) the noncommercial organization that established the arbitration institution; (2) its founder or a person able to direct the actions of such noncommercial organization, or (3) a person whose competencies include matters relating to the

appointment, recusal, or termination of the mandate of arbitrators (as well as such person's immediate relatives or any organization in which such person has the right, directly or indirectly, to control more than 50% of the votes or appoint/elect the sole executive body and/or more than 50% of the collective executive body). The rules of the arbitration institution may provide for other conflict of interest situations.

Nevertheless, existence of a conflict of interest during the hearing of a dispute does not itself serve as a special ground to set aside or deny enforcement of the decision.

Permanent arbitration institutions develop and perform their activities in accordance with arbitration rules, and they may develop different sets of rules for different cases, including: international commercial arbitration, domestic dispute arbitration, expedited arbitration, and arbitration of specific types of disputes, such as corporate disputes.

Functioning of foreign arbitration institutions in Russia

Foreign arbitration institutions may also acquire the status of a permanent arbitration institution in Russia if they obtain approval on the basis of an act of the Government of the Russian Federation. There is only one condition for obtaining such approval: the foreign arbitration institution must possess a "widely acknowledged international reputation."

Establishment of requirements for arbitrators and recommended lists of arbitrators of permanent arbitration institutions

Another innovation of the Law on Arbitration is the establishment of requirements for arbitrators and recommended lists of arbitrators of permanent arbitration institutions.

An arbitrator must be over the age of 25 and legally capable to act, with no unexpunged or outstanding convictions, who has not been found liable for any offenses incompatible with his/her professional activities. A sole arbitrator, the president of an arbitral tribunal, or (if the parties waived such requirements for the president) at least one of the arbitrators must have received a law degree in Russian Federation or have his/her foreign law degree recognized in the Russian Federation.

Every permanent arbitration institution must have a recommended list of arbitrators containing no less than 30 members. However, the parties to arbitration are free to appoint as an arbitrator any person that meets the above-

mentioned requirements, even if such person is not included in the recommended list of the permanent arbitration institution.

The following requirements apply to the recommended list of arbitrators of a permanent arbitration institution: (1) at least one-third of the panel must be comprised of persons with Russian academic credentials in a discipline approved on the basis of the recommendations of the Council on the Development of the Arbitration Process by the Ministry of Justice of Russia; and (2) one-half or more of the arbitrators must have at least 10 years' professional experience as an arbitrator, or as a judge of a federal state court or constitutional/statutory court of a constituent body of the Russian Federation, or as a magistrate. In addition, one individual cannot be on the arbitrator panels of more than three permanent arbitration institutions.

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We would be happy to answer any questions you may have regarding the above.