Andrey Gorodissky & Partners

Overview of the New Legislation on Arbitration in Russia

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The Law "On Arbitration (Arbitral Proceedings) in the Russian Federation" ("Arbitration Law") and the Law "On Amendments to Some Legal Acts of the Russian Federation and on Repeal of Article 6, part 1, paragraph 3 of the Federal Law "On Self-Regulatory Organizations" Due to Adoption of the Federal Law "On Arbitration (Arbitral Proceedings) in the Russian Federation", which had been under lively discussion among the legal community, were adopted by the Parliament and signed by the President on December 29, 2015[1].

Both conceptually and practically, the new legislation can be regarded as a significant move forward in development of arbitration in Russia, which sets the fundamental basis for improvement and unification of law enforcement practices in the area of arbitral proceedings.

In this Overview, we dwell on the novelties which seem to be most important.

General description

The old legislation embodied the principle of maximum freedom of action with respect to formation and activities of arbitral institutions. However, within a relatively short time the following defects in application of such liberal approach in the Russian reality were revealed: the number of existing arbitral institutions became unreasonably excessive, on numerous occasions they failed to ensure adequate dispute resolution proceedings and the key principles of equality and unbiasedness, and served certain business interests rather than provided a worthy alternative to courts. The list of arbitral institutions recorded by the Arbitrazh (Commercial) Court of Moscow provides a sufficient illustration: as per today, there are about 500 permanent arbitral institutions in the Moscow area alone. Many of them have been established by major Russian companies and banks (or their affiliates) or other organizations concentrating their operations in commercial sectors and being rather distant from jurisprudence.

All this finally brought about the awareness of required improvements in this sphere, first of all with respect to formation of arbitral institutions (so called institutional arbitrations).

The new legislation upholds the historically developed regulatory dualism: while international commercial arbitration will still be regulated by the specifically dedicated law ("ICA Law")[2], which will continue in effect subject to some revisions and amendments, domestic arbitral proceedings will be governed by the Arbitration Law being successor to the Federal Law "On Arbitral Tribunals in the Russian Federation", No. 102-FZ. However, now certain provisions of the Arbitration Law will extend to international commercial arbitration which is conducted in Russia. These are the provisions on

[1] According to the Laws, most of the novelty provisions will take effect as of September 1, 2016.
[2] The RF Law "On International Commercial Arbitration" of July 7, 1993, No. 5338-I.

formation and activities of arbitral institutions, requirements applicable to arbitrators, liability of arbitrators and arbitral institutions and some other matters.

It is worth mentioning that the Arbitration Law embodies many of the approaches and rules of the ICA Law, thus aligning regulations of domestic and international arbitration proceedings.

The changes made to the ICA Law are not far-reaching. Mostly, they purport to make the ICA Law, which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, consistent with the currently effective version of the Model Law (i.e. now the ICA Law is adjusted for the amendments to the Model Law made at the 39th session of the UN Commission on International Trade Law).

Analysis of Some Interesting and Important Provisions

Arbitral institutions and ad hoc tribunals[3]

Authorization-based procedure. Requirements

The key novelty of the Arbitration Law is introduction of an authorization-based procedure for formation of permanent arbitral institutions in Russia: now, an institutional arbitration may only be established at a non-commercial organization pursuant to an authorization of the RF Government granting such non-commercial organization the rights to perform functions of an institutional arbitration.

The RF Government issues such authorizations upon recommendations of the Council for Improving Arbitral Proceedings[4] ("Council"), which provides them after determining whether or not the requirements set by the Arbitration Law (see below) are met.

In order for a foreign arbitral institution to act as an institutional arbitration in Russia, it also needs to obtain an authorization of the RF Government. This does not mean however that a foreign arbitral institution having no such authorization will not be able to conduct proceedings in Russia. Arbitral awards rendered in Russia under administration of a foreign arbitration having no authorization of the RF Government will be regarded in Russia as ad hoc tribunal awards for the purposes of the Arbitration Law.[5] Although arbitral proceedings conducted in Russia under administration of a foreign institutional arbitration are very rare, the above-mentioned new provisions should be taken into consideration when determining the terms of arbitration agreements.

It should be noted that the Arbitration Law sets different requirements for formation of Russian institutional arbitrations and for recognition of foreign arbitrations as institutional in Russia.

A Russian non-commercial organization seeking an authorization to perform functions of an arbitral institution should ensure that the following requirements are met:

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[3] An ad hoc tribunal (a tribunal formed by the parties for resolution of a specific dispute, as defined by the Arbitration Law) is a body conducting arbitration proceedings without being administered by a permanent arbitral institution.

[4] The main rules of formation and activities of the Council are set forth in the new Arbitration Law and should be more specifically developed in regulations of the Ministry of Justice.

[5] The Law draws a fundamental distinction between the status of an institutional arbitration and that of an ad hoc tribunal, which will be discussed herein below.

1) The rules of such arbitral institution and its list of recommended arbitrators should be in compliance with the Arbitration law;
2) The information provided with respect to the non-commercial organization establishing such arbitral institution should be accurate;
3) The non-commercial organization's reputation, scale and nature of its operations, with due regard to its founders (members), should ensure efficient management of the arbitral institution, including funding of its formation and proceedings, and its activities aimed at further developing arbitration in Russia.

Upon receipt of the required authorization a permanent arbitral institution may start performing its functions provided that it has filed its rules of arbitration with the Ministry of Justice, posted them on its official website and has given notice thereof to the Ministry of Justice.

With regard to foreign arbitrations, the only requirement is that they should have an internationally recognized reputation.

Obviously, the reputation requirement gives some room for subjective judgement in determining whether or not such requirement is met. Therefore, during development of the draft law some specialists voiced concerns that the government control over formation and activities of arbitral institution was going to be excessive. Most likely, it will be clear relatively soon whether such concerns are justified. It should however be mentioned for fairness' sake that the legislator tried to limit discretionary powers of government authorities. It is provided in particular that the Council, on whose recommendations the RF Government will issue or deny an authorization, should be formed in a way that only 1/3 of its members are government employees while the other members are representatives of the legal, academic and business communities, Russian associations of entrepreneurs, chambers of commerce and industry and other persons. According to the Arbitration Law, denial of an authorization for performing functions of an institutional arbitration can be challenged in court.

The Arbitration Law allows for involuntary dissolution of an arbitral institution. If an arbitral institution is found guilty of committing repeated gross violations of the Arbitration Law, that have caused in particular a substantial damage to rights and legal interests of the parties to arbitration proceedings or other persons, the Ministry of Justice will order the relevant non-commercial organization to dissolve its arbitral institution within a month of the date of the order; if the order is not complied with, the Ministry of Justice will request a commercial (arbitrazh) court to dissolve such arbitral institution.

Transitory mechanism

To bring activities of arbitral institutions in compliance with the new requirements, the Arbitration Law provides for a transitory period during which the already existing institutions wishing to maintain their status should obtain an authorization of the RF Government. If an institution fails to obtain such authorization before expiration of the transitory period, it will not be able to continue administering arbitration proceedings. According to the Arbitration Law, the transitory period is 1 year after adoption by the RF Government of regulations setting the procedure for obtaining the authorization.

From a practical perspective, the question is what would happen to the already existing arbitration agreements if the institutions agreed thereby fail to obtain such authorization. As a tentative solution to this issue, the Arbitration Law allows arbitral institutions having the required authorization to act as successors to other institutions who have not obtained the authorization (predecessor institutions).

According to the Arbitration Law, a predecessor institution may have one successor only. When applying for an authorization to act as a successor institutional arbitration, such institution should submit *inter alia* a consent of the legal entity, which established the predecessor institution, for performance by the new arbitration of functions of the predecessor institution under the arbitration agreements submitting disputes to the predecessor institution. The rules of the successor institution should provide that the rules of the predecessor institution shall apply to the already existing arbitration agreements and pending arbitration proceedings under such agreements.

If there is no successor institution, the Arbitration Law provides that a dispute can be examined under an already existing arbitration agreement by the institution provided thereby, who will act in such case in the capacity of an ad hoc tribunal.

Generally, the transitory provisions of the Arbitration Law appear to be rather underdeveloped and may bring about certain difficulties in practical application.

Therefore, when currently developing arbitration agreements, one should very carefully select an arbitral institution and, ideally, choose an arbitral institution which will most likely be authorized by the RF Government or an institution which is exempt from such authorization (see below).

Institutional arbitrations and ad hoc tribunals

When setting more stringent requirements for formation and activities of arbitral institutions, the legislator saw to it that this would not lead to excessive use of ad hoc tribunals, in particular, with the view of evading the new requirements. The legislator obviously gives precedence to institutional arbitrations over ad hoc tribunals, which is evidenced specifically by the following limitations on ad hoc tribunals:

1) No corporate disputes may be examined by an ad hoc tribunal;
2) An ad hoc tribunal has no right to seek assistance of a court in collection of evidence;
3) Arbitration agreements providing that an award of an ad hoc tribunal shall be final are not valid (such provision may validly be included in an arbitration agreement choosing an institutional arbitration and in such case an award of such arbitration cannot be overruled by a court's decision).

ICAC and MAC. Competence and requirements

The ICA Law preserves the provisions (with some editorial changes) on the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Chamber of Commerce and Industry of the Russian Federation, which are attachments to the ICA Law. Obviously, this evidences that the legislator recognizes the high reputation gained by ICAC and Mac over 80 years of their existence. The ICA Law does not however provide for the ICAC/MAC monopoly over examination of international commercial disputes, and the above-mentioned provisions in no way prevent other arbitral institutions from examining such disputes.

Some changes have been made to the provisions determining the categories of disputes which can be submitted to ICAC/MAC or other international commercial arbitrations. Now, international commercial arbitrations are competent to examine, in addition to disputes where at least one of the parties has its business outside Russia, also disputes where the place of performance of a substantial part of the obligations arising from the parties' relationship or the place with which the subject of the dispute is

most closely connected is abroad. Furthermore, an international commercial arbitration is competent to examine disputes arising in connection with foreign investments in Russia or Russian investments outside Russia.

Apart from that, ICAC and MAC have the right to examine domestic disputes as well, provided that examination of such disputes will be subject to the Arbitration Law (and not the ICA Law). In practical terms this means that existing arbitration agreements submitting disputes to ICAC will remain valid even if a dispute does not qualify for an international and is deemed domestic. Such dispute will still fall under the competence of ICAC and can be examined by it.

Both ICAC and MAC are exempt from the requirement to obtain the RF Government authorization for performance of functions of an institutional arbitration. However, these forums should take into account the novelty provisions and fulfil some requirements of the Arbitration Law to ensure proper functioning in compliance with the updated legislation, such as:

- To bring their lists of recommended arbitrators and their rules of arbitration in compliance with the Arbitration Law;
- To adopt and file the rules of arbitration for corporate disputes (in order to be able to examine such disputes)[6].

Lists of recommended arbitrators

The Arbitration Law requires that an arbitral institution should maintain and post on its website a list of recommended arbitrators, which should include at least 30 arbitrators. An arbitral institution may prepare separate lists for domestic and international arbitrations or a consolidated list of arbitrators. In each list of recommended arbitrators, at least 1/3 of arbitrators should have an academic degree awarded in Russia for a scientific profession included in the list approved by the Ministry of Justice on recommendation of the Council, and at least 1/2 of arbitrators should have experience resolving civil law disputes as arbitrators or as court judges during at least 10 years preceding the date of inclusion in the list of recommended arbitrators.

No arbitrator can be included in the lists of more than 3 arbitral institutions. During the discussion of this limitation, representatives of the Ministry of Justice opined that it would be imposed on institutional arbitrations rather than on arbitrators: the purpose of the limitation is to preclude inclusion of recognized professionals (who will not be fully engaged in activities of the arbitral institution) purely for the purpose of formal compliance with the requirements for such lists. The Ministry of Justice also assumes that the above limitation does not apply to inclusion of arbitrators in the lists of foreign arbitral institutions.

However, keeping in mind the past experience showing that Russian courts not always applied properly the laws and provisions on arbitral proceedings, the concerns that this new rule may create additional problems in practice do not appear to be unreasonable. The matter is that one of the grounds for setting aside or for refusing to enforce an arbitral award is non-compliance of the panel of arbitrators with the parties' agreement or the law. It appears that, in light of the above ground, unfair parties to a dispute may try to refer to the 3 lists limitation to avoid enforcement of arbitral awards.

[6] The new rules of ICA and MAC should be approved, posted on their websites and filed with the Ministry of Justice by February 1, 2017.

As mentioned above, the law provides that lists of arbitrators used by arbitral institutions are merely recommendations. In furtherance of this provision the law prohibits arbitral institutions from imposing a condition that parties to a dispute may only choose arbitrators from among those included in the list of recommended arbitrators. This prohibition does not however apply where appointment of listed arbitrators is required by the parties' agreement or where arbitrators are appointed by an arbitral institution in accordance with its rules.

Arbitrability of disputes

General comments

It is vitally important to be able to determine what categories of disputes can be settled by arbitration. Non-arbitrability of a dispute is an unconditional ground (which is applied on a court's initiative) to set aside an arbitral award or to refuse to recognize it. As it is well known, the case law on this issue was far from being consistent, which brought about legal uncertainties and hampered the development of arbitration process as a valid alternative to court proceedings.

In the new legislation an attempt is made for the first time to systemize non-arbitrable disputes. The Russian Code of Arbitration Procedure ("CAP") and the Russian Code of Civil Procedure ("CCP") now have new articles listing non-arbitrable disputes including in particular:

- Corporate disputes identified in part 2 of the updated Article 225.1 of CAP (disputes over convocation of the general meeting; disputes arising from notarization of transactions involving shares in LLC; disputes to challenge non-regulatory legal acts, resolutions or action (inaction) of government authorities, etc.;
- Disputes arising from relations regulated by the Russian laws on privatization of State-owned or municipal property or by the Russian laws on government or municipal procurement contracts for purchase of goods, works, services;
- Disputes over environmental damages;
- Disputes over compensation for personal injury;
- Disputes arising from employment, inheritance or family relations, including disputes arising from disposition of an heir's property by his guardians or trustees (except for disputes over division of marital property).

It should be noted that the lists of non-arbitrable disputes provided in the above Codes are non-exhaustive and other federal laws may identify additional categories of non-arbitrable disputes.

Arbitrability of corporate disputes

This issue deserves a separate detailed discussion in light of the courts' current approach to the existing legal regulation, which seems to be criticized reasonably.[7]

Now, most of corporate disputes can be settled by an institutional arbitration (no corporate dispute may be settled by an ad hoc tribunal) by virtue of an express provision of the law.

[7] For more information see e.g. the articles by AGP partner Dmitri Lubomudrov: *Case Law on Matters of International Arbitration. Part 1* (Legal Insight № 1(7) 2012; http://www.agp.ru/publications/4161/), *Case Law on Matters of International Arbitration. Part 2* (Legal Insight №2(8) 2012, http://www.agp.ru/publications/4162/) and *Once Again on N. Maximov v. NLMK OJSC* (Legal Insight № 7(13) 2012 (http://www.agp.ru/publications/4175/).

With regard to a substantial part of corporate disputes, additional requirements are set. First of all, certain categories of corporate disputes may only be settled by arbitration if all parties to a dispute (a legal entity and its participants and other persons being claimants or defendants) have entered into a relevant arbitration agreement. Apart from that, most of corporate disputes referred to by the law may only be settled by arbitration which is conducted (a) in Russia and (b) in accordance with the approved special rules of arbitration for corporate disputes. These limitations do not apply to:

- Disputes over ownership of shares or participation interests in companies, partnerships or participation units in cooperatives, encumbrances thereon or exercise of rights conferred thereby, in particular, disputes arising from purchase and sale agreements or from levy of execution on shares, participation interests or units;
- Disputes arising from recording of rights to shares or other securities by holders of registers of security holders, or from exercise and performance of other rights and duties by holders of such registers, as provided for by the federal law, in connection with placement and/or trading of securities.

With regard to certain types of corporate disputes, the law expressly prohibits arbitration due to a special nature of such disputes or parties thereto. Such disputes include, in particular:

- Disputes over convocation of the general meeting;
- Disputes to challenge non-regulatory acts, resolutions or action (inaction) of government authorities or public organizations;
- Disputes relating to legal entities who are essential to ensuring national defense and security;
- Disputes over expulsion of participants, etc.

Arbitration agreement

Both the Arbitration Law and the ICA Law require *pro-arbitration* interpretation of an arbitration agreement, i.e. in case of any doubts an arbitration agreement should be interpreted to the effect that it has been validly made. This is an important novelty because currently courts admit a literal interpretation of arbitration agreements and not infrequently, even if there is an obvious clerical error, such interpretation is made not in favor of the conclusion that the agreement has been validly made by the parties.

Another novelty which is worth mentioning is a distinction between an agreement made directly by and between the parties and rules of arbitration incorporated in an arbitration agreement by reference. Although both options constitute an arbitration agreement of the parties, the Arbitration Law determines certain situations where deviations from the rules set by the Law are only permitted if the parties have expressly provided so in their arbitration agreement. This refers to the possibility:

- To agree that an arbitral award shall be final (i.e. to preclude challenging thereof in court)[8];
- To waive the right to go to a court with respect to a number of questions, mostly concerning the procedure (taking measures for appointment of arbitrators, challenging an arbitrator, termination of powers of an arbitrator, determination of competence of an arbitral forum);
- To exclude oral hearings in arbitration proceedings;

[8] Unlike a court judgment, an arbitral award may anyway be challenged only for certain limited grounds.

- To set a condition that arbitrators may only be chosen from among those included in a list of recommended arbitrators.

Also, the Law now sets the rule, according to which an arbitration agreement remains valid if a party or parties to a primary obligation have been replaced.

Assistance of a court in collection of evidence

An arbitration being a non-state body is deprived of some opportunities that are afforded to courts, in particular an opportunity of enforcing some powers essential to proper resolution of a dispute. First of all, this is applicable to collection of evidence required for an arbitration process.

While providing, as before, that an arbitration and/or a party to a dispute, acting with consent of an arbitration, may request a court for assistance in collection of evidence, the new legislation supplements these provisions (which previously were declarative to a large extent) with a detailed procedure for fulfillment of such requests by courts.

It should be noted here that an opportunity to request a court's assistance is only afforded to permanent arbitral institutions settling disputes in Russia (ad hoc tribunals are not afforded such opportunity).

Provisions regulating fulfillment of requests for assistance in collection of evidence have been added to the above-mentioned Codes. CAP has a new Article 74.1[9], according to which a request of an arbitral institution should be examined and fulfilled (or rejected) within 30 days upon receipt by a court.[10] The list of pieces of evidence is not limited and may include, depending on circumstances, written evidence, exhibits, other documents and materials as provided by CAP.

A court will reject a request of an arbitral institution (or a party to a dispute) if such request has been made with respect to pieces of evidence not provided for by CAP or with respect to a dispute which is non-arbitrable according to part 2 of Article 33 of CAP. A request of an arbitral institution (or a party to a dispute) will also be rejected if it relates to information constituting a State secret and/or official, commercial, banking secret or other secret protectable by law with respect to persons who are not involved in the arbitration proceedings, or if fulfillment of such request may violate rights and legal interests of third parties who are not involved in the arbitration proceedings.

Immunity and liability of arbitrators and arbitral institutions

The new laws set a number of important rules concerning immunity and liability of arbitrators and arbitral institutions.

It is provided that an arbitrator may not be interrogated as a witness with respect to information or circumstances that have come to his knowledge during arbitration proceedings.

Generally, an arbitrator bears no civil law liability toward the parties to a dispute for non-performance or improper performance of arbitrator's functions, except for liability adjudicated in a civil action for compensation of damage caused by a crime committed by an arbitrator who has been found guilty in criminal proceedings. However an arbitral institution may provide in its rules that an arbitrator's fee will be reduced if such arbitrator has failed to perform his functions properly.

[9] Similarly, a new Article 63.1 has been added to CCP.

[10] A request should be submitted in the manner described in Article 66 of CAP to a commercial (arbitrazh) court of a constituent of the Russian Federation where the requested evidence is situated.

Civil law liability of a non-commercial organization, which has established an arbitral institution, to the parties of arbitration proceedings is limited to reimbursement of damages caused by non-performance or improper performance by the institution of its administrative functions or duties provided for by the rules of the institution due to willful intent or gross negligence. Rules of an arbitral institution may provide for a greater liability of the non-commercial organization. A non-commercial organization bears no civil law liability toward the parties to arbitration proceedings for any damages caused by an arbitrator. An arbitral institution may be voluntarily insured against liability toward the parties to arbitration proceedings.

Enforcement of an arbitral award

The provisions on enforcement of arbitral awards have been amended to a small extent. As before, it is required that an arbitral award must be voluntarily complied with immediately and, if need be, a court can enforce an arbitral award upon request of an interested party by issuing a writ of execution. A request may only be rejected for limited reasons permitted by the law (the list of such reasons has not changed substantially).

A significant novelty relates to the time limit for examination of requests for enforcement of an arbitral award. The time limit has been reduced from 3 months to 1 month[11].

Apart from that, the legislator sets a specific rule applicable to situations where the subject to arbitration proceedings is related to determination of rights to objects requiring government registration or other title establishing registration (recordation in legally valid registers). According to the rule, an arbitral award may only serve as the ground for recordation in such registers if a writ of execution has been issued by a competent court. Obviously, this requires a court's enforcement order as a prerequisite for enforcement of an arbitral award by making records in registers. The legislator seems to set up safeguards against attempts to unlawfully acquire property (such attempts were repeatedly seen in the past).

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[11] This change will take effect as of January 1, 2017.

Contact information

Ivan Zykin,

Partner, ScD (Law), Professor, Deputy Chairman of ICAC at the RF CCI

Andrey Gorodissky,

Managing Partner, Acting Arbitrator in ICAC at the RF CCI

Dmitri Lubomudrov,

Partner, Attorney-at-Law

Alexey Gorodissky,

Partner, Attorney-at-Law, Trademark Attorney,

Jose Konstantino Tobar Kirillov,

Lawyer

* * *

Andrey Gorodissky & Partners

Znamenka 13, bldg. 3, 3rd floor, Moscow, 119019, Russia.
Tel.: +7 (495) 933-75-67, 691-98-13 Fax: +7 (495) 697-92-26.
E-mail: office@agp.ru. Internet: http://www.agp.ru.