LAW OFFICES

EGOROV PUGINSKY AFANASIEV & PARTNERS

NEWSLETTER

The purpose of this memo is limited to serve as a source of information and/or educative material. The information presented in this memo does not constitute or contain legal advice. EPA&P is not liable for any negative consequences related to use of this memo by any parties.

FEBRUARY 2016

Russian Arbitration Reform: Key Provisions

On 29 December 2015, the Russian President signed the Federal Law "On Arbitration in the Russian Federation" ("The Law on Arbitration") and Federal Law "On Amendments to Certain Laws of the Russian Federation…" providing for fundamental reform of domestic arbitration.

The new rules come into effect on 1 September 2016. Below is an overview of the key provisions of the reform.

I. REGISTRATION OF ARBITRAL INSTITUTIONS

The Law on Arbitration introduces a revolutionary provision allowing Russian arbitral institutions to be set up as part of **non-profit organizations** ("**NPO**") **entitled to act as arbitral institution**. The NPO shall be granted the right to act as arbitral institution **by a Russian Governmental act** on the basis of recommendations from the Board for Improvement of Arbitration **subject to the following requirements**:

- ✓ Uniformity of the arbitration rules and the Law on Arbitration;
- ✓ Accuracy of the information presented on the NPO and its founders (shareholders);
- ✓ NPO's reputation, the scale and nature of its activities making it possible to ensure a high level of administration of the arbitral institution. NPO is expected to be established based on the reputation of the arbitrators on its list;
- ✓ Keeping of the list of recommended arbitrators of at least thirty people and releasing thereof for information purposes subject to each candidate's written consent to be put on the list. However, an arbitrator may not be on the lists of more than three arbitral institutions.

An exception to the rule on provision of a relevant Russian Governmental act shall be made **for the International Commercial Arbitration Court (MKAS) and the Maritime Arbitration Court at the Chamber of Commerce and Industry (MAK) only**.

Rules for mandatory licensing by the Russian Government for acting as arbitral institution at the territory of Russia also apply to **foreign arbitral institutions**. The only requirement for a foreign arbitral institution is **widely recognized international reputation.** Importantly, should such arbitral institute not be licensed by the Russian Government, the awards it issues in its Russia-seated proceedings, as well as such proceedings themselves, shall qualify as *ad hoc* arbitral awards and *ad hoc* arbitrations.

II. *AD HOC* ARBITRATION

The Law on Arbitration provides for a number of restrictions for *ad hoc* arbitrations:

- ✓ corporate disputes cannot be referred to an *ad hoc* arbitration;
- ✓ *ad hoc* arbitral tribunals do not have the right to request court assistance in the procurement of

The purpose of this memo is limited to serve as a source of information and/or educative material. The information presented in this memo does not constitute or contain legal advice. EPA&P is not liable for any negative consequences related to use of this memo by any parties.

evidence;

- ✓ *ad hoc* arbitration parties do not have the right to enter into an agreement to waive the possibility to request court assistance (**see Section IV below**);
- ✓ *ad hoc* arbitration parties' agreement on the final decision of the arbitral award shall not be valid. The provisions of Art. 34(2) of the UNCITRAL Arbitration Rules are, therefore, in contradiction with the Law on Arbitration. In other words, the party does not lose the right to appeal to the state court to reverse the decision of the *ad hoc* arbitration.

Ad hoc arbitration parties are entitled to delegate certain functions in relation to an *ad hoc* arbitration only to an authorized arbitral institute.

III. ARBITRABILITY OF CORPORATE DISPUTES

The Law on Arbitration expressly provides for **arbitrability** of disputes related to establishing, managing of and participating in Russian companies, where the parties are founders, shareholders or members of the company and the company itself (**corporate disputes**) subject to certain exceptions.

Such disputes may be referred to arbitration provided that **all of** the following conditions are met:

(a) the company, all of its shareholders and other persons acting as claimants or respondents have entered into an arbitration agreement;

(b) the arbitration is administered by an authorized arbitral institution (not *ad hoc* arbitration) under **the rules of corporate disputes arbitration**;

(c) the arbitration must be seated in Russia**.**

The following types of disputes are not arbitrable:

- ✓ disputes on convening of a general meeting;
- ✓ disputes arising out of notarization of the shareholding transactions;
- ✓ disputes related to challenging of non-regulatory legal acts, decisions and actions (omissions to act) of the state bodies, the local authorities, etc.;
- ✓ disputes related to companies of "strategic importance";
- ✓ disputes related to expulsion of a shareholder from a company.

According to the Law on Arbitration, an arbitration agreement may also be entered into by way of incorporation in the **Articles of Association** of a company (except for joint-stock companies having at least one thousand shareholders and public joint-stock companies).

However, such an arbitration agreement would apply to the disputes between shareholders of a company or a company itself **and other persons,** only where such other person has expressed their willingness to be bound by such an arbitration agreement.

IV. INSTITUTE OF COURT ASSISTANCE

The Law on Arbitration introduces a fully-fledged institution of court assistance to arbitral institutions. The parties to arbitration have the right to request court assistance on issues related to:

- the appointment of an arbitrator at the request by either party;
- consideration of a petition to disqualify an arbitrator;
- consideration of a petition to terminate the authority of an arbitrator.

A decision reached by a Russian state court as part of assistance to arbitral institutions shall be **final and binding.**

An important innovation is that parties to arbitration administered by an authorized arbitral institution shall be entitled to reach **an agreement to waive the** possibility of request court assistance on such issues.

V. OTHER INNOVATIONS

Conflict of Interest. The Law on Arbitration contains provisions meant to ensure no conflict of interest between an arbitral institution and the parties to arbitration. However, a conflict of interest by itself shall not automatically lead to denial of enforcement or cancellation of an arbitral award.

Real Estate Disputes. The Law on Arbitration expressly provides that an arbitral award may not serve as ground for an entry to the state register, including Unified State Register of Legal Entities, Unified State Register of Individual Entrepreneurs, the register of registered securities etc. A writ of execution shall be sought from a state court for this purpose.

Arbitrators. One of the innovations is to give the parties the right to appoint a **retired judge** as an arbitrator.

VI. FINAL PROVISIONS

The Law on Arbitration contains detailed final provisions. Specifically, **the following rules** apply once the Law on Arbitration enters into force (1 September 2016):

- the Law on Arbitration shall apply to arbitrations initiated after this date;
- authorized arbitral institutions shall be established in the Russian Federation as per the procedure provided in the Law on Arbitration;
- the arbitration agreements entered into prior to entering into force of the Law on Arbitration **shall remain in force**;
- **validity of an arbitration agreement** and any other agreements entered into by the parties to an arbitration on arbitration issues shall be defined as per the laws effective as of the date of entering into the relevant agreements;
- within **3 months** from the effective date of the Law on Arbitration, the Russian Government shall establish the procedure for processing of applications for the right to act as an authorized arbitral institution;
- where arbitral institutions have failed to comply with the Law on Arbitration within a year from the date of establishing the said procedure by the Russian Government, they **shall lose the right to administer arbitrations**;
- however, if they continue to administer arbitrations, their activities **shall be ceased**, and their arbitral awards shall be deemed made **in violation of the procedure** provided in the Law on Arbitration;
- special rules have been provided for the International Commercial Arbitration Court (MKAS) and the Maritime Arbitration Court at the Chamber of Commerce (MAK). They shall bring their activities in compliance with the Law on arbitration **no later than on 1 February 2017.**

The purpose of this memo is limited to serve as a source of information and/or educative material. The information presented in this memo does not constitute or contain legal advice. EPA&P is not liable for any negative consequences related to use of this memo by any parties.

RECOMMENDATIONS

It is important to take the above innovations into account when entering into arbitration agreements, as well as in the context of corporate relations (in particular, when purchasing shares / stocks in those companies, whose Articles of Association provide for referral of disputes to arbitration courts).

In addition, in light of the final provisions of the Law on Arbitration, adoption of the procedure for processing of applications for the right to act as a authorized arbitral institution by the Russian Government should be monitored.

Reviewed by Evgeny Gurchenko, Dmitry Kaysin,

Svetlana Popova, Ays Lidzhanova and Anastasia Cheredova

Contacts

Ivan SMIRNOV
Managing Partner
St Petersburg Office
+7 (812) 322 9681
ivan_smirnov@epam.ru

Evgeny GURCHENKO
Senior Associate
Litigation Team
+7 (812) 322 9681
evgeny_gurchenko@epam.ru

Subscription

The purpose of this document is to serve as a source of information and as educative material. The information provided herein does not contain or constitute legal advice. The Firm shall not be liable for any negative implications due to the use of this alert by any parties.

You have received this information because this topic may be of interest to you. If you have received this information in error, we would like to extend our apologies and ask that you send us an unsubscribe request.

To unsubscribe from Egorov Puginsky Afanasiev & Partners' mailing list, please reply to this email with Unsubscribe as email subject.

To subscribe to our legal alerts, please reply to this email with Subscribe as email subject.

The purpose of this memo is limited to serve as a source of information and/or educative material. The information presented in this memo does not constitute or contain legal advice. EPA&P is not liable for any negative consequences related to use of this memo by any parties.