ALERT ON INSTITUTIONAL ARBITRATION IN RUSSIA

First results of arbitration reform in Russia

10 November 2017

Dear Ladies and Gentlemen,

We would like to inform you on the current state of institutional arbitration in Russia as changed in the frames of Russian arbitration law reform effective from 1 September 2016[1]. The arbitration law reform was aimed at eliminating so-called "pocket" arbitration institutions by introducing licensing of Russian arbitration institutions willing to permanently arbitrate in Russia.

Licensing of domestic arbitration institutions

In accordance with the new Federal Laws on arbitration in order to be recognized as a "permanent arbitration institution" in Russia an arbitration institution shall be established by a non-profit organization, which shall obtain a permit (license) from the Russian Government. Starting from 1 November 2017 it is prohibited for arbitration institutions to administer cases in Russia without license. The exceptions were provided by the new Federal Laws to the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC) at the Russian Chamber of Commerce and Industry, which do not require any licenses. In addition to obtaining such license, an arbitration institution shall deposit its rules with the Ministry of Justice of the Russian Federation.

Several Russian non-profit institutions have successfully obtained such licenses, and respective arbitration institutions have duly deposited their rules with the Ministry of Justice of the Russian Federation. These are the Arbitration center at the Russian Union of Industrialists and Entrepreneurs (RSPP) (Order of the Russian Government dd. 27 April 2017 No. 798-r) and Arbitration Center at the Institute of Modern Arbitration (Order of the Russian Government dd. 27 April 2017 No. 799-r). Other non-for-profit institutions, such as Russian Arbitration Association (RAA), are expected to apply for licenses as well.

After 1 November 2017 non-licensed arbitration institutions are not allowed to administer disputes in Russia and shall be terminated (either voluntarily or compulsory under the court judgment). Arbitral awards rendered in the auspices of non-licensed arbitration institutions shall be deemed as *ad hoc* awards. The parties who have agreed to arbitrate disputes by non-licensed arbitration institutions (either by domestic or foreign arbitration) are invited to re-negotiate arbitration agreements. Otherwise, such arbitration agreement will be deemed concluded in favour of the *ad hoc* arbitration or may be deemed unenforceable, if the dispute falls within the intra-company category of corporate disputes as described below.

[1] Federal Law dd. December 29, 2015 No. 382-FZ "On Arbitration Proceedings (Arbitration Courts) in the Russian Federation" and the Federal Law dd. December 29, 2015 No. 409-FZ "On Amendments to Certain Legislative Acts of the Russian Federation and Repeal of Article 6.1 (3) of the Federal Law on Self-Regulating Organization in Connection with the Adoption of the Federal Law "On Arbitration Proceedings (Arbitration Courts) in the Russian Federation".

Licensing of foreign arbitration institutions

Foreign arbitration institutions willing to arbitrate disputes in Russia after 1 November 2017 shall also obtain a license from the Russian Government. If such license is not obtained, an arbitral award rendered in the auspices of foreign arbitration institutions with the seat of arbitration in Russia shall be considered as an *ad hoc* arbitral award in the sense of Federal Laws.

So far, none of the foreign arbitration institutions obtained such licenses due to existing uncertainties. It is said that Russian authorities require setting up a non-for-profit institution for licensing, even though the only criteria that a foreign arbitration institution shall meet in order to obtain such license as provided by Federal Law is that it shall have a "widely acknowledged international reputation".

Arbitrating corporate disputes

The Federal Laws clarify the uncertainty over arbitrability of various types of corporate disputes, which has existed for several years, by expressly saying that the certain categories of corporate disputes may be subject of arbitration.

In particular, the Federal Laws establish that intra-company disputes (such as disputes arising out of shareholder agreements, articles of association or disputes relating to corporate governance) may be resolved by way of arbitration, if administrated by permanent arbitration institution seated in Russia under the deposited rules for corporate disputes and provided that the company, all its shareholders and other parties to the dispute concluded an arbitration agreement. Thus, there is a clear intention of arbitration reform to keep such categories of corporate disputes inside Russia.

For the time being, there are three arbitration institutions in Russia, which adopted and deposited their rules for corporate disputes, and thus, are able to administer intra-company corporate disputes. These are the International Commercial Arbitration Court (ICAC), Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (RSPP) and Arbitration Center at the Institute of Modern Arbitration as mentioned above.

The other type of corporate disputes relating to title over the shares in Russian company may be resolved by way of arbitration by permanent arbitration institution not necessary with the seat of arbitration in Russia and in accordance with its arbitration rules. Although the intention of the reform was not aimed at keeping such kind of disputes in Russia, it is not clear what happens if a non-licensed foreign arbitration institution administers a corporate dispute relating to the shares in the Russian company with a seat abroad. The Federal Laws do not contain explicit answer to this question and, thus, there is a substantial risk that Russian courts will refuse to enforce such awards, if enforcement is sought in Russia. Another controversial issue, which arose upon implementation of Federal Laws, is whether a dispute relating to SPA over the shares in Russian company, which is not connected to the disputes over the title (such as dispute on collection of penalty), is considered to be a corporate dispute or not. There is no clear answer in new regulation on arbitration, however, recent case law tends not to qualify such disputes as corporate disputes.

The third category of corporate disputes are non-arbitrable, as to certain extent they involve public interest. Non-arbitrable corporate disputes include disputes relating to convening general shareholders' meetings, disputes with public notaries and disputes involving "strategic" legal entities, etc.

Arbitrating Russian disputes by way of international arbitration

There is also a controversial issue on whether a purely Russian dispute between the Russian parties may be heard abroad by the way of international arbitration. The Federal Laws do not expressly provide for any restrictions in this respect, however, there are two opposite approaches on this issue. In accordance with the first approach a purely Russian dispute with no 'foreign' element may not be heard by international arbitration institution. This approach was recently supported by Arbitrazh court of Moscow city in a dispute[2] on recognition of the foreign arbitral award rendered in the auspices of Russia-Singapore Arbitration (an arbitration institution established in Singapore by a Russian individual with unsavory reputation in Russia). Though the main concern of the judge was not to allow recognition of the doubtful award in Russia, the judge's reasoning that Russian disputes may not be heard in international arbitration is quite disputable. Hopefully, this argumentation was canceled by the cassation court, that makes us believe that a second approach, allowing adjudication of Russian disputes in international arbitration, may further be recognized in case law.

The issues raised by this case reveal the difficulties concerning domestic arbitration in Russia. Considering the main aim of the arbitration reform to regulate the institutional arbitration in Russia and provide more certainty to the parties, we hope that further development of case law would elaborate principles for domestic arbitration in Russia in line with the international standards.

Hope that the information provided herein would be useful for you. If any of your colleagues would also like to receive our newsletters, please let us know by sending us his/her email address in response to this message. If you would like to learn more about our Dispute Resolution practice, please visit our website or let us know about your enquiry in reply to this email. We will be glad to provide you more information on our expertise.

If you have any questions, please, do not hesitate to contact Partner, Head of Dispute Resolution practice **Sergey Petrachkov** (SPetrachkov@alrud.com).

Kind regards,

ALRUD Law Firm

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[2] The case No. is A40-219464/2016.