

NEW RUSSIAN RULES ON ARBITRABILITY OF DISPUTES

On December 29, 2015, the President of the Russian Federation signed a new federal law “On Arbitration (Arbitration Proceedings) in the Russian Federation” (the “**Law on Arbitration**”) together with related amendments to the Law “On International Commercial Arbitration” (the “**Amendments to the International Commercial Arbitration Law**”) (collectively, the “**Arbitration Laws**”) and amendments to the Arbitrazh Procedure Code (the “**APC Amendments**”) and the Civil Procedure Code (together with the APC Amendments, the “**Amendments to the Procedural Codes**”). With the exception of amendments that allow entering into arbitration agreements in relation to corporate disputes, which will apply beginning on February 1, 2017, these laws will enter into force on September 1, 2016.

The Arbitration Laws and the Amendments to the Procedural Codes establish uniform rules on the arbitrability of civil law disputes and the requirements for the submission of corporate disputes to arbitration. Before these rules were introduced, the arbitrability of certain disputes was regulated by various specialized laws and was also sometimes inconsistently dealt with in court practice. Furthermore, before the introduction of the above laws, corporate disputes, including disputes arising out of share purchase and shareholders agreements, were largely treated as non-arbitrable by Russian state arbitrazh courts. The APC Amendments overrule such court practice and thus provide for the arbitrability of most corporate disputes, with certain express exemptions. Below we examine the key provisions of the new of rules with respect to arbitrability of disputes.

I. ARBITRABLE DISPUTES

The definition of an arbitrable domestic dispute in the Law on Arbitration has not changed as compared to the same definition in the 2002 Federal Law on Domestic Arbitral Tribunals (the predecessor of the Law on Arbitration). Specifically, in accordance with the Law on Arbitration, any domestic civil law dispute is arbitrable by domestic arbitration, unless otherwise provided by a federal statute.

The Amendments to the International Commercial Arbitration Law have expanded the definition of a cross-border dispute arbitrable by international commercial arbitration seated in Russia to cover any civil law dispute arising from foreign trade or other types of foreign economic activity that has at least one of the following four foreign elements:

- the commercial enterprise of at least one party is located abroad;
- a significant portion of the contractual obligations is performed abroad;
- the subject matter of the dispute is closely connected with a foreign location; or

- the dispute has arisen in connection with foreign investments into the Russian Federation or Russian investments abroad.

Before the Amendments to the International Commercial Arbitration Law were introduced, the list of foreign elements in the Law on International Commercial Arbitration allowing the submission of a cross-border dispute to international commercial arbitration seated in Russia was limited to (i) the location of a commercial enterprise abroad and (ii) the involvement in the dispute of enterprises with foreign investments. As follows from the above list, the latter element has now been reformulated into a broader category of disputes in connection with foreign investments into Russia and Russian investments abroad.

As a general matter, courts may determine on a case-by-case basis whether a particular dispute is a civil law dispute, and is therefore arbitrable, or whether such dispute involves a public law element that precludes its submission to arbitration.¹

Furthermore, the Amendments to the Procedural Codes provide for a number of specific exceptions to the general rule of the arbitrability of civil law disputes. In particular, there are certain types of disputes that are considered non-arbitrable (*see* Section II) and other disputes that may only be submitted to an arbitration seated in Russia and administered by a permanent arbitration institution, i.e., an institution which has sought, and been granted, prior authorization by the Russian Government (*see* Section III).

II. NON-ARBITRABLE DISPUTES

The Amendments to the Procedural Codes have for the first time attempted to codify non-arbitrable disputes. In particular, they expressly enumerate those disputes that are considered non-arbitrable. Such disputes may not be submitted to arbitration. Moreover, a Russian court may annul any award in such disputes rendered by arbitral tribunals seated in Russia and may refuse to enforce any award rendered by a foreign arbitral tribunal. Such non-arbitrable disputes include:

- Bankruptcy disputes;
- Certain types of corporate disputes (*see* Section III);
- Disputes arising out of state authorities' not registering a legal entity in the state unified register of legal entities;
- Certain intellectual property protection disputes;

¹ In this regard, the position expressed by the Constitutional Court in Resolution No. 10-P of May 26, 2011 that civil law disputes are those which are associated with the nature of civil relations and are based on the recognition of the equality of parties remains in full force and effect.

- Disputes arising from administrative and other public law matters;
- Class actions;
- Privatization disputes;
- Disputes relating to public procurement, including those arising out of state contracts for procurement of goods, works and services;
- Disputes arising in connection with compensation for harm caused to the environment;
- Employment disputes;
- Family law disputes, except for disputes relating solely to the distribution of property between spouses in divorce or following it; and
- Inheritance disputes.

This list of non-arbitrable disputes is not exhaustive since other federal statutes may provide for additional categories of non-arbitrable disputes.

III. CORPORATE DISPUTES

Generally, the APC Amendments define *arbitrable* corporate disputes as those relating to the creation, management of, and participation in a company. Before the APC Amendments, Russian state arbitrazh courts largely treated such disputes as non-arbitrable and falling within the exclusive jurisdiction of Russian arbitrazh courts. In addition, in the view of Russian arbitrazh courts, issues of transfer of title to shares and corporate management were non-arbitrable public law issues. Such court practice was highly debated in the Russian legal community. The APC Amendments now allow submission of corporate disputes to arbitration (except where expressly prohibited, as discussed below), subject to such arbitration being in compliance with the requirements set forth by the APC Amendments. Arbitration agreements relating to corporate disputes may only be concluded after February 1, 2017.²

In particular, under the APC Amendments, corporate disputes that may be submitted to arbitration include but are not limited to:

- Disputes relating to the creation, reorganization and dissolution of a legal entity (except for those in relation to the bankruptcy of a legal entity);

² Any arbitration agreements relating to corporate disputes entered into before February 1, 2017 are unenforceable pursuant to the APC Amendments.

- Disputes regarding the ownership of shares, the creation of an encumbrance over shares, or the exercise of rights arising from such shares (including disputes arising from share sale and purchase agreements);
- Claims by shareholders for damages or invalidation of transactions entered into by a legal entity;
- Disputes relating to the appointment, termination or suspension of the powers of management bodies of a legal entity, or other civil law disputes between a legal entity and its management bodies;
- Disputes arising out of shareholders' agreements regarding corporate governance, including corporate agreements;
- Disputes relating to the issuance of securities, including those relating to the challenge of an issuer's decision to issue securities, and transactions relating to the sale of securities in the context of the placement of the securities by the issuer;
- Disputes in connection with the activities of share registrars; and
- Disputes relating to the challenge of corporate decisions.

For most corporate disputes to be arbitrable, all of the shareholders of the legal entity, the legal entity itself, and any other party involved in the dispute must be parties to an arbitration agreement.³ Thus, an agreement among only some shareholders of a company may not provide for arbitration of corporate disputes.⁴

The APC Amendments further provide that corporate disputes may only be submitted to arbitration administered by a permanent arbitration institution. A permanent arbitration institution is a non-governmental institution empowered to administer arbitrations on a permanent basis. According to the Law on Arbitration, the right to administer arbitrations on a permanent basis is granted by the Russian Government, although the International Commercial Arbitration Court and the Maritime Arbitration Commission are permitted to do so pursuant to the Law on Arbitration. Other Russian arbitration institutions must go through a special procedure and comply with a set of robust requirements set forth in the Law on Arbitration to be

³ The Arbitration Laws allow for the inclusion of an arbitration clause for corporate disputes between shareholders of a legal entity and the legal entity itself in the charter of a legal entity. Such amendments to the charter have to be unanimously approved by all shareholders of the company at the time of such amendment. Such arbitration clauses may not be included in a charter of a public joint stock company or a company with 1,000 voting shareholders or more at the time of the respective amendment.

⁴ The only two exceptions are (i) disputes regarding the ownership of shares, the creation of an encumbrance over such shares or the exercise of rights arising from such shares (including disputes arising from shares sale and purchase agreements); and (ii) disputes in connection with the activities of share registrars, for which the arbitration agreement may be entered into only between the parties involved.

granted the right to administer arbitrations on a permanent basis. Foreign arbitration institutions having a “widely recognized reputation” may also apply for the right to administer arbitrations in Russia on a permanent basis but they do not have to satisfy the numerous requirements set forth for domestic arbitration institutions. If a foreign arbitration institution does not obtain this right, all arbitrations administered by it and seated in Russia will be deemed to be *ad hoc* arbitrations. Consequently, unless a foreign arbitration institution is registered as a permanent arbitration institution in Russia, an award rendered with respect to a corporate dispute under the auspices of such institution will be unenforceable in the Russian Federation and may be contested on such grounds outside Russia.

Finally, for an arbitration agreement with respect to corporate disputes to be valid, the arbitration shall be governed by the special rules adopted by the permanent arbitration institution for the arbitration of corporate disputes⁵ and the Russian Federation must be the seat of arbitration. These additional restrictions do *not* apply to two categories of arbitrable corporate disputes: (i) disputes regarding the ownership of shares, the creation of an encumbrance over such shares or the exercise of rights arising from such shares (including disputes arising from shares sale and purchase agreements); and (ii) disputes in connection with the activities of share registrars.

Although the Amendments to the Procedural Codes allow for broader arbitrability of corporate disputes than the previously existing regime, some limitations remain. The Arbitrazh Procedure Code has explicitly provided for an exhaustive list of specific types of corporate disputes that are non-arbitrable, including:

- Disputes regarding convocation of general shareholders meetings;
- Disputes arising from notarial certification of transactions with interests in limited liability companies;
- Disputes challenging individual acts, decisions or actions/omissions of state or municipal bodies and public authorities or government officials;
- Disputes arising from voluntary, mandatory and competitive tender offers;
- Disputes arising from acquisition and buy-back by a company of its own shares;

⁵ These rules shall contain certain mandatory provisions enumerated in the Law on Arbitration and shall be deposited with the Ministry of Justice and placed on the website of the permanent arbitration institution. Such mandatory provisions include: (i) a provision setting forth an obligation 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 provide a copy of the statement of claim to such legal entity; (ii) a provision setting forth an obligation for the legal entity to notify all of its shareholders about the respective dispute; and (iii) a provision establishing the right of any shareholder of the legal entity to join the arbitration at any stage.

- Any corporate disputes involving strategic enterprises (including disputes arising from a shareholders' agreement) in accordance with the Federal Law on Foreign Investments into Strategic Enterprises;⁶ and
- Disputes relating to the expulsion of participants of a legal entity (e.g., a limited liability company but not in any case a public joint stock company).

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If you have any questions, or if you wish to discuss the above amendments further, please feel free to contact your usual contacts at the firm. You may also contact Yulia Solomakhina (ysolomakhina@cgsh.com), Marina Akchurina (makchurina@cgsh.com) and Ksenia Khanseidova (kkhanseidova@cgsh.com) at the Moscow office of the firm at +7 495 660 85 00.

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⁶ This exception does not apply to disputes over the ownership of shares if their sale does not require approval according to the Federal Law on Foreign Investments into Strategic Enterprises and such disputes may be submitted to arbitration.

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