Linklaters

October 2018

Russia's arbitration reform – what do the new laws mean for arbitration in Russia?

Contents

Background

Significant amendments to Russia's arbitration laws (the "**New Laws**")[1] came into force back in September 2016. The New Laws are intended to create modern and effective mechanisms for domestic and international arbitration in Russia, as well as to provide solutions to some of the perceived problems associated with using arbitration in Russia.

Key changes

Key changes brought about by the arbitration reform include:

> the introduction of a new regime for recognition of arbitral institutions established by various industry associations (those being non-commercial organisations) as "permanent arbitral institutions" ("**PAIs**") – this process is subject to the forum meeting statutory conditions and receiving an approval from the Russian Government to perform these functions;

> express statutory recognition of arbitrability of a majority of disputes connected with the incorporation of a Russian legal entity, its management or participation in its share capital ("**Corporate Disputes**");

> Category 1 Corporate Disputes (e.g. disputes around "holding" (ownership) of shares and security interests over shares and their enforcement) may only be considered by arbitrations administered by a PAI;

> Category 2 Corporate Disputes (e.g. those relating to shareholders' agreements, shareholders' claims for reimbursement of losses caused to a company and invalidation of the respective transactions of the company, operation of a company's management and control-ling bodies and/or issuance of securities by a company) must be heard only by PAIs under special arbitration rules for Corporate Disputes. Category

[1] The Federal Law "On arbitration (arbitral proceedings) in the Russian Federation" dated 29 December 2015 No. 382-FZ (the "**Domestic Arbitration Act**"), the Federal Law "On amendments to certain laws of the Russian Federation and repeal of article 6.1 (3) of the Federal Law "On Self-Regulating Organizations" in connection with the enactment of the Feder-al Law "On arbitration (arbitral proceedings) in the Russian Federation" dated 29 December 2015 No. 409-FZ and Law dated 07 July 1993 No. 5338-1 "On International Commercial Arbitration" (the "**International Arbitration Act**").

2 disputes may be arbitrable only on the condition that the company being subject to the dispute, all its shareholders and other parties which act as claimants or defendants in a case must be parties to an arbitration agreement;

> If Category 1 or Category 2 Corporate Disputes are referred to arbitration which does not meet the requirements mentioned above, this may affect the enforceability of arbitral awards in Russia, as well as provide a basis for the Russian state courts to accept jurisdiction and consider a dispute.

Types of arbitral institutions

The New Laws differentiate between several categories of arbitral institutions with varying status and rights as follows.

Russian PAIs

PAIs may be set up subject to certain statutory conditions and following receipt of a licence from the Russian Government under the recommendation from the special Council. An institution which does not obtain such approval will not be able to administer arbitrations as a PAI in Russia in relation to any Corporate Disputes (both Category 1 and Category 2), but may proceed acting as an ad hoc arbitral tribunal in Russia if that is permitted for the particular type of dispute.

If the PAI wants to proceed with consideration of Category 2 Corporate Disputes, it needs to have a special set of corporate arbitration rules. Under the law such rules should include:

> notification of the dispute to the company and all shareholders of the company;

> publication of information about the claim on the PAI's website;

> a right for each shareholder to join the claim.

The seat of arbitration can be chosen by the parties, except for arbitration of Category 2 Corporate Disputes for which the seat of arbitration should be in Russia.

Based on the above, currently the following Russian arbitral institutions meet Russian law requirements, including for consideration of Category 1 and Category 2 Corporate Disputes:

> **ICAC** – The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation;

> **MAC** – Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation;

> **RSPP** – Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs;

> **RIMA** – Russian Arbitration Centre at the Institute of Modern Arbitration.

Foreign PAIs

A foreign arbitral institution may be approved to act as a PAI in Russia if it has a "*widely recognised international reputation*", which would allow it to receive a licence from the Russian Government under the recommendation of the special Council. If approved, the foreign PAI would be entitled to hear Category 1 Corporate Disputes. In order to administer Cate-gory 2 Corporate Disputes, it should also issue specific corporate rules and be prepared to consider disputes with a seat in Russia.

Leading arbitral institutions, such as the LCIA, the ICC, the SCC, the SIAC and the HKIAC, have not confirmed publicly whether or not they intend to make an application. However, given that it is now two years since the New Laws entered into force and none have applied for a licence, the likelihood of them doing so seems low.

Currently, Russian law does not require that foreign arbitral institutions applying for a PAI licence should have a branch or representative office in Russia. However, there is a legislative proposal (not yet confirmed by the Russian Parliament) that a foreign PAI should also have an office located in Russia.

The PAI status is mostly required for consideration of Corporate Disputes. If an international arbitral institution does not obtain a PAI status in Russia then there is a risk that its awards relating to Corporate Disputes will not be recognised and enforced in Russia. Its awards for other types of disputes (such as financial transactions disputes etc.) should be largely unaffected and should be enforced based on the general principles of the 1958 New York Convention and subject to the usual statutory procedures and limitations relating to such enforcement.

By way of summary, the main arbitral institutions now available in Russia are:

ICAC

The ICAC is a leading arbitral institution in Russia and Eastern Europe created in 1932 and based in Moscow. In 2016, the ICAC considered about 272 cases (compared with 303 cases considered by the LCIA and 199 cases considered by the ICC). In 2017, 34% of the parties were from Russia and CIS countries, about 33% from the EU and 17% from Asia. About 64% of cases related to supply disputes, 13% to services con-tracts disputes and 9% to construction contracts disputes. The ICAC has four different specific set of rules: for (1) international, (2) domestic, (3) corporate and (4) sport disputes. The ICAC also has separate lists of recommended arbitrators for each of these categories.

A review of the list of recommended arbitrators for international disputes indicates that about 20% of arbitrators are international scholars and le-gal practitioners from major international and domestic law firms. It should be noted that parties are not limited to choosing arbitrators from the list and may nominate their own arbitrators.

The fees for a three-arbitrator panel to consider an international dispute where the amount claimed is USD 10 million may be around USD 91,500.

RSPP

RSPP is a non-political organisation for protection of interests of industry and entrepreneurs, established in 1991, with its own arbitral institution. It has an office in Moscow which is also the seat for the majority of the disputes it considers.

RSPP has one set of rules for domestic, international and corporate disputes. It also provides a list of recommended arbitrators for various types of disputes but the parties are free to choose their own arbitrators, or arbitrators from the RSPP's supplementary database. In the recommended list of arbitrators, around 17% are international scholars and le-gal practitioners from major international and domestic law firms.

The fees for a three-arbitrator panel to consider an international dispute where the amount claimed is USD 10 million may be around USD 54,700.

RIMA

RIMA was established after the New Arbitration Act entered into legal force, in Autumn 2016. It is a new arbitral institution focusing on developing arbitration in Russia both through its modern approach to disputes and by arranging various events for the arbitration community.

The head office is located in Moscow with representative offices in Vladivostok and Kaliningrad. To date, it has considered arbitrations seated in Moscow.

RIMA has one set of rules for the consideration of domestic, international and corporate disputes.

RIMA has one list of recommended arbitrators, 13% of which are international scholars and legal practitioners from major international and domestic law firms. As with other arbitral institutions, parties are free to choose arbitrators who are not on the list. RIMA is also available to assist parties by providing access to their arbitrators' databases; around 17% of arbitrators in the international databases are representatives of major international law firms.

The fees for a three-arbitrator panel to consider an international dispute where the amount claimed is USD 10 million may be around USD 76,520. Parties may choose instead to pay arbitrators' fees in hourly rates (for international arbitration this is in the region of USD 450 per hour).

Although RIMA is a new arbitral institution, it states that it has already considered around 100 cases, around 80 disputes for governmental corporation RosAtom (RIMA has a special branch for RosAtom disputes) and around 20 disputes for other companies (currently only domestic disputes, with arbitrators being ex-judges from the Supreme Arbitrazh Court).

Comment

The reforms have not yet been fully implemented, there are a number of uncertainties and related court practice is yet to develop. The New Laws also gave rise to a number of new issues in connection with submission to arbitration.

However, it is clear that the New Laws will provoke some changes in the work of arbitral institutions, as well as create a basis for development of the new arbitral institutions and their practices.

Linklaters

Contacts

For further information please contact:

Vladimir Melnikov
Partner

+7 495 797 9727

vladimir.melnikov@linklaters.com

Valeria Romanova
Managing Associate

+7 495 797 8505

valeria.romanova@linklaters.com

Author: Valeria Romanova

Linklaters CIS
Paveletskaya sq. 2, bld. 2
Moscow 115054

Tel: +7 495 797 9797
Fax: +7 495 797 9798

Linklaters.com