

# The Reform of Arbitral Tribunals in the Russian Federation

Newsletter

August 29, 2017

From November 1, 2017, the arbitral tribunals (*treteyskiye sudy*)<sup>1</sup> that failed to obtain the permission from the Government of the Russian Federation will no longer be allowed to hear disputes. Introduction of the authorization-based order of granting the right to establish institutional arbitral tribunals is aimed at achieving one of the main objectives of the non-governmental arbitration reform in Russia, namely, combatting "puppet" arbitral tribunals, enhancing trust to arbitration and improving its quality.

As a result, this will affect arbitration of disputes under contracts, which already contain arbitration clauses, and trigger the need to amend drafts (templates) of the contracts yet to be signed.

For more information on this and other changes of the arbitral tribunals' system in Russia see our new review below.

## 1. KEY CHANGES

Since September 1, 2016, Federal Law dated December 29, 2015 No. 382-FZ "On Arbitration (Arbitral Proceedings) in the Russian Federation" (hereinafter, the "**Arbitration Act**") and Federal Law dated December 29, 2015 No. 409-FZ on amending certain legal acts in view of the adoption of the Arbitration Act, have entered into full force and effect.

These acts have introduced substantial changes to the Russian legislation on arbitral tribunals, whose overall purpose is to bring Russian arbitral proceedings to the international standards.

- ▶ **Authorization-based order of creation of arbitral tribunals** (*see more details below*)  
The authorization-based order does not apply to the two best-known arbitral institutions in Russia – the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation – they have acquired the right to arbitrate disputes as permanent arbitral institutions by operation of law.
- ▶ **Direct legislative recognition of the arbitrability of corporate disputes** (*see more details below*)
- ▶ **Restriction of competence of *ad hoc* arbitral tribunals**
  - *Ad hoc* arbitral tribunals, *i.e.* the ones instituted to arbitrate a particular dispute, **cannot arbitrate corporate disputes.**
  - The parties to an *ad hoc* arbitration cannot agree to waive the right to address a state court for assistance.

- *Ad hoc* arbitral tribunals are deprived of the right to ask state courts for assistance in discovery.
- The parties' agreement on the finality of the award of an *ad hoc* tribunal is invalid, *i.e.* a party does not forfeit the right to apply to a state court to vacate such an award.
- The parties to an *ad hoc* arbitration can request a permanent arbitral institution to execute certain functions related to dispute administration, without this entailing the recognition of such an arbitration as being administered by the permanent arbitral institution.

#### ▲ Appeal to foreign arbitral institutions

Foreign arbitral institutions are also bound to obtain the Russian Government's permission to exercise the functions of a permanent arbitral institution in Russia. However, the only requirement for foreign arbitral institutions is their **well-regarded international reputation**.



**If a foreign arbitral institution failed to obtain a permission to administrate arbitration in Russia, its award will be deemed an *ad hoc* arbitral award subject to the applicable restrictions (*see above*).**

Furthermore, in order to arbitrate the majority of corporate disputes, a foreign arbitral institution shall also publish special rules on arbitration of corporate disputes (most reputable international arbitral institutions do have such rules in place).

This creates a **risk that Russian courts will not recognize foreign arbitral institutions' awards on corporate disputes** if such institutions failed to obtain a governmental permission.

#### ▲ Form of the arbitration agreement

- The new law provides that the arbitration agreement can be concluded, among other things, through an exchange of letters, telegrams, telexes, telefaxes and other documents (including electronic ones), transmitted through communication channels allowing to reliably ascertain that the document comes from the other party, as well as by way of an exchange of procedural documents.
- A possibility to include the arbitration agreement into the **charter of a legal entity** (except charters of joint-stock companies with over 1,000 shareholders, and charters of public joint-stock companies). The charter shall be approved by all participants. At the same time, it is important to bear in mind that the arbitration agreement included into the legal entity's charter covers disputes with third parties if the respective third party has directly expressed its will to be bound by the arbitration agreement.

## 2. WHICH PERMANENT ARBITRAL INSTITUTIONS HAVE ALREADY OBTAINED PERMISSIONS OF THE RUSSIAN GOVERNMENT?

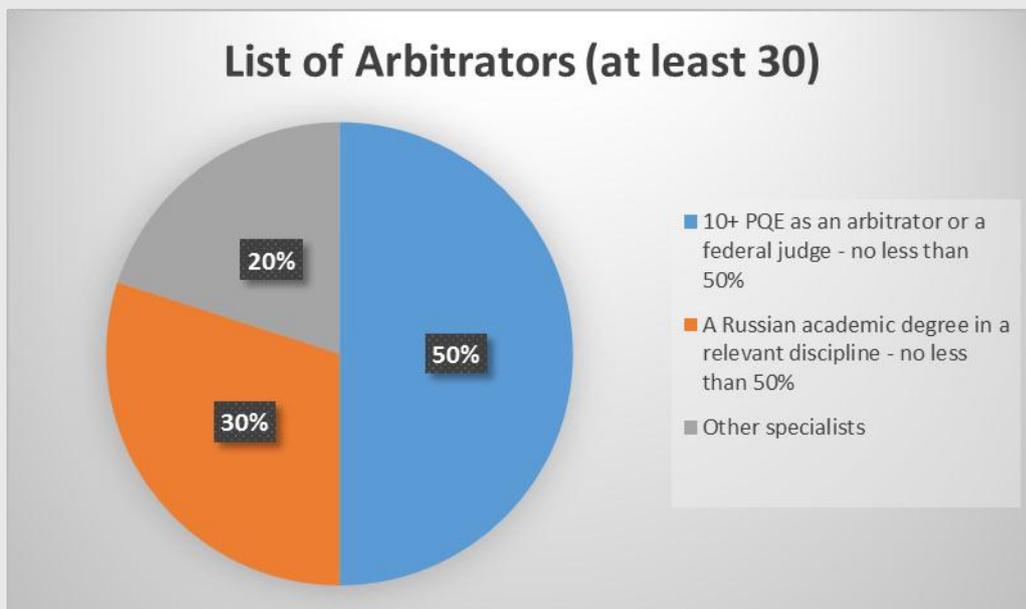
Until September 1, 2016, there were no restrictions for establishing arbitral tribunals, which resulted in the formation of numerous "puppet" arbitral tribunals, instituted for questionable purposes.

To rule out abuses in this sphere, the legislator introduced the authorization-based order. The right to exercise the functions of a permanent arbitral institution is now granted by a Russian Government

order upon the recommendation of the Council for the Improvement of Arbitration Proceedings at the Russian Ministry of Justice.

A permanent arbitral institution can be created at a **nonprofit organization (NPO)** subject to the following requirements:

- ▶ Compliance of the arbitration rules with the requirements of the Arbitration Act;
- ▶ Reliability of the information provided on the NPO and its founders (participants);
- ▶ NPO's reputation, scale and nature of activity allowing to provide a high level of the institution's activity, as well as the NPO's being engaged in activity aimed at the development of arbitration in Russia;
- ▶ Managing and publication of a recommended list of arbitrators for information purposes, containing at least 30 people, provided that each candidate's written consent is included on the list. One arbitrator cannot appear on the lists of more than 3 arbitral institutions. There are further requirements to the list of arbitrators from the standpoint of their qualifications and experience in the legal field (see the diagram below).



As of August 28, 2017, only 4 permanent arbitral institutions have been allowed to operate in Russia:

- ▶ **International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation** (by operation of law, no permission of the Russian Government is required);
- ▶ **Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation** (by operation of law, no permission of the Russian Government is required),
- ▶ **Arbitration Center at the Russian Union of Industrialists and Entrepreneurs** (on the basis of Order of the Government of the Russian Federation dated April 27, 2017 No. 798-p);
- ▶ **Arbitration Center at the Institute of Modern Arbitration** (on the basis of Order of the Government of the Russian Federation dated April 27, 2017 No. 799-p).

At present, there is no unified register of permanent arbitral institutions that have obtained permissions from the Government of the Russian Federation.

### 3. THE STATUS OF THE CLAUSE ON THE ARBITRATION OF DISPUTES IN AN ARBITRAL INSTITUTION, WHICH HAS NOT OBTAINED A PERMISSION FROM THE RUSSIAN GOVERNMENT

An arbitral institution that does not meet the new rules by November 1, 2017, will not be able to continue administering arbitral proceedings.

This means that arbitration clauses on submission of disputes to such an arbitral institution will become unenforceable.



**After November 1, 2017, arbitration clauses on submission of disputes to permanent arbitral institutions that failed to obtain the permission from the Russian Government will become *de facto* unenforceable.**

In that case, pending disputes will be administered as *ad hoc* arbitrations unless the parties agree on a different dispute resolution procedure or the arbitration agreement becomes unenforceable.

### 4. ARBITRABILITY OF CORPORATE DISPUTES

Although before the Arbitration Act became effective, the legislation did not contain an express prohibition of arbitration of corporate disputes, state courts largely adhered to the view denying the arbitrability of such disputes.

At present, the following corporate disputes are arbitrable: disputes related to the incorporation of a legal entity, its management, participation in a commercial legal entity, as well as in a number of NPOs.

All corporate disputes shall be arbitrated only by permanent arbitral institutions. These include, *inter alia*, corporate disputes related to the **ownership of shares in the charter capital of Russian legal entities**, including

- ▶ disputes under share and participatory share purchase agreements;
- ▶ disputes connected with the levying of execution against shares and participatory shares;
- ▶ disputes resulting from the activity of keepers of registers of securities.

Many corporate disputes are subject to **additional** rules; thus, they can be submitted to arbitration only if they meet the following conditions:

- 1) The legal entity, all of its participants and other persons, being claimants and defendants, have concluded an arbitration agreement;
- 2) The arbitral institution has adopted rules on arbitration of corporate disputes;
- 3) The Russian Federation is the seat of arbitration.

The following corporate disputes with an express public interest (from the legislator's point of view) cannot be arbitrated:

- ▶ Disputes on the convocation of the general shareholders' meeting of the legal entity;
- ▶ Disputes resulting from the notaries' certification of transactions with shares in the charter capital of LLCs;

- ▶ Disputes on challenging non-regulatory legal acts, decisions and actions/inaction of public authorities, municipal self-government authorities, etc.;
- ▶ Disputes concerning strategic companies (except for disputes arising from transactions with shares in the charter capital of such companies, which do not require prior approval);
- ▶ Disputes related to the acquisition and redemption of placed shares by joint-stock companies, and the acquisition of more than 30% of stock in a public company;
- ▶ Disputes connected with the expulsion of participants of a legal entity.

Arbitration agreements on the submission of corporate disputes to arbitration can be concluded on February 1, 2017 the earliest. The agreements made before that date are deemed *unenforceable*.

## 5. ARBITRABILITY OF DISPUTES ON REAL ESTATE TITLES

The legislation does not limit submission to arbitration of any disputes on titles to real estate. However, no entries on real estate titles will be made into the public register<sup>2</sup> absent an enforcement order issued by a state court.

A similar requirement – obtaining an enforcement order – applies to making entries into any legally relevant registers under the arbitral award (Art. 43 of the Arbitration Act), including the USRLE, EGRIP, EGRN and any other registers, the making of entries into which entails the creation, change or termination of civil rights and obligations.

## 6. CONCLUSIONS

The key recommendation is **to check the arbitral institution specified in the arbitration clause when making the contract – otherwise, it may turn out to be unenforceable.**

MOSGO & PARTNERS LAW FIRM

Tel.: +7 (495) 228 48 78

[info@mosgolaw.com](mailto:info@mosgolaw.com)

[www.mosgolaw.com](http://www.mosgolaw.com)

All newsletters of Mosgo & Partners are available on our [website](#) and [LinkedIn](#).

This newsletter shall not be viewed as legal advice. It is prepared for educational and informational purposes only.

Mosgo & Partners is not responsible for any consequences of reliance on the information contained in this newsletter without specific professional advice.

© Mosgo & Partners. Moscow, 2017.

---

<sup>1</sup> The new law uses a number of terms perceived as synonyms in the everyday speech: **arbitration (arbitrazh)**, **arbitral tribunal (treteysky sud)**, and **arbitral institution (arbitrazhnoye uchrezhdeniye)**. However, the law distinguishes them. Thus, under the law, **arbitration** is synonymous with arbitral proceedings, that is, the process (not to be confused with the household word “arbitrazh”, frequently denoting a state commercial court). **Arbitral tribunal**, pursuant to the law, is precisely the person (arbitrator) or a group of persons (a panel of arbitrators) examining the dispute. The distinction between institutional arbitrations and *ad hoc* arbitrations, made by experts on arbitral proceedings, is found in two terms used in the law: “**permanent arbitral institution**” (a sub-division of an NPO, carrying out the function of administering arbitration on the permanent basis) and “**arbitral tribunal formed by the parties to resolve a specific dispute**”. All these details can be seen elaborated in Art. 2 of the Arbitration Act.

<sup>2</sup> Uniform State Register of Real Property (EGRN)