RAA first to publish draft arbitration rules for corporate disputes

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Introduction

The recent Russian arbitration law reform was one of the main topics of discussion for Russian arbitration practitioners for almost a year. One of the most praised changes concerns the arbitrability of so-called 'corporate disputes'. The Russian Arbitration Association (RAA) was the first Russian arbitral institution to develop and release for public consultation draft arbitration rules for corporate disputes.**(1)** While some institutions have already followed suit and many more will do so, the RAA's draft rules provide a better idea of what arbitral proceedings in corporate disputes could look like.

Arbitrability of corporate disputes

The definition of corporate disputes was introduced to the *Arbitrazh* (Commercial) Procedural Code in 2009 to ensure that all matters relating to a corporation fall within the exclusive jurisdiction of an *arbitrazh* court at the place of the company's incorporation. For this reason, the legislature developed the broadest possible definition of 'corporate disputes', which covers any dispute "related to the establishment and management of, or participation in, a legal entity". As this was intended to resolve a potential jurisdictional conflict between various courts within the Russian state court system, it was not until 2011 that the notion of the exclusive jurisdiction of *arbitrazh* courts over corporate disputes affected their arbitrability. In *NLMK v Maximov*, the panel of Supreme *Arbitrazh* Court judges refused to grant leave for the case to be considered by the presidium and upheld the lower courts' judgments, which set aside the award rendered under the Rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry. Among other grounds, the judges noted that corporate disputes – including disputes arising from share purchase agreements – are not arbitrable, as they fall within the exclusive jurisdiction of the state *arbitrazh* courts.**(2)**

The arbitration law reform allowed certain corporate disputes to be arbitrated. As the procedural legislation already contained the definition of corporate disputes, the reform used this as a starting point. Corporate disputes were divided into the following categories:

- Corporate disputes involving a public element (eg, disputes regarding the state registration of corporations) – these cannot be referred to arbitration.
- Disputes involving contracting parties only (eg, disputes arising from share purchase agreements) – these are arbitrable, but can be referred only to administered (and not *ad hoc*) arbitration.
- Disputes involving a greater number of parties (eg, disputes relating to the challenge of corporate resolutions and disputes arising from shareholders agreements with respect to Russian entities) – these may be arbitrable under certain circumstances. In particular, these disputes can be referred only to arbitration institutions which have adopted specific rules for corporate arbitrations.

Legislative framework

With respect to the third category of corporate disputes, the legislation established the following requirements:

- Arbitration must be seated in Russia.
- Arbitration must be administered by an arbitral institution which has obtained a licence from the Russian government and adopted special rules for the arbitration of corporate disputes. In particular, these rules must provide that:
  - the arbitral institution must inform the relevant entity about the corporate dispute (and the entity must inform its shareholders) and post relevant information on its website; and
  - the shareholders of the entity can join the proceedings at any stage and, in such cases, must be notified of developments in the case by the arbitral institution.
- Arbitration is possible only if all of the shareholders and the legal entity itself entered into an arbitration agreement providing for the arbitration of corporate disputes.

Basic features of draft rules

The variety of disputes which must be resolved under the special arbitration rules for corporate disputes and the legislative requirements applicable to such rules presented certain challenges in drafting the rules.

The RAA's draft rules are based on the latest edition of the UN Commission on International Trade Law Arbitration Rules, with necessary changes to account for administered arbitration and the specificity of the disputes in question.

The main features of the rules are as follows:

- The rules aim to apply to corporate disputes regarding Russian-registered legal entities. However, under the rules, parties can also agree to refer to arbitration disputes regarding foreign-registered legal entities.
- Arbitration is commenced by filing a statement of claim, a copy of which will be sent by the RAA to the legal entity concerned. It is then the legal entity's responsibility to inform its shareholders, although – unlike the state courts – the RAA has no powers to monitor whether the entity complies with this duty. The RAA will also send the statement of claim to all of the named respondents and post information about the commencement of the corporate dispute (but not the statement of claim) on its website.
- Other shareholders can join the proceedings at any time – either as co-claimants (Article 10 of the rules) or third-party interveners (Article 9 of the rules). Shareholders wishing to join the proceedings must file the relevant application with the RAA, which will then pass it on to the tribunal (if already formed). The arbitral tribunal must decide on the joinder of a third party or co-claimant. However, as such a joinder is a shareholder's statutory right, the instances in which such an application will be dismissed are likely to be limited. Joining parties must accept the proceedings in their existing state at the time of the joinder. The rules prohibit a joinder with separate claims

against other parties to the proceedings. This prohibition was intentional, in order to prevent further complications in the proceedings.

- The rules also provide for the mandatory consolidation of identical claims brought by other shareholders (Article 11). If another shareholder brings its own claim which is identical to that already referred to arbitration, it will be treated as an application for joinder as a co-claimant to the proceedings initiated first. However, this is allowed only until the final award is rendered in the proceedings initiated first. After the final award is rendered, any subsequent identical claims cannot be brought and the arbitral proceedings will be automatically terminated. These rules are, in principle, similar to the procedural legislation regarding the state courts.
- As corporate disputes usually involve multiple parties, the formation of the tribunal may be complicated. The default rule is that disputes should be considered by three-member tribunals, unless the parties have agreed otherwise. This is because corporate disputes are likely to be complicated and, therefore, the appointment of an arbitral tribunal is warranted in most cases. Parties to the proceedings should agree on all of the tribunal members (or the sole arbitrator) within 30 days from the date on which the respondents received the statement of claim. If the parties cannot come to an agreement within this time, all tribunal members will be appointed by the RAA.
- The rules are brief in regards to how proceedings should be conducted, leaving it to the discretion of the arbitral tribunal. However, the rules require that all parties be treated equally and be given reasonable opportunity to present their case.
- The withdrawal of a claim, admission of a claim or entry into a settlement agreement which results in termination of the proceedings do not require the consent of all of the shareholders that joined the proceedings. However, such shareholders should be able to object to such a termination within 30 days of receiving the relevant notice. If an objection is filed, the arbitral tribunal can continue the proceedings if it finds that the shareholder that filed the objection has a legitimate interest in such a continuation.

Comment

While the confirmation of the arbitrability of corporate disputes is a positive step, in reality the proceedings for corporate disputes under the special arbitration rules are complicated from a procedural perspective. The first complication concerns the requirement that all shareholders and the legal entity itself be party to an arbitration agreement. There may be many jurisdictional challenges before there is an established court practice regarding the application of an arbitration agreement to new or former shareholders. The possibility of multiple joinders would likely render the entire proceedings unmanageable if the number of shareholders exceeded a certain number. Further, the diversity of the types of dispute governed by the rules and the lack of a procedural framework mean that the appointment of experienced arbitrators who can manage the dispute while simultaneously ensuring the enforceability of the resulting award is key to the successful arbitration of such disputes.

Most likely, the option to arbitrate corporate disputes will be particularly appealing to foreign investors establishing joint ventures in Russia. If a joint venture entity is established in Russia, the number of shareholders will likely be limited to two or three and the likelihood of this increasing is limited. In such circumstances, a foreign investor may prefer Russian-seated arbitration over Russian litigation. However, it remains to be seen whether arbitration of corporate disputes will be popular in other contexts.

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Endnotes

(1) The existing text is available in Russian on the RAA website.

(2) Supreme *Arbitrazh* Court, January 30 2012, VAS-15384/11, available in Russian here.

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