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Post-reform institutional arbitration in Russia

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As the requirement for all arbitration institutions to be licensed in Russia becomes mandatory in November, WilmerHale's Steven Finizio and Dmitry Kaysin assess the likely post-reform impact on Russia-seated proceedings under the rules of foreign institutions and the arbitrability and enforceability of certain disputes.

In September 2016, a number of changes to Russia's arbitration laws came into effect, with the intent of bolstering the use of arbitration in Russia; undertaken through a new law on domestic arbitration as well as amendments to the law on international arbitration, the Codes of Civil and Commercial Procedure, and to other Russian legislation.

Among other changes, the reform introduced licensing of arbitral institutions and created certain advantages for arbitrations conducted by such institutions. These particular changes were intended, at least in part, to address concerns about so-called pocket arbitrations.

Pocket arbitration refers to arbitration centres affiliated with companies or otherwise seen as not independent and impartial. A number of Russian companies, including large ones, have set up institutions to arbitrate disputes relating to their businesses. In addition to concerns about these institutions, there also is a concern that some institutions have been used for money laundering or other illegal purposes.

While focused in large part on domestic arbitration issues, these changes may also have a significant impact on international arbitration, including by affecting arbitrations seated in Russia under the rules of international arbitral institutions, particularly after November 2017, when the licensing regime comes into effect.

PERMANENT INSTITUTIONS

The reform created the option of a 'permanent arbitration institution', which must be a non-profit organisation licensed by the Russian Ministry of Justice (MoJ). In addition to being licensed, such institutions will need to deposit their arbitration rules with the MoJ.

Arbitral institutions will be able to administer arbitrations without a license until 1 November 2017, after which, parties who have agreed to arbitrate in Russia under the auspices of a non-licensed institution or to arbitrate under rules that have not been deposited with the MoJ will be considered to be arbitrating on an 'ad hoc' basis.

The consequence of the licensing regime is that, even where parties have agreed to resolve disputes in Russia under the rules of a foreign institution, such as the **ICC International Court of Arbitration**, the **London Court of International Arbitration** or the **Institute of Arbitration of the Stockholm Chamber of Commerce** , after 1 November 2017 any arbitration under those and other foreign institutions' rules will be considered ad hoc under Russian law – unless those institutions seek and obtain licenses.

Two longstanding Russian institutions are exempt from the licensing requirement: neither the **International Commercial Arbitration Court** (ICAC) nor the **Maritime Arbitration Commission** (MAC) at the Russian Chamber of Commerce and Industry are required to be licensed. The **Arbitration Court of the Russian Union of Industrialists and Entrepreneurs** has already received a license, as has the **Arbitration Center at the Institute of Modern Arbitration** (IMA), which was formed in 2016 to offer an alternative to existing institutions. Others, including the **Russian Arbitration Association** (RAA), which was founded in 2013, are expected to do so as well.

UNCERTAINTY FOR FOREIGN INSTITUTIONS

What will happen with foreign arbitral institutions is less certain. While the government has encouraged foreign institutions to apply for licenses, the requirements for foreign institutions to be licensed are not entirely clear (for example, it is not clear whether foreign institutions will have to establish an office or a separate non-commercial organisation in Russia), and it appears certain that a number of the best-known international institutions will not apply for licenses at this time.

Unlike in an arbitration conducted under the rules of a permanent arbitration institution, in an ad hoc arbitration, among other things, parties will not be able to request assistance from a Russian court in the taking of evidence (although a court can only assist in collecting documentary or tangible evidence, not witness testimony), nor can they waive the right to request that Russian courts assist in the constitution of the tribunal, or waive the right to seek judicial review of interim or final arbitration awards on any grounds. In addition, as discussed below, the reform creates serious doubts as to whether certain types of corporate disputes can be arbitrated in proceedings that are deemed ad hoc.

Also unclear, is how foreign parties will respond to the new licensing regime; some may want to continue to use the rules of non-licensed foreign institutions for arbitrations seated in Russia despite the fact that these will be deemed to be ad hoc, and others may agree to arbitration under the rules of one of the permanent arbitration institutions, particularly if well-known foreign institutions receive licenses.

ARBITRABILITY OF CORPORATE DISPUTES

In any event, it seems likely that the uncertainties created by the new regime will mean that foreign parties will continue to prefer to arbitrate outside of Russia. However, because the reform has created new uncertainties with regard to arbitrating Russian 'corporate disputes' outside of Russia, foreign parties may feel that they are taking significant risks if they do not agree to arbitrate at least certain types of disputes in Russia under the specialised rules of a permanent arbitration institution.

One of the significant aspects of the reform was to provide that a wider range of corporate disputes are arbitrable. Following the reform, there are three categories of corporate disputes: first, public interest, (for example, disputes relating to 'strategic' companies or actions of certain authorities, including notary publics are still not arbitrable); second, corporate disputes relating to shares in a Russian company (for example, disputes arising out of share purchase agreements). These disputes can be arbitrated by an arbitral institution and, if the seat of arbitration is Russia, by a permanent arbitration institution.

The third category involves corporate disputes relating to intra-company issues, for example, disputes concerning internal governance of the company and arising out of articles of association, shareholder agreements, and other types of corporate arrangements. The law now provides that these disputes can be subject to arbitration in Russia through a permanent arbitration institution if that institution has deposited specific rules for arbitrating corporate disputes with the MoJ.

The conditions that appear to apply to the second and third categories create a number of uncertainties. For example, with regard to the second category of corporate disputes relating to shares, it is unclear whether Russian courts will enforce a foreign award in such a case if it is made in an ad hoc proceeding, such as a proceeding under the **UNCITRAL** Rules, or whether Russian courts will refuse to enforce such an award on the basis that it was not made under the auspices of an 'arbitral institution'.

With regard to the second category of corporate disputes (relating to intra-company disputes), the law is not entirely clear whether such disputes can only be decided by licensed arbitration institutions and must be seated in Russia. As written, the law refers to the right of permanent arbitration institutions in Russia to hear such claims, without expressly stating that such claims cannot be heard outside of Russia.

Thus, while some commentators argue that the clear intent of the law is to require that such claims be heard in Russia under specialised rules issued by a licensed institution, there is scope to argue that the law does not prevent such disputes from being heard outside of Russia by a foreign arbitral institution.

In addition to arguments about whether foreign tribunals should refuse to arbitrate such disputes on arbitrability grounds, there are significant risks that Russian courts will refuse to enforce foreign awards relating to disputes falling within this third category. Russian courts may hold that foreign tribunals are not competent to hear such claims and may refuse enforcement under the New York Convention on arbitrability or public policy grounds.

This is a potentially significant practical concern because, given the nature of those types of disputes, enforcement in Russia may be necessary. In addition, there are concerns that in some cases Russian courts may view disputes falling within the second category (relating to shares in Russian companies) as intertwined with intra-company issues, and may also to refuse to enforce foreign awards with regard to those disputes on the same basis.

ENFORCEMENT

Although the reform is new, and the licensing regime does not come into force until November 2017, Russian courts are already wrestling with issues concerning the enforcement of foreign awards, particularly where such awards relate to disputes between Russian parties that arguably have no foreign nexus.

One ongoing case involves an attempt to enforce in Russia an award made under the rules of an arbitral institution established in Singapore by a Russian commercial entity. The arbitration, which concerned a services contract between Russian parties, took place in

Moscow, although the legal seat of the arbitration was Singapore, and has been viewed by some as an attempt to move pocket arbitrations outside of Russia.

In March 2017, the Moscow Circuit Court reversed and remanded a decision by a lower court which held that, for public policy reasons, Russian contractual disputes without any foreign nexus could not be arbitrated by foreign institutions and the tribunal therefore lacked competence to resolve a dispute.

Later, in May, the lower court again refused to enforce the award, this time on the basis that the enforcement application referred to the procedural rules for enforcement of foreign arbitral awards rather than domestic awards. The court held that the rules for domestic awards applied because the award had been rendered in Moscow, without addressing the distinction between the legal seat of the arbitration and the physical place where the arbitration took place. That decision has been appealed.

The issues raised by the case underscore the difficulties involved in reforming domestic arbitration in Russia while bringing Russia's approach to international arbitration in line with other jurisdictions. Although the reform has taken significant steps to deal with issues that have plagued domestic arbitration, and to expand the use of arbitration for a much wider range of corporate disputes, at least in the short term it also has created new uncertainties, including the role of foreign arbitral institutions for Russian-related and Russian-seated cases. The hope is that further positive steps will follow, particularly with regard to international arbitration.

About the authors

Steven Finizio is a partner at Wilmer Cutler Pickering Hale and Dorr in London. His practice focuses on complex commercial and regulatory disputes, and concentrates primarily on international arbitration. He has advised clients regarding disputes under the rules of most leading international arbitration institutions and in ad hoc proceedings, and also serves as an arbitrator.

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