A·L·R·U·D

LAW FIRM SINCE 1991

*31 August 2016*

**Russian Arbitration Law Reform**

Dear Sirs,

We hereby inform you that changes of Russian arbitration laws implemented under the Federal law dd. 29.12.2015 No. 382-FZ "On arbitration proceedings (arbitration courts)" (hereinafter referred to as "**Arbitration Law**") and the Federal law dd. 29.12.2015 No. 409-FZ on amending the associated laws due to adoption of the Arbitration Law are coming into effect from the 1st of September, 2016.

We would like to inform you on the key and most important changes.

## 1 Disputes that could be referred to arbitration.

### 1.1 Disputes that could be referred to the international commercial arbitration.

Please kindly note that the following disputes could be considered in the international arbitration tribunals (hereinafter referred to as "**IAT**"):

(A) The civil disputes arisen in connection with foreign-trade and other international economic relations between parties if:

- place of business of one of the parties is located outside the Russian Federation;
- place where a substantial part of the obligations is to be performed abroad;
- place where the subject-matter of the dispute is most closely connected with a foreign state.

(B) Disputes related to international investments in Russia or Russian investments abroad.

We would like to take your attention that new laws do not provide that disputes with companies with foreign element could be disputed in the IAT (as it was provided earlier). Thus we may not exclude the risk that Russian courts could take a narrow interpretation of this rule as excluding the possibility of the IAT to consider disputes of Russian companies with foreign element.

### 1.2 Non-arbitrable disputes.

The new laws establish arbitrability only for civil disputes and define the following categories of disputes which could not be referred to the arbitration tribunal:

- Insolvency (bankruptcy) disputes;
- Public law disputes (i.e. disputes on avoidance or refusal in state registration of companies, privatization disputes);
- Family and labor disputes;

- Certain intellectual property disputes (with participation of companies which exercise collective direction of copyrights and associated rights);
- Special proceedings to establish legal facts etc.

### 1.3 Arbitrability of corporate disputes.

Under the Arbitration Law the majority of corporate disputes could be referred to arbitration tribunals under the following conditions:

- Company, all its members and other persons who are claimants or defendants have entered into arbitration agreement;
- The disputes must be referred to permanent arbitral institution with seat in Russia;
- The institution should be administered by its own rules for arbitration of corporate disputes.

The Arbitration Law provides the special regulation for corporate disputes arising with owning of shares of Russian companies (including disputes connected with encumbrances over the shares) and disputes arisen out of actions of a registrar with respect to shares. There is only one requirement for such disputes: the dispute should be adjudicated only by permanent arbitration institution.

Some corporate disputes are non-arbitrable:

- on calling a general meeting of a company's members;
- arising from notaries' activities on certification of shares transactions;
- on disputing non-normative acts, decisions and actions (omission) of the state bodies, local authorities and others;
- with participation of entities which have a strategic importance;
- connected with shares' buyback by companies and purchase more than 30% of public company's shares;
- connected with removal (exclusion) of shareholders.

Arbitration agreements for corporate disputes could be concluded only after February 01, 2017. All arbitration agreements concluded earlier than February 01, 2017 are essentially unenforceable.

In the light of these changes we recommend to check the possibility of referring certain contractual disputes to the arbitration tribunals, especially in case of possible risk of corporate disputes.

### 1.4 Arbitrability of real estate disputes.

The new laws establish arbitrability of the real estate disputes (which eliminated the earlier existed legal uncertainty). However the record into the public register of rights to the real estates could be included only on the basis of enforcement order issued under the judgement of the Russian state court.

## 2 Formation and operation of arbitration tribunals.

### 2.1 Permanent arbitration institutions.

One of the most significant changes of Arbitration Law aimed to prevent creation of “pocket arbitrations” is mandatory licensing of permanent arbitration institutions in order to operate at the territory of Russia (not applied for two well-known arbitral institutions in Russia - International Commercial Arbitration Court and Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation).

The right to operate as permanent arbitration institution will be granted by the act of the Russian Government under recommendation of the Arbitration Development Council under the Russian Ministry of Justice basing on such criteria as specified list of arbitrators, reputation, range and kind of non-commercial organization’s activity etc.

### 2.2 *Ad hoc* arbitrations.

The authority of *ad hoc* arbitration is limited.

First of all the corporate disputes cannot be subject to *ad hoc* proceedings. Another important revision is that parties to *ad hoc* arbitration lose their right to waive the right for the setting aside of an arbitral award, it could be disputed in the state court in any case.

### 2.3 Foreign arbitration institutions.

(A) Foreign arbitration institution may administer the arbitration seated in Russia must obtain the consent of the Russian Government and for administering majority of corporate disputes – to publish the special rules for corporate disputes.

(B) In the absence of such consent the decisions of foreign arbitration institution will be considered as decisions of the *ad hoc* arbitration (with all abovementioned disadvantages).

In connection with these changes we recommend to check the authority of arbitration tribunals to consider the concrete contractual disputes and its compliance with criteria established by Arbitration Law.

## 3 Arbitration clause

### 3.1 Form of the arbitration clause.

According to the new legislation the arbitration agreement could be concluded by exchange of letters, telegrams, telexes, telefaxes and other documents including electronic documents if the sending of its by one of the parties could be established and by exchange of the procedural documents.

New Arbitration law also provides that arbitration agreement could be included into the Articles of association (excluding the articles of join-stock companies with more than 1 000 shareholders and public companies). All shareholders of company should approve such

articles. The arbitration clause covers all disputes between shareholders, between company and the third parties (if the third parties agrees with enforceability of arbitration clause).

**3.2 Effect of the arbitration clause.**

(A) New rules of validity of arbitration clause are established:

- Invalidity of the contract does not mean the invalidity of arbitration clause;
- Arbitration clause remains in force in case of substitution of parties in an obligation.

(B) The terms of reference of arbitration clause is clearly defined:

- "*disputes arisen from the contract or connected with it*" means any transactions between parties intended to execution, modification or termination of the contract;
- arbitration clause effects on any disputes connected with entering into the contract, its coming into effect, its termination and validity including restitution.

Although the changes is aimed to specify and liberalize the laws we recommend to pay attention to the special aspects of conclusion of arbitration clause in order to avoid disputes on its validity.

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Hope that the information provided herein would be useful for you.

If any of your colleagues would also like to receive our newsletters, please let us know by sending us his/her email address in response to this message.

If you would like to learn more about our Dispute Resolution practice, Corporate practice or Commercial practice, please let us know about it in reply to this email. We will be glad to provide you with our materials.

If you have any questions, please, do not hesitate to contact with Senior Partner of Dispute Resolution practice **Vassily Rudomino** (VRudomino@alrud.com), the Partner of Corporate practice **Alexander Zharskiy** (AZharskiy@alrud.com) or the Partner of Commercial practice **Maria Ostashenko** (MOstashenko@alrud.com).

Kind regards,

ALRUD Law Firm

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