RUSSIAN ARBITRATION ASSOCIATION

To the Ministry of Justice
of the Russian Federation

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COMMENTS
BY
THE ASSOCIATION FOR THE PROMOTION OF ARBITRATION
(RUSSIAN ARBITRATION ASSOCIATION)
ON
DRAFT LEGISLATIVE ACTS AIMED AT IMPROVING
ARBITRATION IN RUSSIA

Contents

1. INTRODUCTION

Despite the fairly liberal Russian legislation on arbitration courts that was enacted in the 1990s, arbitration as a form of dispute resolution has yet to gain widespread popularity in Russia.

There are quite a few reasons for that, from shortcomings in legislation regulating certain aspects of arbitration proceedings, to numerous abuses in this sphere.

As a result, the business community in Russia still largely mistrusts arbitration as a form of dispute resolution.

Studies in this sphere have revealed a number of problems such as the dependence of arbitration courts on the organizations under which they have been established, in matters relating to arbitration proceedings, the formation of arbitral tribunals, making awards, etc.; non-transparency in the appointment of arbitrators; susceptibility to corruption; use of arbitration proceedings to legalize illicit operations, and so forth.

In view of the foregoing, proposals of the Russian Justice Ministry[1] will undoubtedly promote a healthier environment for arbitration, which will inevitably result in the broader use of this alternative form of dispute resolution.

Nevertheless, some of the proposals require further clarification and conceptualization, as shown below.

2. DO WE NEED TWO LEGISLATIVE ACTS TO REGULATE ARBITRATION PROCEEDINGS?

It should be noted that there are no fundamental reasons for the simultaneous existence of two laws on arbitration, namely: "On International Commercial Arbitration" and "On Arbitration Courts", because the two statutes often govern coinciding or even identical matters.

Moreover, the existence of two legislative acts that regulate the same legal relationships can create difficulties in implementation.

Many permanent arbitral institutions make no distinction between hearing domestic and international disputes. Besides, in the event that a party to a contested claim is replaced, a domestic dispute may well turn into an international dispute and *vice versa*.

Because of this, it appears expedient that there should be a single legislative act to regulate arbitration in Russia, with such act having a separate section that might govern matters specific to international arbitration.

3. DETERMINATION OF ARBITRABILITY OF DISPUTES

3.1. General Provisions

At this writing, the laws of Russia do not define clearly which disputes are arbitrable and which are not. A lack of direct regulatory control has led to fairly contradictory court practice

[1] Hereinafter, "Draft" or "Drafts" when used in respect of each specific act or all acts.

in these matters (in particular, with regard to corporate disputes and disputes over rights in real estate).

Because of this, the proposal to regard as arbitrable any disputes in which the parties are at liberty to dispose of their procedural rights, specifically disputes in which amicable settlement is admissible[2], is consistent with practice of countries with well-established arbitration traditions.

At the same time, it is an established practice in many countries to submit to arbitration not only civil-law disputes in which amicable settlement is admissible, but also any other disputes in which such settlement may be reached. In particular, this is true of employment and anti-trust disputes.

In this connection, it is suggested that the reference to civil law and other private-law relationships should be removed from the Draft.

3.2. Corporate Disputes and Disputes over Real Estate Rights

One positive feature of the draft legislation is that it states in no uncertain terms that corporate disputes and disputes over real estate are arbitrable.

Thus, the Draft provides that the following categories of disputes may be submitted to arbitration (draft Article 225.1 of the APC *[Code of Arbitrazh Procedure]* of Russia[3]):

"...[disputes] associated with the establishment of a legal entity, and/or the governance of same, or associated with participation in a legal entity that is a commercial organization, and also in a non-commercial partnership, association (union) of commercial organizations, another non-commercial organization combining commercial organizations and/or individual entrepreneurs, a non-commercial organization having the status of a self-regulatory organization in accordance with the federal law (hereinafter "corporate disputes"), including in respect of the following corporate disputes:

1) *Disputes connected with the establishment, reorganization and liquidation of a legal entity;*

2) *Disputes connected with the ownership of shares, participatory interests in the charter (joint-stock) capital of business companies and partnerships, and shares in cooperatives, the creation of encumbrances over the same and the exercise of the rights arising out of them (except in cases listed in other clauses of Part 1 of this Article), in particular, disputes arising out of agreements for the sale/purchase of shares, participatory interests in the*

[2] Draft Art. 33 of the APC RF: *"Disputes arising out of civil-law and other private-law relationships which are subject to the general jurisdiction of arbitrazh courts in accordance with this Code may be submitted to an arbitration court where there is a valid arbitration agreement between the parties, provided that the parties may freely dispose of their procedural rights in connection with such disputes (alter the grounds for and subject-matter of, a claim, acknowledge the claim, withdraw a claim and enter into an amicable settlement agreement)".*

[3] See Art. 10.11 of the draft Federal Law (FL) "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

charter (joint-stock) capital of business companies (partnerships), disputes in connection with the charge of shares and participatory interests in the charter (joint-stock) capital of business companies (partnerships), except for disputes arising out of the activities of depositaries linked with the recording of rights to shares and other securities, disputes arising in connection with the distribution of inherited property and the distribution of common property of married individuals including shares and participatory interests in the charter (joint-stock) capital of business companies and partnerships, and shares in cooperatives;

3) *Disputes over claims by founders, participants and members of a legal entity (hereinafter "Participants of a Legal Entity") for the recovery of damages caused to the legal entity, for the invalidation of transactions entered into by the legal entity, and/or for the invocation of consequences of the invalidity of such transactions;*

4) *Disputes connected with the appointment or election, termination and suspension of authorities of persons who are or were members of governing and supervisory bodies of a legal entity, and also disputes arising out of civil relationships between said persons and the legal entity in connection with the exercise, termination and suspension of said persons' powers; disputes arising out of agreements among and between participants of a legal entity over matters relating to the legal entity's governance;*

5) *Disputes connected with the issuance of securities, including contestation of non-regulatory legal acts, decisions, actions (inaction) of state agencies, local government bodies, other bodies and officials, decisions of an issuer's governing bodies, contestation of transactions made in the course of placement of issuable securities or of reports (notices) on the results of an issue (additional issue) of issuable securities;*

6) *Disputes arising out of the activities of registrars maintaining registers of security holders, in connection with the recording of rights in shares and other securities, the exercise/performance of other rights and obligations by a registrar as provided by the federal law, in connection with the placement and/or circulation of securities; and*

...

8) *Disputes over appeals against decisions of the governing bodies of a legal entity; ..."*

Since some categories of corporate disputes have certain peculiarities due to the involvement of a large number of persons (*e.g.* shareholders of a company), it is logical to require that special rules should be adopted for the settlement of such disputes.

Equally logical is the requirement for the settlement of such disputes within the Russian Federation, since, among other things, many minority shareholders would find it burdensome to participate in proceedings abroad.

At the same time, other categories of disputes, for example, disputes among and between company participants over the company's establishment, activities and liquidation, are devoid of pronounced procedural particularities.

Because of this, the requirement concerning the adoption and publication of special rules governing corporate dispute resolution, as well as the requirement that such disputes should necessarily be resolved within the Russian Federation, should only be limited to cases where a potential dispute can affect the interests of ten or more participants (shareholders) of a company or where the arbitration agreement is included in the charter of the respective legal entity.

In this regard, the limit as to the time of conclusion of arbitration agreements relating to corporate disputes (according to the current Draft, such agreements may be entered into no earlier than 1 April 2016[4]) should be allowed to remain in place solely with respect to the above-referenced cases.

Further, the wording of Article 40.8 of the Draft Law "On Arbitration Courts" should be made more specific, as in its present form it may be construed to suggest that certain categories of corporate disputes arbitrable in accordance with the Draft APC are not arbitrable under the Draft Law "On Arbitration Courts".[5]

3.3. Arbitrability of Disputes over Government Procurement

The question of arbitrability of disputes relating to government procurement should be solved through the adoption of legislation.[6]

While admitting that improprieties did occur in some arbitration courts hearing disputes over government procurement, we nonetheless think that the limitation of such disputes' arbitrability may lead to the limitation of competition, notably, in connection with large infrastructure projects. The impossibility of submitting such disputes to renowned arbitration institutions may serve as an adverse factor for major foreign companies that are participating in tenders.

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[4] See Art. 10.7 of the draft Federal Law "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

[5] See Art. 40.8 of the draft Federal Law "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'": *"Disputes in connection with the establishment of a legal entity, its governance or participation in a legal entity, to which participants of the legal entity and the legal entity itself are parties, may not be arbitrated with a view to resolving a specific dispute. Said disputes, including disputes arising out of claims of participants of a legal entity in connection with the legal entity's relationships with a third party, where the participants of a legal entity are entitled to bring such actions in accordance with the law (except for disputes specified in clauses 2 and 6 of Part 1 of Article 225.1 of the APC RF), may be arbitrated solely on condition that arbitration is administered by a permanent arbitral institution that has approved and published its rules of resolving corporate disputes."*

[6] See decisions of the Supreme Arbitrazh Court of the Russian Federation (ArbatStroy LLC *vs.* Moscow GKUZ [public health institution] "Production-Technical Association for Capital Repairs and Development under the Health Department of Moscow"), case reference: http://kad.arbitr.ru/Card/e940b0c1-bbe0-403e-afd1-6864647297c8.

Because of this, it is expedient that the law should provide for the possibility to submit disputes over government procurement to arbitration.

At the same time, to limit abuses in this sphere, the authorized government agency, in particular the Russian Justice Ministry, can draw up a list of permanent arbitral institutions (Russian and foreign) empowered to resolve such disputes.

4. VALIDITY AND FORM OF THE ARBITRATION AGREEMENT

4.1. Validity of the Arbitration Agreement

At this writing, the Russian Federation lacks special norms governing the rules of interpretation of arbitration agreements, which frequently results in an excessively formalistic construction of their terms and conditions. Besides, there is a fairly widespread court practice of contradictory interpretation of matters relating to the validity of arbitration agreements in the event of the invalidity of an obligation, the future of the existing arbitration agreement in the event of a substitution of persons in an obligation, and the authority to enter into an arbitration agreement.

In this context, one should meet with unqualified approval the Russian Justice Ministry's proposals for changing applicable legislation in accordance with the current experience of countries with well-established legal traditions, including with regard to an effective interpretation of arbitration agreements.

At the same time, the Draft makes no mention of the problem of so-called unilateral agreements under which the right to choose between the [state] court and arbitration is only granted to one of the parties in a dispute.

Such agreements are a tradition of sorts at leading financial institutions, including international institutions when they enter into contracts with borrowers. The peculiarity of unilateral agreements is that once a bank has extended a loan to a borrower, it is highly unlikely that the borrower would have any *bona fide* claims against the bank. As a rule, it is the bank that makes claims against the borrower over payments in connection with the loan; consequently, the bank is interested in having such a dispute heard in any jurisdiction (at the bank's option) where the borrower may have its assets. Because of this, it is an established court practice (in England, for example) to recognize such agreements as valid.

Russian courts, however, give such agreements the opposite interpretation, which can limit Russian business entities' access to foreign loans.

Because of this, it is suggested that the law should expressly provide for the possibility of entering into agreements of this kind.

4.2. Form of the Arbitration Agreement

Regarding the written form of transactions, applicable Russian legislation requires the transaction [document] to be signed by the parties.[7] Importantly, no arbitration agreement may be made in an oral form under the laws of Russia.

Concerning international arbitration, countries with well-established arbitration traditions (France, for one) have generally given up any formal requirements in respect of the arbitration agreement.[8]

Likewise, Sweden's Arbitration Law 1999 does not make any requirements as to the form of arbitration agreements,[9] as a result of which an agreement to arbitrate may be concluded in an oral form.

The purpose of this is to make the country concerned more attractive for arbitration, because the absence of a requirement that the arbitration agreement be done in writing makes it altogether impossible to challenge it on the grounds of a defect of form; that it is to say, it may only be challenged on the grounds of its content. Furthermore, in certain types of arbitration, for example, investment arbitration on the basis of a bilateral or multilateral agreement on investment protection and/or on the basis of national law, no arbitration agreement is ever signed.

If past experience of those countries is any guide, the absence of requirements regarding the written form of an arbitration agreement has not resulted in any improprieties in that field, because the party referring to the existence of the arbitration agreement made in an oral form must prove its content, if the other party challenges it. In the absence of such proof, arbitrators and courts arrive at the conclusion that the arbitration agreement does not exist.

Because of this, it is suggested that the Draft should incorporate the provision from the UNCITRAL Model Law 2006:[10]

> "*An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.*"

5. ELECTRONIC DOCUMENT FLOW

One of the realities of doing business these days is that documents transmitted via electronic communication channels have all but displaced paper documents.

In this context, the inclusion of norms concerning the electronic document flow in the Draft amendments to the ICA Law[11] merits unqualified approval.[12]

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[7] Art. 160 of the Civil Code of the Russian Federation. Written Form of a Transaction. 1. A transaction in writing shall be made by means of drafting a document which records its content and is signed by a person or persons entering into the transaction or by the persons duly authorized thereby.

[8] Art. 1507 of the Code of Civil Procedure of France (as amended in 2011). For an unofficial translation go to http://www.iaiparis.com/pdf/FRENCH_LAW_ON_INTERNATIONAL_ARBITRATION.pdf

[9] Article 1 of Sweden's Arbitration Law 1999.

[10] Option I, Article 7 (3) of the UNCITRAL Model Law (as amended in 2006).

At the same time, the proposed wording differs somewhat from the wording proposed by the UNCITRAL Model Law 2006. In particular, the Draft under review contains an exhaustive list of information that is regarded as an electronic document, whereas the list contained in the UNCITRAL Model Law is open-ended.[13]

Likewise, a more specific wording is required of the norm stating that an arbitration agreement may be concluded by means of exchange of electronic documents transmitted via communication channels that have the capability of verifying that a document has originated from a party to the contract.[14]

The requirement concerning the "credibility" of the sender could lead to an interpretation whereby only documents bearing an electronic digital signature may be regarded as "electronic documents", because only such documents make it possible to "credibly" ascertain who the sender was[15] and, if so, electronic correspondence would not be regarded as an electronic document.

In this context, it is suggested that the requirement regarding "credibility" should be removed from the Draft, because no such requirement is made in the legislation of countries with well-established arbitration traditions or in the Recommendations of the UNCITRAL Commission regarding the interpretation of the 1958 New York Convention.[16]

In addition, some of the articles of the Federal Draft Law "On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation" (hereinafter, the Draft "On Arbitration Courts") require documents to be in writing.[17] However, the Draft does not define

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[11] Art. 9 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

[12] Thus, it is proposed to add to the ICA Law the term *"electronic document transmitted via communication channels, i.e. information generated, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data interchange and electronic mail "*.

[13] Option I, Article 7.4 of the UNCITRAL Model Law: *"…"electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy "*.

[14] Art. 7, Part 3 of the draft amendments to the ICA Law: *"The provision of clause 2 of this Article shall be deemed complied with, if the arbitration agreement is concluded by means of exchange of letters, telegrams, telex or fax messages and other documents, including electronic documents transmitted via communication channels, which make it possible credibly to ascertain that the document originates from a party to the agreement."* The same norm is found in Art. 7.3 of the Draft FL "On Arbitration Courts".

[15] Such construction prevails, for example, in court practice of the Republic of Belarus.

[16] UNCITRAL Recommendations adopted at the 39th Session of the United Nations Commission on International Trade Law on 7 July 2006 regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention (see. Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, New York, 19 June-7 July 2006, http://www.uncitral.org/uncitral/ru/commission/sessions/39th.html: "The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference".

[17] In particular, Section VI 1 Art. 31 (Written Form of an Arbitral Award), Section III Art. 12 (Written Form of Arbitrator's Declaration of Circumstances which may cause Reasonable Doubt as to Arbitrator's Impartiality or Independence), Section III Art. 13 (Written Form of a Challenge of an Arbitrator).

what the "document in writing" is understood to mean, while the equivalence of an electronic document and a document in writing is mentioned only in the context of the requirement as to the form of the arbitration agreement. Because of this, there is a degree of uncertainty as to whether or not electronic document workflow may be used in the course of arbitration proceedings.

The requirement concerning written form can limit the sphere of use of modern information technology in the arbitration sphere, including on-line arbitration.

This limit can be removed and legal uncertainty eliminated by including a provision in the text of the law saying that electronic documents are equivalent to documents in writing if the parties come to an agreement on this; such agreement may be included in the arbitration agreement between the parties as well as in the rules that the parties have agreed as governing [the arbitral proceedings] .

In addition, the Draft states that in order to enforce an arbitral award, a party should provide a duly certified original arbitral award or a duly certified copy thereof. Taking into consideration current trends toward the increased use of electronic document workflows, arbitral awards might be rendered in electronic form. But with the aforementioned provision of the Draft FL "On Arbitration Courts", it is not clear whether an arbitral award made in electronic form comes within the scope of the definition of the "original arbitral award" or "duly certified copy". This creates a degree of legal uncertainty and potential difficulties in enforcing arbitral awards.

Doubts as to the applicability of arbitral awards in electronic form can be removed if a provision is added that an award may be in electronic form, provided that it is possible to verify its authenticity, including by means of an electronic digital signature.

6. INTERACTION WITH STATE COURTS

6.1. Court of Competent Jurisdiction

The proposal in the Drafts that matters connected with arbitration proceedings should be removed from the competence of courts of first instance and should be referred for resolution to courts higher up the line is to be regarded as undoubtedly positive.

Since the reasons for reversing an arbitral award or refusing the request for the issuance of a writ of execution to enforce an arbitral award are very narrow and are not given to expansive interpretation, proceedings in such matters do not require a detailed study of the question of fact.

In this context, it would be more reasonable, it appears, if such matters were elevated to the level of appellate courts, because of the following:

1. Given the sheer vastness of Russia, many business entities may find it difficult to take part in hearings in federal arbitrazh courts.

2. If the number of arbitrated cases increases, federal arbitrazh courts may be overloaded.

3. Submission of cases of such category to federal arbitrazh courts all but precludes chances for appealing their decisions.

Because of this, it would be more expedient if cases in this category were submitted for settlement to appellate courts (guided by the court-of-first-instance rules).

6.2. Involvement of the Legal Community in the Review of Arbitration-Related Cases at the Level of the Highest Level of Judiciary

To work out a balanced policy on arbitration, one in accordance with the best practices of countries with well-established traditions of arbitration, it is expedient that the Supreme Arbitrazh Court of Russia should seek expert opinions from Russian and international organizations that specialize in arbitration, when considering matters connected with the setting aside of arbitral awards, invalidation of arbitration agreements or recognition and enforcement of foreign arbitral awards.

6.3. Simultaneous Review of Cases Concerning Setting Aside of Arbitral Awards and Issuance of Writs of Execution

Draft amendments to the APC RF and the FL "On Arbitration Courts" contain important provisions that govern the order of resolving cases concerning the setting aside of arbitral awards and issuance of writs of execution when proceedings in state courts are conducted on both matters simultaneously.

In this context, one should enthusiastically support the proposed approach whereby in conditions of 'competing' simultaneous proceedings in a case for setting aside of an arbitral award and a case for the issuance of a writ of execution, the proceeding that was the first to be initiated continues, whereas the proceeding in the second case is suspended on a mandatory basis.

At the same time, the wording of clause 2, part 6 of Article 238 of the Draft amendments to the APC RF[18] should be revised, because in its present form it provides that the court which hears an application for the issuance of a writ of execution should rule to terminate proceedings in the event that the request for setting aside of the arbitral award has been dismissed. It would, however, be more logical if in such event a ruling were pronounced granting the request for the issuance of a writ of execution.

6.4. Requesting Documents from an Arbitral Institution

In view of the need to assure that disputes are resolved as soon as possible, it is important that the provision should be made that cases in which the setting aside of an arbitral award is sought should be heard within no more than one month.

[18] See clause 2, part 6 of Art. 238 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

However, it appears excessive that the Draft amendments to the APC RF should include[19] a norm that an arbitrazh court may request [copies of] the files of a case under review from the arbitration institution.[20]

First, the court is entitled to do so anyway by virtue of Article 66 of the APC RF.

Second, the inclusion of that norm in the APC RF will induce judges to request case files in the same manner as they would do when ordinary cases are reviewed in a cassation court, even if the circumstances do not warrant such a request. Considering that the list of reasons for setting aside an arbitral award or refusing to issue a writ of execution is fairly limited, a request that the arbitral institution produce the files of a case should rather be an exception to the general rule. Requesting case files from a permanent arbitral institution will actually result in delays in the case hearing and, consequently, delays in issuing a writ of execution.

Third, judging from world experience, renowned permanent arbitral institutions would safe-keep a fairly limited number of case-related papers. As a rule, these include a statement of claim, statement of defense, documents concerning the appointment of the arbitral tribunal and evidencing the arbitration fee payment, as well as interim and final awards. The case files are in the arbitrators' possession and are not transferred to the respective permanent arbitral institution for safe-keeping.

Because of this, requesting the case files from a permanent arbitral institution is of limited value for deciding the case and, as stated above, should be an exception to the rule (permissible by virtue of the general provisions of the APC RF).

In view of the foregoing, it is suggested that this norm should be removed from the draft amendments to the APC RF.

6.5. Re-Applying to an Arbitral Tribunal

An important innovation is the norm that has filled an existing legislative gap and states that if an arbitral award is set aside, a party is entitled to re-apply to the arbitration court, unless the possibility for doing so has been forfeited.[21]

At the same time, the second part of the article whereby an interested party may apply to the state arbitrazh court appears to be unnecessary, since it may be construed as binding such a party to have recourse precisely to the state arbitrazh court of the Russian Federation. In

[19] See Art. 1 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

[20] See part 2 of Art. 232 of the draft amendments to the APC RF:
"When preparing a case for hearing at the suit of a party to the arbitration proceedings, an arbitrazh court may request the files of the case, in which the award is contested before the arbitrazh court, from the permanent arbitral institution where the files of the arbitrated case are safe-kept or from the agency authorized to safe-jeep the files of the arbitrated case in accordance with applicable legislation, all in compliance with the rules laid down by this Code for the discovery of evidence ".
A similar norm is found in part 2 of Art. 238 of the draft amendments to the APC RF.

[21] Art. 234, Part 3 of the draft APC RF: "*The reversal of an arbitral award shall not prevent the parties to arbitration from re-applying to the state arbitrazh court, unless the possibility has been lost for having recourse to the arbitration court pursuant to the general rules recorded in this Code".*
A similar norm is contained in part 3 of Art. 240 of the Draft APC RF.

regard to international arbitration, a foreign court of competent jurisdiction may also be applied to. Because of this, it would be more expedient if the words "… *or an arbitrazh court pursuant to the general rules recorded in this Code*" in the norm in question were replaced with the words *"... or a state court of competent jurisdiction"*.

6.6. Eliminating Faults in an Arbitral Award

The draft amendments to the ICA Law[22] and the FL "On Arbitration Courts"[23] contain an important innovation, namely, that the court in receipt of an application for setting aside of an arbitral award may, if it deems it appropriate or if either party so requests, suspend for a term prescribed thereby proceedings in that matter so as to enable the arbitral tribunal to resume arbitration or undertake other acts which will make it possible, in the arbitral tribunal's opinion, to eliminate the reasons for the setting aside of the arbitral award.

This provision will undoubtedly serve to make arbitration more popular in Russia.

6.7. Setting Aside an Interim Award on Jurisdiction

Following the principles recorded in the UNCITRAL Model Law on International Commercial Arbitration, the Draft gives the parties the right to file an application for setting aside an interim award that it has jurisdiction.[24]

At the same time, the UNCITRAL Model Law uses the term [the arbitral tribunal] *"rules as a preliminary question"* rather than "*arbitral tribunal's ruling of a preliminary nature*".[25]

The current wording in the draft amendments to the APC RF reads so as to suggest that the award of the tribunal concerning its jurisdiction is purportedly of a preliminary nature and that the tribunal may subsequently reconsider its conclusions.

At the same time, the decision made by the arbitral tribunal on the question of its jurisdiction is final and may not be reconsidered. In other words, the arbitrators may at the beginning decide, as a preliminary question, whether they have jurisdiction and make the final decision on that matter, whereupon (if they decide that they have jurisdiction) they may hear the case on the merits.

Because of this, it is suggested that the wording in the Draft should be made to conform to the text of the UNCITRAL Model Law.

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[22] See Art. 34.4 of the Draft ICA Law (as worded in Article 9 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'").

[23] See Art. 35.4 of the draft Law "On Arbitration Courts".

[24] See Art. 235.1 of the draft amendments to the APC RF: *"In instances specified in the federal law, any party to arbitration proceedings may apply to the federal arbitrazh court of the district where the arbitration proceedings are conducted with an application for the reversal of the arbitral court's ruling of a preliminary nature that it has jurisdiction".*

[25] Art. 16 (3) of the UNCITRAL Model Law: "*The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award*."

In addition, the Draft suggests in accordance with the letter of the Model Law, that only a positive decision of an arbitral tribunal on jurisdiction may be appealed. In other words, if the arbitrators decide that they do not have jurisdiction, no appeal may be taken from their decision.

By contrast, the legislation of many countries gives the parties the right to appeal not only a positive decision of the arbitral tribunal on that matter, but also a negative one,[26] which is more in line with the parties' interests. Accordingly, it is suggested that corresponding amendments be made to the Draft to include the possibility of appealing not only a positive decision on the existence of jurisdiction, but a decision on the absence of jurisdiction as well.

6.8. State Court's Assistance in Composing an Arbitral Tribunal

One should admit as an undoubtedly positive that the Drafts fill in the gap in the existing legislation with regard to state courts' function of appointing arbitrators, challenging arbitrators and terminating their powers,[27] because in the absence of the parties' agreement on the procedure that applies to *ad hoc* arbitration, the arbitration agreement becomes unenforceable because of the legislative gap.

At the same time, for the avoidance of misinterpretation,[28] the draft amendments to the APC RF should expressly state that the above-referenced procedures only apply to the extent that

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[26] For example, Article 190 (2) of the Swiss Law on International Private Law, and Article 67 (1a) of the UK Arbitration Act 1996.

[27] Art. 240.4 of the draft amendments to the APC RF: "Reasons for granting an Application that the Arbitrazh Courts Perform the Functions of Assisting Arbitration Courts. *1. An application concerning the challenge of an arbitrator [Russian: "арбитра третейского суда"] shall be granted by the arbitrazh court if the following circumstances are simultaneously in existence:*

1) The procedure has been complied with for challenging the arbitrator, as specified by the federal law, in accordance with which the question of challenge has been submitted to the arbitrazh court for resolution;

2) There are reasons for challenging the arbitrator, as specified in the federal law.

2. An application on the question of appointment of an arbitrator shall be granted by the arbitrazh court if the following circumstances are simultaneously in existence:

1) The parties to the arbitration proceedings have complied with the procedure for the appointment of the arbitrator, as specified by the federal law, in accordance with which the question of appointment has been submitted to the arbitrazh court for resolution;

2) In accordance with the federal law, the arbitrazh court is empowered to solve the question of appointment of the arbitrator.

3. An application on the question of terminating the powers of an arbitrator shall be granted if the following circumstances are simultaneously in existence:

1) The procedure has been complied with for terminating the powers of the arbitrator, as specified by the federal law, in accordance with which the question of terminating the arbitrator's powers has been submitted to the arbitrazh court for resolution;

2) There are reasons for terminating the powers of the arbitrator, as specified in the federal law."

[28] The current wording of Art. 11.2 of the draft Law "On Arbitration Courts" can be interpreted to suggest that a state court should be the nominating authority in *ad hoc* arbitration, unless the parties have expressly precluded that by agreement between them. Consequently, it is suggested that the wording of the UNCITRAL Model Law should be used in these sections of the Draft.

the arbitration agreement or applicable rules does (do) not specify a different procedure for the appointment of an arbitrator, hearing an application concerning a challenge of an arbitrator and an application concerning an arbitrator's powers termination.

In addition, the draft amendments to the ICA Law say that in appointing arbitrators, the court of competent jurisdiction must do so using either a list of arbitrators of the respective permanent arbitral institution or a special list drawn up by the Russian Justice Ministry.[29]

It should be noted that the proposal is hardly justified, because of the following:

First, most of the well known foreign institutions do not maintain a list of arbitrators (see additional comments below).

Second, if past experience is any guide, it is not often that the parties turn to the competent authority for appointments. Therefore, it would be inexpedient to draw up a list of arbitrators specifically for this purpose, since the costs involved in compiling such a list would not be justified in light of infrequent requests for appointment.

Third, in appointing an arbitrator, the court must proceed from the peculiarities of a given case and the requirements regarding the arbitrator which may be formulated by agreement between the parties. It is impossible to foresee all possible requirements in advance (for example, the would-be arbitrator's command of a specific foreign language). Hence, it may turn out that the list compiled by the Russian Justice Ministry will simply lack a candidate meeting some or other special requirements.

In practical terms, this problem may be resolved by the court by consulting a list of institutions which do maintain such [arbitrator] lists. Just as in the case of appointment of an expert, the parties are entitled to suggest all possible candidates for the court to choose from.

Because of this, it is suggested that the norm concerning a special list of arbitrators should be removed from the Draft.

At the same time, the Draft should state that in appointing arbitrators, the courts are to make such appointment with due regard for the parties' views. A similar addition should be made to the draft amendments to the ICA Law.[30]

Furthermore, it should be stated that those norms also apply to international arbitration proceedings conducted in Russia.

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[29] Draft amendments to Art. 6.11 of the ICA Law: *"In any event when the agency specified in Article 6 decides on the appointment of an arbitrator, the appointment shall be made by means of:*

1) Selection of the arbitrator from a recommended arbitrators list of the permanent arbitral institution if the dispute is administered by that institution; or

2) Selection of the arbitrator from a list drawn up under the procedure established by the Ministry of Justice of the Russian Federation, if it was impossible to make the appointment using the list mentioned in Clause 6 (1) of this Article, and also in the event that the appointment is made as part of arbitration not administered by any permanent arbitral institution".

[30] See Art. 11.6 of the draft amendments to the ICA Law.

6.9. State Court's Assistance in Obtaining of Evidence by an Arbitration Court

The Draft amendments to the APC RF[31] regarding assistance to arbitration courts in obtaining evidence, if modified as suggested herein, will undoubtedly promote the popularity of arbitration in Russia.

But it should be noted that there is nothing in the pertinent article to suggest that it is also applicable to international arbitration, including in the event that arbitration is conducted outside Russia. Because of this, it is suggested that the norm should be made more specific.

Besides, the article[32] as currently worded says that an arbitral tribunal's ruling requesting assistance in obtaining evidence should briefly describe the dispute and the circumstances to be clarified. Since it is not the function of a state court to re-assess the circumstances of a dispute or the expediency of obtaining evidence and in order to preclude a breach of the confidentiality of the arbitration proceedings, it is suggested that the norm should be modified and that the mention of a brief description of the dispute and the circumstances to be clarified should be removed.

Because of the same, it is suggested that a copy of the statement of claim should be removed from the list of documents required for submission.[33]

Furthermore, one of the reasons for a state court's refusal to assist in obtaining evidence is the non-arbitrability of the dispute brought before the arbitration court.[34] This norm should be removed, because when it comes to deciding the question of assistance in obtaining evidence, the state court will have very little information on the subject-matter of the dispute. In this connection, the court's conclusion as to the non-arbitrability of the dispute will, on the one hand, be made without the court's studying the circumstances of the case in full and, on the other hand, will have preclusion effect for the parties.

6.10. Broader Reasons for Refusal to Enforce a Judgment of a Foreign Court and a Foreign Arbitral Award

According to the Draft amendments to the APC RF, it is proposed to broaden the grounds by which a Russian state court is entitled to refuse to enforce a foreign court's judgment or a foreign arbitral award, including in situations where the debtor makes no reference to such reasons.[35] This list materially differs from the list of reasons recorded in the New York

[31] See Art. 74.1 of the draft amendment to the APC RF "Requests of Arbitral Court for Assistance in Obtaining Evidence."

[32] Draft Art. 74.1 (2) of the APC RF and draft Art. 63.1 (2) of the Code of Civil Procedure of the Russian Federation: *"A request mentioned in part 1 of this Article shall be drawn up by the arbitral tribunal as a ruling. The ruling shall set out in brief the substance of the dispute under review and indicate the circumstances to be elucidated and evidence to be obtained by the arbitrazh court acting upon the request."*

[33] Draft paragraph 1, clause 3 of Art. 240.2 of the APC RF.

[34] Drafts Art. 74.1 (4) of the APC RF and draft Art. 63.1 (4) of the CCP RF.

[35] Part 2 of Art. 244 of the draft amendments to the APC RF:

"Unless an international treaty signed by the Russian Federation provides otherwise, an arbitrazh court may refuse to issue a writ of execution to enforce a foreign court's judgment because of the reasons specified in clauses 3-7 of part 1 of this Article even in the event that the party to the arbitration proceedings against which the arbitral award was made does not refer to such reasons."

Accordingly, clauses 3-7 of Art. 244.1 of the APC RF read as follows:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") to which the Russian Federation has acceded.

Even though this norm begins with the proviso "*unless an international treaty provides otherwise"*, it may, if recorded in the APC RF, pave the way toward the courts' invocation of this norm notwithstanding the fact that the Russian Federation is a signatory to the New York Convention.

In this context, it is suggested that the wording should be revised so as to preclude the possibility of this norm being applied to foreign arbitral awards; for such purposes, references to a "party to the arbitration proceedings" and "arbitral award" should be removed from the text.

Further, the draft of amendments to the CCP RF [Code of Civil Procedure] states that the court is entitled to request an explanation from the foreign court that rendered the judgment.[36] It should be noted that the courts (and the Russian courts are no exception) generally do not provide clarifications in connection with their decisions. Because of this, this norm could be used to delay proceedings and should therefore be removed.

6.11. Recognition of Foreign Arbitral Awards

The Draft contains a fairly important provision that a foreign arbitral award is automatically recognized in Russia without going through the execution proceedings, unless the interested party objects, before the Russian court within one month of the date that the party learnt of the foreign arbitral award, to it being recognized.[37]

For the purposes hereof, it should be noted that the reasons by which a Russian court is entitled to refuse to recognize a foreign arbitral award are the same by which a Russian court is entitled to refuse to issue a writ of execution to enforce a foreign arbitral award.

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3) Under an international treaty signed by the Russian Federation or the federal law, courts in the Russian Federation have the exclusive jurisdiction to try the case;

4) A court in the Russian Federation issued a decision in the same dispute, between the same parties, about the same subject matter and on the same grounds, which decision has taken legal effect;

5) A case concerning the same dispute between the same parties, about the same subject matter and on the same grounds is being heard in a court in the Russian Federation, and such case was initiated prior to the case in the foreign court, or if the court in the Russian Federation was the first to accept a statement of claim in the dispute between the same parties, about the same subject matter and on the same grounds;

6) The period of limitations for enforcing a foreign court's judgment has run out, and the period was not reinstated by an arbitrazh court;

7) The enforcement of a foreign court's judgment would be contrary to the public policy of the Russian Federation".

[36] Draft of Art. 411.5 of the CCP RF: *"In the event that in deciding the question of enforcement, the court has doubts, it may ask the party that made the request for the enforcement of the foreign court's judgment to provide an explanation, and also may question the debtor as to the substance of the request and, where necessary, request a clarification from the foreign court that rendered the judgment".*

[37] See Art. 245.1 of the draft amendments to the APC RF.

At the same time, the Draft amendments to the APC RF state that an application concerning the refusal to recognize an award must contain a reference to certain circumstances which are not among the reasons for such refusal.[38]

Because of this, it is suggested that no mention be made of the need to list such circumstances, since in no case does their existence constitute a reason for the refusal to recognize a foreign arbitral award or court judgment.

6.12. Applying to the Court at the place where Debtor's property is situated

The current version of the APC RF and the Draft amendments to the APC RF[39] contain norms whereby an application for the issuance of a writ of execution or the recognition and enforcement of a foreign arbitral award is to be filed in the area where the debtor's assets are situated, but only if the debtor's location or place of residence is unknown.

These norms may be interpreted to suggest that if the debtor's place of residence or location outside the Russian Federation is known, execution may not be levied upon its assets in Russia.

It would be more proper if the provision concerning the unknown address of the debtor were removed altogether.

6.13. Derivative Actions

At this writing, the efficiency of arbitration is largely impeded because it is impossible to file so-called derivative actions, i.e. actions brought by a shareholder (participant) of a company for the invalidation of a third-party transaction covered by the arbitration agreement.[40] In practical terms, such right is often abused when a company that wishes to avoid liability in the course of arbitration commences proceedings in a state court via a minority shareholder seeking to invalidate a transaction on formal grounds.

The draft amendments to the APC RF travel from the premise that such disputes are subject to the jurisdiction of state arbitrazh courts[41] and that they can be submitted to arbitration solely in the event that all parties (including the shareholder/participant that brings the action)

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[38] See part 5 of Art. 245.1 of the draft amendments to the APC RF.

"An application specified in part 4 of this Article must cite:

…

5) The interested party's request for a refusal to recognize the foreign court's judgment or foreign arbitral award with an indication of the reasons for such refusal, and also with an explanation that said judgment or award violates the rights and legitimate interests of the interested party in the sphere of entrepreneurship or other economic activities in the Russian Federation".

[39] See part 9 of Art. 38, and also part 3 of Art. 236 of the draft amendments to the APC RF.

[40] See Art. 79.6 and Art. 84.1 of FL No. 208-FZ "On Joint-Stock Companies", dated 26 December 1995, and Art. 45 and 46 of Federal Law No. 14-FZ "On Limited Liability Companies", dated 8 February 1998.

[41] See clause 3, part 1 of Art. 225.1 of the draft amendments to the APC RF: "… 3) *disputes at the suit of founders, participants and members of a legal entity* (hereinafter, "participants of a legal entity") for the recovery of damage caused to the legal entity, *invalidation of transactions made by the legal entity and/or invocation of the consequences of the invalidity of such transactions…*».

are bound by the arbitration agreement,[42] which is impossible in practical terms (as such a participant/shareholder is not a party to the contract containing the arbitration agreement).

Thus, the right of a participant (shareholder) of a company to file a lawsuit with a state court seeking to invalidate a transaction containing the arbitration agreement violates the interests of a *bona fide* third party that has entered into the transaction with the company.

In this context, it is suggested that a provision be made that a participant (shareholder) of a company is entitled to bring an action for the invalidation of the company's transaction only if the shareholder (participant) has requested that the company submit to arbitration, in accordance with arbitration agreement, a claim for invalidating the transaction on the grounds specified by the participant (shareholder) and if its request was not granted.

In addition, it should be noted that a participant (shareholder) of a company bringing an action for invalidating a company's transaction shall have all the rights and obligations of the claimant, as provided by the applicable procedural rules, including the terms and conditions of the arbitration agreement made as part of the transaction, in respect of which the action was brought.

This rule should also apply to the public prosecutor's filing of an action in the interests of a government enterprise or institution.

7. PROCEDURE FOR THE ESTABLISHMENT AND ACTIVITIES OF PERMANENT ARBITRAL INSTITUTIONS. LIABILITY OF PERMANENT ARBITRAL INSTITUTIONS AND ARBITRATORS

7.1. Registration of Permanent Arbitral Institutions

The draft FL "On Arbitration Courts" provides that permanent arbitral institutions should be registered as non-commercial organizations, having received prior authorization from an inter-departmental commission to be established by the Russian Justice Ministry.

While it is understood that such provision was prompted by the desire to put an end to misuse of arbitration, it appears that such a measure, on the one hand, will not preclude all kinds of improprieties and, on the other hand, may severely impede the development of arbitration in Russia. The reasons for this conclusion are as follows.

First, the criteria (as described in the Draft), in accordance with which an authorization is given to establish a permanent arbitral institution, are fairly formal. Companies in possession of 'pocket' arbitration courts will have no difficulty founding a non-commercial organization complete with an arbitration court attached. Likewise, it will be no problem for them to form the governing bodies of an arbitration court of this kind by appointing persons who are actually associated with such companies, while not formally being their representatives.

[42] See part 3 of Art. 225.1 of the draft amendments to the APC RF:

"Disputes specified in clauses … 3… of part 1 of this Article may be submitted to an arbitration court … *solely if the legal entity, all of its participants and other parties which represent the claimant or respondent in such disputes have entered into an arbitration agreement whereby such disputes are submitted to arbitration.* Such a dispute may only be brought before an arbitration court as part of arbitration administered by a permanent arbitral institution that has approved and published the rules of hearing corporate disputes under the procedure established by the federal law, with the Russian Federation being the venue of arbitration".

Therefore, the goal, i.e. combating 'pocket' arbitration courts, will not be achieved. As is shown by the example of Ukraine and Latvia where the registration of arbitration courts was introduced earlier, virtually all such courts, including 'pocket' ones, have successfully undergone re-registration.

Furthermore, *mala fide* arbitration courts will use the authorizations issued by the Russian Justice Ministry as an argument that their activities have actually been authorized by the Ministry.

Second, *ad hoc* arbitration is used in practice fairly often to legalize semi-criminal and criminal schemes. Even though the Draft limits the range of disputes submitted to *ad hoc* arbitration, the scope of its use remains broad. Therefore, stricter regulation of institutional arbitration will have no impact whatsoever on the scope of improprieties associated with *ad hoc* arbitration and the goal for which the registration of arbitration courts was proposed in the first place will not be achieved.

Third, the existence of a permission system of establishing permanent arbitration courts (which also implies the possibility for their liquidation) will create a breeding ground for *mala fide* litigants striving to avoid liability. Such litigants may initiate all kinds of audits and assessments against an arbitral institution, and may even raise the question of liquidation of it.

Fourth, a permanent arbitral institution has a very limited influence over arbitral tribunals. The parties willing to legalize some act or thing with the help of an arbitral award, including one made in the course of arbitration administered by a permanent arbitral institution, may well compose such a tribunal that will render any award that they need. Importantly, the arbitral institution does not have the right to influence either the award making process or the substance of the award. But the very fact that such an award has been made may be used as argument in favor of liquidating the arbitral institution.

Fifth, the requirement concerning the establishment of a permanent arbitral institution entails costs in connection with its registration, its maintenance of books and records and its compliance with other proposed rules. Therefore, such costs actually preclude the ability of smaller regional business associations from establishing arbitration courts.

At the same time, as shown by the experience of countries with well-established arbitration traditions, court supervision is sufficient for rooting out improprieties in the sphere of arbitration. Where an arbitral tribunal is not independent in making an award, the state court should either refuse to issue a writ of execution or set aside the award made.

When deciding whether the arbitrators were fully independent in making their award or not, the courts should take into account all circumstances which may be relevant, including whether or not the arbitral institution that administered the proceedings is dependent on either party to the dispute. For such purposes, attention should be paid primarily to the following circumstances: the existence of a list of arbitrators drawn up by only one of the parties; the appointment of a sole arbitrator or chairman of the arbitral tribunal; the funding of the arbitral institution's activities by one of the parties, etc. In this connection, the courts should also pay attention to recommendations made by international and Russian organizations that establish criteria for the arbitrators' independence.

Because of this and other measures proposed with a view to improving judicial supervision, interaction with state courts, including those concerning the administration of disputes by 'pocket' arbitration courts[43], will be quite sufficient to overcome improprieties in this sphere; accordingly, the creation of an authorization-based system of establishing arbitration courts appears to be unnecessary and unjustified.

It should also be noted that the proposed model itself raises many questions.

First, let's take the requirement that an arbitration court must exist as an independent legal entity. Very often permanent arbitration courts are structural divisions of business associations or chambers, under the auspices of which they were organized (*e.g.*, the ICC International Arbitration Court, Arbitration Institute of the SCC, *etc.*). If the state wants to establish supervision over the activities of an arbitration court,[44] the issuance of the authorization for such court's establishment should be regarded as a sufficient control mechanism.

Second, the proposed establishment of permanent arbitral institutions in actual fact prevents the creating of arbitration courts as an arm of entrepreneurs' associations. With such associations, it is customary for participants to be represented in their governing bodies and other divisions and, accordingly, in the attached arbitral institutions. Because of this, participants will not be able to submit disputes to arbitration courts attached to entrepreneurs' associations. Since governing bodies of such associations are elective, it is impossible to foresee whose representative will sit on the governing body; therefore, no participants will be able to submit disputes to the respective arbitration courts which such associations founded. The Arbitration Court at the Commercial Banks Association, the Russian Union of Entrepreneurs, Association of Participants of Securities Markets will all be negatively affected.

To avoid such interpretation, an exception should be made and this norm should not apply to business associations in which the number of voting participants is, say, at least 20. In this case, the likelihood that a participant could influence the policy of the permanent arbitral institution (let alone the process of forming an arbitral tribunal) is practically non-existent. If in any specific case it is discovered that such influence was in fact exerted, this will constitute grounds for setting aside the arbitral award by reason of the arbitral tribunal's not being independent.

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[43] Article 41 of the draft Law "On Arbitration Courts": "*Prevention of Conflict of Interest in the Activities of a Permanent Arbitral Institution established in the Russian Federation.*

Arbitral institutions shall be prohibited from administering arbitration proceedings in which their founders, participants, and also their controlled and controlling persons act as a party to the arbitration proceedings, if the founders and participants of the permanent arbitral institution, and also their controlling and controlled persons are represented on the organs of the permanent arbitral institution that make any decisions associated with administering dispute resolution (except in instances where such organs include all the parties to the dispute or their controlling or controlled persons). Awards made in violation of the requirements of this Article shall be reversed or their enforcement shall be refused, if as a result of such violations, grounds emerged for the reversal of the arbitral award, as specified in Article 35.2 of this Federal Law, or for the refusal of the recognition and enforcement of the arbitral award, as provided by Article 37.1 of this Federal Law."

[44] Which, as noted above, will hardly be efficient and, conversely, may have adverse consequences.

7.2. Requirements in Respect of Arbitrators

The Draft FL "On Arbitration Courts" makes certain requirements in respect of the sole arbitrator or the arbitral tribunal chairman, namely:

i. Higher legal education received in Russia or abroad, provided the foreign education diploma is recognized in Russia;
ii. The age of 25 or more;
iii. Full legal capacity; and
iv. No record of convictions.

It is not very clear what purpose these criteria are supposed to serve, for in practice the arbitrators (including in cases of misuse of the arbitration proceedings) invariably met the criteria listed above.

On the other hand, such restrictions may have an adverse impact on the development of specialized arbitration proceedings when the role of arbitrator (fairly often the sole one) is played by a narrowly-focused specialist in a particular field having no legal education. This is particularly true of the construction industry,[45] exchange trade, insurance disputes, etc.

It should be noted that the legislation in any country with well-established arbitration traditions does not make any special requirements in respect of the establishment and activities of arbitration institutions (permanent arbitration courts) or in respect of arbitrators and their qualifications. The very fact that such requirements exist, including with respect to foreign arbitrators, creates grounds for challenging awards on the allegation that the arbitrator(s) lacked the necessary qualifications.

Because of this, the requirements as to arbitrator qualifications should be removed from the Draft FL "On Arbitration Courts".

7.3. Lists of Arbitrators

The draft FL "On Arbitration Courts" sets forth a series of requirements in the respect of the arbitrator lists. Thus, a permanent arbitral institution must:[46]

i. Maintain and publish recommendatory lists of arbitrators;
ii. Have a list of at least 30 arbitrators;
iii. In the event of administering international arbitration, foreign arbitrators must make up at least one-third of the total number of arbitrators on the list; and
iv. Arbitrators included on the list must provide their written consent to being listed.

At the same time, it is not very clear what functions a recommendatory list of arbitrators is supposed to perform, since in accordance with the Draft it is prohibited to make the appointment of arbitrators conditional on their presence on a list of recommended arbitrators, unless the law provides for otherwise (which it does not).

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[45] For example, 63% of arbitrators on the list of Construction Industry Arbitrators of the American Arbitration Association are lawyers specializing in construction, while 37% are architects, engineers, contractors, developers and insurers.

[46] See Art. 42 of the draft Law "On Arbitration Courts".

It should be noted that permanent arbitral institutions, including those whose actions are not in good faith, will have no difficulty compiling such a list (on which foreign arbitrators will be represented, with foreign arbitrators being, for such purposes, citizens of some CIS countries). One can also expect the appearance of ceremonial bystanders, *i.e.* titled lawyers whose names will be included on arbitrator lists of numerous arbitration courts. Because of this, the proposed measure will hardly improve the quality standards of arbitration proceedings.

The experience of leading arbitration institutions shows that none of them maintains such a list for a number of reasons:

First, the mission of a permanent arbitration institution is to assist the parties in forming an arbitral tribunal best suited for deciding a specific case. It is impossible to draw up a list of arbitrators in line with all characteristics of future disputes.

Second, the inclusion of arbitrators on a recommendatory list entails significant reputation risks for arbitration institutions. In fact, no arbitration institution can control the activities of arbitrators and in the event that an arbitrator is found to have committed negative acts, of which the arbitration community is aware, the reputation of the respective institution will also be affected. And removing such arbitrator's name from a recommendatory list is no simple task, since there is no procedure or institution for evaluating whether an arbitrator's actions are ethical.

Recommendatory lists of arbitrators are mainly characteristic of institutions in post-socialist countries and virtually always serve to limit the parties' choice of arbitrators (either an arbitrator to be appointed must necessarily come from among persons on the list of arbitrators, or in appointing an arbitrator, the arbitral institution must make its choice from among persons thus listed).

Because of this, it is suggested that a provision should be made in the Draft that permanent arbitral institutions *may* have recommendatory lists of arbitrators, but in such case it is prohibited to make the appointment conditional on the candidate's presence on such a list.

Nonetheless, a special reservation should be made in the body of the law with respect to specialized arbitration (dealing with insurance, sport, finances, exchange, maritime and other matters). It is specialized arbitration centers that may have close lists of arbitrators, as the appointment of an insufficiently qualified arbitrator by a party may very seriously complicate and delay the proceedings.

In the event that an arbitral institution has a close list of arbitrators, it must publish the rules governing the listing of persons so that any interested specialists may claim a place thereon.

7.4. Nomination Committee

The draft FL "On Arbitration Courts" makes it obligatory that arbitrators be appointed by an arbitrator nominating committee (the "ANC") or some other collegiate authority of the respective arbitral institution.[47] For such purposes, in both cases the following requirements must be met:

[47] Art. 42 of the draft Law "On Arbitration Courts".

i. The ANC must consist of at least five persons;

ii. The ANC must be elected by persons included on the recommendatory list of arbitrators;

iii. The ANC may only comprise individuals with a higher legal education;

iv. Persons on the recommendatory list of arbitrators must account for no more than one-third of the total number of ANC members. The remaining ANC members are to be elected from among persons enjoying a high reputation in dispute resolution but not included on the list;

v. The ANC member rotation is a must, with at least one-third of members to be replaced in the course of a year; one and the same individual may not be an ANC member for three years after replacement;

vi. The powers of ANC members may not be terminated before the expiration of their respective terms, except by a member's own choice and also in the event that it is physically or legally impossible for the individual to continue performing the functions of an ANC member.

True, arbitrator appointment by a collegiate authority mitigates the risk of corruption in arbitration proceedings. However, it should be borne in mind that:

First, arbitration proceedings rest on agreement between the parties. The parties determine whether they wish to submit a dispute to arbitration, including where it is administered by a permanent arbitral institution. The manner in which some or other arbitral institution appoints arbitrators is essentially its internal matter. In the event that the parties hold that the arbitrator appointment procedure practiced by a specific institution cannot assure the appointment of an independent and qualified arbitrator, they are free not to name such institution as the institution administering the resolution of a dispute between them and to choose a different institution that gives the parties more guarantees.

The law provision concerning the collegiate nomination of arbitrators constitutes excessive government regulation of internal matters relating to arbitration proceedings and should therefore be removed from the text.

Second, the proposed pattern of ANC formation has some serious drawbacks.

As noted above, the requirement that an arbitral institution must have a recommendatory list of arbitrators is at variance with the best practices of countries with well-established arbitration traditions and leading arbitration institutions the world over. In the absence of a recommendatory list of arbitrators, the ANC is to be formed by the arbitral institution itself. This means that the founders will at any rate supervise, whether directly or otherwise, the formation of the ANC.

Even if the provision concerning the recommendatory list of arbitrators remains in place, such a list will be drawn by the arbitral institution itself. So, the founders will all the same remain in control of the process.

Third, in regard to most of arbitral institutions, it will be practically impossible to assemble all arbitrators who are on the recommendatory list for a general meeting and thus assure a quorum for electing the ANC.

Fourth, the criterion regarding the appointment of persons *"enjoying a high reputation in dispute resolution"* has very questionable value from the practical viewpoint, since such criterion presupposes a high degree of subjectivity. And it should be borne in mind that failure to comply with the requirements of the law can constitute grounds for liquidating a particular arbitral institution.

Finally, such requirements will be impracticable from the viewpoint of smaller regional associations of entrepreneurs. Because of this, arbitral institutions will only be based in major cities, which will hardly promote the popularity of that method of dispute resolution.

It is therefore suggested that ANC-related provisions should be removed from the Draft FL "On Arbitration Courts". Arbitral institutions may incorporate such norms into their respective rules, but they should not be written into law.

7.5. Information Publishing by Permanent Arbitral Institutions

The draft FL "On Arbitration Courts" requires a permanent arbitral institution to have its own site on the Internet for publishing information including, but not limited to, the following[48]:

i. The general number of cases it heard with the proceedings administered thereby;

ii. The number of adopted state court decisions:

   a. On the setting aside of rulings and arbitral awards;

   b. On the refusal to issue a writ of execution to enforce the arbitral awards;

   c. On the grant of challenges lodged in connection with the cases that were administered by the permanent arbitral institution (with an indication of the grounds);

iii. The list of founders and participants, and governing organs (including an indication of whether the arbitral institution's founders and participants, their controlling and controlled parties are represented in the governing organs), and also a list of funding sources and the financial results of the arbitral institution.

The publishing of information concerning the founders and governing organs of an arbitral institution (as well as concerning the funding sources) will undoubtedly promote greater transparency and make it possible to limit the activities of 'pocket' arbitration courts.

At the same time, it appears that the publication of state court decisions is unnecessary, since judgments of state arbitrazh courts are open to the general public and any interested party can easily access such information.

In addition, the draft FL "On Arbitration Courts" requires the obligatory publishing, via an arbitral institution's Web-site, of information on claims filed as part of corporate disputes[49]. However, information on a corporate dispute which only concerns a small number of parties can violate their right to keep such a dispute in strict confidence. Therefore, this norm should be narrowed to disputes involving holders of securities that are in public circulation.

[48] See Articles 42.6 and 42.7 of the draft Law "On Arbitration Courts".

[49] See Art. 40.9 (2) of the draft Law "On Arbitration Courts".

7.6. Safe-Keeping of Case Files

The draft FL "On Arbitration Courts" requires the case files to be safe-kept for 10 years from the date that the arbitration proceedings are completed.

In view of the fact that the term for challenging an arbitral award is three months, it would be clearly excessive to demand that the case papers be stored for 10 years.

In addition, since the procedural reasons for setting aside an arbitral award are limited mainly to problems with notification and formation of the arbitral tribunal (it is not permitted to set aside an arbitral award on the merits, including in connection with the re-evaluation of evidence), there is no need to safe-keep all case papers on an obligatory basis.

Because of this, it is suggested that the term of document safe-keeping should be reduced to three years and that the requirement be limited to documents relating to notification, formation of the arbitral tribunal, payment and allocation of the arbitration fee, and the arbitral award made or the ruling on the termination of the proceedings.

7.7. Liability of Permanent Arbitral Institutions and Arbitrators

There is no doubt that for the purposes of promoting arbitration, one should regard as positive the inclusion of a norm in the draft FL "On Arbitration Courts" to the effect that an arbitrator's failure to perform or improper performance of its functions does not entail civil-law liability before the parties to the arbitration proceedings, except where damages are claimed in a civil suit forming part of a criminal case in which the arbitrator was found guilty.

In addition, it is proposed to broaden the list of perpetrators under Articles 290, 291, 291.1 and 304 of the RF Criminal Code, by including arbitrators thereon.[50]

Article 290 of the Criminal Code of the Russian Federation (the "CC RF") defines liability for the receipt by an officer, in person or via an intermediary, of a bribe in the form of cash, securities, other property or in the form of illicit performance for the officer of property-related services or the grant thereto of other property rights for the commission (omission) of acts in favor of the bribe-giver or persons represented thereby, where such commission (omission) forms part of the official powers of the officer or where in view of its official status the officer can assist such commission (omission), as well as for overall patronage or forbearance in office.

It appears that the proposed provision is too wide-ranging and is not suited for the purposes of regulating questions of liability associated with arbitration proceedings.

Because of this, it is suggested that the CC RF should incorporate a special definition of the crime consisting of the provisions similar to those in Articles 290 and 305 of the CC RF and should establish liability exclusively for the acceptance of a bribe and the making of a knowingly unjust award by the arbitrator.

[50] It is proposed to supplement the draft annotation to Art. 285 of the Criminal Code of the Russian Federation with the following paragraph: "*6. For the purposes of application of Articles 290, 291, 291.1 and 304 of this Code, the officer shall be understood to include an arbitrator who hears a dispute in accordance with the Russian legislation on arbitration courts and international commercial arbitration ".*

Further, it is suggested that a provision should be made that Article 303 of the CC RF (Falsification of Evidence in a Civil Case by a Party to the Case or its Representative) applies to arbitration proceedings as well.

7.8. Insurance

The draft FL "On Arbitration Courts" states that a permanent arbitral institution is allowed to insure its liability before the parties to the arbitration proceedings[51].

At the same time, as experience shows, insurance companies are very reluctant to insure the risks of arbitration institutions and arbitrators.

In view of the foregoing, it is suggested that this norm should be supplemented with an indication of the possibility for mutual insurance, and that arbitrators should be added to the list of insured persons[52].

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[51] See Art. 42.9 of the draft Law "On Arbitration Courts".

[52] The RAA-proposed supplement to Articles 45 and 46 of the draft Law "On Arbitration Courts" is as follows

"Article 45. Liability of a Permanent Arbitral Institution

2. The performance by a permanent arbitral institution of its functions of administering arbitration or of its duties connected with the conduct of arbitration as provided by the rules of the permanent arbitral institution may be secured by insuring the permanent arbitral institution's civil liability before the parties to the arbitration proceedings by means of the permanent arbitral institution's participation in a mutual insurance company duly licensed to provide mutual insurance and established solely for the purposes of carrying out the aforementioned type of activity.

3. The terms and conditions of insurance shall be determined by the insurance rules adopted and approved by the insurer.

4. Insurance of civil liability of a permanent arbitral institution against failure to perform or improper performance of its arbitration-administering obligations or of its duties connected with the conduct of arbitration as provided for by the rules of the permanent arbitral institution shall be in favor of the beneficiaries.

5. The beneficiaries under the insurance contract shall be the parties to the arbitration proceedings. It shall be permitted to replace the beneficiary specified in the insurance contract with another party in the event of the assignment of a claim under the contract, upon notice to the insurer in writing.

6. The object of insurance shall be the property interests of the permanent arbitral institution connected with its liability before the parties to the arbitration proceedings in the event of failure to perform or improper performance of, the arbitration-administering obligations or of the duties connected with the conduct of arbitration.

7. The insured event shall be the permanent arbitral institution's failure to perform or improper performance of, the arbitration-administering obligations or of the duties connected with the conduct of arbitration.

8. The method of the establishment and operating procedures of a mutual insurance company as provided by this Article shall be determined by Federal Law No. 286-FZ "On Mutual Insurance", dated 29 November 2007."

Article 46. Arbitrator Liability

2. The risk of arbitrator liability within the framework of a civic suit heard as part of a criminal case may be insured by means of the arbitrator's participation in a mutual insurance company duly licensed to provide mutual insurance and established solely for the purposes of carrying out the aforementioned type of activity.

3. The terms and conditions of insurance shall be determined by the insurance rules adopted and approved by the insurer.

4. Arbitrator civil liability insurance shall be in favor of the beneficiaries.

7.9. Regulation of Activities of Foreign Arbitral Institutions

The Draft amendments to the ICA Law extend the rules governing the activities of permanent arbitral institutions to foreign arbitration institutions in instances where the Russian Federation is the place of arbitration.[53] The Draft FL "On Arbitration Courts" likewise has a provision that for the purposes of that law, foreign permanent arbitral institutions are regarded as such solely on condition that they are in receipt of the appropriate authorization.[54]

Therefore, a foreign arbitral institution administering proceedings in Russia is required:

i. To obtain an authorization from the Inter-Departmental Expert Council formed by the Russian Justice Ministry. Importantly, such authorization are only to be issued to foreign arbitral institutions "having a widely recognized international reputation"[55]; and

ii. To safe-keep case files for 10 years.[56]

In addition, a foreign arbitral institution that administers the Russian corporate disputes must publish in a special manner approved by the Russian Ministry of Justice its special rules governing resolution of corporate disputes.

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5. The beneficiaries under the insurance contract shall be the parties to the arbitration proceedings. It shall be permitted to replace the beneficiary specified in the insurance contract with another party in the event of the assignment of a claim under the contract, upon notice to the insurer in writing.

6. The object of insurance shall be the property interests of the arbitrator related to its liability before the parties to the arbitration proceedings in the event of failure to perform or improper performance of, the arbitrator's duties.

7. The insured event shall be the arbitrator's failure to perform or improper performance of, its functions.

8. The method of the establishment and operating procedures of a mutual insurance company as provided by this Article shall be determined by Federal Law No. 286-FZ "On Mutual Insurance", dated 29 November 2007."

[53] See part 2 of Art. 1 of the draft amendments to the ICA Law: *"Matters not regulated by this Law, including those relating to the establishment and activities in the Russian Federation of permanent arbitral bodies that administer international commercial arbitration, the safe-keeping of case files and the making modifications to public registers and registers of public importance in the Russian Federation pursuant to arbitral awards, the balance between mediation and arbitration, and also the requirements in respect of arbitrators (arbitration court members) and liability of arbitrators and permanent arbitral bodies within the framework of international commercial arbitration in instances where the place of arbitration is the Russian Federation, shall be regulated in accordance with the Federal Law "On Arbitration Courts and Arbitration (Arbitral Proceedings) in the Russian Federation".*

[54] See Art. 39.3 of the draft FL "On Arbitration Courts": *For the purposes of this Federal Law, arbitration administered by an arbitral institution established outside the Russian Federation shall be regarded as administered thereby solely on condition that the foreign arbitral institution has obtained the authorization to perform the functions of a permanent arbitral institution in accordance with the procedure specified by Clauses 4 and 6 of this Article.*

[55] See Art. 39.6 of the draft FL "On Arbitration Courts".

[56] See Art. 34 of the draft FL "On Arbitration Courts".

It should be noted that none of the leading foreign institutions has rules specially governing corporate disputes (the sole exception is the DIS). It is highly unlikely that such institutions will take the trouble of working out special rules for the sole purpose of meeting the requirements of Russian legislation.

At the same time, the introduction of rigid elements of administrative regulation will not build up foreign investors' confidence in permanent institutions in Russia: on the contrary, it will work as a fairly serious factor of unpredictability.

As a result, corporate transactions will be structured outside the Russian Federation and any corporate dispute will be submitted to the jurisdiction of foreign arbitration institutions with arbitration taking place outside Russia.

Therefore, the proposed measures devised to bring back to Russia the resolution of disputes involving Russian parties will have the opposite effect.

Because of this, it is suggested that any and all requirements in respect of permanent arbitration institutions that administer proceedings in the Russian Federation should be removed.

As an alternative, we suggest that an exception should be made, legislatively, for certain renowned arbitration institutions hearing disputes involving Russian parties, namely: the ICC International Court of Arbitration (Paris); London Court of International Arbitration; Arbitration Institute of the Stockholm Chamber of Commerce; Vienna International Arbitral Centre; DIS, and AAA-ICDR.

7.10. Legal Succession of Permanent Arbitral Institutions

In light of the planned registration of arbitration courts, the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of FL 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'"[57] and the Draft FL "On Arbitration Courts"[58] set out transitional provisions regarding the resolution of disputes pursuant to earlier arbitration agreements providing for the submission of disputes to arbitration courts which did not exist as independent legal entities but which, if the Drafts are approved, will have to be registered as such.[59]

The proposed provision will create the threat that 'clones' of renowned foreign arbitration institutions will appear, which will, by virtue of the aforesaid provision, feel that they have the powers to resolve disputes under earlier arbitration agreements whereby disputes are to be submitted to such institutions (especially given that the Draft formally does not prohibit the use of such name as, for example, the International Arbitration Court at the International Chamber of Commerce).

It is not very clear why consent must be obtained from all founders (participants) of an earlier established arbitration court to the use of its name. This actually means that in regard to the arbitration court at the Russian Union of Entrepreneurs, consent should be given by all its members, which is impracticable.

Because of this, the aforesaid provisions should be thoroughly revised and made more specific.

8. QUESTIONS OF ARBITRATION PROCEEDINGS

8.1. Appointing an Arbitrator in the Event of Termination of Powers

The Draft FL "On Arbitration Courts" provides that in the event that the powers of an arbitrator are terminated, a replacement arbitrator is appointed in accordance with the same rules that applied to the appointment of the arbitrator being replaced[60].

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[57] See Art.10.22 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'".

[58] See Art. 47 of the draft FL "On Arbitration Courts".

[59] See Art. 10.22 of the draft FL "On Amendments to Individual Legislative Acts of the Russian Federation in Connection with the Enactment of the Federal Law 'On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation'":

"22. Arbitration agreements on the submission of a dispute to international commercial arbitration made both before and after the effective date of this Federal Law and containing a provision that arbitration is to be administered by a permanent arbitral institution (arbitration court) established before the effective date of this Law and using the name of ... the permanent arbitral institution that was established in accordance with the requirements of Article 39 of the Federal Law "On Arbitration Courts and Arbitration (Arbitration Proceedings) in the Russian Federation", shall be deemed enforceable and shall be viewed as arbitration agreements providing for the submission of a dispute to such permanent arbitral institution that meets the requirements of Article 39 of the aforesaid Federal Law (provided the process is administered thereby) in accordance with the best suited rules, subject always to the provisions of this Article, regardless of whether or not such permanent arbitral institution is the legal successor of the institution established earlier".

[60] See Art. 15 of the draft Law "On Arbitration Courts".

Current practice shows that a party acting in bad faith can protract the proceedings by appointing one arbitrator after another who will avoid performing their functions under a variety of pretexts. To preclude such a situation, most leading arbitration institutions reserve the right (in the event that the powers of any existing arbitrator are terminated) to nominate, in lieu of the party to arbitration, a replacement arbitrator.

In this connection, it is suggested that this norm should be supplemented with the words: "*unless the parties agree otherwise, including by means of reference to the applicable rules*".

8.2. Notifying a Party to Arbitration Proceedings

Cases are not uncommon in court practice when the courts set an arbitral award aside in view of the fact that a party to the arbitration proceedings was not notified in accordance with the procedure used in the state courts to notify litigants, even if the applicable rules prescribe a different notification procedure.

Notwithstanding that the respective provision in the draft law as currently worded states that a different procedure may be established by agreement between the parties[61], for the avoidance of misinterpretation, it is suggested that the norm should be supplemented with the following words: "*including by means of reference to the applicable rules*."

9. TERMINOLOGY PROBLEM

At this writing, there is no consistency in using the term "arbitration court" ["третейский суд"] which is understood to mean both the tribunal that makes an award following the arbitration proceedings and the organization that administers such proceedings.

It should also be noted that the terms "arbitration court", "international commercial arbitration" and "arbitration" [Russian: "третейский суд", "международный коммерческий арбитраж, "арбитраж"] are not clearly delimited from each other. This is particularly visible in the proposed amendments to the APC RF. Most amendments use the term "arbitration court" [Russian: "третейский суд"], but some of the amended articles still mention "international commercial arbitration" [Russian: "международный коммерческий арбитраж"].

The inconsistency in the use of the aforementioned terms may well complicate the application of the respective legislative provisions.

Because of this, it is suggested that the terms used in diverse legislative acts governing arbitration proceedings should be harmonized and used uniformly.

Chairman of the Board, Russian Arbitration Association

V.V. Khvalei 

[61] See Art. 3 of the draft Law "On Arbitration Courts".