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ON THE NEW PROCEDURE FOR THE CREATION OF THE ARBITRATION INSTITUTION (INTRODUCTION TO REVIEW)

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This informational introductory article is devoted to the peculiarities of the procedure of creation of the arbitration institution according to the new 2015 Federal Law "On arbitration (arbitration proceedings)". The aim of the article is the identification of the new law preconditions to the emergence of administrative barriers in the establishment of arbitral institutions.

The study is based on methods of formal law, analysis and synthesis, the sociological method of survey is also used.

The results and scope of the results. The article notes the objective difficulties in the establishment of arbitration institutions as well as provides a critical analysis of the innovations in 2015 Federal Law "On arbitration (arbitration proceedings) in the Russian Federation". The procedure for creating the arbitration courts became more bureaucratic and it is focused on filtering such institutions by tightening the requirements. The procedure for creating the arbitration courts can be described as permissive and multi-stage. The second noticeable trend in the 2015 Federal Law is broad sphere of control over arbitration courts and substitution of their competence by a competent court. According to the results of a survey of representatives of the business community authors identify the legislative background of administrative barriers on a way of establishment of arbitration courts. The results of the study can be used in the improvement of legislative procedures for the establishment of arbitration courts.

Conclusions. New Law actually creates a "quasi-judicial" bodies, that have highest level of bureaucratization, so arbitration courts lose their main characteristics: contractual and dispositive principles. Novels of Law, aimed at stricter administration and control, are obvious, however, a new quality for arbitration as the most popular form of alternative dispute resolution is still not created.

Keywords: administrative barriers; arbitral institution; arbitration court; arbitration ad hoc; improving arbitration; alternative dispute resolution; domestic arbitration; international arbitration; the competent court.

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1. Preconditions for updating the legislation on arbitration proceedings

At various state levels, it has been repeatedly stated that the most important areas for the development of the judicial system include ensuring citizens' access to justice and ensuring its maximum openness and transparency, implementing the principle of independence and objectivity in adjudicating judgments. This should help to increase the protection of private property and to

create an understanding that the ability to protect property is one of the criteria for a favorable investment climate and the effectiveness of state power. This partly explains the need to adopt new legislation on arbitration proceedings.

2. Modern regulatory regulation of arbitration

The Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" (hereinafter referred to as the Law on Arbitration, the Law) entered into force on September 1, 2016.

Contrary to expectations, unification and liquidation of the multiplicity of normative acts in this sphere did not happen. Previously, the activities of arbitration courts in the Russian Federation were governed by Federal Law No. 102-FZ of July 24, 2002 "On Arbitration Courts in the Russian Federation", Law of the Russian Federation of July 7, 1993 No. 5338-1 "On International Commercial Arbitration", Civil Procedure Code, CPC) and the Arbitration Procedural Code (APC). CPC and APC had been sufficiently unified.
The newly adopted law replaced only one normative legal act, and namely, the Federal Law "On Arbitration Courts in the Russian Federation". Despite its name, the new law did not become the only one in its field. The law "On International Commercial Arbitration" continues to operate. The federal law "On Arbitration Courts in the Russian Federation" will partially retain its validity (in respect of previously concluded agreements). CPC and APC also retain their sphere of regulation, and since September 1, 2016, Chapter 30 of the APC and Section VI of the CPC have been reissued. Both codes, in addition to regulating the procedures for challenging decisions of arbitration courts and issuing execution orders on the basis of decisions of arbitration courts, currently regulate proceedings in cases related to the performance by courts of the functions of assistance with regard to arbitration courts.

3. Is it possible to consider the Law as a normative legal act of the "new generation"?

We will try to answer this question by analyzing the content of the Law. There are certainly new trends in it. And the first of them is a change in the very procedure of creating an arbitration (arbitration court).

3.1. Procedure of creating arbitration (arbitration court).

The procedure has become more bureaucratic and is aimed at filtering through toughening requirements for arbitration courts. The creation procedure can be described as permissive and multistage. In fact, "quasi-judicial" bodies have been created.
The creation of permanent arbitration under the new law is a fairly time-consuming activity. Ad hoc arbitrations are not abolished, but judging by the text of the law, they are not meant as the main players in the field of alternative dispute resolution. Virtually no attention has been paid to them. Perhaps this is for the better, because the very freedom of choice, for which the arbitration courts appreciated, was preserved in the choice of ad hoc arbitration.

Permanent arbitration institutions should be established with non-profit organizations. The non-profit organization receives the right to establish arbitration from the Government of the Russian Federation. With the Ministry of Justice of Russia, a special Council for the improvement of arbitration proceedings is being set up. This means that a permit for this activity must be obtained at the very high state level.

The government will receive recommendations from the Council for improving the arbitration procedure (Part 4, Article 44 of the Arbitration Law) for such a function. It is necessary to prepare and approve the Regulations on the procedure for the creation and operation of the Council. The

"authorized body" will have to approve the list of documents submitted for the Council's decision on the issue of issuing a recommendation and the procedure for considering such documents.

In our opinion, the creation of a rather cumbersome bureaucratic machine is assumed. Moreover, "permanent" arbitration courts, which have long been established and are functioning at the present time (part 11 Art. 44 of the Law), should be approved. The procedure for obtaining the right to exercise the functions of a permanent arbitration institution also provides (Articles 44-45 of the Law):
- presence of Rules of a permanent arbitration institution;
- presence of a list of arbitrators;
- deposit of these documents on the site of a permanent acting arbitration institution.

The site also needs to post information on the bodies of a permanent acting arbitration institution. The procedure for posting information on the site is established by the same "authorized federal executive body" (Part 10, Article 47). The list of arbitrators may be the same, but the creation of separate lists is also permitted for domestic arbitration and for international one (Part 2, Article 47). In the list of arbitrators there must be at least 30 people, and at least one third of them must have a profile degree (part 1, 3, article 47).

It should also be noted the obligation of the non-profit organization, under which a permanently functioning arbitration institution was established, to post information on the composition of its founders on the website (Part 8, Article 47). Apparently, it is planned to constantly monitor the activities of arbitration. Otherwise, it is difficult to explain the requirements for the content of the site (part 13, article 44, part 1, 8-11 article 47) and sufficiently detailed provisions on the grounds and procedure for terminating the activity of a permanent acting arbitration institution (Article 48). Thus, the desire of the parties to turn to one of the alternative forms of dispute settlement is a serious obstacle: the state invades the sphere of relations between the parties and the arbitrators. Any non-profit organization wishing to create a permanently functioning arbitration institution will need to assess the proportionality of efforts to create it and administer the number of cases that will be considered in the future. The annual "turnover" of 10-20 cases is clearly not worth the effort. However, in such situations it would be possible to recommend the establishment of arbitration courts to deal with a specific dispute.

3.2. A wide scope of control over arbitration courts

The second notable trend in the law is a fairly broad scope of consideration of issues or control of the "competent court". It is so broad that it raises questions: is it the sphere of assistance to arbitration courts on the part of the state, or is it a manifestation of distrust and suspicion regarding arbitration courts? There are doubts as to whether the state courts are simply not ready to increase the burden due to new categories of cases, but to the fact that they are really obliged in their activities to be distracted by the problems of arbitration courts and to resolve them.

After all, this implies, among other things, a thorough study of legislation on arbitration courts and maintenance of "in working order" of this knowledge. So, the competent court in accordance with Part 4 of Art. 11 of the Arbitration Law controls the election (appointment) of arbitrators, it can take the necessary measures, taking into account the procedure of election (appointment) agreed by the parties. However, it was also noted there that the parties could exclude the possibility of solving this issue by the court by their agreement. But in this case, the parties must foresee such a development of the situation, and the court, in turn, will be obliged (if asked to do so) to find out whether the parties have a special reservation for such a case. Further, the competent court is connected to the challenge of the arbitrators (Article 13), termination of the arbitrator's powers (Article 14). As in the previous case, the parties may by their agreement exclude such a solution of these issues. It is

important to recognize and the right of each party to apply to the competent court with a statement that the arbitral tribunal has no competence (Part 3, Article 16). Here, the competent court decides on matters of jurisdiction of the case. The competent court may also assist in obtaining evidence for permanent arbitration institutions (Article 30).

Decree of the Constitutional Court of the Russian Federation of May 26, 2011 No. 10-P defines a position: disputes on the right to real estate have a nature of civil law (therefore they can be resolved by arbitration courts), the procedure for state registration of the transfer of rights to immovable property does not make such disputes publicly-legal, but it means special attention of the state to the turnover of real estate. Therefore, we can consider the rule of Art. 43 of the Law on Arbitration by the development of the position of the Constitutional Court and its logical conclusion: a control procedure is envisaged by the state court between the arbitration decision and the act of registration. This is the procedure for obtaining the writ of execution.

A survey of representatives of a number of non-profit organizations in Omsk confirms that the opportunity that has appeared does not stimulate their optimism and a great desire to achieve this. Among the reasons are the following: - an organizationally complex and financially high-cost procedure for the establishment and further operation of a permanent arbitration institution; - a significant element of subjective discretion in the adoption of a decision of the relevant Council under the Ministry of Justice of Russia; - difficulties to fulfill qualification requirements to the list of arbitrators and objectively limited opportunities for their provision.

Conclusions.

Summing up, it is necessary to answer the question about the possibility to mention the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" as the law of the new generation. Of course, there are innovations in the Law. But in the notion of the normative legal act of the "new generation" it is customary to invest a qualitatively new level of the law, and not its toughening. Tougher administration and control in the Arbitration Law is obvious, however, a new quality for the most popular form of alternative dispute resolution has not still been created.

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