

## NEW FORMS OF OUT-OF-COURT DISPUTE RESOLUTION IN RUSSIA

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### Abstract

PFUR lecturers and scientists of the Institute of Legislation and Comparative Law under the Government of the Russian Federation conduct ongoing research work and closely monitor reforms in the field of civil justice, arbitration and mediation in foreign countries. (Ermakova et al., 2018). This article is the result of such research. The article includes the following subsections: 1) The evolution of an out-of-court procedure, the consideration of corporate disputes; 2) Non-judicial resolution of venture disputes; 3) Mediation in resolving hereditary disputes.

It was concluded that the activities of arbitration courts in Russia should be divided into two periods in their operation: and November 1, 2017 became the benchmark between them, when the transition period for the existing arbitration courts established by the Law "On arbitration (arbitration proceedings) in the Russian Federation", of September 1, 2016, which replaced the law "On arbitration courts in the Russian Federation" in force since 2002 ended. At present, there are only four permanent arbitration institutions (arbitration courts) in Russia. No other previously existing arbitration courts managed to pass the main obstacle embodied by the Ministry of Justice of the Russian Federation, where documents are submitted for the initial check.

Thus, the state has put under tight control the process of creation (transformation) and functioning of arbitration courts in the Russian Federation.

The outcomes of the article may be of great help both for practising lawyers and law students.

**Keywords:** alternative dispute resolution; the law of Russia; mediation; venture disputes; corporate disputes; hereditary disputes.

## 1 INTRODUCTION

After the entry into force of the Federal Law dated December 29, 2015, No. 382-FZ "On Arbitration (Arbitration) in the Russian Federation", the system of arbitration courts in the Russian Federation was completely reformed. According to the findings of "Arbitration Court" magazine in February 2017, there were 398 institutions (Zanina A., 2017). Other sources point to 1,500 arbitration courts in force at the time of the adoption of the law. (Didukh Julia, 2017). However, only two of them (the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation) were entitled to administer arbitration after September 1, 2017, under this law. All the

rest were required the approval procedure with the Government of the Russian Federation; otherwise, they had to cease their activities. The same situation occurred with the Arbitration Court for Venture Disputes, which was forced to join the International Commercial Arbitration Court at the RF CCI. Only two arbitral tribunals managed to obtain permission from the Government of the Russian Federation to administer arbitration proceedings in the Russian Federation - the Arbitration Center at the Institute of Modern Arbitration (on February 16, 2018, it was renamed the Russian Arbitration Center at the Russian Institute of Modern Arbitration) and the Arbitration Center at the Russian Union of Industrialists and entrepreneurs. Some Russian experts express a pessimistic forecast about the prospects for the development of specialised arbitration proceedings in Russia. They note only one positive moment of the reform, namely: "the creation of an understandable legal framework for the consideration of corporate disputes" (Zanina, 2017)

## **2 METHODOLOGY**

First of all, the authors would like to state that this work is a scientific study explicitly prepared for students in order to lay out the basics of non-judicial settlement of venture, corporate and hereditary disputes in Russia in the most accessible way. The information presented in this article should serve postgraduate students and law students a theoretical basis for the preparation of dissertation research, reports, term papers and final qualifying works. The article was prepared on the basis of the works of Russian scientists: Akimov L.Yu., Ilyutchenko N.V. (2016); Alekseeva T.V., Cherdakov O.I. (2018); Didukh J., (2017); Frolova, E.E. (2017); Goncharova O.S. (2017); Khimikus E.I., (2017); Polyakova N. (2017); Severinova N.V. (2016); Zanina A. (2017), as well as Aceris Law LLC publications (2018).

Some regulatory acts were used in the work: Arbitration Procedure Code of the Russian Federation; Federal Law of 29.12.2015 No. 382-FZ "On Arbitration in the Russian Federation"; as well as domestic acts: the Arbitration Rules of the Russian Arbitration Center at the Russian Institute of Contemporary Arbitration 2017; Regulation on the Resolution of Venture Disputes of the Arbitration Court on Resolution of Venture and Corporate Disputes 2017.

### **2.1 Evolution of out-of-Court (Amicable) corporate Disputes Resolution**

Until recently, the consideration of corporate disputes was attributed to the exclusive competence of state arbitration courts, i.e. the exclusive jurisdiction of these disputes was established. The main determining factors that led to the commencement of amicable corporate disputes proceedings were, on the one hand, the amendments to article 225.1 of the APC RF, and, on the other, the adoption of Federal Law No. 382 of December 29, 2015 - "On Arbitration in the Russian Federation" (hereinafter - the Law on Arbitration). In accordance with Article 225.1 of the APC, it was established that 1) - disputes in which a public law element is present, are not subject to arbitration administered by a permanent arbitration institution, such as disputes arising from the activity of notaries to certify transactions with shares; disputes on the exclusion of a member from the corporation; disputes related to the acquisition and redemption of shares of a corporation, and others); 2) - arbitrable disputes are disputes related to the ownership of shares or shares in the authorized capital of a corporation; disputes related to encumbrance and others specified in the law; 3) - disputes that only under certain additional conditions can be considered by arbitration, administered by a permanently operating arbitration institution are disputes related to the reimbursement of losses of a corporation; disputes between the parties over the management of the corporation, and others.

The Law on Arbitration established that to resolve corporate disputes by arbitration administered by a permanent arbitration institution; it is necessary to have rules for arbitrating corporate disputes. For example, the Rules of Arbitration of Corporate Disputes included in Chapter 8 of the Arbitration Rules of the Russian Arbitration Center at the Russian Institute of Contemporary Arbitration (hereinafter referred to as Arbitration Rules) govern the following issues: the procedure for concluding arbitration agreements in relation to corporate disputes and specifics of joining such agreements, for example , counterparties of a legal entity; establish the order of commencement of arbitration, including on "indirect" claims; the procedure for notifying a legal entity and its participants of the commencement of a dispute, consolidation of arbitrations in a corporate dispute, formation of the panel for a corporate dispute, notification of the progress of arbitration, interim measures, arbitral award, and others. At the same time, arbitration agreements (clauses) on transferring to corporate arbitration disputes concluded earlier on February 1, 2017, are considered to be unenforceable.

In legal literature, a question is sometimes raised concerning the rights of those persons "who did not participate in the voting on the issue of an arbitration clause, since they became members of the corporation after the introduction of this reservation in the charter". As an example, Goncharova O.S. believes that in

case of joining a corporation, not at the stage of resolving the issue of including a clause on arbitration in the charter the principle of voluntariness is violated. (Goncharova, 2017) From our point of view, such an approach is hardly justified. When acquiring a share/stock, a new participant of the company becomes a participant/shareholder and voluntarily accepts obligations to comply with the charter of the corporation, including the procedure for disputes resolution. The procedure stipulated in the Rules of Arbitration, detailing the procedural features of the consideration of corporate disputes, makes the implementation of arbitration transparent. The commencement of arbitration, to which the parties that are participants of the legal entity, are informed, does not prevent the legal entity from sending its separate representatives, as well as to joining other participants to the arbitration. When several members of a legal entity join the arbitration, the panel of the arbitration has the right to invite all individual participants to discuss the possibility of jointly nominating a representative. In the event of a conflict of positions of individual representatives of a legal entity, the panel of the arbitration provides the opportunity to express all positions and evaluates them according to the judge's belief.

It should be noted that the Law on Arbitration provides for the need to obtain consent to the resolution of a dispute through arbitration, which all participants in corporate relations must express. In connection with this law, the possibility of including the arbitration agreement in the text of the charter, approved by all participants unanimously, is established. Besides, paragraph 7 of Article 7 of the Law on Arbitration prohibits the inclusion of an arbitration agreement in the company's charter, with some shareholders owning one thousand or more voting shares, as well as in the charter of a public joint-stock company. Such a ban seems to be connected with the difficulty of making a unanimous decision by all participants/shareholders. These provisions are also reflected in the Rules of Arbitration. The arbitration procedure is an adversary procedure alternative to litigation. Recently, however, not only this non-judicial procedure has been developed. We are talking about mediation, which is both a conciliation procedure and at the same time a means of settling disputes. As Akimov L.Yu. and Ilyutchenko N.V. reasonably noted mediation has significant advantages, including a significant reduction in costs, shorter consideration periods, as well as a decrease in reputational risks due to the confidentiality of mediation (Akimov, 2016).

## **2.2 Amicable Resolution of Venture Disputes**

The institutions of alternative dispute resolution have significantly been applied in civil law relations, and, above all, in the business. In this regard, the question of the use of these institutions by the business community in practice, and, first of all, the innovative Russian business, which is in the zone of risk capital investment, is of research interest. Moreover, here, in our opinion, venture investment comes to the fore with the use of venture funds, emerging in Russia and specialising in projects with a high degree of risk and return. In June 2017, President V.V. Putin proposed "Russian high-tech companies, including Rostec, Roskosmos, Rosatom, to actively use opportunities to form units capable of working with start-ups and of forming venture funds for financial support. Today, corporate venture funds have been created by such financial institutions as Sberbank, Qiwi, Bank St. Petersburg, pharmaceutical companies Pharmstandard and R-Farm, Mail.ru, IBS, Rostelecom and Softline corporations "(Tropko V., 2017).

The topic of venture disputes resolution has not yet been reflected in the legal literature, although the need for research on this problem is obvious. It is in the process of joint economic activities between investors and entrepreneurs that disagreements arise and require quick and qualified resolution. Only prompt intervention in the conflict between the disputing parties can ensure their reconciliation and satisfaction, but this requires the relevant competent arbitrators. Due to workload and lack of specialisation, the state judicial system is not able to resolve venture disputes properly. The representatives of business have repeatedly spoken about the expediency of creating a specialised arbitration court for resolving venture disputes, as well as the need for organising a mediation centre. However, only thanks to the vigorous activity of the Russian Venture Capital Association with the support of the Russian Arbitration Association and the Russian Venture Company, on February 1, 2017, the first Arbitration Court for the Resolution of Venture and Corporate Disputes was created. The Rules for the consideration of venture disputes has been approved, the primary lists of arbitrators and mediators have been formed, and procedural rules for arbitration of corporate disputes have been developed, as well as recommended arbitration clauses for the Regulation on the resolution of venture disputes. This step allowed the Russian companies to obtain an alternative to international arbitration, reduce litigation costs, and "strengthen the position of Russian law in choosing jurisdiction to enter into investment transactions and create a business" (Polyakova N., 2017).

As one of the developers of the Regulations noted, "The basis of the document is the UNCITRAL Arbitration Rules from which the ad hoc elements were removed". (Arbitration court for venture disputes, 2017). The preparation of this document contributed to the development of specialised arbitration. In modern reality, the

"Regulation on the resolution of venture disputes" represents the only holistic document that defines the rules and procedure for the independent consideration of venture disputes. It defines the key concepts: "arbitration"; "venture disputes"; "mediator"; "mediation agreement"; "mediation procedure". An algorithm for arbitration proceedings is proposed, the jurisdiction of the arbitral tribunal is disclosed, and more. However, with all the advantages in the submitted document, there are inconsistencies with the current legislation, starting from the conceptual apparatus. The regulation interprets the concept of "venture disputes" quite widely: the developers attributed all kinds of disputes to them, starting with the organisation and management of various forms of collective investment in the field of direct and venture investments, ending with disputes with debt financing. We believe that this concept could be clarified using generalisation, for example, "venture disputes are disputes arising from venture financing agreements, certain types of investment transactions relating to the transfer of rights to shares, stocks, equity, and other forms of financing" ( Alekseeva TV, 2018).

It is necessary to pay attention to the fact that the developers of the Regulations identified two dispute resolution technologies: arbitration and mediation. The regulation provides for a mandatory mediation procedure and a simplified procedure for exiting the mediation process. There is a gradation of disputes in their volume. Two different procedures have been developed: one procedure for more substantial disputes, the second procedure for small disputes. The procedure of mediation is described; the content of the concept of "mediator" and "mediation agreement" is disclosed. In some cases, the authors of the Regulations repeated the interpretation of these concepts outlined in Article 2 of Federal Law No. 382-ФЗ dated December 29, 2015 "On an alternative dispute resolution procedure involving an intermediary (mediation procedure)".

There is another feature of the Regulations. Despite the fact that this document should define the procedure for resolving exclusively venture disputes, which include a whole list, including corporate disputes (Article 1.4.), it clarifies the need to consider venture disputes by arbitrators from a particular list of arbitrators approved by a joint decision of the Russian Arbitration Association and the Russian Venture Capital Association (Article 3.13). We believe that this article is out of the context of the document.

The Regulations were created for a specific task and applied to the field of venture investment to resolve venture disputes between investors and startups. The main venue for the trial was the specialised Arbitration Court on Venture Disputes, created by the Russian Venture Capital Association and the Russian Arbitration Association. Despite the stated relevance, this institute today is not in demand. The practice of considering venture disputes by an arbitration court in Russia has not been developed; therefore, it is rather difficult to assess the effectiveness of the activities of this specialised arbitration court. It can be stated that the "Regulations on the Resolution of Venture Disputes" turned out to be a successful symbiosis of the current Federal Law "On Arbitration in the Russian Federation" 2015 and developments prepared by the Association of Participants in Assistance to Arbitration and the Russian Venture Capital Association. We believe that, by its social significance, the document is timely, reflecting the needs of the business community in resolving civil and legal disputes arising in connection with the management of investment funds, mutual investment funds and other forms of collective investment operating in the venture capital investment market. All of these costs can be attributed to the "growing pains" of the new legislation governing the activities of arbitration courts. At the same time, it is obvious that the development of venture capital investments will lead to an increase in disagreements between the parties, participants in commercial projects, which actualises the topic of specialised arbitration courts and shortly this institution will be in demand. The current trend of creating specialised arbitrations in foreign jurisdictions confirms the author's conclusion. For example, since June 2018, the Court of Arbitration for Art (CAA), which will resolve issues of copyright, property, and authenticity of exhibits, has begun to operate in The Hague. The founders of the court are the Netherlands Arbitration Institute and the non-profit organisation Authentication in Art. The arbitrators of the court will be experienced lawyers - art historians who should settle the problem of distrust of people from the world of art (including collectors) to such disputes settlement by state courts (Aceris Law LLC, 2019).

### **2.3 Mediation of Hereditary Disputes**

The use of the mediation procedure with the help of a mediator and the conclusion of a mediation agreement on its results is becoming an increasingly popular method of settling disputes in Russia. Under Part 2 of Art. 1 of the Federal Law of 27.07.2010 no. 193-FZ "On the alternative dispute resolution procedure with the help of a mediator (mediation procedure)" the mediation procedure may be applied to disputes arising from civil law relations, including in connection with entrepreneurial and other economic activities, to disputes arising from labour and family relations, as well as in other cases provided for by federal laws. (Khimikus, 2017). According to the Judicial Department at the Supreme Court of Russia, more than 100 thousand disputes are

inherited by the courts every year. What is worth, hereditary disputes can last for years. The reasons for resorting to mediation may be as follows: 1) mediation is the fastest way to settle a dispute, since it can be organised in a few weeks, not months or years; 2) by choosing mediation, the parties to the dispute save on legal costs, which, in the case of going to court with the help of lawyers, can amount to a considerable sum; 3) mediation reduces the stress of a dispute through a more informal and personal approach, while people suffering from the severe loss of a relative can avoid litigation; 4) all persons who will be involved in resolving a dispute will be family members, thus, mediation works better for maintaining or restoring family relationships; 5) mediation is aimed at finding a compromise, when all parties will be satisfied with the result, and not with the direct situation of a "winner or a loser". The mediator knows how to organise negotiations between the disputing parties, he is neutral (does not defend the interests of one side), is impartial, knows how to ask questions, so that when responding, the parties begin to understand, "hear" each other and look for a solution that suits everyone (Severinova, 2016).

To focus the notary chambers of the entities of the Russian Federation and the regional branches of the Association of Russian Lawyers on attracting Russian notaries to the introduction of conciliation procedures was decided at a meeting of the relevant Committee of the Association of Russian Lawyers, held in Moscow on June 21, 2012. For several years, the notarial community of Russia made in refresher courses for notaries of the program "Mediation in notarial activities." In 2009, this program was adopted by the Board of the Federal Notary Chamber of Russia, and later, on the recommendation of the European-Asian Congress, taking into account the need to train notaries in media technology aimed at enhancing the role of notaries as a body of indisputable jurisdiction, the courses were elaborated by experts of the Mediation Centre of the Ural State Law Academy taking into account the goals and specifics of the activity of notaries (Federal notarial chamber, 2012).

The data on application by the courts of the Federal Law of July 27, 2010 No 193-FZ "On the alternative dispute resolution procedure involving a mediator (mediation procedure)" for the period from 2013 to 2014", approved by the Presidium of the Supreme Court of the Russian Federation on 01.04.2015 quotes that as of 2014, more than sixty entities of the Russian Federation had established organisations that carry out mediation procedure (non-profit partnerships, autonomous non-profit organisations, limited liability companies). Mediation procedure is carried out by some regional chambers of the Chamber of Commerce and Industry of the Russian Federation, regional offices of the Russian Union of Industrialists and Entrepreneurs and departments of higher education institutions. The generalisation of judicial practice has shown that the parties use mediation, including on disputes arising from inheritance relations property. The use of mediation is carried both as proposed by the court after clarification of its essence, advantages, order and its terms, and on the initiative of both parties.

Thus, the current legislation of the Russian Federation does not prohibit the notary from carrying out conciliation activities, including in the format of the mediation procedure. For the implementation of mediation on a professional basis, it is necessary to reach the age of 25 years, have higher education and receive additional professional education on the application of the mediation procedure. Additional requirements for the mediator may be established by the agreement of the parties or rules of the conciliation procedure (Article 15 of the Law on Mediation). However, the law on the notary today still has an unresolved issue regarding notarial mediation, the procedure for its implementation, the legal consequences of a mediation agreement by a notary, and the size of the state duty for such a notarial act. Despite this, in modern notarial practice, the use of the mediation procedure is becoming increasingly common, especially when resolving conflicts between heirs about the division of inherited property and the procedure for its use (Fomin, 2014). Russian scholars emphasised that the notary is the best candidate for the position of a mediator in hereditary disputes: he has extensive experience in indisputable jurisdiction and dispute resolution, has the ability to notarially certify the signed mediation agreement with affixing an executive inscription on it, which will serve as an additional guarantee ensuring its performance. However, at present in Russia, in resolving disputes arising from labour and family relations, the mediation procedure is used less frequently than in other disputes (Khimikus, 2017).

### **3 FINDINGS**

The authors believe that considering the practice of activities of arbitration courts in Russia, two periods should be distinguished in their operation, the boundary between which was November 1, 2017: when the transitional period for the existing arbitration courts established on September 1, 2016 under the law "On arbitration in the Russian Federation", and which consequently replaced the then existing law "On arbitration courts in the Russian Federation" in force since 2002 ended. At present, there are only four permanent arbitration institutions (arbitration courts) in Russia. No other previously existing arbitration courts succeeded

in passing the main obstacle embodied by the Ministry of Justice of the Russian Federation, where documents are submitted for the initial check. Thus, the state has put under a tight control the process of creation (transformation) and functioning of arbitration courts in the Russian Federation.

The difficulties associated with the activities of the institution of mediation in Russia are determined by objective and subjective factors. The objective factors include a) a relatively weak legal framework governing the activities of mediation as an institution for the alternative resolution of disputes; b) lack of adequate funding; c) poor training of mediators. The subjective factors are found in a low level of interest in the legal community, and indeed in society as a whole, to the designated institution and dispute resolution processes by alternative means. The traditional system of resolving conflict situations through the courts of general jurisdiction and arbitration courts dominates the minds of ordinary people, which prevents the proper use of forms and methods of resolving civil disputes popular abroad.

## **ACKNOWLEDGEMENT**

The research is implemented within the framework of the RUDN university participation in the Russia-wide 5-100 project.

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