ARBITRATION RULES 2021

Suggested Amendments

PREAMBLE. CHAPTER 1. GENERAL PROVISIONS

The Preamble is amended to clarify and exclude provisions duplicated in the text of the Arbitration Rules. The equal legal force of the Arbitration Rules in Russian and English is also established.

The amendments to Chapter 1 are aimed at reducing, simplifying and specifying regulation.

Core suggestions

1) Streamlining the exchange of documents procedure (Article 5)

It is proposed to add a provision on exchanging documents by e-mail with the obligatory indication of the RAC address as the addressee, along with other participants of the proceedings (Paragraph 2 of Article 5); determine the address, which was usually used by the Party in the framework of legal relations, as the default address for the purpose of sending documents in hard copies (Paragraph 3 of Article 5); clarify the moment from which the documents are considered received if they are sent in electronic form, in hard copy and by uploading to the OAS (Paragraph 6 of Article 5);

2) Establishing the procedure for determining the value of claims that are not subject to monetary evaluation (Article 8)

In the current Arbitration Rules, the value of claims that are not subject to monetary evaluation is deemed to be 30 million Rubles for arbitration of domestic disputes and 500 thousand US dollars for international commercial arbitration.

The Arbitration Rules 2021 propose to exclude this provision and refer the issue to the Board.

CHAPTER 2. COMMENCEMENT OF ARBITRATION

The provisions of the Arbitration Rules governing the commencement of arbitration are clarified taking into account the practice of administration that has developed over the past years.

Core suggestions

1) systematising the provisions governing the submission by Parties of the first procedural documents, accumulating them for the convenience of the Parties in one chapter

We suggest to establish the regulation for the first procedural documents of Parties (Request for Arbitration, Response to the Request) in the Arbitration Rules 2021 and to provide that subsequent extended positions of the Parties (Claim and Response) shall be filed in accordance with the Procedural Schedule.

In addition, the requirements for the content and annexes to the first procedural documents are reduced to the minimum required for the purposes of commencing arbitration.

Finally, considering the increase in the exchange of documents in electronic form, the amendments allow the Request for Arbitration to be sent not only in hard copy, but also by e-mail. In this case, the proper evidence of sending the Request for Arbitration to the Respondent is the indication as the addressee, in addition to the Respondent, of the RAC e-mail address.

2) providing for the prima facie determination of the seat of arbitration by the Executive Administrator (Article 9)

Depending on the applicable law the mandatory rules of the seat of arbitration may differ in the requirements for candidate arbitrators and the constitution procedure. Taking into account the need to comply with such rules when constituting the Arbitral Tribunal, it is proposed to add a provision to the 2021 Arbitration Rules that, in the absence of an agreement between the Parties on the seat of arbitration, it can be preliminary determined by the Executive Administrator. The Arbitral Tribunal is not bound by such a decision of the Executive Administrator in any event.

CHAPTER 3. CONSTITUTION OF THE ARBITRAL TRIBUNAL

Part of the amendments made to Chapter 3 of the RAC Arbitration Rules are aimed at reducing, bringing to uniformity and simplifying the regulation.

Core suggestions

• specifying the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Commercial Arbitration as applicable guidelines to conduct conflict of interests check (note 8 to Paragraph 5 of Article 14);

• changing the procedure for choosing the presiding arbitrator of the Arbitral Tribunal by other arbitrators in a panel instead of appointing by the Board (Paragraph 3, Article 16);

• allowing the Board to refuse to confirm the designation of an arbitrator chosen by a Party, Parties or other arbitrators in a panel if it considers that such a person is not impartial or independent, does not meet the requirements of applicable law or does not have sufficient qualifications to perform the functions of an arbitrator (Paragraph 8 of Article 14);

• provide the co-claimants and co-respondents with the possibility to agree on the candidacy of an arbitrator for the purposes of constituting the Arbitral Tribunal in case of a multi-party arbitration;

• consolidating provisions regarding the termination of the arbitrator's mandate in Article 18 of the Arbitration Rules; while including the provisions of Paragraphs 1-3 of Article 18 of the effective Arbitration Rules into a separate article "Termination of the Arbitrator's Mandate Due to Inability to Participate in the Dispute Resolution" (Article 20) in accordance with the structure and logic of the rules on the grounds for termination of the arbitrator's mandate;

• providing the Board with wider discretion in determining whether remuneration and/or compensation of the expenses of the arbitrator whose mandate was terminated should be paid and in what amount (Paragraph 4 of Article 18).

CHAPTER 4. CONDUCT OF ARBITRATION

A significant number of amendments to the Chapter 4 of the Arbitration Rules is aimed at simplification of the regulation, *inter alia*, for the purposes of more coherent understanding by the users of the provisions and the procedures, stipulated by the Arbitration Rules.

Core suggestions

1) Modernisation of the provisions dedicated to determination of a Procedural Schedule (Article 28).

New edition of this Article is intended to make it easier for the Parties to understand the ways of determining the Procedural Schedule of the arbitration. It is suggested that as a general rule the Procedural Schedule should be agreed upon by the Parties and the Arbitral Tribunal. If such agreement is not possible, the Arbitral Tribunal shall determine the Procedural Schedule unilaterally.

2) Simplification of provisions on consolidation of claims (Article 31).

It is suggested to provide the Executive Administrator the power to decide on admissibility of consolidation of multiple claims covered by different compatible arbitration agreements. This decision is made by the Board only if reasonable doubts exist as for compatibility of arbitration agreements; or if the parties to the arbitration agreements are not identical; or if the Respondent objects the consolidation of claims.

3) IIntroduction of the duty to notify about a new representative at the earliest opportunity to avoid potential conflict of interest (Paragraph 2 Article 33).

In order to comply with the main ethical guidelines on party representation, it is suggested to supplement the Arbitration Rules with an additional duty to timely identify new representatives in order to avoid conflict of interest or prevent abuse of Parties' or Arbitral Tribunal's unawareness of the identity of a new representative.

4) Simplification of provisions on multi-party arbitration (Article 34).

New edition of the Arbitration Rules clarifies the conditions for joinder of additional parties to arbitration and their procedural rights.

Moreover, due to the elaboration of the provisions on additional parties, it is proposed to remove the Article, dedicated to the third parties, and exclude this notion from the Arbitration Rules.

5) Clarification of the provisions on holding oral hearings by videoconferencing (Article 37).

Taking into account the current realities, it is suggested to specify that the Arbitral Tribunal has the right to determine that an oral hearing shall be conducted using videoconferencing. Such a decision shall be made by the Arbitral Tribunal taking into account the circumstances of the particular case.

6) Clarification of the legal status and powers of the assistants to the Arbitral Tribunal (Article 38).

It is suggested to clarify the legal status of external assistants – persons that are not employees of the Administrative Office of the RAC but invited by the Arbitral Tribunal to perform certain assignments in the course of arbitration. The information about external assistants should be disclosed to the Parties and the Administrative Office of the RAC. While performing their functions both external and internal assistants (employees of the Administrative Office of the RAC) shall avoid conflict of interest and sign the declaration of independence.

Moreover, it is proposed to specify the power of the assistant to review clerical errors in the drafts of the arbitral awards and (or) orders of the Arbitral Tribunal, provided such review does not entail the resolution of the dispute on merits. If the internal assistant was not appointed by the Executive Administrator, such review in any case shall be conducted by the Administrative Office of the RAC.

Together with the adoption of the new edition of the Arbitration Rules, it is planned to announce practical guidelines, including on assistants to the Arbitral Tribunal, which will contain detailed explanations of their legal status and essence of the main internal practices.

In addition, it is suggested to streamline certain general provisions of the Arbitration Rules, in particular:

- stipulating the need to have the Parties' agreement for holding oral hearings in the venue, determined by the Arbitral Tribunal, if it would imply additional costs (Paragraph 3 Article 23);

- extending confidentiality requirements to candidate arbitrators since at the stage of requesting their prior consent, brief information about the dispute and the Parties is disclosed (Paragraph 4 Article 25);

- extending the term of arbitration for arbitration of international commercial disputes within the expedited procedure of arbitration up to 90 days from the date of the Arbitral Tribunal's constitution (Subparagraph 4 Paragraph 1 Article 27).

CHAPTER 5. INTERIM MEASURES

The amendments are aimed at more clear and precise understanding of the Chapter 5 of the Arbitration Rules. Taking into account the peculiarities of the Russian approach to the interim measures and the occasional resort to that institute, it is suggested to outline the provisions of Chapter 5 more structurally, in particular:

- providing information about interim measures and emergency interim measures in different Articles to emphasise their differences, as well as to make the procedure for considering an application for interim measures (emergency interim measures) clearer;
- indicating the main rationale of interim measures;
- specifying the binding nature of granted interim measures and the obligation to comply with them voluntary.

With the purpose of modernisation of this Chapter it is suggested, *inter alia*:

1) Establishing that the Arbitral Tribunal considers the application for interim measures at the earliest opportunity rather than specifying the time limit for such consideration (Paragraph 1 Article 46).

The effective edition of the Arbitration Rules provides that the application for interim measures shall be considered within one day from the receipt of the relevant application by the RAC. Probably, this time limit does not fully allow the Arbitral Tribunal to assess all the circumstances of the case and make a motivated decision. Moreover, in such a case, the other party lacks the right to submit the position on this issue.

It is suggested to specify that the application for granting interim measures shall be considered by the Arbitral Tribunal at the earliest opportunity.

This proposition is consistent with the recommendations of the Dechert team, which analyzed the RAC Arbitration Rules.

2) Introducing the institute of emergency arbitrator and mechanism for his/her appointment (Article 48).

International approach favors the consideration of application for emergency interim measures by a specially designated person (emergency arbitrator). It is suggested that consideration of application by emergency arbitrator rather than the President of the Board responds to the best international practices and allows to avoid specific problems (for instance, conflict of interest).

The RAC team believes that for the compliance with the Russian legislation, providing for the power of an arbitral institution to decide on emergency interim measures (Paragraph 2 Article 17 Federal Law “On arbitration (arbitral proceedings) in the Russian Federation”), it is sufficient that the arbitral institution *appoints* an emergency arbitrator rather than itself considers the request for emergency interim measures.

Thus, it is proposed that the emergency arbitrator shall be appointed by the President of the Board together with the Presidents of Subcommittees.

3) Increasing the time limit for consideration of application for emergency interim measures (Paragraph 4 Article 48).

It is suggested that the sufficient term for consideration of such application shall be 5 days from the referral of the relevant request to the emergency arbitrator.

4) Stipulating the power of the Arbitral Tribunal to confirm granted emergency interim measures (Paragraph 7 Article 48).

RAC team believes that the order granting emergency interim measures shall remain in force even after the constitution of the Arbitral Tribunal. This provision is aimed to ensure that the Parties do not abuse their rights by refusing to voluntarily comply with emergency interim measures in the absence of an indicated term for their validity.

At the same time, the Arbitral Tribunal shall have the power to confirm granted emergency interim measures or annul them.

5) Implementing the new mechanism ensuring enforceability of interim measures and emergency interim measures, confirmed by the Arbitral Tribunal (Paragraph 5 Article 49).

Taking into account that orders granting interim measures are not enforceable in the Russian Federation, it is suggested to provide the Parties with the right to apply to the Arbitral Tribunal with an additional claim for awarding a monetary amount for non-compliance with the interim measures or emergency interim measures, confirmed by the Arbitral Tribunal.

The Party may file such claim if this right is provided by the Parties' agreement. The RAC team believes that consideration of this additional claim shall not entail the increase of the Arbitration Fee.

At this point, the rules of other arbitral institutions do not contain similar provisions. At the same time, the right of the Arbitral Tribunal to award *astreinte* (including, in case of the Parties' agreement) is discussed in the doctrine.

CHAPTER 6. ARBITRAL AWARDS AND ORDERS

Core Suggestions

Many amendments to this Chapter has an aim to reduce and simplify the regulation. Among those, we suggest:

1) Excluding the provisions of the Arbitration Rules 2017 which were taken verbatim from the Russian legislation on arbitration or which overload the text of the Arbitration Rules.

In particular, we suggest deleting Article 58 (Challenging the Arbitral Award) and Article 59 (Enforcement of the Arbitral Award) of the Arbitration Rules 2017. In addition, we suggest moving several provisions, for example the requirements to contents of arbitral awards, from this Chapter to the guidelines for arbitrators.

Besides, we suggest excluding Article 55 of the Arbitration Rules 2017 (Application for Mediation) in view of the development of special rules on mediation (in progress). Meanwhile, we suggest specifying the mechanism of issuance of arbitral awards on agreed terms based on mediated settlement agreements (Article 52).

2) Stipulating a new ground for termination of arbitral proceedings, if an actual dispute between Parties does not prima facie exist (Article 55).

This provision is aimed at preventing cases in which arbitration may be used in bad faith, for example, when the parties commence arbitration based on the fake dispute for malicious purposes.

We believe that such a ground for termination of arbitration allows addressing the problem of using arbitration for illegal purposes while following the requirements of transparency and predictability of arbitration.

CHAPTER 7. EXPEDITED ARBITRATION

The aim of amending Chapter 7 is to reduce and simplify the regulation. It appears that, taking into account the consensual nature of arbitration, the expedited procedure shall also stay flexible, irrespective of the reduced time limits. In general, the amendments comply with the world's best practices and reflect the deliberations of the UNCITRAL Working Group II.

Core Suggestions

1) Providing for the Parties' opportunity of transition from the expedited procedure to the standard one and vice versa (Articles 57 and 58).

The provisions of the effective Arbitration Rules do not provide for the opportunity of transition from the expedited procedure to the standard procedure.

According to the Arbitration Rules 2021, the transition is possible in two cases: 1) by a Parties' agreement, 2) by the Board's decision basing on the motivated request of the Party and taking into consideration the opinion of the Arbitral Tribunal and other Parties, as well as the circumstances of the specific dispute (Article 57).

Besides, the Arbitration Rules 2021 provide for the opportunity of transition from the standard procedure to the expedited one even after the commencement of arbitration. The transition is possible if both Parties agree on that within 7 days following the notice on the commencement of arbitration (Article 58).

2) Removing the restriction on disputes with a higher value of claim.

The effective Arbitration Rules do not allow using expedited arbitration if the value of claim exceeds 30 million Rubles for domestic disputes and 500 thousand US Dollars for international arbitration.

In the Arbitration Rules 2021, we suggest removing this limitation.

3) Stipulating the Parties' right to agree that their dispute shall be considered by three arbitrators (Article 60).

The effective Arbitration Rules stipulate that in the expedited procedure the disputes shall be considered by a sole arbitrator. As there may be discrepancies between this rule and Parties' agreements providing for three arbitrators, to mitigate the risks of annulments of awards we suggest specifying the Parties' opportunity to change a number of arbitrators.

4) Specifying that the Arbitral Tribunal may decide upon the Procedural Schedule on its discretion (Article 61).

The effective Arbitration Rules contain the default Procedural Schedule for expedited arbitration and provide for the time limits for Parties' submissions.

In the Arbitration Rules 2021, we suggest specifying that the Arbitral Tribunal may decide upon the Procedural Schedule in expedited arbitration on its discretion, taking into account the circumstances of the specific disputes and the substance of the expedited arbitration.

5) Allowing oral hearings in expedited arbitration in exceptional circumstances (Article 61).

The effective Arbitration Rules do not allow holding oral hearings under the expedited procedure. Meantime, the case may arise when it is reasonable to hold oral hearings, but there is no need to move to the standard procedure.

The Arbitration Rules 2021 specifies that under exceptional circumstances the Arbitral Tribunal may decide to hold oral hearings upon the Party's request, unless the Parties expressly agreed to opt-out the right to hold oral hearings.

CHAPTER 8. RULES ON ARBITRATION OF CORPORATE DISPUTES

Chapter 8 is subject to the minor substantive amendments with regard to the procedure of arbitration of corporate disputes.

Among them, we suggest removing the rule that the provisions of Chapter 8 cannot be amended by a Parties' agreement. In practice, this rule raised concerns with regard to drafting of arbitration agreements for corporate disputes, including the agreements upon the procedure of constitution of the Arbitral Tribunal other that stipulated by Chapter 8.

RULES ON ARBITRATION FEES AND ARBITRATION COSTS

Core Suggestions

Including the provision on payment of arbitration fees by third parties (Article 14 of the Rules)

For the conflict of interest screening, if a third party pays the arbitration fee or the advance payment in favour of a Party, we suggest stipulate that the funded Party is obliged to provide information on the payer. Particularly, we suggest distinguishing between two cases:

1) the payment is made by someone who has no interest in the outcome of the dispute. In this case, we suggest stipulating that the funded Party shall immediately provide the RAC with information on the payer;

2) The payment is made by the third party in accordance with the third party funding agreement, and the third party provides financial support in exchange for the remuneration dependent on the outcome of the arbitration. Following the internationally recognised practices, it is suggested that the funded Party shall notify all other Parties, the Arbitral Tribunal (emergency arbitrator) and the RAC of the existence of such an agreement and the funder's identity no later than it files its first submission related to the merits of the dispute or, if the third party funding agreement is concluded after the commencement of arbitration, immediately after that. Besides, we suggest providing for the Party's obligation to disclose any change of this information immediately.

RAC INTERNAL RULES

Amending the RAC Internal Rules, we focused primarily on prohibition of conflicts of interest of the Board's members and the Administrative Office (Articles 3 and 7).

Core Suggestions

Stipulating the limitations with regard to appointment of the Board's members as arbitrators (Article 3)

In the Arbitration Rules 2021, we suggest providing that the Board's members may be appointed as arbitrators by the Board under exceptional circumstances.

These limitations do not apply if the Board's members are designated by a Party, agreed upon by Parties or chosen by co-arbitrators.