Arbitration 2020

Contributing editors
Gerhard Wegen and Stephan Wilske

LEXOLOGY.
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2006
Fifteenth edition
ISBN 978-1-83862-302-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Arbitration
2020

Contributing editors
Gerhard Wegen and Stephan Wilske
Gleiss Lutz

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Chile and Norway.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

LEXOLOGY.
Getting The Deal Through

London
January 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Russia

Dmitry Ivanov and Grigory Marinichev
Morgan Lewis

LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Russia is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) as a successor to the USSR (which joined on 22 November 1960). When joining, the USSR made a single declaration that in respect of the decisions rendered on the territories of non-contracting states, the Convention would be applied on a reciprocal basis only.

Russia is also a party to a number of multilateral conventions on international commercial and investment arbitration, including:

- the European Convention on International Commercial Arbitration of 1961 (ratified on 7 January 1964);
- the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation of 1972 (ratified on 20 April 1973);
- the Kiev Convention on Settling Disputes Related to Commercial Activities of 1992 (ratified on 19 December 1992); and
- the Minsk Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases of 1993 (ratified on 10 December 1994).

Also, in 1992, Russia signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, but to date has taken no steps for its ratification. Russia also signed the Energy Charter Treaty, but later decided not to become a contracting party.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

To date, Russia is a party to 88 bilateral treaties on legal assistance, including 79 bilateral investment treaties of which 16 treaties have been signed but have not entered into force, and 63 are currently effective. Most of those treaties contain dispute resolution provisions providing for either institutional (the most common option is either the Stockholm Arbitration Institute or the International Centre for Settlement of Investment Disputes) or for ad hoc (under the UNCITRAL Arbitration Rules) arbitration.

A full list of the bilateral treaties is available on the website of the Ministry of Justice (https://minjust.ru/ru/perechen-mezhdunarodnyh-dogovorov-rossiyskoy-federacii-po-voprosam-pravovoy-pomoshchi-i-pravovyh-28).

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Russia has dual arbitration legislation, with one law for domestic arbitration and another for international arbitration. A major arbitration law reform in 2015 included a new law on domestic arbitration being adopted (which replaced a 2002 law) as well as in substantial amendments to the law on international commercial arbitration. There is also some overlap between them (ie, certain procedural provisions of the domestic-focused also apply to some aspects of international arbitrations in Russia as well).

The principal laws on arbitration in Russia are:

- Law No. 5338-1 On International Commercial Arbitration of 7 July 1993 (the ICA Law). This regulates international arbitration having its seat in Russia, except for certain provisions that also apply to cases when an arbitration is seated abroad; and
- Federal Law No. 382-FZ On Arbitration (Arbitral Proceedings) in the Russian Federation of 29 December 2015 (the Arbitration Law). This relates to domestic arbitration and, to some extent, international arbitration seated in Russia (for example, requirements applicable to arbitrators, liability of arbitrators and arbitral institutions and others).

Certain parts of the Arbitrazh (Commercial) Procedure Code of 24 July 2002 and Civil Procedure Code of 14 November 2002 also apply to arbitration. These are the rules governing proceedings in Russia's state court system for commercial disputes, but they have some direct and indirect application to commercial arbitration.

For arbitration to qualify as foreign (international commercial arbitration) one of the following conditions should be met:

- the place of business of at least one of the parties is abroad;
- the place where a substantial part of the obligations out of the relationship of the parties is to be performed is abroad;
- the place with which the subject-matter of the dispute is most closely connected is located abroad; and
- disputes arising in connection with making foreign investments in the territory of the Russian Federation or Russian investments abroad.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The ICA Law declares in the preamble that it takes into account the provisions of the UNCITRAL Model Law of 1985 and therefore mirrors it. Although directly provided in the text, the ICA Law does not reflect the 2006 amendments to the UNCITRAL Model Law.

The Arbitration Law, being structured in almost the same manner as the ICA Law, also follows the UNCITRAL Model Law, with certain deviations and additions.

Mandatory provisions

5 What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Mandatory provisions are not generally characteristic of the national arbitration legislation, which supports party autonomy, but certain rules are still mandatory:

- the arbitration agreement must be made in writing (see question 9 for more details);
- the parties have equal rights, with each party having the opportunity to provide its arguments in the arbitration;
- the parties may not appoint an arbitrator who fails to meet certain criteria provided by law (for instance, being under 25 years old or a person with a criminal record); and
- the arbitration institution and rules must be correctly and unambiguously stated. (For instance, Russian courts have rejected the enforcement of an ICC award considering that the standard ICC arbitration clause did not refer to the 'arbitration institution', but only to the ICC rules – see more on Case A40-176466/2017.) However, we note that later the Supreme Court emphasised the validity of a standard ICC clause in its 26 December 2018 review of arbitration-related cases. The recent Supreme Court practice overview of 10 December 2019 generally made emphasis on a pro-arbitration approach, though with some caveats.

Substantive law

6 Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In relation to domestic arbitration the Arbitration Law provides that the arbitral tribunal shall resolve the dispute in accordance with the rules of Russian law or, in cases where, under Russian law, the parties may choose foreign law, in accordance with the rules of law that the parties have chosen.

For international arbitration, the ICA Law provides that the arbitral tribunal is to be guided by the rules of law that the parties indicated as applicable to the merits of the dispute. (Note also that the Russian Civil Code and some other laws mandate application of Russian substantive law for certain types of disputes where no foreign parties or interests or contracts are involved, etc).

In the absence of parties' choice of law the arbitral tribunal will (under both laws) itself decide on the applicable law in accordance with the conflict of laws rules it considers applicable.

Arbitral institutions

7 What are the most prominent arbitral institutions situated in your jurisdiction?

Pursuant to the arbitration reform in December 2015, an institutional arbitration organisation may now be established only by a non-commercial organisation upon receipt of an accreditation: a permit from the Russian government granting rights to perform functions of an institutional arbitration. A foreign arbitral institution is also required to have such a permit to hold proceedings seated in Russia. Arbitral awards with seat in Russia rendered by an arbitral institution not having a permit will be regarded as ad hoc awards.

Ad hoc tribunals are prohibited from administering corporate disputes (including most disputes between shareholders of a Russian-incorporated company, some M&A or share purchase type disputes involving a Russian company, etc; see also question 8) and have a more limited capacity than institutional arbitrations (eg, the parties cannot request assistance from state courts in obtaining evidence, and cannot agree on finality of the award).

Institutional arbitration organisations must have the recommended lists of arbitrators, which is often used by parties to choose arbitrators. However, parties may choose any arbitrator, including those who are not included in the recommended lists.

The transitional period of the arbitration reform ended on 1 November 2017, with only the four institutions below having been accredited so far (the first two being automatically given permits by the Arbitration Law as the oldest and reputable institutions in Russia):

- the International Commercial Arbitration Court at the Chamber of Commerce and Industry (CCI) of the Russian Federation (ICAC) (6/1 Ilyinka Street, Moscow, 109012; http://mkas.tpprf.ru/en/). In late January 2017, new rules and regulations of ICAC were adopted which expanded its jurisdiction to cover domestic arbitrations as well. Fees and costs in ICAC are relatively modest, with a registration fee of US$1,000 and arbitration fee depending on the amount of claim, the minimum being US$2,600;
- the Maritime Arbitration Commission at the CCI of the Russian Federation (MAC) (6 Ilyinka Street, Moscow, 109012; http://mac.tpprf.ru/en/). MAC is a reputable arbitration institution that resolves maritime disputes including vessel chartering, maritime transportation, collisions between marine vessels, etc. Fees and costs at MAC are more or less comparable with those at ICAC;
- the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (RUIE Arbitration Centre) (17 Kotel'nicheskaya naberezhnaya, Moscow, 109240; https://arbitration-rspp.ru/). The RUIE Arbitration Center administers both domestic and international commercial arbitration, and has a good historic track record in Russia for resolving domestic arbitrations. Fees and costs are on average lower than those of ICAC and are also based on the amount of dispute; and
- the Arbitration Center at the Institute of Modern Arbitration (Modern Arbitration Center) (14, bldg 3 Kadashevskaya Embankment, Moscow, 119017; https://centerarbitr.ru/en/mainpage/). This is a newly established institution that can administer both domestic arbitration (including corporate disputes) and international commercial arbitration. The arbitration fee is calculated as a percentage of the amount in dispute, but the parties may agree that the arbitration fee shall be based on hourly rates.

Two foreign arbitration institutions were accredited in 2019 by the Russian Ministry of Justice – the Hong Kong International Arbitration Centre (HKIAC) and Vienna International Arbitration Center (VIAC) – making those an eligible choice of institutional international arbitration for a number of disputes with a seat in Russia.

A special sports arbitration centre was also accredited in April 2019 for sports-related disputes, linked to amendments introduced to the federal law 'On Physical Activity and Sports'.

ARBITRATION AGREEMENT

Arbitrability

8 Are there any types of disputes that are not arbitrable?

Over time, different types of disputes have evolved from being arbitrable to non-arbitrable and vice versa, as courts took diverging positions.

As an overarching principle, Russian law allows submission to arbitration only of disputes arising from civil law relations; disputes of

a public (administrative) nature are non-arbitrable. The specific types of disputes below are non-arbitrable:

- antitrust disputes;
- insolvency and bankruptcy disputes;
- disputes involving state registration matters (disputes on immovable property located in Russia, disputes concerning establishment or liquidation of legal entities and individual entrepreneurs, disputes involving IP (trademarks, patents, etc) registration);
- family and inheritance law matters; and
- disputes arising from state procurement contracts.

As a result of the 2015 arbitration reform corporate disputes became arbitrable (but only by permanent arbitration institutions, and some types only by a tribunal having its seat in Russia. There are still a few exceptions, including the following, that are non-arbitrable:

- on convening a general meeting of a company's shareholders;
- arising out of activities of notaries on certification of transactions with participation interests in limited liability companies;
- almost all disputes with respect to strategically important companies (as defined by Russian law), with minor exceptions;
- related to buy-back and redemption of outstanding shares of a joint stock company; and
- related to the expulsion of a shareholder from a company.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

The arbitration agreement must be in writing (or any other form that is deemed equal to written form, that is, by exchange of emails, by inclusion in relevant clearing or trading rules, etc). The Arbitration Law specifically allows conclusion of an arbitration agreement by exchange of procedural documents (including a statement of claim and a statement of defence), whereby one party declares an arbitration agreement and the other party does not object.

An arbitration agreement with regard to corporate disputes can be inserted into the charter of a Russian company, as long as it is adopted unanimously by the shareholders (providing there are fewer than 1,000 in total), but not in the charter of a public joint-stock company.

The arbitration agreement can be made by reference to a general terms and conditions document containing an arbitration clause. Such reference should be made in such a way that makes it a part of the agreement.

Also note some recent Russian court decisions to the effect that a lawyer's power of authority to represent a client in arbitration must expressly specify such authority, for failure of which an award may be declared invalid upon court challenge. This footnote line of cases seems to have been defused by the most recent Supreme Court clarification, but caution suggests including such specificity in the relevant powers of attorney.

Enforceability

10 In what circumstances is an arbitration agreement no longer enforceable?

The most common defects rendering an arbitration clause unenforceable are lack of written form of arbitration agreement, non-arbitrability of a particular type of dispute, or defects of the party's intent (mistake, coercion, fraud, etc).

Avoidance, rescission or termination of the underlying contract in general does not entail unenforceability of an arbitration agreement. Russian courts in a number of cases have confirmed the principle of arbitration clause autonomy (see, for example, Resolution of the Supreme Court dated 2 November 2016 No. 306-ES16-4741 in case No. 65-19616/2015, Resolution of the Supreme Arbitrazh (Commercial) Court dated 17 December 2010 No. VAS-14379/10 in case No. A40-112301/09-7-886).

The recent Supreme Court Plenum of 10 December 2019 provided for some grounds when an arbitration agreement could be at risk. For example, an arbitration agreement will be unenforceable if the parties failed to correctly name the arbitration institute, or named a non-existing institute or rules.

Also, a split-jurisdiction arbitration clause, granting only one party a right to refer disputes in arbitration or the state courts, or both, shall be interpreted as granting mirror rights to both parties.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

Russian legislation has a general principle of separability of the arbitration agreement from the main contract. In addition, the recent Supreme Court Plenum of 10 December 2019 provided that the severability of the arbitration agreement should be governed in accordance with applicable law to such an arbitration agreement. In the absence of such a choice of law, the lex arbitri would apply to this question.

Third parties – bound by arbitration agreement

12 In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties that are not signatories to the arbitration agreement cannot be bound by it. This follows from the general Civil Code rule that no obligation can impose duties on non-parties thereto (third parties).

In cases of assignment or cession the arbitration clause binds the new parties, as explicitly stated in the Arbitration Law and supported by the Supreme Court. (Previously, reliance was placed on Resolution of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 9094/11 dated 29 March 2012.)

Third parties – participation

13 Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Neither the Arbitration Law nor the ICA Law contains relevant provisions on third-party participation in arbitration. The rules of some arbitration institutions (eg, ICAC, MAC, Modern Arbitration Center) provide for admittance of a third party to arbitration, which may join the arbitration provided that all parties to the dispute and such party are parties to an arbitration agreement or have all given written consent for this.

Groups of companies

14 Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not well elaborated in Russian law (at least in relation to procedural questions). The arbitration agreement may only extend to and be effective for the signatories of such (and for legal successors of parties, etc).

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

Russian law applies the same principles and criteria for validity of the arbitration agreement regardless of the number of parties involved, although it does not directly cover multiparty situations. Some arbitration rules (ICAC rules, for instance) provide for a case where there are multiple parties on the claimant's or respondent's side. In such cases those parties will act as claimant and respondent, with the right to nominate one arbitrator (failing such, the arbitration institute will appoint the arbitrator). Very complex procedures are provided now by law for multiple parties in relation to arbitrations of corporate disputes.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Russian law does not regulate the question of consolidation of arbitration proceedings. Some arbitration rules provide for such an option. For instance, ICAC rules provide for a possibility for ICAC to consolidate the arbitration proceedings provided that either the claims are covered by the same arbitration agreement, or the claims are governed by arbitration clauses providing for the same choice of arbitration institution and the claims are materially interconnected.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Law sets a list of restrictions for any potential arbitrator, which cannot be altered by the parties' agreement:

- must be at least 25 years old;
- must have full legal capacity;
- must have no criminal record;
- if applicable, former special powers (as a judge, public notary, prosecutor, etc) have not been terminated as a result of an offence; and
- must be fully independent and unbiased.

The sole or presiding arbitrator of a tribunal must be qualified in law, but this may be waived by the parties' agreement.

Some further restrictions are stipulated by laws: for example, active judges are prohibited from acting as arbitrators. Retired judges can now serve as arbitrators.

It is also stated in law that no one can be deprived of the right to act as an arbitrator on the ground of his or her nationality, but the parties may agree otherwise.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

The most commonly appointed arbitrators could be seen in the recommended arbitrator lists of the most reputable arbitration institutions in Russia. These lists feature outstanding scholars and practitioners, including retired judges, law professors, in-house counsel and lawyers in private practice (including partners and counsels at international law firms). Industry-based domestic arbitration centres also included professional experts – in oil and gas, electric power, banking and finance.

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Both the Arbitration Law and the ICA Law provide for the same default appointment procedure. If the parties have not agreed on the procedure of appointment of the arbitrators the procedure is as follows (unless otherwise provided by the relevant arbitration rules).

In an arbitration with three arbitrators, each party appoints one arbitrator and the two selected arbitrators appoint the third arbitrator. In case a party fails to appoint an arbitrator within 30 days after receiving a request from the other party or in case the two selected arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made upon request of any party by a competent state court.

In an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator the appointment is made upon a request of any party by a competent state court. A panel of three arbitrators is appointed in the absence of the parties' agreement.

Further, state courts may (upon a request of any party) assist in appointing arbitrators in the following cases:

- one of the parties violates the procedure of appointment; or
- a third party (including relevant arbitration institute) fails to perform certain functions in connection with such procedure.

Parties to institutional arbitration may exclude intervention by state court in the appointment of arbitrators (and in such cases, if the institution fails to form the tribunal, the arbitration agreement would become inoperative).

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator can be challenged either if there are circumstances that give rise to justifiable doubts as to his or her impartiality or independence or if an arbitrator fails to meet the eligibility criteria provided by law or by the parties' agreement. If the parties fail to agree otherwise, a requesting party should within 15 days of becoming aware of the formation of the arbitration tribunal (or of any of the above circumstances) file a written notice specifying the grounds for challenging an arbitrator. Unless an arbitrator withdraws voluntarily or the other party consents to the challenge, the question of challenge will be resolved by the arbitration institution.

Replacement of an arbitrator takes place when:

- an arbitrator is successfully challenged or withdraws voluntarily;
- an arbitrator is unable to perform his or her functions or fails to participate in the arbitration proceedings for an unreasonable time; or
- the parties agree to terminate an arbitrator's functions.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

The procedural relationship and communications between the parties and arbitrators are usually addressed in the rules of the relevant arbitration institution. Russian law does not recognise any kind of contractual

relations between parties and the arbitration tribunal. The Arbitration Law and the ICA Law provide only for the requirements of impartiality and independence of the arbitrators, which applies to any kind of arbitration universally.

The determination of arbitration fees depends on the type of arbitration: in ad hoc arbitration the arbitrators' fees are determined either by the parties' agreement or, in the absence of such agreement, by the arbitration tribunal. For institutional arbitration the amount of fees is provided by the rules of the relevant institution.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

The Arbitration Law, as well as the rules of arbitration institutions (ICAC rules, for instance) do not provide for specific examples of what the duty of impartiality and independence would mean in practice. In practice this gives relatively wide discretion for potential challenges in court.

The Russian Chamber of Commerce and Industry in 2010 adopted a set of Rules on the Impartiality and Independence of Arbitrators, which generally follow the IBA Guidelines on Conflicts of Interest in International Arbitration. Both are taken into account by reputable practising arbitrators, but are rarely referred to in the court practice. Some institutional arbitration institutions (for example, the RUIE Arbitration Centre) have adopted their own regulations in this area.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Arbitration Law expressly regulates this subject. An arbitrator shall not be liable for civil wrongdoing to either party to the arbitration or to the institutional arbitration for misconduct. In the case of an arbitrator's misconduct, the rules of the relevant arbitration institution can provide for the reduction of an arbitrator's fee.

An arbitrator may be held liable only by civil claim filed in criminal proceedings for recovery of damage incurred as a result of a crime, if the arbitrator was found guilty. As a matter of Russian criminal law, an arbitrator may be liable only for deliberate action, not negligence.

State court judges have better immunity guarantees. A judge cannot be liable for a disciplinary offence in the case of a judicial error, whereas an arbitrator may be held liable for that. (Russian law also provides for a special procedure by which administrative and criminal prosecution of a judge could be pursued.)

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

According to Russian law, when a claim is brought before a court despite an existing arbitration agreement, the court must dismiss the claim and refer the parties to arbitration if any party raises an objection on this basis. The party must raise the objection no later than at the moment of making its first statement on the merits of the dispute, otherwise it is precluded from raising such objection. Unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, the court must terminate the proceedings and remand the parties to arbitration.

Jurisdiction of arbitral tribunal

25 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The arbitral tribunal may rule on its own jurisdiction, including on any objections with respect to the existence or validity of the arbitration agreement. A jurisdictional objection must be raised by any party no later than when it makes its first statement on the merits. A statement that the arbitral tribunal is exceeding the scope of its authority must be made as soon as the alleged beyond-scope matter is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later objection if it considers the delay justified.

The arbitral tribunal may rule on a jurisdictional objection either as a preliminary matter or in an award on the merits. If the arbitral tribunal as a preliminary matter rules in favour of its own jurisdiction, any party within one month from receipt of that ruling may apply to the state court with an argument that the arbitral tribunal has no jurisdiction. If the agreement provides for arbitration by a permanent arbitration institution, the parties can contract out of this option.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Failing prior agreement of the parties, the arbitral tribunal determines the place of arbitration, taking into account the circumstances of the case and the parties' convenience. Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate to hold hearings, to hear witnesses, experts or the parties, or to inspect goods, other property or documents. Rules of institutional arbitration provide by default the place of arbitration (Moscow for ICAC, for instance).

Under the Arbitration Law, failing prior agreement of the parties, the arbitration proceedings are to be conducted in Russian. Under the ICA Law, if the parties fail to agree on the language(s) of arbitration, this shall be determined by the arbitral tribunal. The arbitral tribunal may request to provide any written evidence with translation into the languages agreed by the parties or determined by the tribunal.

The substantive law of the dispute is determined on the basis of the parties' choice in the agreement. If no choice is made by the parties, the arbitral tribunal would make the choice of applicable law, subject to the lex arbitri conflict of laws rules. In the case of Russia as a seat of arbitration, the relevant conflict of laws provision is provided in article 1211 of the Civil Code and is based on the principle of the closest connection. However, if the legal relationship is most closely connected to one country, the choice of law may not affect the mandatory rules of such country's law.

Commencement of arbitration

27 How are arbitral proceedings initiated?

According to the Arbitration Law and the ICA Law, the arbitration is commenced when the statement claim is received by the respondent, unless otherwise agreed by the parties. The laws indicate the content of a request for arbitration that should be part of the statement of claim.

For instance, the ICAC rules provide that arbitration commences with the filing of a statement of claim, which is deemed filed only after the claimant has paid the registration fee. All documents are to be

submitted by the parties to the ICAC in six copies (or four copies in case of a sole arbitrator), provided that additional copies are required if there are more than two parties in the dispute, unless otherwise specified by ICAC or the tribunal. ICAC will not proceed with the arbitration unless the advance arbitration fee is paid in full by the claimant.

Hearing

28 | Is a hearing required and what rules apply?

If the parties have not agreed otherwise, the arbitral tribunal decides whether to hold a hearing or to proceed on a documents-only basis. However, unless the parties have expressly agreed to forego a hearing, the arbitral tribunal must hold it (could be held via videoconference) if either of the parties so requests.

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Each party must prove the facts relied on in support of its claim of defence. Each party may submit the documents it considers relevant to the case, together with its statements on the merits of the dispute, or to make reference to the documents or other evidence that it will present in future. If the arbitral tribunal finds the presented evidence insufficient, it may invite the parties to present additional evidence. If either party fails to present documentary evidence without reasonable excuse, the arbitral tribunal may continue the proceedings and render an award based on the evidence that has already been produced. The arbitral tribunal determines the admissibility, relevance, materiality and importance of the evidence as it considers appropriate. Documents, witness statements, expert reports and inspections are generally admitted as evidence, though neither the Arbitration Law nor the ICA Law contain any specific provisions on witnesses.

The arbitral tribunal may appoint one or more experts on specific issues determined by the tribunal and requiring special knowledge.

The parties and the tribunal normally refer to traditional Russian state courts' principles of evidence production and assessment. Parties rarely include reference to the IBA Rules on the Taking of Evidence in International Arbitration in their arbitration clauses, and Russian arbitrators rarely use them in the conduct of cases, except in some unusually complex matters. The newly adopted Prague Rules remain largely untested in practice.

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Russian state courts have the following powers to provide assistance and supervision to arbitral tribunals:

1 granting interim relief;
2 assisting the arbitral tribunal in taking evidence (available only for institutional (not ad hoc) arbitration);
3 appointment and challenge of arbitrators, or termination of an arbitrator's mandate;
4 challenge an interim arbitration ruling on competence of the arbitral tribunal;
5 setting aside arbitral awards; and
6 enforcing arbitral awards.

The powers (3), (4) and (5) listed above may be contracted out by express agreement of the parties to an institutional arbitration (ie, which is administered by an accredited permanent arbitration institution only).

Confidentiality

31 | Is confidentiality ensured?

Arbitration is confidential, and hearings are closed to the public. Without the consent of the parties the arbitrators and the staff of permanent arbitration institution are not entitled to disclose the information that has become known to them during the arbitration. An arbitrator cannot be examined as a witness about the information that became known to him or her during the arbitration.

During enforcement or challenging of the arbitral award in state courts, confidentiality would be partially undercut, as proceedings in state courts are public. A party may request the state court to hold proceedings closed to the public To protect confidentiality, but the court may not necessarily grant it without taking into account other factors.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

A Russian state court at the place of the arbitral tribunal or at the location (residence) of debtor or its property is empowered to grant interim measures at the request of a party to arbitration before or after arbitration proceedings have been initiated, including, but not limited to:

- freezing the respondent's money and other assets;
- prohibiting the respondent and other persons from performing certain actions relating to the subject matter of the dispute;
- ordering the respondent to take specific actions to prevent deterioration of the property in dispute; or
- ordering the respondent to hand over the property in dispute, to be held in custody by the claimant or a third party.

An application for interim measures must be accompanied by a certified copy of the statement of claim and properly certified copy of the arbitration agreement. An application for interim measures must be considered by a judge ex parte, within a day.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Law and the ICA Law do not provide for general provisions on an emergency arbitrator procedure. However, a similar concept is reflected in these laws: if provided by the parties' agreement, prior to the constitution of the arbitral tribunal a permanent arbitration institution, per request of a party, may order interim measures that it considers necessary. Moreover, certain emergency powers are granted to presidents of several arbitration institutions in Russia or their boards. The ICAC Regulation provides that the chairman of ICAC is entitled to grant interim relief upon a party's request.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

According to the Arbitration Law and the ICA Law, unless the parties agree otherwise, the arbitral tribunal may at the request of a party grant interim measures that it considers appropriate. The laws do not provide

any specific measures that might be imposed by the tribunal. The arbitral tribunal may require either party to provide counter-security in connection with such measures.

Orders of domestic and foreign arbitral tribunals on interim measures remain non-enforceable in Russia (for example, Ruling of the Supreme Court of the Russian Federation dated 19 January 2015 in case No. 307-ES14-3604, 21-9806/2013), unless such order is part of a partial arbitral award. Another possible approach could be to apply to the state court for the same measures and to refer to the relevant interim order issued by the tribunal.

Neither Arbitration Law nor the ICA Law provides for any rule on security for costs. Although this may be ordered by the tribunal based on its general powers to grant interim measures as it considers necessary, practice in this area has been quite limited to date.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither the Arbitration Law, the ICA Law nor the rules of arbitration institutions in Russia provide for special rules allowing arbitral tribunals to order sanctions against parties or their counsel who attempt to undermine the arbitration proceedings using such tactics. However, the arbitral tribunal could take such tactics into account when deciding on the distribution of arbitration costs between the parties. Thus a party that used such could be ordered to pay the arbitration costs regardless of the outcome of the case.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Decisions by the arbitral tribunal are made by majority vote, unless the parties to the arbitration agree otherwise. Procedural issues could be resolved by the presiding arbitrator alone if he or she has the necessary authorisation from the parties and other arbitrators.

For instance, the ICAC Rules also set forth that the decision is made by majority vote, but with the caveat that if a decision cannot be made by majority vote, the presiding arbitrator shall make the decision.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Most applicable rules and the Arbitration Law contain a general statement that an arbitrator who is in disagreement with the tribunal's decision is allowed to issue a dissenting opinion in writing. Such opinion is attached to the award. The ICA Law is silent on dissenting opinions.

Form and content requirements

38 | What form and content requirements exist for an award?

Awards must be in writing and signed by all arbitrators (including the dissenting arbitrator), or the majority of the arbitrators, with an explanation for the missing signatures.

The ICA Law and Arbitration Law set forth similar yet somewhat different requirements for the content of an award, as follows:

Under the ICA Law, an award should contain:

- the reasoning on which it is based;
- the conclusion on granting or dismissing claims; and
- the amount of the arbitration fee and costs and their distribution between the parties.

The award should also indicate the date and seat of the arbitration.

In addition to the above requirements, under the Arbitration Law the award should also contain (unless the parties agree otherwise):

- the composition of the tribunal and the procedure of arbitrators' appointment;
- the names and addresses of the parties;
- an explanation of the jurisdiction of the tribunal over the dispute; and
- the substance of the claims.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Law does not contain any time limitations for rendering of the final award.

Under ICAC rules, ICAC should take measures to finalise the proceedings within 180 days following the composition of the arbitral tribunal. This term can be extended by the ICAC Presidium, on its own initiative or by request of the tribunal.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Unless the parties agree otherwise, under the ICA Law and the Arbitration Law the date of delivery of the award is decisive for:

- filing a request for correction of mistakes, typographical errors and similar deficiencies in the award or explanation of the award (30 days); the tribunal itself could also correct mistakes in the award within the same period; and
- filing a request for issuing a separate award for claims filed during the proceedings but not addressed in the award (30 days).

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

Although the ICA Law and the Arbitration Law do not provide for an explicit classification of awards, these laws directly mention final awards and awards on agreed terms. Interim awards and partial awards are also possible, although the enforceability of interim awards issued by the tribunals is questionable.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Under the Arbitration Law and the ICA Law, in addition to an award, the proceedings could be terminated either by decision of the tribunal or in certain cases automatically.

The tribunal could decide on termination of the proceedings, if:

- the claimant withdraws its claim (provided that the respondent does not object and the tribunal does not find a legitimate interest of the respondent in final settlement of the dispute);

- the parties agree on termination of the proceedings; and
- the tribunal for some other reason believes that continuing the proceedings has become unnecessary or impossible.

Cost allocation and recovery

43 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

As a general principle, the costs in domestic arbitration under the Arbitration Law are distributed in accordance with the agreement of the parties; in the absence of such agreement the costs are in proportion to the granted and dismissed claims. At the request of a winning party, the tribunal could allocate counsel fees of such party and other proceedings-related costs on the other party. In-house counsel fees are not common.

Interest

44 May interest be awarded for principal claims and for costs, and at what rate?

Interest is not treated as a procedural issue by the Arbitration Law and the ICA Law. It is to be resolved under the substantive rules of law applicable to the dispute when rendering the award. If the dispute is resolved under Russian law, default interest is to be awarded at the key rate of the Bank of Russia (as at 16 December 2019 this is 6.25 per cent per annum for claims in roubles).

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The tribunal is entitled to correct or interpret the award – both on its own initiative or at a party's request (see question 40 for more details).

Challenge of awards

46 How and on what grounds can awards be challenged and set aside?

If under the arbitration agreement between the parties the dispute is assigned to a permanent arbitration institution, the parties could agree that such award is final and not subject to further challenge. In other cases, awards could be challenged within three months from the date of the award. An award could be set aside by a state court on the same grounds as provided by the New York Convention, such as:

- a party to the arbitration agreement was not fully legally capable, or the arbitration agreement was invalid under the applicable law;
- the award is granted in a dispute not covered by the arbitration agreement or contains statements outside the scope of the arbitration agreement;
- the composition of the tribunal or procedure contradicts the parties' agreement or applicable law; or
- the party was not notified on appointment of the arbitrators or was unable to provide its arguments.

A state court could also set aside the award if:

- the dispute in question could not be resolved by arbitration under applicable Russian law; or
- the award contradicts public policy.

Levels of appeal

47 How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Once a commercial (arbitrazh) court considers a case on challenging an arbitration award, its judgment enters into force immediately. The parties could appeal that judgment to the cassation instance (the commercial (arbitrazh) court of the relevant circuit) and then to the Supreme Court.

Depending on the workload of the court and complexity of the case, the first appeal takes from three to five months, and appeal to the Supreme Court could take from four to six months at least.

The state duty is 3,000 roubles for each appeal, which could be recovered from the losing party. Legal fees and other costs could also be recovered, but to a 'reasonable extent' determined by the court.

Recognition and enforcement

48 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Russian courts are generally favourable on enforcing both domestic and international arbitral awards – unlike the decisions of foreign state courts, which are rarely enforced.

In earlier post-Soviet years there was some tendency of state courts to reject foreign awards in favour of foreign parties against Russian parties on public policy or similar grounds, but this occurs less often now. (There may still be practical difficulties for a foreign party in enforcing foreign or Russian awards against a large or otherwise influential Russian state-owned company.)

An award itself cannot be used automatically in Russia without a writ of execution issued by a state court. The award is enforced by the court at the location of the respondent: the court issues a writ of execution, which is subsequently presented to the banks or the bailiffs for forced execution.

An application for issuance of a writ of execution should be accompanied most importantly by copies of the award and arbitration agreement.

The court is supposed to review the application on enforcement of the award within one month of the application being received by the court, although there could be delays.

Time limits for enforcement of arbitral awards

49 Is there a limitation period for the enforcement of arbitral awards?

The overall limitation period in relation to the enforcement of arbitral awards in Russia, combined with local enforcement, can be a maximum of six years. A limitation period of three years is established for voluntary performance of an award or application to the court for execution writ (article 246 APC RF). Once the writ is rendered, another three years are given for its enforcement (article 321 APC RF). This approach to the limitation periods for the enforcement of arbitral awards (combined with the relevant court ruling's enforcement) was confirmed by Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation No. 13211/09 dated 9 March 2011.

Enforcement of foreign awards

50 What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

If the award has been set aside by the courts at the place of arbitration, the Russian courts will most likely not enforce it.

Enforcement of orders by emergency arbitrators

51 Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Although the ICA Law and the Arbitration Law do not explicitly provide for emergency arbitrators, the laws allow the parties to agree on the right of the arbitration institution to grant interim measures prior to composition of the tribunal (see question 34).

Cost of enforcement

52 What costs are incurred in enforcing awards?

The amount of state duty for reviewing an application on enforcement of the award is the same as for challenging the award – 3,000 roubles. Legal fees could be recovered from the losing side in a reasonable amount.

The costs of enforcement through the bailiffs are collected from the debtor directly by the bailiffs.

OTHER

Influence of legal traditions on arbitrators

53 What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Domestic arbitration proceedings are very much influenced by the rules and norms of state court proceedings in Russia. Thus, typical arbitration would largely follow the logic of the state court process. There are also no statutory provisions governing discovery. Unlike in common-law influenced jurisdictions or proceedings, in Russia arbitrators tend to consider only the documents provided by each party and work more with written evidence than list witnesses or witness statements. Generally, in most cases, it is difficult to have flexibility in the proceedings.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no country-specific professional or ethical rules applicable to counsel in international arbitration. If counsel in such arbitration has Russian attorney status, he or she is bound by that ethical and professional code of conduct, and any violations of such could be reported to the local bar.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is not widespread in Russia, nor is it specifically regulated; therefore, it is not currently subject to restrictions. This is an ongoing area of business for funders, who appear to have accelerated in past years. The recent Supreme Court's position and amendments to the law have made it possible for attorneys to agree on a success fee (in certain circumstances), which will likely drive more third-party funders.

Morgan Lewis

Dmitry Ivanov
dmitry.ivanov@morganlewis.com

Grigory Marinichev
grigory.marinichev@morganlewis.com

Legend Business Center
Tsvetnoy Bulvar, 2
Moscow 127051
Russia
Tel: +7 495 212 2518
www.morganlewis.com

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

A foreign practitioner should be aware of the visa requirements when travelling to Russia: an appropriate visa type should be arranged in advance (the minimum timing is around one to two weeks for applications from most countries, although expedited processing may be available for an extra fee) and also comply with the migration registration formalities. There are no specific ethical rules for foreign practitioners, nor any restrictions on foreign attorneys appearing as counsel, although representation in Russian courts is now limited to Russian law qualified attorneys only (with a few minor exceptions).

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

The most recent court practice has demonstrated that the legal arbitration environment in Russia remains developing and is unstable to a certain extent. We have seen several quite alarming court judgments that have not been overruled, which became a matter of a concern for the arbitration community.

There have been a number of cases where courts made surprising rulings, invoking, for instance, a public policy ground and challenging

the arbitration clause's wording, that were inconsistent with established court practice.

The Russian arbitration system has been heavily affected by the arbitration reform of 2015 (see, eg, questions 3, 7 and 8). The purpose of the reform was to promote arbitration, to make arbitration more transparent and friendly, and to stop the spread of the 'pocket arbitration courts' (arbitration institutions affiliated with or controlled by one of the parties to the dispute), which affected the reputation of arbitration in Russia and made it practically impossible to challenge apparently unfair awards on the merits. The interim results of the reform have shown that it did not result in the promotion of arbitration, as only five institutions (including VIAC and HKIAC) have received the status of permanent arbitration institutions in Russia since 2017, and statistics show a drastic reduction in arbitration-related disputes in Russia.

The approval of HKIAC and VIAC as accredited arbitration centres in Russia now allows for an option for foreign parties to refer disputes seated in Russia to these two foreign institutions.

At the same time, despite some tensions at a political level, the Supreme Court generally demonstrates an arbitration-friendly approach and trend in the most recent 10 December 2019 Plenum ruling, as well as in the practice review of 26 December 2018. The message is aimed at reconfirming an arbitration-friendly approach in court practice.

Furthermore, Russia remains interested in the active role of foreign investors. In recent years, no bilateral investment treaty has been terminated or renounced and, while the current political situation may affect the foreign investment landscape in the country, Russia has not to date manifested any inclination to reduce investment protections or otherwise introduce any barriers to arbitration or enforcement.

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-302-9