GAR KNOW HOW COMMERCIAL ARBITRATION

Russia

Evgeny Raschevsky, Vladimir Talanov, and Yana Bagrova

Egorov Puginsky Afanasiev & Partners (EPAM)

JUNE 2023

GAR

Infrastructure

1 Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Russia is a party to the New York Convention. In 1960, the USSR made a reservation that it shall apply the provisions of the Convention in respect of arbitral awards made in the territories of non-contracting states only to the extent to which they grant reciprocal treatment. This reservation is still in force for Russia.

2 Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Russia is a party to the European Convention on International Commercial Arbitration 1961, which contains the reference to the New York Convention in relation to recognition and enforcement of the arbitral awards that were set aside.

In addition, Russia, as well as some former COMECON members, is still a party to the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation 1972. Article IV of that Convention sets forth that the awards shall be recognised without any further procedure and shall be subject to enforcement in any country party to the Convention in the same manner as judgments passed by the state courts of the country of execution and that have come into legal force.

Russia is a signatory to the Washington (ICSID) Convention from 16 June 1992, but has not yet ratified it.

3 Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

Russia has a dual arbitration regime distinguishing domestic arbitration proceedings and international arbitration proceedings seated in Russia.

The Law of the Russian Federation No. 5338-1 dated 7 July 1993 on International Commercial Arbitration (the ICA Law) governs international arbitration proceedings seated in Russia. Certain provisions also apply to arbitral proceedings seated outside Russia: obligation of a court to refer parties to arbitration if a party so requests and if a matter brought before the court is the subject of an arbitration agreement; the right to apply for interim measures in courts; recognition and enforcement of awards. The ICA Law closely follows the Russian text of the UNCITRAL Model Law as adopted in 1985 (the Model Law).

Federal Law No. 382-ФЗ dated 29 December 2015 on Arbitration (Arbitration Proceedings) in the Russian Federation (the DCA Law) entered into force on 1 September 2016 and replaced the previous law of 2002. The DCA Law applies to domestic arbitration with certain provisions applicable to international commercial arbitration seated in Russia, including provisions on record keeping, liability of institutions and arbitrators, mandatory notification of a legal entity on corporate disputes between its shareholders, admission of the foreign arbitral institutions to act as a permanent arbitral institution in Russia, etc. The latter aspect as well as several others was significantly simplified by the December 2018 amendments into the DCA Law.

The content of the DCA Law with respect to procedural issues of arbitral proceedings has been largely unified with the ICA Law to reduce practical differences to minimum.

4 What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

Before the Russian arbitration reform, all arbitral institutions in Russia had a right to administer cases. Since 1 November 2017, almost all arbitral institutions lost their right to administer cases unless they had obtained a permission from the Ministry of Justice of the Russian Federation and became recognised as a "permanent arbitral institution" in Russia. Two major arbitral institutions were recognised as permanent ones

automatically without the requirement of obtaining a permission: the International Commercial Arbitration Court (ICAC, also known under its Russian acronym MKAS) and Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation.

As of the beginning of 2023, five Russian arbitral institutions have obtained a permission and the right to administer disputes – the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (RAC), Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (RUIE), National Center for Sports Arbitration at the autonomous non-profit organisation Sports Arbitration Chamber (Centre for Sports Arbitration), Arbitration Center at the autonomous non-profit organisation National Institute for the Development of Arbitration in the Fuel and Energy Complex, and Arbitration Institution at the All-Russian industrial association of employers Union of Machine-Builders of Russia.

In January 2017, the ICAC approved special rules whereby it acts as appointing authority. The RUIE has the provisions to the same effect in the Arbitration Rules adopted in June 2018. The Arbitration Rules of the Arbitration Institution at the All-Russian industrial association of employers Union of Machine-Builders of Russia adopted in July 2021 also contain the general right to act as appointing authority.

Ad hoc Arbitration Rules dated January 2017 of the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation provide for the exercise of the appointing authority function. The RAC Ad hoc Arbitration Rules effective from October 2019 also specifically govern the administration of ad hoc arbitration, including acting as appointing authority. The same provision is reflected in the Arbitration Rules of the Centre for Sports Arbitration of 2021.

Arbitration Rules of the Arbitration Center at the autonomous nonprofit organisation National Institute for the Development of Arbitration in the Fuel and Energy Complex, effective from April 2021, do not envisage such service.

5 Can foreign arbitral providers operate in your jurisdiction?

Yes. Foreign arbitration institutions may also receive the status of a "permanent arbitral institution" in the event of obtaining a permission issued by the Ministry of Justice of the Russian Federation. The DCA Law expressly provides only one requirement for foreign institutions to receive a permission, which is a "widely accepted international reputation". In the absence of the permission, arbitrations administered by foreign providers shall be treated as ad hoc arbitrations. In addition, they are prohibited from administering any corporate disputes seated in Russia (see question 8). Furthermore, in order to administer Russian domestic disputes, such foreign institutions have to open a branch or representative office in Russia (article 44(6.2) of the DCA Law).

So far, four foreign arbitral institutions obtained a permission – the Hong Kong International Arbitration Centre (HKIAC),the Vienna International Arbitral Centre (VIAC), the International Chamber of Commerce (ICC), and the Singapore International Arbitration Centre (SIAC).

The only exemption is provided by the DCA Law with respect to foreign legal entities who redomiciled to Russia from abroad (international companies). Foreign arbitral institutions may administer disputes under arbitration agreements between shareholders of such entities entered in prior to the relocation without the need to obtain the admission from the Ministry of Justice.

6 Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There are no specialist arbitration courts in Russia. Arbitration-related cases fall within the jurisdiction of the Arbitrazh (state commercial) courts of the Russian Federation. Due to Moscow being the place of the majority of arbitrations in Russia, a large part of arbitration-related cases are tried by the Arbitrazh Court of Moscow city (a first instance court) and the Arbitrazh Court of Moscow Region (a court of cassation appeal). Both courts have accumulated significant experience in cases dealing with challenges and enforcements of arbitral awards. There are no specifically assigned judges or divisions within those courts to deal with arbitration matters on a permanent basis.

Russian courts remain to be supportive of international arbitration in general, and the statistics is steady (see also question 45). Certain contradictory rulings in recent years gave reasons for concern, including the ones of 2018 in Inzhtranstroy case on the ICC standard clause and on procurement contracts of state-controlled companies. However, the Supreme Court of the Russian Federation effectively wiped out the negative effect of the latter by the Review of the Jurisprudence of 26 December 2018 devoted solely to international and domestic arbitration (see also question 8). The Review reconfirmed the pro-arbitration approach of the Supreme Court and was welcomed by the arbitration community. On 10 December 2019, the Plenum of the Supreme Court issued a Resolution fully devoted to assistance and control functions by Russian courts in relation to international commercial arbitration.

It is important to note the special approach applicable for persons being under foreign restrictive measures (sanctions), imposed by any foreign state or union. Article 248.1 of the Russian Arbitrazh Procedure Code (APC) allows such persons to submit disputes to the Russian Arbitrazh court, despite any arbitration clauses, if the sanctions impede their access to justice. In December 2021, the Supreme Court ruled that the very fact of being under foreign sanctions is enough for creating obstacles to justice (Case A60-36897/2020 Uraltransmash v PESA).

In December 2022, the Arbitrazh Court of the Far East Region confirmed this approach. The court ruled that imposition of foreign sanctions on one of the parties per se makes the arbitration agreement unenforceable, while proving specific obstacles to justice is ancillary (Case A73-15265/2022 Asia Les v Prodesa Medioambiente SL).

Recently, the scope of article 248.1 of the APC was expanded even further to cover the cases where none of the parties is subject to sanctions. In December 2022, the Arbitrazh Court of Moscow City declared the arbitration agreement invalid because the EU and UK sanctions affected the claimant's ability to continue its banking business, as well as posed obstacles to access to justice for all Russian parties arbitrating in the UK, in particular, by virtue of blocking of SWIFT transactions and travel restrictions (Case A40-121362/22-107-789 Loco-Bank v Fitch ratings CIS LTD). For this reason, sanctions can affect the enforceability, and even validity, of an arbitration clause.

Russian courts have also considered applications under article 248.2 of the APC entitling the parties who are subject to foreign sanctions to seek anti-arbitration injunctions. In one case, where a sanctioned party claimed such remedy, the SCC arbitration in question proceeded much speedier than the party's application before the arbitrazh court of the Nizhny Novgorod Region. The claimant applied for anti-arbitration injunction, but now as a form of provisional measure, which, under the APC, must be resolved within a day. To avoid frustration of the main claim, the court granted the injunction to the same effect and ordered the respondent to pay the entire claimed amount in case of non-compliance (Case A43-411/2022 GAZ PJSC v AIG Europe SA). However, this practice is yet to prove itself before higher courts.

Agreement to arbitrate

7 What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

An arbitration agreement shall be in writing and refer to a specific legal relationship. In this aspect, the ICA Law and the DCA Law replicate the text of article 7 of the Model Law. In addition, both national laws provide that an arbitration agreement may be a part of a corporate charter or registered trading rules (with a few exceptions). It may cover existing and future disputes, whether contractual or not (Resolution of the Plenum of the Supreme Court of the Russian Federation dated 10 December 2019 No 53).

8 Are any types of dispute non-arbitrable? If so, which?

As a general rule, all disputes are arbitrable unless otherwise provided by a federal law (article 1(4) of the ICA Law, article 1(3) of the DCA Law). Article 33 of the APC indicates that bankruptcy, public acts and collective actions, as well as certain types of corporate and IP disputes are subject to exclusive jurisdiction of commercial courts (Resolution of the Plenum of the Supreme Court of the Russian Federation dated 10 December 2019 No 53). Article 22.1(2) of the Civil Procedure Code (CPC) adds to this list the disputes arising out of: family relations, employment relations, inheritance relations, environmental damage, relations governed by the legislation on the contract system in the field of procurement, privatisation of state and municipal property, compensation for damage caused to life and health, and some other (Ruling of the Judicial Chamber for Civil Disputes of the Supreme Court of the Russian Federation dated 17 November 2020 in case No 13-2387/2019).

The disputes relating to public procurement are temporary non-arbitrable – until the law governing the procedure for determination of the arbitral institution for administration of such cases is adopted. In December 2018, both the Supreme Court in the Review of the Court Practice and the legislator confirmed that the public procurement prohibition shall be interpreted narrowly and shall not cover procurement contracts of Russian state-controlled companies. But in accordance with DCA Law (as amended in December 2018) such disputes having their seat in Russia shall be administered by a "permanent arbitral institution" (Case A40-46243/2019 RailTransAuto v Transtech Oy (Skoda Transtech Oy)).

The DCA Law finally confirmed that in general, corporate disputes are arbitrable. The following conditions shall be satisfied for most of the corporate disputes: the seat of arbitration must be in Russia; the dispute must be referred to permanent arbitral institution; the institution must have special rules for corporate disputes; and the arbitration agreement needs to be signed by the legal entity itself, all its shareholders as well as other persons who are claimants or defendants in such disputes, or the arbitration clause is included into the charter of the legal entity (see article 225.1(3) of the APC, articles 7(7) and 45(7) of the DCA Law). Certain categories of corporate disputes are exempted from the two latter requirements following the December 2018 amendments into the DCA Law (see articles 7(7.1) and 45(7.1)).

In the meantime, disputes arising out of the procedure of notarial certification of transactions, disputes regarding the calling of a shareholders' meeting, disputes related to excluding participants of legal entities, and some minor ones listed in article 225.1(2) of the APC are non-arbitrable, The only exception from this rule applies to Russian international companies (ie, foreign legal entities that redomiciled to Russia from abroad), if the charter of such company contains an arbitration agreement and provides for the application of foreign law rules (see details in article 225.1(2.1) of the APC).

9 Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

Overall, under Russian law, an arbitration agreement, by virtue of the freedom of contract principle, binds only the parties to such an agreement and shall not be enforceable against third parties who are not parties to it (Case A40-56769/07-23-401 Solvay Industries Ltd v TotalTransOil).

Thus, as a general principle, no third party could be joined without its expressed consent and expressed consent of the parties to the arbitration proceedings. Both the ICA Law and the DCA Law endorse that arbitration agreements bound not only their original signatories, but also successors and assignees of such signatories (Case A41-10549/2022 AlfaStrakhovanie v ARMSAHSTROY; Case A27-1875/2015 Kredimundi NVSA member of CREDENDO GROUP v Southern Kuzbass Coal Company).

The DCA Law also contains a rule that arbitral institutions shall notify a legal entity that shareholders and participants started a corporate dispute provided that such legal entity is a party to the arbitration agreement. Following that, other shareholders will be entitled to join the proceedings.

10 Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

The ICA Law, following the Model Law, is silent on the matter. Thus, the matter shall be settled either by agreements of parties or through the applicable rules. Rules of all Russian arbitral institutions contain provisions regarding the possibility to commence a single arbitration for multiple contracts, consolidation of arbitrations, joinder of additional parties, and so on.

11 Is the "group of companies doctrine" recognised in your jurisdiction?

No. However, if as a matter of applicable law, a parent company of a signatory or an assignee becomes a successor with respect to the obligations of a signatory or an assignee, the issue of liability of an affiliated person will be considered.

The case law confirms this approach: "...natural persons who have themselves signed... an agreement, have extended ... the effect of the arbitration agreement to themselves as individuals and to any affiliate entity they control, including parent companies". Thus, the arbitration agreement was found applicable to all entities and individuals affiliated with its signatories (Case A40-264409/19-68-1743 Axel Hartmann v RHV Verwaltungs GmbH and others).

12 Are arbitration clauses considered separable from the main contract?

Yes. This principle is established in article 16(1) of the ICA Law and article 16(1) of the DCA Law.

13 Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

The principle of competence-competence established in articles 16 of the ICA Law and the DCA Law expressly empower tribunals to decide on an issue of their jurisdiction. This rule is supported by article 148(1)(5) of the APC and article 222 of the CPC, which dictate termination of proceedings where there is an arbitration agreement unless the court finds an arbitration agreement null and void, inoperative or incapable of being performed.

However, article 16(3) of the ICA Law and the DCA Law expressly allow the parties to challenge interim arbitral decisions establishing tribunal's jurisdiction. As further emphasized by the Supreme Court Plenum in its Resolution on assistance and control functions by Russian courts in relation to international commercial arbitration of December 2019, there are two conditions for a challenge: first, the decision on jurisdiction must be issued as a separate (from the award on the substance) decision and, second, the decision must positively confirm the arbitral tribunal's jurisdiction, which means that the arbitral decisions declining jurisdiction are always final.

An interim decision on jurisdiction may be challenged before the arbitrazh court of the region or the court of the district (first instance court) where the arbitration is seated (article 235 of the APC, article 422.1 of the CPC). Proceedings on the challenge of the arbitral tribunal's jurisdiction before domestic courts do not have any suspensive effect on arbitration, although, in case a domestic court finds a lack of the tribunal's jurisdiction, such a ruling constitutes a ground for termination of arbitration.

It should also be noted that a failure to challenge an interim decision on jurisdiction under article 16(3) of the ICA Law and the DCA Law does not bar the parties from challenging the final award on jurisdictional grounds in set-aside proceedings (the Supreme Court Plenum's Resolution of December 2019).

14 Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

There are no specific statutory requirements as to the drafting language of an arbitration clause. However, parties will be well advised to be specific and use model clauses recommended by institutions to avoid arguments on whether a clause is incapable of being performed. Both the ICA and DCA Laws provide a possibility for parties to agree that an arbitral award would be final, in which case it would not be subject to setting aside. The Russian Supreme Court in the December 2018 Review of Jurisprudence explained that an agreement on finality shall be expressly set out in an arbitration clause and a provision to the same effect contained in applicable arbitration rules would not suffice. Also, the Supreme Court confirmed that an agreement on the finality of an arbitral award would not exempt such an award from being challenged based on a violation of public policy or non-arbitrability of the dispute (Case A40-117758/2022 Krasnogorsk plant v Energomera).

15 Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Ad hoc arbitrations are not very common in Russia. In most cases, parties prefer to opt for institutional arbitration. Understandably, UNCITRAL Arbitration Rules could also be used by sophisticated parties in major contracts. Another variant of ad hoc proceedings was introduced by the DCA Law. Arbitration proceedings with a seat in Russia that are administered by a foreign provider without a licence from the Russian Ministry of Justice shall be treated as ad hoceven though they are administrated by such provider.

The DCA Law provides more privileges to the institutional arbitration ("permanent arbitral institutions") in comparison to the ad hoc ones. In particular, "permanent arbitral institutions" may request the competent court to assist in obtaining evidence, to consider certain types of disputes (see also question 8). Furthermore, the parties to ad hoc arbitration are not entitled to waive their right of challenging an arbitrator and an award in a state court, etc. Only "permanent arbitral institutions" may administer certain disputes including corporate ones (see question 8).

16 What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

It is very helpful to determine in the arbitration agreement the number of arbitrators and any specific mechanism of their appointment, including the appointing authority, where parties do not reach agreement. It is also important to refer specifically to the right of tribunals to consolidate proceedings and to join other parties of a contract or a series of contracts. However, the drafter shall ensure that all such parties should be signatories to such an arbitration agreement. So, either one would need to produce a single umbrella arbitration agreement or ensure that arbitration clauses in multiple contracts are identical or, at least, compatible and clearly and unequivocally refer to the powers of tribunals to consolidate the proceedings.

Commencing the arbitration

17 How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

Some institutions, such as the ICAC, still follow a litigation model where to commence proceedings, it is necessary to submit a statement of claim, although it does not have to be extensive and does not limit the claimant's ability to submit further filings. However, parties are free to adopt the rules of other institutions or UNICTRAL Arbitration Rules, where the process starts with a request for arbitration.

As a matter of Russian law, the statute of limitations is a part of substantive law. So this issue will be considered as per the law chosen to govern the main contract or according to the conflict of laws rules.

Choice of law

18 How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

The ICA Law, following the Model Law, refers to the choice of parties and, if it was not chosen, a tribunal will apply the law "that it considers applicable" in accordance with the conflict of laws rules.

Appointing the tribunal

19 Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

Yes. Article 11 of the DCA Law expressly provides that an arbitrator must be at least 25 years old and have no criminal record. The sole or presiding arbitrator must have a degree in law.

Furthermore, a person may not be an arbitrator if his or her mandate as a judge, lawyer, notary, investigator, prosecutor or other law enforcement officer has been terminated due to misconduct incompatible with his or her professional activities.

In other respects, parties are free to agree on the additional requirements for arbitrators.

20 Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

There is no statutory restriction for non-Russian nationals to act as arbitrators. Parties are free to agree on any limitations on this point (article 11(1) of the ICA Law). Usual travel and visa requirements apply.

21 How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

Articles 11 of the ICA and the DCA Laws empower a Russian competent court to act as an appointing authority where the parties failed to agree or to follow the agreed procedure and where institutions do not perform their functions under applicable rules.

22 Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

The DCA Law provides that arbitrators may be liable only if they are found guilty of committing a crime. However, institutions are free to reduce their fees in accordance with the applicable rules if they fail to perform their duties properly.

The DCA Law also specifies that institutions are liable only for their own faults in the course of administering proceedings. Their rules also may shift the burden of liability to their founders. Any liability could be triggered by gross negligence or deliberate acts and omissions only.

23 Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There is no statutory regulation of the issue. Normally, it is settled by arbitration rules and the process will not continue before parties or claimants pay an advance on the arbitrators' fees and arbitration costs.

Challenges to arbitrators

24 On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

Following the approach of the Model Law, parties shall prove their justifiable doubts as to the arbitrator's impartiality or independence (article 12(2) of the ICA Law and the DCA Law). It is also provided that an arbitrator may be challenged if he or she failed to meet requirements stipulated by law or by an agreement of parties. But a party who appointed an arbitrator may challenge him or her only if a ground for challenge became known after the appointment.

Under both the ICA and the DCA Laws (article 13), procedure for challenge replicates the one provided by the Model Law. Courts are named as competent authorities, but parties are free to waive their jurisdiction if the proceedings are administered by an institution having the status of a "permanent arbitral institution" (licensed by the Ministry of Justice of the Russian Federation).

The Rules of ICAC, RAC and RUIE, Arbitration Institution at the All-Russian industrial association of employers, the Union of Machine-Builders of Russia; the Arbitration Centre of the autonomous non-profit organisation National Institute for the Development of Arbitration in the Fuel and Energy Complex, Center for Sports Arbitration and Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation provide for the respective procedures.

It is normal for parties and arbitrators to refer to the IBA Guidelines. Furthermore, in 2010 the ICAC issued its own Rules on Impartiality and Independence, which generally follow the IBA Guidelines.

Interim relief

25 What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Pursuant to the ICA Law and the APC, the list of interim relief is non-exhaustive (ie, any measures may be granted by both arbitral tribunals and courts in aid of arbitration). However, as a non-final decision, an interim order of an arbitral tribunal is not enforceable in Russia. That is why it is preferable to apply directly

to domestic courts at the seat of arbitration, or at the place of the debtor's incorporation, or at the place where the debtor's assets are located.

Russian courts may issue injunctions in support of commercial arbitration (eg, see the case A55-22/2016 Telecom Povolzhye v OJSC SMARTS and Bolaro Holding Ltd, where Samara Commercial Court issued a freezing injunction in support of an ongoing LCIA arbitration). Anti-suit injunctions could be issued under article 248.2(1) of the APC with respect to disputes involving persons subject to restrictive measures by foreign states or unions (eg, see the case A40-156736/2020 Sovfraht v Prosperity Estate; Case A43-411/2022 GAZ PJSC v AIG Europe S.A. Finland Branch; Case A53-6923/22 Commercial Bank Center-Invest v European Bank for Reconstruction and Development).

Anti-suit injunctions ordered by foreign courts are not enforceable in Russia, and they cannot estop a Russian court from trying a case (Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 9 July 2013 No. 158). It should be noted that Russian courts will not secure the attendance of witnesses.

26 Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

The ICA Law is silent on the security of costs issue. There is also no case law addressing this issue. However, there is nothing special in Russian law to conclude that a tribunal is not entitled to issue such an order. Articles 17 and 19(2) of the ICA Law provide arbitrators with wide discretion to determine the course of the process and grant interim measures.

Procedure

27 Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

No. To some extent, articles 18–27 of the ICA Law set up a framework for conducting arbitration. The overarching principles, as per the Model Law, are equal treatment of parties and right to be heard (article 18 of the ICA Law). To the rest, parties to arbitration may agree on applicable procedural rules. In the absence of parties' agreement, an arbitral tribunal may conduct the arbitration in such manner as it considers appropriate (article 19(2) of the ICA Law).

A rare exception to the party autonomy is article 24(1) of the ICA Law, which requires an arbitral tribunal to give parties sufficient advance notice of any hearing or meeting for the purposes of inspecting goods, other property or documents. Russian courts tend to interpret this provision as mandatory, although implying a mutual obligation of the parties to act in good faith when receiving such notices (Case A33-25043/2014 Puutarhaliike Helle Oy v Vasily Ursulyak; Case A51-5582/2019 YSL AGENCY v SLK Service).

However, the DCA Law (article 45(8)) envisages a few requirements applicable to arbitration of corporate disputes. For instance, the "permanent arbitral institution" shall notify a legal entity that shareholders and participants started a corporate dispute provided that such legal entity is a party to the arbitration agreement.

28 What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

Failure to participate does not prevent an arbitral tribunal from entertaining a claim and delivering an award on the evidence presented before the tribunal. Therefore, default awards are enforceable in Russia. It is of paramount importance to ensure that a respondent received notice of the proceedings in a sufficient and timely manner. Non-service on a respondent is a frequent ground for non-enforcement of default awards in Russia (eg, see case No. A56-99317/2020 Global Fortuna v. VzaimnyKredit).

29 What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

Documents, witness and expert statements generally used in international commercial arbitration are the most common evidence in Russia. Basically, other types of evidence are also admitted.

Parties to arbitration may agree on application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration or other "soft law". Tribunals apply the IBA Rules as guidelines frequently.

Arbitral awards based on fabricated documents are not enforceable in Russia as contradicting public policy (Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation of 22 December 2005 No. 96). This position is still cited in recent case law (eg, cases A56-14308/2015 and A63-4635/2018 (domestic arbitration)).

The above notwithstanding, Russian arbitration practitioners actively participated in the drafting of the Prague Rules and a few permanent arbitral institutions have signed it, the IBA Rules remain the main soft law source on the taking of evidence in arbitration disputes.

30 Will the courts in your jurisdiction play any role in the obtaining of evidence?

Pursuant to article 27 of the ICA Law and article 74.1 of the APC, Russian commercial courts may order a third party to produce evidence. The court proceedings in aid of institutional arbitration shall be initiated at the request of the arbitral tribunal with a seat in Russia (except ad hoc tribunals) or by a party to such arbitration subject to the tribunal's approval. Such aid is unavailable for ad hoc arbitrations. There are very few cases where Russian commercial courts have considered such motions (eg, Case A40-47047/11-68-399 Conocophillips Russia Inc v CJSC Chartis, OJSC Gasheka Realty; Case A40-45779/11-50-378 Conocophillips Russia Inc v OJSC Gasheka Realty). Domestic courts will not secure the attendance of witnesses.

31 What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

Document production is not envisaged as a separate stage of arbitration in the ICA Law. Depending on the complexity of a case and other associated circumstances, parties to arbitration or an arbitral tribunal may stipulate this stage as a part of arbitration process. The rules of the existing arbitration institutions in Russia provide a very general regulation of this issue.

Redfern schedules are frequently used in the course of document production. If a party fails to comply with an order for document production, a tribunal may draw adverse inferences against that party.

32 Is it mandatory to have a final hearing on the merits?

It is standard practice, although a final hearing on the merits is not mandatory unless parties to arbitration agreed otherwise. In the absence of such agreement, an arbitral tribunal must hold a hearing if so requested by a party.

33 If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Article 20(2) of the ICA Law does not ban the holding of hearings in a place other than the juridical seat of arbitration, unless the parties agreed otherwise. The seat must be named as such in an award.

Award

34 Can the tribunal decide by majority?

*1.9.1. Can the tribunal decide by majority?

The majority rule applies where there is more than one arbitrator. The ICA Law does not specify the voting procedure, stating that such an issue shall be determined by the presiding arbitrator. Neither does it stipulate that by default in the case of diverging opinions the chairperson shall have a casting vote, unless he or she is authorised to do so by the parties or other arbitrators.

Arbitration Rules of the permanent arbitral institutions may set out their own rules for the adoption of the award. RAC Arbitration Rules (article 50), Arbitration Rules of the Center for Sports Arbitration (article 35) and RUIE Arbitration Rules (article 33) establish that an arbitral award may be rendered and signed by the majority of arbitrators.

The ICAC Rules (article 31), the Arbitration Rules of the Arbitration Institution at the All-Russian industrial association of employers, the Union of Machine-Builders of Russia (article 36) and the Arbitration Rules of the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (article 33) stipulate that if an award cannot be made by a majority vote, it shall be made by the presiding arbitrator.

The Rules of the Arbitration Center at the autonomous non-profit organisation the National Institute for the Development of Arbitration in the Fuel and Energy Complex entitle the presiding arbitrator to deal with procedural matters, while the substance of an award shall be rendered by a majority (article 51).

35 Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

If Russian law governs the substance of a dispute, there are no specific restrictions on remedies or relief that can be granted. Among others, orders for specific performance, declaratory and monetary awards are eligible in Russia.

36 Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

The ICA Law is silent on this matter. The ICAC Rules allow such opinions (article 36(3)). Dissenting opinions are quite rare. In practice, arbitrators endeavour to reach unanimous awards.

37 What, if any, are the legal and formal requirements for a valid and enforceable award?

Primarily, an award shall be made within the jurisdiction of a tribunal as it is set up in an arbitration clause.

An award shall contain arguments behind decisions made by a tribunal, including on the allocation of costs. It shall state the date and the seat of arbitration along with clear conclusions about whether claims have been granted or dismissed. Unreasoned awards are not enforceable in Russia.

When arbitration is conducted by a panel, it is sufficient to have the signatures of the majority of arbitrators, provided that the reason for the absence of other signatures is indicated.

38 What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

International arbitrations seated in Russia are not limited in time for rendering awards. It usually takes up to six months to deliver an award from the date of the hearing or the date of the final submission. The ICAC Rules (article 35) prescribe that the ICAC shall take measures to secure completion of the arbitral

proceedings in a case within 180 days after the date of composition of the arbitral tribunal. This period is often extended by the ICAC Presidium.

Any party may refer to a tribunal for the purpose of rectifying errors or typographical mistakes in an award within 30 days from its receipt unless another time scale is agreed. If such a request is justified, a tribunal shall correct an award within 30 days (article 33(1) of the ICA Law). A tribunal may correct an award likewise on its own.

The power of an award's interpretation may be vested in a tribunal under an agreement of the parties. A tribunal shall give an interpretation within 30 days from the request (article 33(1) of the ICA Law).

Unless parties agreed to the contrary, a tribunal may render an additional award on the request of a party to be lodged within 30 days from an award's receipt. Subject to this, within 60 days from the request, a tribunal shall render an additional award regarding the claims left unconsidered in the course of main proceedings (article 33(3) of the ICA Law).

The above time periods for correction, interpretation and delivery of an additional award may be extended by a tribunal (article 33(4) of the ICA Law).

Article 33 of the ICAC Rules provides for an expedited procedure, according to which relevant bodies and authorised officials of the ICAC and tribunals shall take measures to secure completion of arbitral proceedings within 120 days after the date of the constitution of a tribunal. This period may also be extended.

Costs and interest

39 Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

Parties are able to recover fees paid and costs incurred. It is for the tribunal to rule on these issues in an award. A losing party is usually ordered to pay reasonable fees and costs of a winning party.

40 Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

The ICA Law does not address this issue. Parties can specify interest in their agreement, and an award will be enforceable in this respective part (Cases A65-1901/2023 RACIN v GUAR-AGRO (domestic arbitration), A40-120756/2009 Arktur v General Motors Uzbekistan, A40-192942/2019 Monolit v Betafin Limited).

Russian law provides for the payment of interest for the failure to repay (article 395 of the Civil Code). Thus, in practice arbitrazh courts will enforce arbitral awards that grant interest for the principal claim amount that was not agreed by the parties, but is available under the applicable law (Case A72-14198/2021 Koito Manufacturing v Autosvet).

Challenging awards

41 Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

No, Russian courts are not empowered to hear appeals from awards. Rather, they can set aside awards in a limited number of cases. Awards are immune from judicial review on the merits or on the point of Russian law that applied to the substance of the dispute.

42 Are there any other bases on which an award may be challenged, and if so what?

A list of grounds for challenge is provided in article 34 of the ICA Law. That list repeats the same grounds as specified in article 36 of the UNCITRAL Model Law on International Commercial Arbitration.

43 Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

The ICA Law (article 34(1)) envisages that parties may waive their right to bring an action to set aside an award, except in ad hoc arbitration. The Supreme Court clarified the issue in its Review of jurisprudence relating to state court assistance and control in arbitration approved by the Presidium of the Russian Supreme Court on 26 December 2018 (the Supreme Court Review). According to the Supreme Court Review, both parties must expressly agree on the finality of an arbitral award (paragraph 19) provided that an arbitration is run under the auspices of an arbitration institution that received a Russian government's permission to operate in such capacity. The agreement of parties on the finality of an ad hoc arbitration award is not valid under Russian law.

At the same time, if an arbitral award affects the rights or interests of a third party (eg, a bankruptcy receiver), such a party may nevertheless file a set-aside application. This right is also confirmed in paragraph 22 of the Supreme Court Review.

Recently, the Supreme Court has provided more detail to this approach. In one of its latest decisions dated February 2023, the Court identified two unconditional grounds for annulment: non-arbitrability of the subject matter and public policy (Case A40-117758/2022 Krasnogorsk plant v Energomera).

Enforcement in your jurisdiction

44 Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

It is for the domestic court to decide whether an annulled award should be enforced in Russia. Normally, Russian courts refuse the enforcement of annulled arbitral awards.

It should be kept in mind that article IX of the European Convention on International Commercial Arbitration 1961 narrows down the cases when the annulment of an award at the place of arbitration can lead to its non-enforcement in Russia. Namely, the Convention provides for the possibility of annulment when:

- the parties to the arbitration agreement were under some incapacity or the said agreement is not valid under applicable law or, failing any indication thereon, under the law of the country where the award was made;
- the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement.

45 What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

Russian courts favour international arbitration. The official statistics comprises the data of enforcing both foreign arbitration awards and judgements and remains stable in recent years. The frequency of the enforcement of foreign arbitral awards and decisions of foreign courts has reduced by 10 per cent. In 2016–2021, it was at 60-75 per cent, and in the first half of 2022 it fell to 58 per cent.

While reviewing statistics, one should also keep in mind that some refusals and set-asides were triggered by courts' efforts to block evasion of statutory rules on licensing of domestic arbitral institutions.

At the end of 2018, the Presidium of the Russian Supreme Court issued the Review of Jurisprudence relating to state court assistance and control in domestic and international arbitration. It provides helpful guidance and supports a pro-arbitration approach. In addition, at the end of 2019, the Plenum of the Supreme Court issued a 64-paragraph long resolution to guide courts about their assistance and control functions in relation to international commercial arbitration.

46 To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

The Federal Law of 3 November 2015 No. 297-ФЗ on Jurisdictional Immunities of Foreign States and Property of Foreign States in the Russian Federation finally endorsed the restrictive theory of sovereign immunity. Basically, the Law resembles the provisions of the UN Convention on Jurisdictional Immunities of States and their Property of 2004. In assessing state activity as jure gestionis (commercial), Russian courts shall determine both the nature and the purpose of such activity. Russian judiciary is vested with power to lower the level of foreign state protection based on reciprocity rule.

Article 16 of the aforesaid law enumerates categories of property that are immune from enforcement.

Three award creditors recently attempted to enforce awards rendered against sovereign states. In Tatneft v Ukraine, the court in Moscow refused to enforce the award against Ukraine's diplomatic assets (A40-67511/2017). The court in Moscow later transferred the case to another region, Stavropol, where the court enforced the award against a sanatorium indirectly owned by Ukraine (A63-15521/2018). In Entes v Kyrgyzstan, the courts relied on state immunity and refused to enforce an award against the shares owned by Kyrgyzstan in Mir, a broadcasting company created by CIS states (A40-230382/2018). In UK DaVinchi v Belarus, the courts issued a writ of execution and pointed to the presence of four facilities in Moscow belonging to Belarus. However, the Supreme Court overturned the decisions and sent the case for reconsideration. One of the reasons concerned the state immunity over the assets (Case A40-100098/2020).

Further considerations

47 To what extent are arbitral proceedings in your jurisdiction confidential?

Unlike the DCA Law, the ICA Law does not provide for confidentiality rule. Typically, arbitration agreements and applicable institutional rules stipulate that arbitration and awards shall not be public. Publication of materials may also be prescribed by institutional rules. For example, in accordance with article 46(4) of the ICAC Rules arbitral awards and orders may be published with the consent of the Presidium provided that names of the parties and other identifying details that may impair the legitimate interests of the parties are removed.

48 What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

Unlike the DCA Law, the ICA Law is silent on this matter. Typically, confidentiality of arbitration covers submissions with evidence in the course of arbitration. In accordance with the ICAC Rules (article 46(1)) unless the parties agree otherwise, arbitration shall be confidential. At the same time, there is no consistent practice regarding this issue.

49 What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

There are no ethical codes in Russia that apply specifically to counsel or arbitrators. However, lawyers who are admitted to advocates' chambers (bars) shall abide by the rules of the Law on Advocates Activity and Advocates and the Code of Professional Advocate Ethics. Still, lawyers who are not admitted to advocates' chambers (bars) are not prohibited from counselling or arbitrating in Russia.

As for the professional standards, those are established for arbitrators by article 11 of the DCA Law. The general requirements are:

- an arbitrator may not be a person who has not reached the age of 25, an incapable person or a person whose legal capacity is limited;
- an arbitrator may not be an individual who has an unexpunged or outstanding conviction;
- an arbitrator may not be an individual whose powers as a judge, lawyer, notary, investigator, prosecutor or other law enforcement officer were terminated in the Russian Federation in the manner prescribed by federal law for misconduct incompatible with his professional activities;
- an arbitrator may not be an individual who, in accordance with his status determined by federal law, cannot be elected (appointed) as an arbitrator; and
- unless the parties have agreed otherwise, an arbitrator should have higher education conformed by a diploma issued in the Russian Federation or abroad.

In addition, pursuant to article 11 of the ICA Law the parties are free to agree upon any professional requirements, which the arbitrators should satisfy.

50 Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

Extensive production of documents and broad use of witness statements should not be expected in Russia, which is a civil-law jurisdiction.

51 Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

There is no express restriction with respect to third-party funding, although it is not commonly used and there is a lack of court practice on this issue. There are no rules in place governing its use.

Also, the Federal Law On Advocacy and the Bar in the Russian Federation, as amended in July 2020, expressly allows contingency fees for advocates facilitating development of the relevant practice.

Evgeny Raschevsky

Egorov Puginsky Afanasiev & Partners (EPAM)

Evgeny Raschevsky, PhD, is a partner and co-head of international arbitration and litigation practice at EPAM Law Offices.

Evgeny Raschevsky practises international commercial arbitration and litigation, and specialises in management of complex cross-border disputes. He is experienced in the arbitration proceedings under ICAC of CCI of Russia (MKAS), ICC, LCIA, SCC and Swiss Rules. His portfolio includes coordination of high-profile court cases in the UK, the USA, Germany, Turkey, India and other countries.

Evgeny has been recognised as a leading expert in the area of international arbitration by *GAR 100, Chambers Europe, Chambers Global, The Legal 500* and *Best Lawyers*. He is one of only 11 Russian lawyers endorsed as "leading individuals in dispute resolution" in Russia by *The Legal 500*. He has authored numerous articles in specialist Russian and international legal publications in the area of international arbitration and civil law, as well as several leading Russian commentaries in the field of international arbitration.

Evgeny is admitted as a solicitor of the senior courts of England and Wales. He is a member of the Chartered Institute of Arbitrators (CIArb) and International Counsel for Commercial Arbitration (ICCA), and holds a position with the Arbitrators Nominating Committee of the Russian Arbitration Association (RAA). He is a member of the SIAC Users Council's Russia Committee, a member of the International Chamber of Commerce (ICC) Task Force on Arbitration of Climate Change Related Disputes. He is a vice president of the International Arbitral Tribunal of the Qingdao Arbitration Commission in the SCO demonstration area. Evgeny is among the arbitrators of the Board for International and Investment Disputes at the RSPP Arbitration Center.

Vladimir Talanov

Egorov Puginsky Afanasiev & Partners (EPAM)

Vladimir Talanov is a counsel of international arbitration and litigation and international trade practices at Egorov Puginsky Afanasiev and Partners. He represents clients in international arbitration and litigation and specialises in complex cross-border disputes, as well as advises on international trade law, foreign investment and issues related to the work of the World Trade Organization and the Eurasian Economic Union. He has extensive experience of representing clients in arbitration proceedings under ICC, LCIA, UNCITRAL and SCC rules, as well as coordinating litigation in the courts of Russia, the USA, EU countries, Turkey, India, Singapore, Serbia, England and Wales and others.

He is also a recognised expert in the field of international trade law and provides clients with support in structuring international investment projects, and advises on the implementation of measures aimed at reducing customs duties and obtaining various government support measures. Vladimir also has significant experience in the legal support of the automotive industry, both in terms of entering foreign markets, and in obtaining government support measures and structuring foreign investments.

Alongside his law practice, Vladimir teaches at the National Research University "Higher School of Economics" and St. Petersburg State University, where he lectures on public international law, international trade, cross-border dispute settlement and regional economic integration.

Vladimir graduated with honours from the Faculty of Law of St. Petersburg State University and received an additional master's degree in International Law and Economics (magna cum laude) from the World Trade Institute, the University of Bern, Switzerland.

Yana Bagrova

Egorov Puginsky Afanasiev
& Partners (EPAM)

Yana Bagrova is an associate in the international arbitration and litigation practice at EPAM Law Offices. She represents clients in international arbitration and litigation and specialises in sanctions regulation and compliance, as well as complex cross-border disputes.

Member of the RAA working group The Impact of Sanctions on Commercial Arbitration, member of the HSE Research Laboratory in the field of protection of state interests in the context of economic sanctions.

She is also a member of Moscow Bar Association.

Egorov Puginsky Afanasiev & Partners (EPAM)

Egorov Puginsky Afanasiev & Partners is an international law firm in the CIS with offices in Russia, Ukraine, Belarus and an associated office in Cyprus.

Founded in 1993, the firm provides the full range of legal services to domestic and foreign businesses, international organisations and financial institutions across the CIS.

Egorov Puginsky Afanasiev & Partners advises its clients in many areas of law, including commercial dispute resolution in Russia and abroad, corporate law, M&A, project finance and PPP, antitrust practice, restructurings and insolvencies. We also offer our clients advice on energy and natural resources, property management and privatisation, environment, technical regulation and industrial safety, banking and finance, intellectual property, criminal law, real estate and construction, taxation, family and labour disputes, marine and transport law and international trade and customs.

In our work, we combine our expertise in emerging markets with the highest professional standards. We offer our clients a comprehensive approach with a blend of legal advice, representation of clients before the regulator, interaction with mass media and general public and other services.

21, 1st Tverskaya-Yamskaya Str.,
Moscow,
125047,
Russia
Tel: +7 (495) 935 8010
Fax: +7 (495) 935 8011

www.epam.ru

Evgeny Raschevsky
evgeny_raschevsky@epam.ru

Vladimir Talanov
vladimir_talanov@epam.ru

Yana Bagrova
yana_bagrova@epam.ru