ADVANT Beiten

ARBITRATION IN RUSSIA

As in any country, conflict situations can arise when doing business in Russia. Many conflicts can be settled through negotiations with counterparties; however, some grow into disputes that can only be settled through the courts.

Russia offers a wide range of opportunities for dispute settlement. In addition to Russian state courts, professional mediators are also available, or disputes can be referred to an arbitral tribunal for consideration, with proceedings held in Russia or in a foreign country.

In this brochure, we offer you the opportunity to learn about the special features of consideration of disputes by arbitral tribunals in Russia.

CONTENTS

List of abbreviations

Sources of law and state courts	
Arbitration Procedure Code of the Russian Federation dated 24 July 2002 No. 95-FZ	APC
Supreme Court of the Russian Federation	SCRF
Supreme Commercial Court of the Russian Federation	SCCRF
Civil Procedure Code of the Russian Federation dated 14 November 2002 No. 138-FZ	CPC
Law No. 5338-1 of the Russian Federation dated 7 July 1993 “On International Commercial Arbitration”	ICA Law
Constitutional Court of the Russian Federation	CCRF
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958	New York Convention (1958)
UNCITRAL Model Law on International Commercial Arbitration, adopted in New York on 21 June 1985 at the 18th session of UNCITRAL	UNCITRAL Model Law
Federal Law No. 282-FZ dated 29 December 2015 “On Arbitration (Arbitral Tribunal Proceedings) in the Russian Federation”	Arbitration Law

Arbitration Institutions	
Arbitration Institute of the Stockholm Chamber of Commerce	SCC
Vienna International Arbitral Centre	VIAC
London Court of International Arbitration	LCIA
International Chamber of Commerce International Court of Arbitration	ICC International Court of Arbitration
International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation	ICAC Russia
Singapore International Arbitration Centre	SIAC
Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation	MAC CCI
Deutsche Institution für Schiedsgerichtsbarkeit (German Arbitration Institute)	DIS

I. Introduction

One of the most important guarantees enshrined by the Russian Constitution is the right of access to courts. The right to access to courts is implemented through the creation of an effective system of state courts. However, by agreement of the parties, a dispute may be resolved not only in state courts; frequently, the alternative is proceedings in an arbitral tribunal.

Arbitration institutions are private organisations that are created at non-profit organisations (for example, chambers of commerce and industry). In Russia, the best known and most popular are the ICAC Russia, the MAC CCI, the Russian Arbitration Centre (RAC), as well as foreign institutions: the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce International Court of Arbitration (ICC International Court of Arbitration), and the German Arbitration Institute (DIS).

On the legislative level, commercial arbitration in Russia is governed by:

- the ICA Law;
- the Arbitration Law.

First and foremost, these laws determine the grounds and conditions for the creation of arbitration institutions, their organisational structure, and their competence. Russian laws also take into consideration the provisions of the UNCITRAL Model Law.

The Russian Federation is also a signatory of international treaties on issues of international commercial arbitration. The key conventions to which the Russian Federation is a signatory (among others) are:

- the New York Convention (1958);
- the European Convention on International Commercial Arbitration dated 21 April 1961;
- bilateral treaties involving the Russian Federation on the protection of investments.

In 2015–2017, Russia enacted arbitration reforms that are intended to prevent the use of arbitration for unfair purposes, to substantially reduce the number of arbitration institutions (there had been more than 2500 such institutions), and to bring their practices into accordance with the latest advances of leading international arbitration centres.

As a result of the reforms, the following institutions were given the status of permanent arbitration institutions:

- ICAC of Russia and MAC CCI;
- the Russian Arbitration Centre (RAC) at the Autonomous Non-commercial Organisation Russian Institute of Modern Arbitration;
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs;
- the Arbitration Centre at the Autonomous Non-Profit Organisation "National Institute for the Development of Arbitration in the Fuel and Energy Sector";
- the Arbitration Institution at the Russian National Industrial Association of Employers "Union of Machine Builders of Russia";
- the Hong Kong International Arbitration Centre;
- the Vienna International Arbitral Centre (VIAC);
- the International Court of Arbitration of the International Chamber of Commerce (ICC International Court of Arbitration);
- the Singapore International Arbitration Centre (SIAC);
- the National Centre for Sports Arbitration at the Autonomous Non-profit Organisation Sports Arbitration Chamber[1].

The oldest Russian arbitration institution is the ICAC Russia[2]. In 2021 860 cases were heard at the ICAC at the RF CCI, of which 189 were international cases. In 83 instances European companies were parties in the case.

In addition to international commercial disputes, since 2017 the ICAC Russia can also consider domestic economic disputes, as well as corporate disputes.

There are significant differences between dispute resolution in state courts and commercial arbitral tribunals. In commercial arbitration, the parties have a much greater influence on the process; specifically, they can select the arbitrators themselves. Arbitration proceedings are confidential, i.e. they are closed to the public, and the awards are not published without the consent of the parties. Finally, in general, arbitral tribunals ensure rapid and efficient proceedings, since the case is usually considered in a single instance whose decision is final and binding on the parties.

[1] This list was current as of the time of writing.

[2] http://mkas.tpprf.ru/.

II. The arbitration agreement

An arbitration agreement is an agreement between the parties to refer to arbitration all or certain particular disputes that arise or could arise between them in connection with specific legal relations, regardless of whether these relations are contractual in nature. Generally, an arbitration agreement is concluded in the form of an arbitration provision in a contract or in the form of a separate agreement. An arbitration agreement may be concluded with both legal entities and individuals[3].

The parties also need to take into account the sanctions laws. In June 2020, new provisions of the RF Code of Commercial Procedure (Articles 248.1 and 248.2) entered into force[4], which allow Russian legal entities affected by foreign sanctions to sue foreign counterparties in a Russian state court, notwithstanding a clause favourable to a foreign arbitration institution (or a foreign state court). Pursuant to Article 248.1 of the RF Code of Commercial Procedure Code, the exclusive competence of commercial courts in the Russian Federation includes the following cases:

- in disputes involving persons subject to restrictive measures by a foreign state, state association and/or union and/or government (intergovernmental) institution of a foreign state or state association and/or union (hereinafter the "**Foreign Sanctions**");

- in disputes between a Russian or foreign person and any other Russian or foreign person, provided that the grounds for such disputes are the Foreign Sanctions imposed against citizens of the Russian Federation and Russian legal entities.

The persons who are subject to the Foreign Sanctions include:

- citizens of the Russian Federation, Russian legal entities which are subject to the Foreign Sanctions;

- foreign legal entities that are subject to the Foreign Sanctions and the grounds for such measures are sanctions imposed by a foreign state, state association and/or union and/or government (intergovernmental) institution of a foreign state or state association and/or union against citizens of the Russian Federation and Russian legal entities.

[3] There is judicial practice in disputes involving consumers according to which an arbitration clause in an agreement with a consumer does not deprive the consumer of the right to recourse to a state court by virtue of its imperative right to determine the jurisdiction of a dispute at its own discretion (Appellate Ruling of the Moscow City Court dated 22 January 2020 in case No. 33-2906/2020). There is also contrary judicial practice on this issue.

[4] Federal Law No. 171-FZ dated 8 June 2020.

The aforementioned persons are entitled to:

- seek resolution of the dispute by a commercial court of constituent entity of the Russian Federation at its location or place of residence, provided that there is no dispute between the same persons, on the same subject matter and on the same grounds in a foreign court or international commercial court outside the territory of the Russian Federation;

- file an application for an injunction prohibiting the initiation or continuation of the proceedings in a foreign court or international commercial court outside the territory of the Russian Federation.

If an arbitral award has already been issued, Article 248.1 of the RF Code of Commercial Procedure does not preclude the recognition and enforcement of a judgment of a foreign court or a foreign arbitral award issued in respect of a claim filed by a sanctioned Russian person. The same applies if the person has not objected to the dispute being heard by a foreign court or international commercial court located outside the Russian Federation, *inter alia*, if such person has not filed an application for an injunction prohibiting the initiation or continuation of the proceedings in a foreign court or international commercial court located outside the Russian Federation.

The Supreme Court of the Russian Federation has provided the following clarifications on the application of the aforementioned provisions[5]:

The goal of adopting the amendments to the RF Code of Commercial Procedure was to establish guarantees to protect the rights and legitimate interests of certain categories of Russian citizens and Russian legal entities subject to restrictions introduced by foreign states, as the restrictions de facto deprive them of the ability to protect their rights in the courts of foreign states, international organisations or arbitration tribunals located outside the Russian Federation.

The actual introduction per se of sanctions against a Russian party in a dispute in international commercial arbitration outside the Russian Federation serves as sufficient grounds for concluding that the Russian party's access to justice is limited.

A unilateral expression of will expressed in a procedural form is sufficient for the transfer of a dispute to the jurisdiction of Russian courts.

There is no mandatory need to prove the impact of sanctions on the enforceability of an arbitration clause. On the contrary, the wording of the law emphasises that proving this fact is optional.

[5] Ruling No. 309-ES21-6955 (1–3) of the Judicial Panel for Economic Disputes of the Supreme Court of the Russian Federation dated 9 December 2021 in case No. A60-36897/2020.

The introduction by foreign states of restrictions (bans and personal sanctions) on Russian persons impairs their rights, at the very least from a reputational perspective, and thereby deliberately places them on an unequal status with other persons. In such circumstances, doubts that a dispute with a person located in a state that introduced restrictions will be considered on the territory of the foreign state that also introduced restrictions in compliance with the guarantees of a fair trial are entirely justified, *inter alia*, when it comes to the impartiality of the courts, which constitutes one of the components of access to justice.

Under this approach, there is no material infringement of the rights of the claimant (the foreign company) to legal protection, as the claimant can turn to a Russian state court for legal protection.

An anti-suit injunction is only a relevant and effective interim measure before judicial actions have been completed. Once they have been completed, injunctive relief is no longer enforceable, does not provide the applicant with legal protection, and as a result loses all meaning.

If such sanctions have been introduced against the respondent (Russian company), then the company should assess in advance the consequences related to the possible issue of an anti-suit injunction by a Russian state court further to the petition of the Russian company (the "**Petition**"). During the consideration of the Petition in a Russian court, the foreign company may participate in the court sessions and submit its objections. If the Petition is satisfied, the claim of the foreign company against the Russian respondent can be considered in a Russian state court, regardless of whether the respective contract contains an arbitration clause (or clause on contractual jurisdiction) in favour of a foreign forum.

1. TYPES OF AGREEMENTS

1.1 EXPLICIT AGREEMENTS

Since 1 September 2016 the parties to an arbitration agreement also have the right to conclude an explicit agreement in respect of a number of issues, in the cases expressly established by law.

Such explicit agreements

- apply only if the arbitration agreement stipulates that the arbitration be administered by a permanent arbitration institution;
- take priority over arbitration rules.

The parties may conclude an explicit agreement on the following matters:

- to exclude the possibility of filing with a competent court on the issue of appointing arbitrators in one of the following cases: (i) when one of the parties does not comply with the procedure agreed on by the parties in appointing arbitrators; (ii) when the parties or two arbitrators cannot reach an agreement in accordance with this procedure; (iii) when a third party, including the arbitration institution itself, does not fulfil the function entrusted to it by the procedure in accordance with the arbitration rules;

- to exclude the possibility of filing a petition to disqualify an arbitrator with a competent court in the event of a refusal to satisfy the petition;

- to exclude the possibility of filing with a competent court on the issue of terminating the authorities of an arbitrator in the event the arbitrator does not recuse him/herself and there is no agreement between the parties on terminating the authorities of the arbitrator;

- to consider an application for the issue of a writ of execution to enforce an arbitral award issued in a dispute within a special administrative district, within a period not exceeding fourteen days, without holding a court hearing;

- to exclude the possibility of filing a petition with a competent court on the lack of competence of an arbitral tribunal if it declares itself competent;

- to rule out the conduct of oral hearings between the parties;

- on the finality of the arbitration award and its irreversibility (the majority of the rules stipulate that arbitration awards are final and binding, but it would be preferable to include this provision in the arbitration agreement)[6];

- arbitrators of disputes between the parties may be selected (appointed) only from the recommended list of a permanent arbitration institution.

1.2 MIXED AGREEMENTS

An agreement on the means of dispute resolution may stipulate that its parties have the ability to use not only commercial arbitration but also state courts. Such hybrid agreements have the features of both prorogation and arbitration agreements. In Russian and foreign legal literature, various names can be found for such agreements and clauses: optional, hybrid, combined, and mixed clauses.

[6] However, for other persons whose rights and obligations are affected by an arbitral award, the award will not be final, and they reserve the right to file an application for its reversal with the court (Ruling No. 88-2465/2021 of the First Cassation Court of General Jurisdiction dated 18 February 2021).

Hybrid agreements on the means of dispute resolution have a strictly practical purpose: to allow the parties to use both the state courts and arbitration. After all, when defining the terms of the future contract, the parties cannot foresee all variations for the behaviour of the counterparty and all potential conflict situations.

The following types of agreements vary depending on the scope of the parties' rights to select the means of dispute resolution between arbitration and state courts:

- Bilateral hybrid agreements on the means of settling disputes, under which both parties to the agreement have the right to choose between state courts and arbitration.

  The validity of bilateral hybrid agreements on the means of dispute resolution is not questioned, since in this case each of the parties to the agreement has the same scope of rights to select the means of dispute resolution.

- Unilateral (asymmetrical) hybrid agreements on the means of dispute resolution, under which only one party to the agreement has the right to choose between state courts and arbitration.

The most common type of agreement (especially in credit agreements) is the unilateral hybrid agreement on the means of dispute resolution which gives only one party the right to choose the means of dispute resolution (for example, the bank in credit agreements). In these cases, the question arises of whether the unilateral provision violates the right of one of the parties (for example, the borrower) to judicial protection, since if the bank files for arbitration the borrower will be unable to file a suit in a state court.

In comparison, we note that whereas English court practice, for example, proceeds on the basis that unilateral hybrid agreements on the means of dispute resolution are valid[7], in Russian state court practice one-sided arbitration agreements are invalidated to the extent that the other party is deprived of the option to choose the same means of dispute resolution[8].

1.3 ALTERNATIVE AGREEMENTS

An alternative arbitration agreement stipulates the possibility of choosing among several previously agreed arbitration institutions in accordance with established criteria (location of the claimant or respondent, or at the choice of the claimant).

[7] *For example, see*: Decision of the Queen's Bench Division (Commercial Court) of the High Court of Justice of England and Wales dated 13 October 2004 in the case *NB Three Shipping Ltd v Harebell Shipping Ltd.* [2004] All ER (D) 152 (Oct); Decision of the Chancery Division of the High Court of Justice of England and Wales dated 1 July 2005 in the case *Law Debenture Trust Corporation PLC v Elektrim Finance B.V. and others*.

[8] Clause 24 of Resolution No. 53 of the Plenum of the Supreme Court of the Russian Federation dated 10 December 2019 "On the Assisting and Controlling Function of the Courts of the Russian Federation in Relation to Arbitral Proceedings and International Commercial Arbitration".

An advantage of this type of arbitration agreement is that if one arbitration institution ceases its operation, the parties can use others. A disadvantage is the risk that the parties will simultaneously file with different arbitration institutions, as well as the likelihood that such an agreement will be declared invalid.

In addition, if an alternative arbitration agreement exists, each party will first seek recourse to the arbitration institution most preferable to it, following the "first come – first served" principle. Russian arbitration institutions recognise alternative arbitration agreements as valid[9].

1.4 MULTIMODAL AGREEMENTS

A multilevel (multimodal) arbitration agreement foresees negotiations and/or mediation before or during arbitration proceedings and may contain either a simple reference to holding negotiations or may stipulate the creation of special authorised bodies to consider claims or making an expert decision on the substance of the dispute.

2. FORM OF THE ARBITRATION AGREEMENT

The arbitration agreement must be made in writing.

The written form requirement is considered to be met in the following cases:

- the text of a contract contains an arbitration clause, or a separate document containing an arbitration agreement is drafted;
- there is an exchange of letters, telegrams, telexes, faxes, or other documents, including electronic documents transferred using communication channels that make it possible to establish that a document originates from the other party;
- the contract includes a reference to a document containing an arbitration clause, provided that this reference allows this clause to be considered part of the contract[10];
- service documents (statement of claim and response to a statement of claim) are exchanged, in which one of the parties states the existence of an agreement, and the other party does not object;

[9] Ruling of the ICAC at the Chamber of Commerce and Industry of the Russian Federation dated 2 September 2013 in case No. 225/2012.

[10] However, the inclusion of an arbitration clause in the Standard Terms of Delivery sent not to the counterparty but to an interested party affiliated to it shall not be deemed to be the proper conclusion of an arbitration agreement (Ruling of the Supreme Court of the Russian Federation dated 23 April 2021 in case No. A40- 76498/2020). A substantive response to a request which, among other things, contains a proposal to conclude an arbitration agreement does not in itself constitute the party's consent to refer disputes to arbitration (Ruling of the Sixth Cassation Court of General Jurisdiction dated 30 April 2020 in case No. 88-9380/2020).

- an arbitration agreement is included in the charter of a legal entity, in the rules of organised competitive bidding, or in the rules of clearing – provided that a number of special conditions are met.

When choosing the form of the arbitration agreement, it would be advisable to take into consideration the practice of state courts at the place where the arbitral tribunal's award will be enforced.

For example, in accordance with Russian procedural law, a petition filed in court for the issue of a writ of execution for the compulsory enforcement of an arbitral tribunal's award must be accompanied by the original of the arbitration agreement or a notarised copy (Clause 2 of Part 3 of Article 237 of the APC; Clause 2 of Part 4 of Article 424 of the CPC). Accordingly, from a practical point of view, the drafting of an arbitration agreement in the form of a document signed by the parties (as a separate document or in the form of a clause in a contract) is the most preferable.

3. CONTENT OF THE ARBITRATION AGREEMENT

Particular attention should be given to the drafting of the arbitration agreement, since it becomes valid only if the parties have reached an agreement on its terms explicitly and unambiguously.

3.1 CERTAINTY IN THE DETERMINATION OF THE COMPETENT ARBITRATION INSTITUTION

The parties to the arbitration agreement must determine where a dispute will be referred to for consideration: to a permanent arbitration institution or to *ad hoc* arbitration, set up by the parties for the one-time consideration of a dispute[11].

When selecting institutional arbitration, the parties should indicate the correct name of the arbitration institution that will administer the dispute resolution procedure.

If the name of the arbitration institution is not given correctly, there is a risk that the arbitration clause will be declared unenforceable. This conclusion may be reached by the arbitrators when considering the dispute, or by a state court when considering a petition for the issue of a writ of execution on the compulsory enforcement of an arbitral tribunal's award.

A commercial court may refuse to issue a writ of execution on the compulsory enforcement of an arbitral tribunal's award if the party to the arbitration against which the

[11] The issuance of an ad hoc arbitral award in a dispute administered by an arbitration institution without the status of the Permanent Arbitration Institution in the Russian Federation constitutes an action to circumvent the requirements of the law (Ruling of the Supreme Court of the Russian Federation dated 12 March 2020 in case No. A27-5147/2019).

award was made submits evidence that the arbitration agreement on the basis of which arbitral tribunal resolved the dispute was invalid under the law to which the parties made it subordinate, and if no law is indicated, then under Russian law.

3.2 CERTAINTY IN THE DETERMINATION OF THE DISPUTES THAT ARE TO BE REFERRED TO ARBITRATION

In the majority of cases, the parties transfer to arbitration all disputes arising from a particular contract or legal relationship by concluding a so-called "broad" arbitration clause.

However, it is also possible to transfer to arbitration only specific categories of disputes (a "narrow" arbitration clause).

When drafting the text of the arbitration agreement, it is essential to clearly determine a list of disputes that can be referred to arbitration.

The majority of arbitration institutions suggest the use of a broad arbitration clause.

A commercial court may refuse to issue a writ of execution on the compulsory enforcement of an arbitral tribunal's award if the party to the arbitration against which the award was made submits evidence that the arbitral award was issued on a dispute that is not covered by the arbitration agreement or which does not meet its conditions, or that the award contains rulings on issues beyond the scope of the arbitration agreement.

3.3 AGREEMENT ON APPLICABLE REGULATIONS

Permanent arbitration institutions use regulations and rules developed in-house to consider disputes. At the same time, the permanent arbitration institution may have various rules depending on the category of the dispute (rules for resolving corporate disputes, sports disputes, internal disputes, or international commercial disputes).

In ad hoc arbitration, to avoid the need to agree on the dispute resolution procedure among themselves, the parties have the right to agree to use any existing rules (for example, the UNCITRAL Arbitration Rules[12]). However, an ad hoc arbitration clause that refers to a publicly accessible website where the rules of arbitration are set forth may indicate features that are characteristic of institutional arbitration, which is inconsistent with the nature of ad hoc arbitration[13].

A commercial court may refuse to issue a writ of execution on the compulsory enforcement of an arbitral tribunal's award if the party to the arbitration against which the

[12] Text: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[13] Ruling of the Commercial Court of the Urals District dated 3 March 2020 in case No. A50-35345/2019.

award was made submits evidence that the panel of the arbitral tribunal or the arbitration procedure was not in accordance with the parties' agreement.

3.4 ADDITIONAL (OPTIONAL) TERMS AND CONDITIONS OF THE ARBITRATION AGREEMENT

Additionally, the parties may agree on the following in the arbitration agreement:

- the place of arbitration;
- the number of arbitrators and the procedure for appointing and replacing them;
- the language of the arbitration proceedings;
- expenses and fees related to resolving the dispute through arbitration, and how to allocate them;
- procedure and terms for the participation of representatives in the proceedings;
- procedure and terms for the use of enforcement measures by the arbitration;
- conditions of and deadlines for a voluntary execution of the award;
- issues of submitting evidence and ensuring confidentiality;
- issues of the appointment and conduct of expert reviews; and others.

We will examine in more detail the most important additional terms that the parties may include in the arbitration agreement.

Place of arbitration

The parties have the right to agree at their own discretion on the place of arbitration or on the procedure for determining such place. The place of arbitration may differ from the law applicable to the main obligation from which the dispute arises.

If the parties have not reached an agreement, the place of arbitration is determined by the arbitrator, taking into account the background of the case and the convenience of the parties. The corresponding explanations may be also given in the rules of the permanent arbitration institution.

When choosing the place of arbitration, it is essential to take into account the opportunities available in the procedural legislation of various countries for the state courts to assist the arbitral tribunal.

Number of arbitrators and the procedure for their appointment and replacement

In institutional arbitration, the panel of arbitrators is created following the procedure established by the arbitration institution's rules. At the same time, the parties have the right to make certain amendments.

The parties have the right to additionally agree on the number of arbitrators, the means of and deadlines for their appointment, the means of filling a vacant position when a party avoids appointing of an arbitrator, the scope of assistance on the part of state courts, additional requirements on the qualifications of arbitrators, and the procedure for disqualifying arbitrators and terminating their authorities.

Language of the arbitration proceedings

This is particularly significant when the parties are residents of different countries. It would be preferable to select a single language for the arbitration, since choosing two or more languages can increase costs and delay proceedings due to the need to translate materials into several languages. Whereupon, the parties can separately indicate that certain documents and materials may be submitted in a language other than the language chosen for the proceedings.

Furthermore, when choosing the language of arbitration, it is also essential to take into account the applicable law, in order to prevent the incorrect interpretation of its norms due to incorrect or incomplete translation as well as the nationality of the arbitrators and the level of their language proficiency.

Expenses and fees

At the time the parties conclude the agreement, they may define the expenses related to the consideration of disputes through arbitration, and also allocate them among themselves. In addition, if a dispute is to be considered in ad hoc arbitration, the amount of the arbitrators' fee can also be determined by agreement of the parties.

4. AUTONOMY OF THE ARBITRATION CLAUSE

The legislation and court practice of the majority of countries have enshrined and recognised the concept of separability/severability/autonomy of the arbitration clause[14].

[14] For example, in England, paragraph 7 of the Arbitration Act 1996. URL: https://www.legislation.gov.uk/ukpga/1996/23/pdfs/ukpga_19960023_en.pdf; in the USA, US Supreme Court decision of 12 June 1967 in the case *Prima Paint Co. v Flood Conklin Manufacturing Corporation* No. 343, 388 US 395, 402. URL: https://supreme.justia.com/cases/federal/us/388/395/case.html; in Switzerland, Art. 178 (3) of the Law on ICA. URL: https://fedlex.data.admin.ch/eli/cc/1988/1776_1776_1776.

In the Russian Federation, this concept is worded as follows: "An arbitration clause which forms part of an agreement shall be deemed to be an agreement that is independent of other terms and conditions of the agreement, i.e. it isautonomous in nature. If an agreement is declared invalid or not to have been concluded, this fact shall not invalidate the arbitration agreement."[15] This Russian norm is based on a similar provision of the UNCITRAL Model Law.

Thus, the invalidity of the main substantive law contract does not automatically entail the invalidity of the arbitration clause. However, a situation may arise under which an existing defect in a transaction may extend to the main contract and to the arbitration clause contained in this contract (for example, the performance of a transaction affected by deceit may entail the invalidity of both the main contract as well as the clause on the choice of law and the arbitration clause).

III. Arbitrability

Arbitrability means the ability to transfer a specific dispute for resolution in arbitration. In general, disputes that arise from civil-law relations may be referred by the parties for consideration by an arbitral tribunal, provided that there is a valid arbitration agreement between the parties. Thus, all disputes arising from sale and purchase agreements, supply agreements, service agreements, carriage agreements, lease agreements, finance leasing agreements, and so on are arbitrable. Also arbitrable are disputes involving real estate and other disputes that involve the transfer of real estate title, its state registration, and the introduction of the corresponding amendments to the Unified State Register of Real Estate Rights and Transactions Therewith, as well as foreclosures on (among other things) mortgaged real estate[16].

The APC and the CPC separately give a list of disputes that cannot be referred for consideration to arbitral tribunals, since legislators have defined them as non-arbitrable. For example, the following cannot be referred for consideration to an arbitral tribunal (Article 22.1 of the CPC and Article 33 of the APC[17]):

[15] Clause 20 of Resolution No. 53 of the Plenum of the Supreme Court of the Russian Federation dated 10 December 2019 "On the Assisting and Controlling Function of the Courts of the Russian Federation in Relation to Arbitral Proceedings and International Commercial Arbitration".

[16] State registration of real estate rights and transactions therewith, as an act of the state registration authority, is not a factor that alters the nature of civil-law relations between parties regarding this property. An arbitral award foreclosing on mortgaged real estate entails either the issue of a writ of execution in the case of enforced foreclosure, or the holding of a public auction, as a result of which the title to the mortgaged property may be transferred – if the decision is executed voluntarily. Judgment No. 10-P of the CCRF dated 26 May 2011.

[17] For more detail, see the commentary of *N.A. Bogdanova* on Article 22.1 of the CPC and Article 33 of the APC in Научно-практический постатейный комментарий к законодательству о третейских судах [Theoretical and Practical Article-by-Article Commentary on the Legislation on Arbitral Tribunals]; *M.N. Akuyev*, *M.A. Akchurina*, *T.K. Andreyeva* et al., Editor-in-Chief *V.V. Khvaley*. Moscow: RAA, 2017. 935 pages.

- cases of special proceedings, such as cases to establish facts, cases of adoption;
- disputes arising from family relations, including disputes arising from relations on the disposal by guardians and trustees of their wards' assets, except for cases on the division of joint property between spouses;
- disputes arising from labour relations;
- disputes arising from inheritances;
- disputes arising from relations governed by Russian legislation on the privatisation of state and municipal property;
- disputes arising from relations governed by Russian legislation on the contract system in the procurement of goods, works, and services to meet state and municipal needs[18];
- disputes on compensation of harm to life and health;
- disputes on evictions from residential premises;
- disputes arising from relations connected to compensation of harm caused to the environment;
- disputes on cases arising from administrative and other public legal relations;
- insolvency (bankruptcy) disputes;
- disputes on a refusal of state registration, denial of state registration to legal entities and individual entrepreneurs;
- disputes on the protection of intellectual property involving the collective management of copyrights and related rights, as well as disputes classified as being under the jurisdiction of the Court on Intellectual Property;

[18] This clause will lose force from the date of entry into force of the federal law defining the permanent arbitration institution responsible for administering disputes regarding the contract system. Ruling of the Commercial Court of the North-Western District dated 27 June 2018 in case No. A44-9747/2017, Clause 14 of the Overview of the Practice of Consideration by the Courts of Cases Related to the Assisting and Controlling Function of the Courts of the Russian Federation in Relation to Arbitral Tribunals and International Commercial Arbitration, approved by the Presidium of the Supreme Court of the Russian Federation on 26 December 2018; Ruling of the SCRF dated 3 March 2015 in case No. A41-60951/2013.

For comparison, in Germany, the arbitrability of disputes is governed by paragraph 1030 of the ZPO (Code of Civil Procedure), in accordance with which the subject of arbitration can be any property claim. The legislation on procurement, which is based on the Law on the Restriction of Competition, does not contain any prohibition on the arbitrability of disputes.

- cases on the establishment of legal findings;
- cases on awarding compensation for violation of the right to a trial within a reasonable period or the right to enforcement of a court order within a reasonable period;
- cases on protecting the rights and lawful interests of a group of parties;
- disputes on convening a general meeting of participants of a legal entity;
- disputes arising from the actions of notaries when certifying transactions with participation interests in the charter capitals of limited liability companies;
- disputes concerning the expulsion of participants of a legal entity;
- disputes pertaining to the acquisition and buyout by joint stock companies of placed shares and the acquisition of more than 30 percent of shares in a public joint stock company;
- disputes associated with a challenge of the non-regulatory legal acts, decisions, and actions (inaction) of state authorities, local government authorities, other authorities and agencies, and officials entrusted by federal law with certain state or other public powers;
- other disputes in the instances expressly stipulated by federal law[19].

As for corporate disputes, the following disputes **may** be referred for arbitration:

- disputes concerning the incorporation, reorganisation, and liquidation of a legal entity;
- disputes based on the claims of participants of a legal entity on the reimbursement of losses the legal entity has incurred, invalidation of transactions performed by the legal entity and/or application of the consequences of the invalidation of these transactions;
- disputes involving the appointment, election, termination, or suspension of the authorities and liability of persons who are or were members of the management and supervisory bodies of a legal entity, disputes arising from civil-law relations between the indicated persons and the legal entity in connection with the performance, termination, or suspension of the authorities of these persons, and also disputes arising

[19] An example is Clause 22 of Article 4.1 of Federal Law No. 39-FZ dated 22 April 1996 "On the Securities Market", which establishes that disputes under contracts concluded between forex dealers and individuals who are not individual entrepreneurs cannot be referred for resolution by an arbitral tribunal.

from the agreements of the participants of a legal entity concerning the management of this legal entity (including disputes arising from corporate agreements);

- disputes associated with a securities issue (including a challenge of the non-regulatory legal acts, decisions, and actions (inaction) of the state authorities, local government authorities, other authorities and officials, the decisions of the issuer's management bodies, or a challenge of transactions performed during the placement of public securities or reports (notifications) on the results of an issue (additional issue) of public securities;

- disputes concerning an appeal against the decisions of the management bodies of a legal entity;

The disputes listed in points above may only be referred to an arbitral tribunal for consideration if the legal entity, all the participants of the legal entity, and also other persons acting as claimants or respondents in these disputes have concluded an arbitration agreement to refer these disputes to an arbitral tribunal. Such a dispute may only be referred to an arbitral tribunal for consideration as part of arbitration proceedings conducted by a permanent arbitration institution (hereinafter a **PAI**). An arbitration agreement on the referral to arbitration of all or some of the disputes between the participants of a legal entity established in the Russian Federation and the legal entity itself, for the proceedings of which the rules of corporate dispute arbitration apply, may be concluded by including such an agreement in the legal entity's charter[20].

- disputes arising from the activity of registrars of the share register related to the registration of rights to shares and other securities;

- disputes concerning the ownership of shares and participation interests in the charter capitals of business entities and partnerships, the equity interests of the members of cooperatives, the establishment of encumbrances, and the exercise of the rights arising therefrom (in particular, disputes arising from sale and purchase agreements for shares and participation interests in the charter capitals of business entities, associations, and partnerships, and disputes involving the forfeiture of a share and participation interests in the charter capital).

All the corporate disputes indicated in points above are non-arbitrable if the legal entity in relation to which these disputes arose is of strategic importance for national defence and security at the time when the case is instigated in the commercial court or at the beginning of consideration at an arbitral tribunal[21].

[20] For more details see the commentary of N.A. Bogdanova Inclusion of an International Jurisdiction Clause in the Charter of a Legal Entity: The EU experience//Arbitration and Civil Litigation. 2016. No. 6. P. 29–34.

[21] In accordance with Federal Law No. 57-FZ dated 29 April 2008.

This does not apply to disputes involving the ownership of shares and participation interests in the charter (share) capitals of such legal entities, except in those cases when these disputes arise from transactions with shares and participation interests that are subject to prior approval.

In case of a violation of the above restrictions on the arbitrability of disputes, a state court may refuse to issue a writ of execution on enforcement of the award of an arbitral tribunal (for more details, see section VIII of this brochure).

The legislation separately determines categories of disputes that are subject to the exclusive jurisdiction of Russian state courts, in order to exclude the jurisdiction of foreign state courts to resolve these cases (Article 248 of the APC and Article 403 of the CPC). These norms distinguish jurisdiction of Russian from that of foreign state courts[22] but **do not** limit the arbitrability of disputes[23].

IV. Composition of the arbitral tribunal

1. APPOINTMENT OF ARBITRATORS

In general, the procedure for electing (appointing) an arbitrator or arbitrators is determined by the parties to the arbitration at their discretion. Yet, the following persons cannot be arbitrators:

- an individual who has not reached twenty-five years of age;
- a legally incompetent individual;
- an individual with limited legal capacity;
- an individual with uncleared or outstanding convictions;
- an individual whose authorities as a judge, attorney, notary, investigator, prosecutor, or other law enforcement official were terminated for the commission of acts inconsistent with his or her professional activity;
- an individual who, based on his or her status as determined by federal law, cannot be elected as an arbitrator.

[22] Judgment No. 10-P of the CCRF dated 26 May 2011.

[23] For more details, see the comments of *A.Y. Bezborodov* on Article 248 of the Russian Code of Commercial Procedure in the Theoretical and Practical Article-by-Article Commentary on the Legislation on Arbitral Tribunals / *M. N. Akuev*, *M. A. Akchurin*, *T. K. Andreyeva*, etc.; under the general editorship of V. V. Khvalei, Moscow: RAA, 2017, 935 pages.

The parties to arbitration may determine the number of arbitrators at their own discretion. However, unless federal law indicates otherwise, there must be an odd number of arbitrators.

1.1 APPOINTMENT OF AN ARBITRATOR (ARBITRATORS) BY AGREEMENT OF THE PARTIES

The parties may agree on additional requirements to be placed on arbitrators (including requirements on their qualifications) or on the consideration of a dispute by a specific arbitrator or arbitrators.

Parties whose arbitration agreement stipulates that arbitration be conducted by a permanent arbitration institution tend to use the regulations established by the rules of this institution[24].

Parties that intend to resolve their dispute in an ad hoc arbitral tribunal will determine the procedure for electing (appointing) the arbitrators in their arbitration agreement, by including the relevant terms and conditions in it or by referring to the applicable regulations (see, for example, Articles 8 – 10 of the UNCITRAL Arbitration Rules).

1.2 APPOINTMENT OF AN ARBITRATOR (ARBITRATORS) IN THE ABSENCE OF AN AGREEMENT OF THE PARTIES

If the parties to arbitration do not determine the number of arbitrators, three arbitrators will be appointed.

If the parties have not agreed on a procedure for electing arbitrators, the following procedure will be used:

- in case of arbitration with three arbitrators, each party will elect one arbitrator and the two elected arbitrators will elect the third arbitrator. If a party does not elect an arbitrator within one month after receiving the request to do so from the other party or if the two arbitrators cannot agree upon the election of the third arbitrator within one month, the arbitrator will be appointed at the request of either party by a competent court;

- in case of arbitration with a single arbitrator, if the parties cannot agree on the election of the arbitrator, the arbitrator will be appointed at the request of either party by a competent court.

[24] The PAI must compile and post on its website a recommended list of at least 30 arbitrators. However, unless expressly stipulated by an agreement of the parties, the election of arbitrators **cannot** be made contingent on whether they are included in the list of recommended arbitrators. This prohibition does not apply to cases when the arbitrators are appointed by a permanent arbitration institution.

If the parties have not agreed otherwise, the arbitrator resolving the dispute single-handedly (in case of collegial dispute resolution – the chairman of the arbitral tribunal) must meet one of the following requirements:

- have a higher legal education certified by a diploma issued in the Russian Federation;
- have a higher legal education certified by the documents of a foreign country recognised in the Russian Federation.

If

- one of the parties does not comply with the agreed upon procedure for electing the arbitrators, or
- the parties or the two arbitrators cannot reach an agreement based on this procedure, or
- a third party, including a permanent arbitration institution, does not perform its duty to appoint the arbitrator,

then any party may ask a competent court to take the necessary measures to elect (appoint) the arbitrator. In addition, the parties are entitled to set forth other methods to ensure the appointment of the arbitrator in the agreement.

Parties whose arbitration agreement stipulates that arbitration is to be conducted by a permanent arbitration institution may exclude the possibility for this issue to be resolved by a state court directly in their agreement. If the parties have exercised this right, the arbitration will be terminated and the dispute may be referred to the competent court for resolution.

2. VIOLATION OF THE PRINCIPLE OF IMPARTIALITY AND INDEPENDENCE AS GROUNDS FOR CHALLENGE OF ARBITRATORS

2.1 GENERAL PROVISIONS

Arbitration is conducted based on the principles of independence and impartiality of arbitrators, the free exercise of rights, and the principle of adversarial proceedings and equal treatment of the parties.

Local legislation has developed an entire system of norms ensuring the impartiality and independence of arbitrators. Rules on the impartiality and independence of arbitrators and requirements on ensuring the impartiality and independence of arbitrators are also contained in the rules of a permanent arbitration institution.

The legislation does not regulate how the terms "independence" and "impartiality" of an arbitrator should be understood. The Constitutional Court of the Russian Federation provided the following clarification of this issue[25]:

- the **independence** of the arbitrator from the parties to the dispute is an objective criterion that assumes the absence of labour (employee – employer, superior – subordinate), civil law (debtor – creditor), and other legal relations (administrative, financial, family, etc.);

- the **impartiality** of the arbitrator in relation to the parties to the dispute is a subjective criterion that assumes that the judge has no direct or indirect interest in the outcome of the case.

In addition, the categories of "independence" and "impartiality" are defined in the Rules on Impartiality and Independence of Arbitrators approved by the Chamber of Commerce and Industry of the Russian Federation, which are binding on the ICAC at the Chamber of Commerce and Industry of the Russian Federation and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation[26].

If there are factors that lead to justifiable doubts regarding the impartiality or independence of the arbitrator, a party will be entitled to disqualify an arbitrator. In this regard, the party can disqualify the arbitrator that it has already appointed or an arbitrator appointed without its participation only for reasons that became known to it after the arbitrator's appointment.

The discovery of a violation of the principle of independence or impartiality at a time when the competent court is considering the question of issuing the writ of execution or when challenging the award of an arbitral tribunal serves as "categorical ground for a refusal to issue a writ of execution or to overturn the award of an arbitral tribunal"[27].

2.2 WHICH DOUBTS ARE CONSIDERED JUSTIFIABLE?

Russian legislation does not contain a clear list indicating which doubts should be considered justifiable.

Additional explanations are given in the rules of arbitration institutions. These rules are often drafted based on the IBA Guidelines on Conflicts of Interest in International Arbitration[28] (hereinafter the **IBA Guidelines**). For example, the rules on the impartiality

[25] Judgment No. 30-P of the CCRF dated 18 November 2014.

[26] Order No. 110 of the Chamber of Commerce and Industry of the Russian Federation dated 30 September 2021.

[27] Judgment No. 30-P of the CCRF dated 18 November 2014.

[28] The IBA rules: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

and independence of arbitral tribunals approved by order of the Russian Chamber of Commerce and Industry[29] expressly indicate that these rules are built on foreign experience, including the IBA Guidelines.

The IBA Guidelines establish that

- doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

Justifiable doubts concerning the impartiality and independence of an arbitrator are inevitable if there is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration, or if the arbitrator has a direct economic interest in the award to be rendered in the arbitration. Under Russian law, if an individual is contacted in connection with his or her possible appointment as an arbitrator, this individual must communicate in writing any circumstances that could cause justifiable doubts concerning his or her impartiality or independence. In addition, from the time of his or her appointment and throughout the entire period of arbitration, the arbitrator must immediately notify the parties of the appearance of any such facts, if he or she had not notified of these facts previously.

The IBA Guidelines also outline situations where the disclosure of information or the disqualification of an arbitrator is or is not required. These lists (which have come to be called the "red", "orange", and "green" lists) make it possible to achieve the necessary consistency of practice and to reduce the number of redundant challenges, recusals, and disqualifications of arbitrators from the consideration of a case.

2.3 WHAT ARE THE OTHER GROUNDS AND PROCEDURES FOR CHALLENGE OF ARBITRATORS?

In addition to the grounds for disqualification indicated above, an arbitrator may also be disqualified if:

- the arbitrator does not meet the requirements imposed by law, or
- the arbitrator does not meet the requirements imposed by the agreement of the parties.

Procedure for disqualification:

- by agreement of the parties,

[29] Order No. 39 of the Russian Chamber of Commerce and Industry dated 27 August 2010 "On the Rules on the Impartiality and Independence of Arbitrators".

- in the absence of an agreement – a written appeal of a party to the arbitral tribunal setting forth the reasons for the disqualification.

If the arbitrator in relation to whom a disqualification has been proposed does not announce his or her recusal, or the other party does not agree with the disqualification, this issue is resolved by the arbitral tribunal.

If the request for disqualification is not satisfied, the party is entitled to file an application on approval of the disqualification in a state court within one month.

If the parties' arbitration agreement stipulates that arbitration is to be conducted by a permanent arbitration institution, the parties are entitled to exclude the possibility for this issue to be resolved by a state court directly in their agreement.

The filing of an application in a state court on the approval of a disqualification does not prevent the arbitral tribunal from continuing the arbitration and issuing an arbitral award.

3. THE COMPETENCE-COMPETENCE PRINCIPLE

The principle that an arbitral tribunal can independently decide on its own competence, including based on any objections concerning the existence or validity of an arbitration agreement[30] (the "competence-competence" principle) is enshrined in local legislation.

Therefore, the arbitral tribunal has the authority to decide independently whether it has the competence to consider a dispute. That being said, when taking a decision, the arbitral tribunal takes into account

- the substance of the arbitration agreement and its validity;

- the restrictions on referring certain categories of disputes for arbitration (the arbitrability of the subject of the dispute).

The competence-competence principle limits the interference of the state in arbitration and prevents the consideration by state courts of the issue of the competence of the arbitral tribunal before it can be resolved by the arbitrators themselves during an ongoing dispute in arbitration[31].

[30] Article V of the European Convention on International Commercial Arbitration; Article 16 of the Federal Law "On Commercial Arbitration"; Article 16 of the ICA Law. This norm of Russian legislation was based on Article 16 of the UNCITRAL Model Law. The competence-competence principle has also found broad application and support in foreign legal systems (for example, § 1040 of the German Code of Civil Procedure and § 30 of the UK Arbitration Act).

[31] The Permanent Arbitration Institution shall not be liable for damages caused by the arbitrators' erroneous recognition of its jurisdiction over a dispute (Ruling of the Ninth Commercial Court of Appeal dated 29 January 2020 in case No. 40-142956/2019).

If the claimant contacts a state court for any reason in circumvention of the arbitration clause, and the respondent refers to this fact and asks that a statement of claim to be dismissed without prejudice, the court will check the validity of the arbitration agreement (Clause 5 of Part 1 of Article 148 of the APC, para. 6 of Article 222 of the CPC)[32].

V. Conduct of arbitral proceedings

1. EVIDENCE AND MEANS OF EVIDENCE IN ARBITRATION

In arbitration each party is required to prove the circumstances to which it refers as the grounds for its claims or objections: The claimant must prove the circumstances on which it bases its claims, and the respondent, in turn, must prove the circumstances on which it bases its objections to the claim.

1.1 TAKING OF EVIDENCE IN ARBITRATION

Based on the principle of free exercise of rights and the principle of adversarial proceedings and equal treatment of the parties during the consideration of a case through arbitration, the arbitral tribunal is not required to take an active part in establishing the facts of the case. It only has the duty to assist the parties in establishing the facts of significance for the case.

Evidence is taken based on the principle that each party must act in good faith and has the right to study the evidence to which the other party refers within a reasonable period prior to the hearings.

If the need arises to eliminate ambiguity, gaps in or contradictions between the existing evidence, or if a dispute arises between the parties regarding a specific piece of evidence, the arbitral tribunal may deem the evidence provided by the parties insufficient and propose that the parties provide additional evidence.

In the absence of the required evidence, a party may apply to the arbitral tribunal with a request to produce from the other party. In the request to produce, the party should indicate the specific demanded evidence, provide an explanation of how the requested evidence relates to the case, and which facts pertaining to the case will be established through the requested evidence, and should also indicate the reasons why the party filing the request to produce cannot independently provide the evidence to the court.

[32] Recourse to a state court before the arbitral tribunal examines the issue of its own competence and the validity of the arbitration clause may be considered as an improper means of protection of rights (Judgement of the Moscow Commercial Court dated 3 February 2021 in case No. A40-263502/2020).

The arbitral tribunal cannot force the claimant or the respondent to provide the required evidence. However, if a party avoids providing the evidence at its disposal without a good reason or if a party abuses its procedural rights in some other way, this could lead the arbitral tribunal to conclusions on specific issues of the case that are adverse for the party shying away from providing evidence.

The arbitral tribunal does not have the coercive powers to demand that third parties that are not parties to the arbitration provide the evidence necessary for these proceedings. Therefore, Russian law stipulates the possibility to appeal to a state court for assistance in receiving (demanding) evidence from third parties for the arbitration process (for more details, see section VI of this brochure).

1.2 TYPES OF EVIDENCE

The Arbitration Law and the ICA Law do not contain a list of the types of evidence to which the parties may refer to substantiate their position. However, the list of evidence that can be used by the parties in arbitration proceedings is extremely broad, is not exhaustive, and includes the following evidence:

- written evidence,
- material evidence,
- witness testimony,
- expert reports,
- spoken statements of specialists and experts,
- explanations, statements, and other information from the parties and third parties,
- electronic documents, including e-mails and text messages,
- information from the Internet, etc.,
- audio and video recordings,
- other evidence.

Special requirements on evidence and means of evidence may be established by the rules and regulations of a PAI. When agreeing on the procedure for conducting arbitration proceedings, the parties may, at their discretion, agree on the evidentiary procedure and a list of evidence to which the parties may refer to substantiate their claims and objections during consideration of the dispute in an arbitral tribunal. In this regard,

the requirements on evidence and means of evidence agreed by the parties should not contradict the peremptory norms of applicable legislation on arbitration and the rules and regulations of the respective PAI.

When agreeing on the procedure for conducting arbitration, the parties may also agree to use the rules on the taking of evidence developed by various international associations (for example, the "**IBA Rules**")[33]. These Rules are applied to the extent that they do not contradict the peremptory norms of the applicable legislation on arbitration and the rules and regulations of the respective PAI.

If the parties have not agreed on a procedure for conducting arbitration, the arbitral tribunal will conduct the proceedings on the case in the way that it considers appropriate, including determination of the admissibility, relevance, and significance of any evidence.

1.3 RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

To improve the efficiency of arbitration and reduce the related expenses of the parties, international and professional associations are developing uniform rules on the taking of evidence and means of evidence in arbitration. These rules are recommendatory in nature and are applied if their use is agreed upon by the parties or at the initiative of the arbitral tribunal itself.

The best known and most widely used rules on the taking of evidence are the IBA Rules on the Taking of Evidence in International Arbitration, adopted by decision of the International Bar Association on 17 December 2020.

The Rules propose a mechanism for providing documents, witness testimony, and expert reports, conducting investigations and hearings to study evidence, and conducting cross-examinations of witnesses. The Rules were drafted for application and adoption together with institutional rules, ad hoc rules, or other rules or procedures regulating international arbitration.

If the parties have agreed or the arbitral tribunal has decided to apply the IBA Rules on evidence, they must be applied in a way that they do not contradict the peremptory rules of law that the parties or the arbitral tribunal have (has) deemed applicable in this process.

The recently drafted Rules on Conduct of the Taking of Evidence in International Arbitration (The Prague Rules) (hereinafter the "**Prague Rules**")[34] present another set of

[33] https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[34] http://praguerules.com/prague_rules/.

rules on the taking of evidence and means of evidence in international arbitration. Well-known European arbitration specialists took part in the working group on the drafting of the Prague Rules.

The main difference between the Prague Rules and the IBA Rules is that the Prague Rules envisage a more active role of arbitrators in the procedure for taking and examining evidence.

The authors of the Prague Rules believe that the development of rules on the taking of evidence based on an inquisitorial model of procedure and capable of giving arbitrators a more active role should help to increase the efficiency of international arbitration. Since the final version of the Prague Rules has not been approved yet, it is difficult to predetermine the prospects of their application in arbitration in Russia at the moment.

1.4 APPOINTING AN EXPERT AND PERFORMING AN EXPERT EXAMINATION IN ARBITRATION

Questions that require specialised knowledge in specific areas to correctly establish the facts of a case and the evidence subject to examination often arise when considering cases in arbitration. In such cases, the parties and/or arbitrators turn to the persons who are recognised and qualified specialists in the required areas for the relevant expert examination.

Arbitration differentiates between two types of experts:

- a party-appointed expert,
- a tribunal-appointed expert.

When considering a case in arbitration, the parties themselves usually appoint experts to clarify the issues requiring specialised knowledge that arise during dispute resolution.

Even though a party to the case pays for the expert's services and presents the expert with the issues for expert examination, the party-appointed expert must remain independent and impartial when performing his or her duties. The task of a party-appointed expert is not to protect the position and interests of the party that engaged him or her, but to provide a professional and independent expert report on the issues which he or she has been engaged to clarify.

The second party can provide a report issued by an expert it has appointed in response to and on the same issue as the expert report of an expert appointed by the other party.

If there are several expert reports with contradictory conclusions in a case and the arbitral tribunal cannot independently decide which expert report contains the most

reliable conclusions, the arbitral tribunal may bring in experts to take part in the hearings on the case. These experts may be called for examination during the hearings regarding the performance of the expert examination and the provided expert report. In these situations, the arbitral tribunal itself can also appoint an expert to perform a reexamination.

Unless otherwise agreed by the parties, the arbitral tribunal is entitled to appoint one or more experts to clarify any issues that require specialised knowledge arising during dispute resolution.

When resolving the issue of ordering an expert examination, the arbitral tribunal must determine:

- the advisability and the need for ordering an expert examination;
- the candidacy of an expert or expert organisation;
- the issues to be resolved by the expert;
- the form of provision of the expert report (written, spoken, etc.);
- the procedure for allocation of the parties' expenses on the performance of the expert examination and advance payment to cover these expenses;
- other issues involved in the organisation and performance of the expert examination.

The expert is required to take part in the hearings on the case if he or she is called for examination based on a motion of one of the parties or on the initiative of the arbitral tribunal. If an expert does not appear at the hearings on the case without good reason, the arbitral tribunal is entitled not to take the report submitted thereby into account as evidence in the case.

Unless otherwise agreed by the parties, the arbitral tribunal will be entitled to demand that any party provide the expert with any information pertaining to the case or present or make available any goods, other property, or documents for examination by the expert.

If a party does not provide the requested documents and materials, the arbitral tribunal is not entitled to apply any coercive measures or sanctions. However, the arbitral tribunal may consider such behaviour of the party as bad faith, which could have adverse consequences for the latter during resolution by the arbitral tribunal of the dispute and the allocation of expenses between the parties.

VI. Assistance in arbitration from the state courts

The state courts of the Russian Federation exercise the following support functions in arbitration proceedings:

- resolution of the issues related to the formation of the arbitral tribunal – appointment, disqualification, and termination of the powers of arbitrators;
- assistance in taking (demanding) the evidence necessary for arbitration proceedings;
- adoption of interim measures in support of arbitration proceedings.

1. ASSISTANCE IN THE COMPOSITION OF THE ARBITRAL TRIBUNAL

As a general rule, state courts are entrusted by law with the duty to assist arbitral tribunals in the appointment, disqualification, and termination of the powers of arbitrators.

1.1 APPOINTMENT OF AN ARBITRATOR

In the absence of an agreement between the parties to the arbitration on the procedure for electing (appointing) arbitrators:

- in the case of arbitration with three arbitrators, each party elects one arbitrator, and the two arbitrators elected this way elect the third arbitrator. If a party does not elect an arbitrator, or if the two elected arbitrators cannot agree on the election of the third arbitrator, the arbitrator is appointed by a state court at the request of either party;
- in the case of arbitration with a single arbitrator, if the parties cannot agree on the election of the arbitrator, the arbitrator is appointed by the state court at the request of either party.

If during the procedure of electing (appointing) the arbitrators agreed on by the parties:

- one of the parties does not comply with this procedure, or
- the parties or two arbitrators cannot reach an agreement in accordance with this procedure, or
- a third party, including a PAI, does not follow the arbitration rules in performing any function assigned to it in accordance with this procedure,

Either party may ask the state court to take the necessary measures, with due account of the election (appointment) procedure agreed on by the parties, unless the agreement on the election (appointment) procedure stipulates other methods for securing appointment.

1.2 DISQUALIFICATION OF AN ARBITRATOR

If during the application of any arbitrator disqualification procedure agreed on by the parties or stipulated by law, the request for disqualification is not satisfied, the party applying for the disqualification may file an application with a state court to approve the disqualification.

1.3 TERMINATION OF THE POWERS OF THE ARBITRATOR

If an arbitrator is unable *de jure or de facto* to participate in the consideration of a dispute or does not participate in the consideration of the dispute for an unjustifiably protracted period, his or her powers cease if the arbitrator announces his or her recusal or the parties agree on the termination of such powers. In other instances, if the arbitrator does not announce his or her recusal, and there is no agreement of the parties on termination of the powers of the arbitrator on any of these grounds, *either party may apply to a state court to resolve the issue of terminating the arbitrator's powers*.

Parties whose arbitration agreement stipulates that arbitration be conducted by a PAI authorised by the Ministry of Justice of the Russian Federation based on the recommendation of the Council for the Improvement of Arbitral Proceedings are entitled by their express agreement to exclude the possibility of an appeal to a state court for assistance regarding the issues of the appointment, disqualification and termination of the powers of arbitrators. By contrast, parties in *ad hoc* arbitration are denied the option of rejecting the resolution of such issues by a state court.

An appeal for assistance is filed with a commercial court of the constituent entity of the Russian Federation or a district court (in accordance with general rules on jurisdiction) by the party (parties) to the arbitration at the place where the arbitration proceedings were conducted within one month from the day when the appellant learned or should have learned about facts that serve as grounds for filing the appeal.

A state court considers such an appeal in a court session and summons the arbitration parties.

The appeal should be satisfied provided that the following terms and conditions are met simultaneously:

- the procedure established by the parties or by law for appointing, disqualifying or terminating the powers of the arbitrator must be observed, and

- there should be grounds established by law for appointing, disqualifying or terminating the powers of the arbitrator.

The ruling of a state court on the issue of assisting in the appointment, disqualification or the termination of the powers of the arbitrator is final and binding on the parties to the arbitration and the arbitral tribunal or arbitration institution conducting the dispute.

2. ASSISTANCE IN TAKING EVIDENCE

The arbitral tribunal does not have the coercive powers to demand that third parties that are not parties to the arbitration produce the evidence necessary for these proceedings. Therefore, Russian law stipulates the possibility of appealing to a state court for assistance in the receipt of (request for) evidence from third parties for the arbitration process.

The opportunity to obtain evidence through a state court is only stipulated in the case of arbitration to be conducted by a permanent arbitration institution, and is excluded in ad hoc arbitration.

Evidence may be requested through a state court in instances when the Russian Federation is the venue for arbitration. A Russian court is not authorised to assist an arbitral tribunal in the receipt of evidence when the arbitration venue is outside the Russian Federation.

The state courts competent to consider requests for assistance in obtaining evidence for the arbitration are the commercial courts of the constituent entities of the Russian Federation or district courts (in accordance with general rules on jurisdiction), in both instances the courts where the requested evidence is located.

A request for assistance in obtaining evidence may be submitted to a state court by the arbitral tribunal itself or by a party to the dispute with the consent of the arbitral tribunal.

A request may be sent for the receipt of:

- written evidence,
- material evidence, and
- other documents and materials.

The assistance of a state court to an arbitral tribunal in obtaining witness testimony is not stipulated by Russian law.

A state court may refuse to perform the request for assistance in obtaining evidence in the instances stipulated by law, for example:

- if granting the request may infringe the rights and legal interests of third parties not participating in the arbitration,
- if the request is sent in respect of a non-arbitrable dispute,
- if the request facilitates access to information constituting an official, commercial, banking or other secret protected by law in respect of persons that are not participating in the arbitration, and
- in certain other instances.

A state court considers a request for assistance in obtaining evidence in a court session and duly notifies the parties to the arbitration and – if the court deems it necessary – also the person from whom the evidence has been requested.

If the request is satisfied, the state court establishes the timeframe and procedure for the submission of the evidence.

If the duty to provide the requested evidence has not been performed for reasons recognised by the state court to be unjustifiable, the state court may impose a court fine on the person that has been asked to produce the evidence. The imposition of the fine does not release such a person from the obligation to provide evidence.

3. INTERIM MEASURES

A party to arbitration is entitled to file a petition with a state court for the adoption of interim measures in respect of a case being considered in an arbitral tribunal, in other words, urgent interim measures aimed at securing the claim or property interests of the party.

Compared to the interim measures which may be adopted by the arbitral tribunal, the interim measures of a state court have important advantages, such as:

- the enforceability of such measures through an application to the system of state enforcement proceedings, and
- the possible assignment of liability for the violation of such interim measures.

The acts of arbitral tribunals on the introduction of interim measures are not enforceable in the Russian Federation.

A party may file a petition with a state court for the adoption of interim measures both before (preliminary interim measures) and during arbitration proceedings. Furthermore, such a petition and the issue by a state court of a ruling on the adoption of interim measures are not inconsistent with arbitration agreement, in other words, they do not lead to the repudiation by a party (petitioner) of the arbitration agreement and the referral of the case to a state court for consideration on its merits.

A state court may order interim measures:

- both for arbitration conducted by a PAI and for ad hoc arbitration,

and also

- both for arbitration with a seat in the Russian Federation, and for foreign arbitration.

State commercial courts or courts of general jurisdiction of the Russian Federation consider a petition for injunctive measures for arbitration proceedings in accordance with the general rules on jurisdiction.

Such a petition is filed at the location of the arbitral tribunal or at the location or place of residence of the debtor, or at the location of the debtor's property. A petition for preliminary interim relief for arbitration proceedings is generally filed at the location of the petitioner or at the location of the funds or other property in respect of which the petition is filed, or at the place where the rights of the petitioner were infringed.

The following interim measures may be ordered:

- the attachment of the funds or other property of the respondent;

- prohibition on the respondent and/or other persons to perform specific actions regarding the subject matter of the dispute;

- the transfer of contested property to the claimant or another person for storage;

- other measures.

A state court may order interim measures on any of the following grounds:

- the failure to order these measures might render enforcement of the future arbitral award difficult or impossible;

- these measures are necessary to prevent significant damage to the petitioner.

The interim measures must be proportionate to the claims filed in the arbitral tribunal and must be directly related to the subject of the dispute. They must be necessary and sufficient to ensure the enforcement of the future arbitral award and/or to prevent damage.

A state court considers a petition for interim relief not later than the next business day after the date the petition is filed in court, without summoning the parties and without holding a court session. When considering the petition, the state court verifies, *inter alia*, the validity and enforceability of the arbitration agreement, and the arbitrability of the dispute being considered by the arbitral tribunal.

The likelihood that a state court will order interim measures may increase if the petitioner provides counter-security (security for the reimbursement of the possible losses of the respondent in connection with the interim measures). The counter-security may be provided by depositing funds with the court, or the provision of a bank guarantee, surety or other financial security. The amount of the counter-security must equal at least half the amount of the claims filed in the arbitral tribunal.

VII. Arbitration costs and their reimbursement

The parties to arbitration are required to pay costs related to dispute resolution by an arbitral tribunal. Generally, the costs of dispute resolution through arbitration include:

- registration fee – fee payable at the time of filing the statement of claim or petition to secure a claim in order to cover costs related to the start of the arbitration proceedings;

- administration fee – costs on organisational, material and other support for the arbitration;

- arbitrators' fee. In arbitration conducted by an arbitration institution, the amount of the arbitrators' fee is set by the rules of this institution. In ad hoc administration, the amount of the arbitrators' fee is determined by agreement of the parties, and in its absence by the arbitral tribunal, with due account of the value of the claim, the complexity of the dispute, the time spent by the arbitrators on the arbitration, and any other facts pertaining to the case;

- costs incurred by the arbitrators in connection with participation in arbitration (including costs on the payment of travel to the venue of the arbitration), as wel as in connection with the inspection and examination of written and material evidence at its location;

- costs payable to experts and translators;
- costs incurred by witnesses;
- costs on the payment of the services of the representatives of the parties.

The costs related to the resolution of a dispute in arbitration are allocated by the arbitral tribunal in accordance with the agreement of the parties, and in its absence pro rata to the satisfied and dismissed claims.

Third party funding of arbitration is worth separate consideration. Such funding involves the provision by a party (sponsor) which is not a party to the arbitration and does not have a substantive interest in the subject of the dispute, of financial support to a participant in the dispute on the basis of an agreement, in exchange for the receipt of consideration (reimbursement), depending on the results of the dispute (as a rule, in the form of a share of the amount that is recovered).

Such financing is used extensively, for example, in England along with (and sometimes jointly with) other alternative forms of financing and the allocation of risks in court proceedings, in particular, insurance before and after an insured event. No legislative act authorises such financing, and it is regulated on the basis of court precedents[35].

In Russia, third-party funding of arbitration has not yet been developed extensively and is not regulated at the legislative level, but proposals on the development of this legal institute have been submitted.

VIII. Recognition and enforcement of awards. Setting aside of awards

The parties are entitled to execute the award of an arbitral tribunal voluntarily. If this does not happen, the party in whose favour the arbitral award was issued is entitled to file an application for the issue of a writ of execution on the enforcement of the award. Meanwhile, the party that disagrees with the arbitral award is entitled to file an application for the setting aside of the award[36]. If both parties apply simultaneously to the same state court with opposing claims, then as a rule the proceedings in the cases should be consolidated.

[35] *S. V. Morozov* in the article "Third-party funding: international experience and prospects in Russia" in the collection: New Horizons of International Arbitration: Collection of Articles of the Speakers at the Conference "Russian Arbitration Day – 2018".

[36] Here, compliance with the procedural timeframe is important: an application to set aside an arbitral award may not be filed on the expiry of three months from the day when the party received the award.

If a foreign court is considering an application for setting aside or suspending a foreign arbitral award, the commercial court considering an application for the recognition and enforcement of this award may, at the request of one of the parties, adjourn consideration of the application for a writ of execution.

An application for the recognition and enforcement of a foreign arbitral award is filed with the state court at the location or place of residence of the debtor, or if its place of location or place of residence is unknown at the location of the debtor's property, with the attachment of the necessary documents (including a certified copy of the award).

A state court considers the application and notifies the parties, which are entitled to set out their positions. The state court is not entitled to review the case on its merits and only reviews whether there are any grounds for setting aside the award[37].

The fact that a foreign arbitral institution that has issued an arbitral award (not an ad hoc award) does not constitute grounds for denying the recognition and enforcement of the arbitral award. In this case, the lack of the status of a Permanent Arbitration Institution shall have the following legal consequences:

- the parties will not be able to refer certain types of disputes (in respect of immovable property as well as corporate disputes) to such an arbitration institution;

- the parties will not be able to exclude by their express agreement the possibility of appealing to a state court on the merits or on jurisdiction issues;

- the issued arbitral award and other arbitration materials must be deposited with the state court, unless the parties additionally agree to deposit the arbitration case materials with a Permanent Arbitration Institution pursuant to Article 39 of the Federal Law on Arbitration.

Neither Chapter 30 of the APC nor Part 3 of Article 44 of the Law on Arbitration provides for such a consequence for an arbitral award issued through the administration by a foreign arbitration institution (or a denial of the issue of a writ of execution).

In this case, the Russian state court must apply Part 3 of Article 44 of the Federal Law on Arbitration specifically dealing with cases of administration of disputes in the territory of Russia by foreign arbitration institutions.

[37] Clauses 12 and 20 of the Overview of the Practice of the Consideration by Commercial Courts of Cases on the Recognition and Enforcement of Foreign Court Awards, on Challenges against the Awards of Arbitral tribunals and on the Issue of Writs of Execution for the Enforcement of the Awards of Arbitral tribunals, approved by Information Letter No. 96 of the SCCRF dated 22 December 2005; Ruling of the Commercial Court of the Moscow District dated 12 February 2020 in case No. A40-201739/2019; Ruling of the Commercial Court of the North-Western District dated 29 April 2021 in case No. A56-131886/2019).

Pursuant to Part 3 of Article 44 of the Federal Law on Arbitration, if a foreign arbitration institution administers arbitration proceedings in the territory of Russia, without having the status of a permanent arbitration institution under the Law on Arbitration, the award issued in the territory of Russia by such an arbitral tribunal must be considered as an award issued by an arbitral tribunal established for the particular case (ad hoc). Thus, the Federal Law on Arbitration allows for arbitration proceedings to be administered in the Russian Federation by foreign arbitration institutions[38].

In accordance with Article V of the New York Convention (1958), recognition and enforcement of an award may be refused at the request of the party against whom it is invoked, only if this party furnishes to the competent court where the recognition and enforcement is sought, proof that:

- the parties to the agreement were under the law applicable to them under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the law of the country where the award was made; or

- the party against whom the award is invoked was not duly notified of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case[39], or

- the award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement or arbitration clause in the agreement, or it contains decisions on matters beyond the scope of the arbitration agreement or the arbitration clause in the agreement; 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, was not in accordance with the law of the country where the arbitration took place; or

- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of the arbitral award may also be refused if the state court in the country where the recognition and enforcement is sought finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

[38] Ruling of the Commercial Court of the Povolzhskii District dated 11 March 2021 in case No. A06-2352/2020.

[39] Ruling of the Commercial Court of the Povolzhskii District dated 11 March 2021 in case No. A06-2352/2020.

- the recognition or enforcement of the award would be contrary to the public policy (*ordre public*) of that country.

Public policy in the Russian judicial system is understood as the basic legal fundamentals (principles) that are of the greatest mandatory nature, are universal, are of particular social and public importance, and form the basis of the economic, political and legal system of the Russian Federation[40].

To set aside or deny the enforcement of an arbitral award on the grounds of the violation of public policy, the court must establish that two criteria are both met: firstly, the violation of the fundamental principles of the economic, political and legal system of the Russian Federation, which, secondly, may result in damage to the sovereignty or security of the state, affect the interests of large social groups, or violate the constitutional rights and freedoms of individuals or legal entities[41].

The application by the arbitral tribunal of foreign legal rules that have no equivalent in the Russian law, the defendant's failure to participate in the arbitration proceedings, and the debtor's failure to raise objections to the enforcement of the arbitral award do not in themselves constitute a violation of the public policy of the Russian Federation.

Similar grounds for the refusal to recognise and enforce the arbitral award are stipulated by Articles 34–36 of the ICA Law and Article 426 of the CPC.

After considering an application on the recognition and enforcement of the foreign arbitral award, the state court issues a ruling which may only be contested through cassation proceedings (thus, the procedure for obtaining the writ of execution is expedited in the process).

Foreign arbitral awards that do not require enforcement are recognised in Russia if their recognition is stipulated by an international treaty and federal law. In the absence of objections from an interested party, such decisions are recognised without requiring any further proceedings.

[40] Clause 51 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 dated 10 December 2019 "On the Assisting and Controlling Function of the Courts of the Russian Federation in Relation to Arbitral Proceedings, International Commercial Arbitration".

[41] Ruling of the Commercial Court of the North-Western District dated 29 April 2021 in case No. A56-131886/2019), Ruling of the Commercial Court of the North-Western District dated 17 January 2020 in case No. A56-83489/2019).

IX. Investment arbitration

One of the guarantees of a favourable investment climate for investors is the existence of effective international law and local (national) regulation, aimed at protecting foreign investments, including the possible settlement of emerging investment disputes through investment arbitration.

1. INTERNATIONAL CONVENTIONS ON THE PROTECTION OF FOREIGN INVESTMENTS

For the purposes of protecting foreign investments, countries conclude multilateral and bilateral agreements providing contracting states and investors from contracting states with guarantees against the illegal confiscation of foreign investments and determining the procedure for settling investment disputes.

One of the most important international conventions in the protection of foreign investments is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[42] (hereinafter – **the Washington Convention (1965)**), stipulating the establishment of the International Centre for Settlement of Investment Disputes (hereinafter **ICSID**[43]). The objective of ICSID is to provide structures for reconciliation and arbitration in connection with investment disputes between contracting states and private investors from contracting states.

Disputes between contracting states and private investors from contracting states should be considered by ICSID subject to the written consent of the participants in the dispute. An appeal to ICSID is performed on a voluntary basis. However, once they have agreed to arbitration, neither party may repudiate it unilaterally. At the same time, if a dispute is referred to ICSID for consideration, the parties are entitled to determine the applicable procedure themselves: the conciliation procedure or arbitration procedure to be conducted by the Conciliation Commission or arbitrators, respectively.

Pursuant to Clause 1 of Article 54 of the Washington Convention (1965), each contracting state must recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.

Russia has signed the Washington Convention (1965), but has not ratified it. Consequently, this convention does not apply to investors making capital investments in Russia. However, investment disputes with the participation of the state may be con-

[42] Convention on the Settlement of Investment Disputes between States and Nationals of Other States https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925.

[43] Official website of the International Centre for Settlement of Investment Disputes: https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925.

sidered by the ICSID Secretariat on the basis of the Additional Facility Rules of ICSID which entered into force on 10 April 2006[44].

In 1992 the Russian Federation ratified the Convention Establishing the Multilateral Investment Guarantee Agency of 1985 (hereinafter the **Seoul Convention (1985)**), which established the Multilateral Investment Guarantee Agency (hereinafter **MIGA**)[45] and determined the procedure governing its operation.

The object of MIGA is to stimulate investments for production purposes between contracting states and in particular in developing countries, thereby supplementing the activity of the International Bank for Reconstruction and Development, the International Finance Corporation and other international financial development institutions. To attain this goal, MIGA provides guarantees, including joint and repeat insurance from non-commercial risks regarding the investments being implemented at any contracting state by investors from other contracting states, engages in corresponding additional activity on facilitating the inflow of investments into and between developing member states; and also uses other additional authorities that may be required for the attainment of this goal.

The Seoul Convention (1958) stipulates a procedure for the resolution of disputes arising between contracting states through negotiations, application of the conciliation procedure or referral of the dispute to arbitration.

2. BILATERAL AGREEMENTS ON THE PROTECTION OF FOREIGN INVESTMENTS

Bilateral agreements on the promotion and protection of capital investments also play a key role in the protection of foreign investments. As a rule, such agreements create favourable conditions for investment, provide foreign investors from contracting states with protection from illegal nationalisation, expropriation or other measures leading to the loss of investments, and guarantee the payment of adequate and commensurate compensation.

The Russian Federation is a party to 82 bilateral agreements with foreign states on the promotion and mutual protection of capital investments.

Such bilateral agreements involving the Russian Federation define the concept of foreign investment, provide investors with guarantees against the illegal confiscation of investments, and contain provisions on the applicability by parties of various dispute reso-

[44] https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Additional-Facility-Rules.aspx.

For example, the admissibility of resolving a dispute through the application of the indicated facility rule is established in article 9 of the Agreement between the Government of the Russian Federation and the Government of the Republic of Singapore for the Promotion and Reciprocal Protection of Capital Investments dated 27 September 2010.

[45] Official website of MIGA: http://www.miga.org/.

lution mechanisms. If a dispute between an investor and the state cannot be resolved through negotiations, then at the discretion of the parties it may be referred to the competent state court or arbitral tribunal of the contracting state on whose territory the capital investments were made, or to *ad hoc* arbitration in accordance with the rules approved by the parties, or to arbitration by the conciliation commission of the ICSID established in accordance with the Washington Convention (1965).

In the event of arbitration, the place of arbitration shall be the Russian Federation. The arbitration shall be conducted under the rules of the Permanent Arbitration Institution, including a foreign arbitration institution which has been authorised to perform the functions of a Permanent Arbitration Institution[46] (see Section I above).

When deciding on investments in the Russian Federation or in any other foreign state, the investor must have assurances that there is an existing agreement between the state where the investor is a resident and the state in which the investor plans to invest (such as the Russian market) on the protection of investments (capital investments) which stipulates the procedure for resolving investment disputes. The Russian Federation has such agreements, for example, with Austria, Germany, Switzerland, France, Great Britain and many other countries.

X. Mixed dispute resolution methods

The parties are entitled to combine arbitration and other dispute resolution methods to reduce costs and increase the effectiveness of the settlement of differences. Federal Law No. 193-FZ dated 27 July 2010 "On the Alternative Dispute Resolution Procedure with the Participation of an Intermediary (Mediation Procedure)" serves as the basis for mediation in Russia. A number of arbitration institutions, including the ICAC Russia, also have separate rules on mediation[47].

1. MEDIATION-ARBITRATION (MED-ARB)

Based on this model, an independent mediator elected by the parties or appointed by the organisation, acting as the mediator, helps the parties resolve the dispute. If this cannot be done, the mediator completes the mediation and commences arbitration proceedings on the existing dispute. At the same time, the role of mediator also changes. The mediator becomes the arbitrator and resolves the dispute in arbitration proceedings.

[46] Article 13 of Federal Law No. 69-FZ dated 01 April 2020 "On Protection and Promotion of the Investment in the Russian Federation".

[47] ICAC Russia Rules: http://mediation.tpprf.ru/ru/docs/47907/;
ICC Regulations: https://iccwbo.org/dispute-resolution-services/mediation/;
SCC Regulations: https://sccinstitute.com/media/49819/medlingsregler_eng_web.pdf.

2. ARBITRATION-MEDIATION (ARB-MED)

When selecting this dispute resolution model, the parties start the arbitration with the participation of a single person as an arbitrator-mediator, who helps the parties resolve the dispute, and after clarifying the issues where compromise or cooperation is possible, refers them for resolution through the mediation procedure. If agreement is reached on all the issues, the arbitration proceedings cease.

3. ARBITRATION-MEDIATION-ARBITRATION (ARB-MED-ARB)

ARB-MED-ARB represents the procedure for applying mediation during arbitration proceedings, with the assistance of a single person as an arbitrator-mediator, who renders an arbitral award on the conditions approved by the parties if they reach an agreement. Consequently, the mediation agreement, based on the results of the mediation procedure, is approved by the arbitral tribunal as an arbitral award on the approved conditions.

Contacts

Falk Tischendorf
Rechtsanwalt | Partner
Head of CIS
ADVANT Beiten
Falk.Tischendorf@advant-beiten.com

Alexander Bezborodov
Rechtsanwalt | LL.M. | Partner
ADVANT Beiten
Alexander.Bezborodov@advant-beiten.com

Natalia Bogdanova
Lawyer | Ph.D.
Associate
ADVANT Beiten
Natalia.Bogdanova@advant-beiten.com

ADVANT Beiten in Russia
Turchaninov Per. 6/2
119034 Moscow
T: +7 495 2329635
www.advant-beiten.com

Our offices

BEIJING
Suite 3130 | 31st floor
South Office Tower
Beijing Kerry Centre
1 Guang Hua Road
Chao Yang District
100020 Beijing, China
beijing@advant-beiten.com
T: +86 10 85298110

BERLIN
Luetzowplatz 10
10785 Berlin
Germany
berlin@advant-beiten.com
T: +49 30 26471-0

BRUSSELS
Avenue Louise 489
1050 Brussels
Belgium
brussels@advant-beiten.com
T: +32 2 6390000

DUSSELDORF
Cecilienallee 7
40474 Dusseldorf
PO Box 30 02 64
40402 Dusseldorf
Germany
dusseldorf@advant-beiten.com
T: +49 211 518989-0

FRANKFURT
Mainzer Landstrasse 36
60325 Frankfurt/Main
Germany
frankfurt@advant-beiten.com
T: +49 69 756095-0

FREIBURG
Heinrich-von-Stephan-Strasse 25
79100 Freiburg im Breisgau
Germany
freiburg@advant-beiten.com
T: +49 761 150984-0

HAMBURG
Neuer Wall 72
20354 Hamburg
Germany
hamburg@advant-beiten.com
T: +49 40 688745-0

MOSCOW
Turchaninov Per. 6/2
119034 Moscow
Russia
moscow@advant-beiten.com
T: +7 495 2329635

MUNICH
Ganghoferstrasse 33
80339 Munich
PO Box 20 03 35
80003 Munich
Germany
munich@advant-beiten.com
T: +49 89 35065-0

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