



The European Arbitration Review

2022

Russia

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Russia

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BGP Litigation

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IN SUMMARY

Following last year's edition, this article provides a brief overview and updates to the Russian arbitration law and recent significant cases. It aims to familiarise the reader with the general framework of the Russian arbitration law as amended in 2015–2016 with the aim of making Russia a neutral and arbitration-friendly jurisdiction, as well as how it is interpreted by the Russian courts. While the reform has introduced certain positive features to the Russian arbitration law, it still raises concerns in the arbitration community given the licensing requirements of the arbitration institutions.

DISCUSSION POINTS

- The statutory framework for arbitration in Russia
 - Newly registered permanent arbitration institutions
 - Main procedural figures of the Russian permanent arbitration institutions
 - A sample of recent Russian case law in the field of arbitration
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REFERENCED IN THIS ARTICLE

- Russian Federation Law 'On International Commercial Arbitration'
 - Federal Law 'On Arbitration (Arbitration Proceedings) in the Russian Federation'
 - *Uraltransmash* case (anti-suit injunction against SCC proceedings)
 - *Yukos* cases
 - Bankruptcy and arbitration in Russia
 - Ad hoc arbitration in view of the Russian courts
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In last year's edition, we described the continuing reforms within the arbitration community in the Russian Federation.

From a general standpoint, the provisions on international and domestic arbitration in Russia remain the same. Russia succeeded the USSR as a member state of the New York Convention of 1958. Upon ratifying the New York Convention of 1958, the USSR declared that it would apply the provisions of the Convention in respect of awards made in the territories of non-contracting states only to the extent to that they grant reciprocal treatment. This declaration remains in effect. Russia is also a party to the European Convention on International Commercial Arbitration of 1961 and the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific, and Technical Cooperation of 1972.

Two primary statutes on arbitration are the Russian Federation Law 'On International Commercial Arbitration' (ICAL RF), which governs international arbitrations seated in Russia (even though several provisions apply to arbitrations seated abroad), and the Federal Law 'On Arbitration (Arbitration Proceedings) in the Russian Federation' (AL RF), which governs

domestic arbitrations. Both laws were substantially influenced by the UNCITRAL Model Law, as well as by international principles and guidelines.

ARBITRAL INSTITUTIONS AND THE FIGURES

One of the main peculiarities of Russian arbitration law is the introduction of the system of licensing for permanent arbitration institutions by the government of the Russian Federation.

There are currently seven domestic arbitral institutions in Russia (as opposed to more than 1,000 in the pre-reform years):

- the International Commercial Arbitration Court (ICAC);
- the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation;
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs (AC RUIE);
- the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (RIMA);
- the Sports Arbitration Chamber, licensed in April 2019;
- the Arbitration Institution at the All-Russian Industrial Association of Employers 'Union of Russian Machine Builders', recently licensed in April 2021; and
- the Arbitration Centre at the autonomous non-profit organisation the 'National Institute for the Development of Arbitration in the Fuel and Energy Complex', recently licensed in August 2021.

In addition, in 2018 and 2019, the Hong Kong International Arbitration Centre and the Vienna International Arbitration Centre, respectively, also obtained government permission to administer arbitrations seated in Russia. The past year has brought two more international arbitration institutions to Russia. First, the International Court of Arbitration of the International Chamber of Commerce announced that it has been granted the status of a permanent arbitration institution.^[1] Second, the Singapore International Arbitration Centre similarly received the status of a permanent arbitration institution.^[2]

The available statistics from the permanent arbitration institutions record the following figures in 2020:

- ICAC had 621 cases,^[3]
- AC RUIE had 435 registered claims, including 41 claims registered in regional branches of the Arbitration Centre,^[4] and
- RIMA had 394 cases.^[5]

However, while the arbitration reform achieved the goal of cleaning from Russia partial and 'pocket' arbitral institutions, there are still serious concerns in the Russian arbitration community due to the licensing requirements, following which only seven Russian arbitration institutions remain. In particular, the new rules caused doubts as to the transparency of the licensing process and led to several studies in this respect.^[6] Also, while the number of disputes is generally growing in the Russian arbitration institutions, it was noted that the number of international disputes is still relatively small.^[7]

BRIEF ROADMAP INTO THE MAIN ISSUES OF ARBITRATION IN RUSSIA

Arbitration Agreement

ICAL RF and AL RF set out a mandatory provision as to the written form of the arbitration agreement. Exchange of letters, faxes, emails and other means also qualify as evidence of a written arbitration agreement. Both ICAL RF and AL RF establish a general presumption in favour of survivability of an arbitration agreement^[8] and recognise the principle of separability.^[9]

The decisive factor is that the agreement must be valid, meaning that nothing should override the party's authority or will. Defects in arbitration agreements are often used as grounds for challenging arbitral awards in the state courts. Among the most frequently used arguments are: incorrect or incomplete name of an arbitration institution and absence of references to the exact set of procedural rules of an institution.

Third Parties

As a general rule, neither ICAL RF nor AL RF establish any rules or provisions regarding third parties that are willing to join the arbitration proceedings. Some institutional arbitration rules may provide for the regulation of a joinder for a non-party to the arbitration.

Interim Measures

The arbitral tribunal has the power to order interim measures (unless otherwise agreed by the parties).^[10] Both ICAL RF and AL RF clarify that it is not prohibited for a party to request a state court (at any stage of the proceedings) to order interim measures of protection, or for a court to grant such measures.^[11] The court will decide in accordance with the general principles of Russian procedural law whether to grant interim measures in support of an arbitration claim.

Recognition And Enforcement

A winning party must receive a writ of execution in a state court in order to enforce an arbitral award. The application for the issuance of the writ of execution is made with a court of general jurisdiction (for non-commercial matters) or commercial court.

The application for recognition and enforcement of a foreign commercial arbitral award can be filed within three years of the date on which the award became effective. The ruling of a first-instance court on the issuance of, or refusal to issue, a writ of execution can be appealed to the cassation court within one month of its rendering (within three months for non-commercial matters). A resolution of the cassation court can be further appealed to the Supreme Court of Russia (second cassation) within two months of its rendering (within three months for non-commercial matters). Supervisory review by the Supreme Court is available within three months from the date of entry into force of the judgment of the second cassation instance (for both commercial and non-commercial matters). There is no express provision against enforcing only part of an arbitral award. A court can refuse to enforce a part of an award.

Costs

In general, the provisions of ICAL RF are silent on the matter that makes the unsuccessful party obliged to pay successful party's costs. However, tribunals usually allocate arbitration costs according to the relevant success of the parties.

As for the AL RF, the arbitral tribunals allocate costs in relation to arbitration proceedings in accordance with the agreement of the parties and where there is no such agreement, in proportion to the granted or dismissed claims.^[12] Upon a winning party's application the tribunal may make an award that the costs of its legal representatives be paid by the other party.

RECENT DECISIONS AND CASES

Russian Case Law

Russian Supreme Court Against An Injunction On SCC Arbitration

The Russian Supreme Court has refused to restrain a Stockholm Chamber of Commerce (SCC) arbitration on the basis of recent legislation providing for the exclusive jurisdiction of Russia's courts over disputes involving sanctioned Russian parties.^[13]

JSC Uraltransmash brought an appeal against the decision of lower courts denying a stay of an SCC arbitration. JSC Uraltransmash relied on June 2020 amendments to Russia's Commercial Procedure Code, which provide for the exclusive jurisdiction of the country's commercial courts over certain disputes involving sanctioned Russian individuals and entities and foreign entities controlled by them.^[14] The amendments empower the courts to issue injunctions to restrain the foreign proceedings and to order a non-complying party to pay compensation up to the amount at stake in the foreign proceedings, plus costs.

The courts assumed that the appellant was fully exercising its right to judicial relief at the SCC by taking active steps in the arbitration for over two years. Furthermore, they found that the sanctions introduced against the appellant did not entail any limitations preventing performance of the relevant agreement, consideration of the dispute arising from it, or provision of legal services in view of such a dispute.

The Russian Supreme Court endorsed the lower courts' reasoning, refusing to refer the appeal to the Judicial Chamber on Economic Disputes for further review. However, on 21 September 2021, the Deputy Chairman of the Supreme Court, Ms Irina Podnosova reconsidered the matter and ruled to transfer the appeal for consideration in the Judicial Chamber of the Supreme Court. This will be obviously a precedential case, in which the Supreme Court will set its position regarding the use of anti-suit injunctions in the disputes involving the sanctioned persons.

Russian Court Lost In Translation With German Arbitration Clause

In the case at hand (No. A40-222805/2019), the lawsuit was filed against several defendants. A contract and a supplementary agreement were entered into with one of the defendants. The contract provided for disputes to be heard by Schiedsgericht Stuttgart (German version) and the Arbitration Court of Stuttgart (Russian version).

The court of the first instance considered that the arbitration clause referred specifically to an arbitral tribunal and not to a state commercial court, but since there was no such arbitral tribunal in Stuttgart, in view of the Russian commercial court the arbitration clause was not enforceable. Accordingly, the court allowed the case on the merits.

The court of appeal upheld the decision of the court of first the instance, stating that:

- there is no arbitral tribunal with the mentioned name in the city of Stuttgart;
- there is no mechanism for the parties to use this arbitration clause;

- it is impossible to determine which arbitral institution is authorised to arbitrate the dispute between the parties; and
- the parties failed to specify the arbitration or mediation rules and the governing law to the dispute.

Public Policy And The Prohibition On Reconsideration Of Identical Claims In Arbitration

After issuing the award on the merits to recover the principal debt and a penalty under the contract, and following an application of the claimant, the arbitral tribunal issued a supplementary award that increased the amounts originally awarded. The state court then overturned this award, finding that it violated Russian public policy.^[15]

Later, the arbitral tribunal again considered the dispute and satisfied the claimant's claims, after which both parties, disagreeing with the arbitral award, applied to the state court for annulment. The state court satisfied the application to set aside the award, since the initial award had been annulled earlier as contrary to Russian public policy, which precluded the parties from resorting to the arbitration again.

According to the commercial court, the parties should have instead applied to the commercial court to resolve their dispute (Russian Commercial Procedure Code, article 234(4)) and the arbitral tribunal could not have reconsidered the case on the merits under such circumstances.

The Russian Supreme Court Sends A Bankrupt To Arbitration

On 13 May 2021, a ruling was rendered refusing to refer an insolvent party's appeal against the decisions of lower instance courts to the Judicial Chamber of the Supreme Court of the Russian Federation for Economic Disputes. The debtor is contesting the judgments due to the fact that its claims were left without consideration, reasoning that the claimant's insolvency did not rule out arbitration.^[16]

When justifying why the dispute could not be arbitrated, the claimant relied on judgments in Case No. A40-16719/19, whereby an arbitration clause with another creditor was declared unenforceable in the same insolvency proceedings. The courts had refused to follow this practice, ruling that the facts of the disputes were different.

Thus, in Case No. A40-16719/19, the claimant sought a deferral of payment of the arbitration fee, which was denied, while the respondent failed to prove that the debtor had funds to cover the arbitration. At the same time in Case No. A40-31546/2020, having been declared bankrupt, the claimant nonetheless did not apply for a deferral of payment of the arbitration fee, and the respondent provided evidence of the claimant's being in possession of sufficient funds, and filed a guarantee letter, confirming its willingness to cover all of the arbitration costs itself.

The role of a court-appointed receiver in these two disputes is also worth considering. In the first dispute, the appellate court remanded the case for re-examination, since the claimant was undergoing bankruptcy supervision. The court was of the opinion that the provisional administrator should have been brought into the arbitral proceedings as a third party, which was not permitted by the ICC Arbitration Rules. At the same time, the dispute in Case No. A40-31546/2020 coincided with the latest stage of insolvency proceedings (receivership), and, therefore, the court-appointed receiver was fully authorised to represent the insolvent claimant, hence the issue of third-party joinder was not relevant.

A Document Named As An Arbitral Award

On 16 November 2020, a judge of the Commercial Court of the Kaluga Region delivered a ruling refusing to issue a writ of execution for the enforcement of an award of the ad hoc arbitrator, A A Galich, 'who called himself an arbitral tribunal acting as a sole arbitrator' and who rendered, in the opinion of the state court, 'a document named an arbitral award.'^[17]

In dismissing the request for a writ of execution filed by Scientific and Production Enterprise Foton LLC against Synergia LLC, the commercial court stressed, in particular, that A A Galich effectively performed administration of arbitration in the absence of the government permission to the arbitration institution, which is a violation of the procedure set forth by the federal law.

Furthermore, according to the court, the tribunal was an ad hoc tribunal constituted for resolving a specific dispute only formally, while in reality it demonstrated the characteristics inherent to institutional arbitration, as confirmed by the website, containing the information on the work of the tribunal, links to case law, an association of arbitrators – the Kaluga Regional Chamber of Arbitrators and Judges – that has not obtained the right to function as a permanent arbitration institution after 1 November 2017.

The court then qualified the conduct of the parties to the dispute as a form of unlawful use of arbitration, pointing out the bad faith and abuse of rights by the parties and the arbitrator, which created the appearance of a private law dispute.

Russian Courts Agreed With An Ad Hoc Award Issued With Respect To Non-signatories Of The Arbitration Agreement

On 3 November 2020, the Commercial Court for the Moscow District upheld the ruling of the court of first instance that refused to set aside the arbitral award in question. In support of their arguments, the applicants submitted that the arbitration agreement had been signed by only one of the seven respondents.

Yet, the Moscow Commercial Court and later the Commercial Court for the Moscow District both confirmed that the arbitration clause extended not only to its signatory, but also to the affiliates of the latter. In this regard, the Moscow Commercial Court cited the arbitral award in its ruling: 'Para. 8.2 of the Settlement Agreement stipulates that all parties thereto are responsible for the recognition by their affiliates of the final nature of that Agreement. Therefore, if the affiliates – here, meaning also any legal entities – face claims under the said agreements or in view of their termination, the arbitration clause must apply as well.'^[18]

The Court also noted that the respondents never contested the arbitral tribunal's jurisdiction during the arbitration and were actively participating in the proceedings in the case.

International Investment Cases With A Russian Twist

Prosecutors Take The Driving Seat In Arbitration And International Courts

The State Duma (lower house of the Russian parliament) passed in the third (final) reading the presidential bill on empowering the Prosecutor General's Office of the Russian Federation instead of the Russian Ministry of Justice to represent the interests of the Russian Federation in international and foreign courts. The explanatory note to the draft law indicates that the transfer to the Prosecutor General's Office of the Russian Federation of the functions of representing and protecting the interests of the Russian Federation in interstate bodies,

foreign and international courts and before international arbitral tribunals will increase the overall effectiveness.^[19]

Originally, in March 2021 Prosecutor General Igor Krasnov asked Russian President Vladimir Putin to delegate to the Prosecutor General's Office the authority to represent Russia at the European Court of Human Rights and other international courts. Prosecutor General Igor Krasnov justified it based on the constant pressure on Russia from Ukrainian legal claims, 'legal aggression' against Russia unleashed by Russian and foreign businessmen (Sergei Pugachev, Mikhail Khodorkovsky and others), as well as the delicate situation with the World Anti-Doping Agency. In his view, the situation required urgent actions and the Prosecutor's Office has all the tools to most effectively ensure the protection of the state.

Yukos Saga Continues

The **Yukos** narrative continues to be one of the most vividly discussed topics in the sphere of international arbitration. On 5 February 2021, the Supreme Court of the Netherlands held an in-person hearing on the appeal of the Russian Federation against the ruling of the Court of Appeal of The Hague of 18 February 2020, which upheld the arbitral awards issued in 2014 in the **Yukos** case.^[20]

The counsel of the Russian Federation presented several arguments about serious flaws in the arbitral awards that were ignored by the appellate court. First, the Russian Federation could not be considered bound by the arbitration clause contained in the Energy Charter Treaty (ECT) as this international treaty had never been ratified by the state. Only the Russian parliament could, by its decision on ratification, extend the jurisdiction of international arbitration (arbitral tribunal) to relations between the Russian state and investors. Moreover, the ECT cannot protect the so-called circular 'investments', which in fact were the siphoning off assets from the Russian Federation for the purpose of money laundering and tax evasion.

Further, the Russian counsel emphasised that the issues of the proper interpretation of the ECT should be referred to the Court of Justice of the European Union, as they relate to the interpretation of EU law. The Russian Federation shares the concern at the level of many EU countries that the modern investor-state dispute settlement system, instead of protecting genuinely foreign investments, is often being used for resolution of in fact domestic tax and administrative disputes, and arbitral tribunals regularly overstep their established competence. One might also take a closer look at the final remarks of the Russian Deputy Minister of Justice concerning the case.^[21]

At the same time, on 23 April 2021, an adviser to the Supreme Court of the Netherlands has recommended that Russia's appeal to overturn the US\$50 billion award won by the former majority shareholders in **Yukos** should be dismissed.^[22] In its non-binding opinion, the court's advocate general Paul Vlas advised that all grounds that Russia has raised in its set-aside application should be rejected.^[23]

The decision of the Supreme Court of the Netherlands on the appeal of the Russian Federation is awaited before the end of 2021.

Notably, on 14 April 2021, the High Court in London refused to lift a stay on enforcing the **Yukos** award. Although originally the stay was put in place before the judgment of the Court of Appeal of The Hague, on 14 April 2021, Mr Justice Henshaw of the High Court ruled to maintain it until the Supreme Court of the Netherlands makes its final decision. Mr Justice Henshaw reasoned that in his view Russia's appeal before the Supreme Court of the

Netherlands stands a chance of success and is not aimed solely at delaying the procedure any further. The Court also dismissed the Yukos shareholders' request to order that Russia provide security in the form of US\$7 billion. The High Court judge noted that, although Russia was opposing enforcement, there was no evidence of the state's intention to hide assets.^[24]

In parallel, Russia received a new decision in the *Yukos* case. The Yukos Foundation reported that a Geneva-seated tribunal issued the award, ordering Russia to pay US\$5 billion to a former affiliate of Yukos, in one of the second wave of treaty claims filed over the oil company's collapse.^[25] The Yukos Foundation stated that 'The Tribunal found that Russia illegally expropriated Yukos Capital's loans to its former parent company Yukos Oil and denied it justice in the Russian courts in what represented the very opposite of due process of law.'^[26]

As was expected, the Prosecutor General's Office of the Russian Federation stated that it would appeal this decision.^[27] Apparently, the *Yukos* case is far from being finished, and there is a lot of room for further action.

VEB.RF Looking To Recover Damages From Ukraine In The Prominvestbank Dispute

VEB.RF is a Russian state development corporation that provides financing for large-scale projects to develop the country's infrastructure, including the banking sphere.

In September 2018, the Kiev Court of Appeal seized the shares of Ukrainian 'subsidiaries' of the Russian state banks, including Prominvestbank. At the beginning of March 2020, it became known that the Ukrainian authorities sold the shares in Prominvestbank at an auction, but there was no information about the buyer. VEB.RF considers the auction illegal and intends to compensate for its losses at the expense of the Ukrainian assets on the territory of foreign jurisdictions.^[28] According to the UNCTAD, the Russian state corporation's claims amount to US\$200 million.^[29]

On 31 January 2021, the Stockholm Chamber of Commerce tribunal issued an interim award recognising VEB.RF as an investor within the meaning of the Russia–Ukraine BIT. The arbitrators also confirmed that VEB.RF discharged its duty to try to settle the dispute.

The Paris Court Of Appeal Reverses The Russia V JSC Oschadbank Award

The arbitral award ordering Russia to pay US\$1.1 billion worth of compensation to Oschadbank has been set aside in France on jurisdictional grounds. The reason for the reversal was that the bank's Crimean division had been functioning since 1991. The French court therefore ruled that the bank's assets were not covered by the Russia–Ukraine BIT that guaranteed investment protection only from 1992. The Court also dismissed the bank's objections to the effect that those arguments had not been raised during the arbitration.^[30]

Ukrainian Company Energoatom Demands Compensation For Lost Assets

The Ukrainian company Energoatom has announced on its website that it has sent a notice of dispute to the competent authorities of the Russian Federation under article 9(1) of the 1999 Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation No. 1302 on Promotion and Mutual Protection of Investments.^[31]

The dispute refers to assets lost by the company in Crimea, in particular, the Donuzlavskaya Wind Power Plant, which is currently located in the territory held by the Russian Federation.

Endnotes

- 1 See <https://iccwbo.org/media-wall/news-speeches/russian-ministry-of-justice-grants-icc-permanent-arbitration-institution-status/>. ^ [Back to section](#)
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- 6 See <http://centerarbitrgongo.ru/en.htm>. ^ [Back to section](#)
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- 8 ICAL RF, article 16(1); AL RF, article 16(1). ^ [Back to section](#)
- 9 ICAL RF, article 7(3); AL RF, article 7(3). ^ [Back to section](#)
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- 11 ICAL RF, article 9; AL RF, article 9. ^ [Back to section](#)
- 12 AL RF, article 22. ^ [Back to section](#)
- 13 See <https://globalarbitrationreview.com/anti-suit-injunction/sanctioned-russian-entity-fails-restrain-scc-case>. ^ [Back to section](#)
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- 19 See <https://sozd.duma.gov.ru/bill/1183775-7>. ^ [Back to section](#)

- 20 See <https://www.yukoscase.com/news/in-the-news/russian-federation-presented-cas-e-dutch-supreme-court/>. ^ [Back to section](#)
- 21 Final remarks of the Russian Deputy Minister of Justice Mikhail Galperin (has now ceased to hold this position) at the hearings of the Dutch Supreme Court on 5 February 2021: <https://minjust.gov.ru/ru/events/48316/>. ^ [Back to section](#)
- 22 See <https://globalarbitrationreview.com/dutch-advocate-general-says-yukos-award-s-should-stand>. ^ [Back to section](#)
- 23 Opinion of the Supreme Court of the Netherlands advocate general Paul Vlas concerning the Yukos case, https://files.lbr.cloud/public/2021-04/ECLI_NL_PHR_2021_425.pdf?ASPI97zin96XbAF_XqVZn0VKV3852NNE. ^ [Back to section](#)
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