

# ARBITRATION IN RUSSIA

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## 1. Historical background

- 1.1.1 From September 1922 onwards, the newly created arbitration commissions settled commercial disputes between domestic parties and state enterprises.<sup>1</sup> These “*arbitrazh*” tribunals were neither courts, in the proper sense of the term, nor an independent arbitration system but rather quasi-judicial panels of adjudicators.<sup>2</sup> Foreign trade disputes were resolved by arbitration under two specialised permanent arbitration bodies: the Maritime Arbitration Commission (**MAC**) and the International Commercial Arbitration Court (**ICAC**),<sup>3</sup> which dealt with all non-maritime international trade disputes. During the Soviet era, only special, state-controlled trading enterprises could engage in foreign trade. These enterprises alone had access to international arbitration.
- 1.1.2 In addition to this system for resolving trade disputes between Soviet foreign trade enterprises and parties from non-communist countries, the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (**Moscow Convention**)<sup>4</sup> introduced a compulsory international arbitration scheme for all disputes arising between state trading enterprises of the Member States of the Council for Mutual Economic Assistance (**COMECON**).
- 1.1.3 On 14 August 1993, the Law of the Russian Federation on International Commercial Arbitration (**Russian Arbitration Act**) came into force.<sup>5</sup> The Russian Arbitration Act was introduced to make international commercial arbitration in Russia more acceptable to foreign parties, with particular regard to investment and foreign trade disputes. The Russian Arbitration Act is based on the internationally recognised standard of the Model Law (1985).<sup>6</sup>

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<sup>1</sup> Statute on the procedure of resolution of proprietary disputes between state institutions and enterprises, published by the All-Russian Central Executive Committee and the Council of the People’s Commissars of the Russian Socialist Federated Soviet Republic, dated 21 September 1922. See *Sobranie uzakonenyi i rasporyazheniy Rabochego i krestyanskogo Pravitel’sva* 1922, No 60, s 769.

<sup>2</sup> State *arbitrazh* was a process by which State-owned entities would solve their disputes. Each State *arbitrazh* commission was a three-member panel consisting of a lawyer, an executive member of the trade relevant to the dispute and a third-party neutral. State *arbitrazh* was based on the premise that all disputes should be resolved for the benefit of all State-owned enterprises.

<sup>3</sup> ICAC has been in existence since 1932 when the Foreign Trade Arbitration Commission was set up. In 1987 it was renamed the Arbitration Court of the USSR Chamber of Trade and Commerce and in 1993 the entity became known as ICAC.

<sup>4</sup> Moscow Convention (adopted on 26 May 1972; in force on 13 August 1973) [<http://www.jurisint.org/en/ins/161.html>] (accessed 1 December 2011).

<sup>5</sup> Federal Law on International Commercial Arbitration No 5338-1, approved by the Supreme Court of the Russian Federation on 7 July 1993, as amended by Federal Law No 250-FZ dated 3 December 2008.

<sup>6</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

- 1.1.4 The Ministry of Economic Development of the Russian Federation has recently proposed changes to the Russian Arbitration Act. The changes are aimed at updating the Russian Arbitration Act to reflect the amendments made by the Model Law (2006).<sup>7</sup>

## 2. Scope of application and general provisions of the Russian Arbitration Act

### 2.1 Subject matter

- 2.1.1 The Russian Arbitration Act applies to international commercial arbitrations that are seated within the Russian Federation.<sup>8</sup> However, the following provisions of the Russian Arbitration Act also apply to disputes where the seat of the arbitration is outside the Russian Federation:

- Article 8 (stay of court proceedings in favour of arbitration);
- Article 9 (court applications for interim protective measures in support of arbitral proceedings); and
- Articles 35 and 36 (recognition and enforcement of awards).<sup>9</sup>

- 2.1.2 It follows from the wide definition of “arbitration”<sup>10</sup> in the Russian Arbitration Act that the provisions apply not only in relation to ICAC or MAC administered arbitrations, but may also be applied to ad hoc arbitrations and arbitrations organised under the rules of other permanent arbitral institutions (e.g. the ICC Court of Arbitration in Paris).

- 2.1.3 The Russian Arbitration Act does not apply to purely domestic arbitrations, which are presently governed by the Federal Law on Arbitration Courts in the Russian Federation (**AC**).<sup>11</sup> This chapter on Arbitration in the Russian Federation will focus primarily on international commercial arbitration under the Russian Arbitration Act, as currently in force. It will also highlight some important provisions of the ICAC Rules.

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<sup>7</sup> Draft Federal Law on the Amendments to the Federal Law of the Russian Federation on International Commercial Arbitration No 583004-5 (**Draft Amendments**) [<http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=88337>] (accessed 1 December 2011).

<sup>8</sup> Russian Arbitration Act, ch 1, art 1(1).

<sup>9</sup> The Draft Amendments also propose that a new art 17.9 of the Russian Arbitration Act (concerning the enforcement of interim measures) be applicable to arbitrations outside of the Russian Federation.

<sup>10</sup> Russian Arbitration Act, ch 1, art 2.

<sup>11</sup> Federal Law on Arbitration Courts in the Russian Federation No 102-FZ dated 24 July 2002, as amended by Federal Law No 194-FZ dated 27 July 2010 and Federal Law No 8-FZ dated 7 February 2011.

## 2.2 Structure of the law

2.2.1 The Russian Arbitration Act contains the following chapters:

- (i) general provisions;
- (ii) arbitration agreement;
- (iii) composition of arbitral tribunal;
- (iv) jurisdiction of the arbitral tribunal;
- (v) conduct of proceedings;
- (vi) making of the award and termination of proceedings;
- (vii) challenging an award; and
- (viii) recognition and enforcement of awards.

2.2.2 The Russian Arbitration Act also contains two appendices: the ICAC statute<sup>12</sup> and the MAC statute.<sup>13</sup>

## 2.3 General principles

2.3.1 The Russian Arbitration Act provides that:

- no court interference in the arbitral process may take place except as provided for by the Russian Arbitration Act (principle of non-intervention by the courts);<sup>14</sup>
- prior to their appointment, and subsequently at any stage of the arbitration, arbitrators must disclose any information that may give rise to justifiable doubts as to their impartiality or independence and they may be challenged if such doubts exist (principle of impartiality and independence of the arbitral tribunal);<sup>15</sup>
- the parties to a dispute may decide on particular issues relating to the arbitral procedure to be followed and thereby deviate from the provisions of the Russian Arbitration Act (where so permitted) (principle of party autonomy);<sup>16</sup> and
- the parties to a dispute must be treated equally and without preference and each party must be provided with an opportunity to present its case (principle of equality of the parties, fairness and due process).<sup>17</sup>

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<sup>12</sup> Russian Arbitration Act, appendix I.

<sup>13</sup> *Ibid*, appendix II.

<sup>14</sup> *Ibid*, ch 1, art 5.

<sup>15</sup> *Ibid*, ch 3, art 12.

<sup>16</sup> *Ibid*, ch 5, art 19.

<sup>17</sup> *Ibid*, ch 5, art 18.

## 3. The arbitration agreement

### 3.1 Definitions

- 3.1.1 The Russian Arbitration Act defines an arbitration agreement as:  
“[A]n agreement by the parties to submit all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, to arbitration. An arbitration agreement may be in the form of a separate agreement or, more usually, will be incorporated as a clause in the main agreement between the parties to which it relates.”<sup>18</sup>

### 3.2 Formal requirements

- 3.2.1 The arbitration agreement must be in writing.<sup>19</sup> The following will satisfy the formal requirement for the agreement to be in writing:
- an agreement in the form of a document signed by the parties;
  - an exchange of letters, telexes, or other means of telecommunication that provides a record of the parties’ agreement;<sup>20</sup>
  - an assertion by one party in its statement of claim or defence that there is an agreement between the parties to refer any dispute between them to arbitration that is not denied by the other party; and
  - a reference in an agreement to a separate document containing an arbitration clause, provided that the agreement is executed in writing and that the reference to the arbitration clause in the separate document expressly makes that clause part of the underlying agreement.<sup>21</sup>
- 3.2.2 As with international arbitration, an arbitration agreement executed in writing is required for parties to refer a domestic dispute to arbitration. Parties to a domestic dispute have a right to enter into an arbitration agreement up until the point when a court hands down a decision on the merits of the case.<sup>22</sup>
- 3.2.3 Previously, the Russian courts were known to readily annul awards on the basis that a signatory to an arbitration agreement (frequently a natural person) lacked the necessary authority of the corporate entity on behalf of which the arbitration

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<sup>18</sup> *Ibid*, ch 2, art 7(1).

<sup>19</sup> *Ibid*, ch 2, art 7(2).

<sup>20</sup> The Draft Amendments envisage that an arbitration agreement may be capable of being concluded by electronic means of communication including email. Draft Amendments, s 3.

<sup>21</sup> Russian Arbitration Act, ch 2, art 7(2).

<sup>22</sup> AC, ch 1, art 5(4).

agreement was entered into. This practice has subsided. The Russian courts have provided that certain corporate entities delegate certain implied authority to their directors/managers.<sup>23</sup>

- 3.2.4 Russian courts have also held that an arbitral institution must be identified by the parties at the time of execution of the arbitration agreement. The *arbitrazh* courts established that an arbitration agreement that allows a party to nominate a relevant institution at the time the dispute occurs will be deemed null and void.<sup>24</sup> With this in mind, both parties must expressly designate an arbitral institution at the time the arbitration agreement is executed to ensure its validity.
- 3.2.5 When designating an arbitral institution in the arbitration agreement, parties must ensure that the correct name of the institution is used. For example, prior judgments of the *arbitrazh* courts suggest that a reference of a dispute to the “Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation” is insufficient and may lead to non-enforcement of the award.<sup>25</sup>

### 3.3 Special tests and requirements of the jurisdiction

- 3.3.1 Under the Russian Arbitration Act the parties may refer the following disputes to international commercial arbitration in their agreement:<sup>26</sup>
- foreign trade disputes, resulting from contractual or other civil law relationships and disputes arising from other forms of international economic relationships, if the place of business of at least one of the parties is located outside of the Russian Federation; and
  - disputes between Russian companies with foreign investments and disputes between participants in such companies, as well as disputes between such entities and other private or public Russian persons.<sup>27</sup>
- 3.3.2 Notwithstanding the wide scope of disputes outlined above, the jurisdiction of the Russian Arbitration Act is limited by the wider Russian legal framework.<sup>28</sup> The

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<sup>23</sup> See *OOO Neftegaztehnologiya v CJSC NORD-Service*, Case No BAC-18170/09, Supreme Arbitrazh Court, 1 June 2010; the lower courts’ decision in the Federal Arbitrazh Court of the Western Siberian Region, Case No A81-4139/2009, 23 November 2009; and the Arbitrazh Court of the Yamalo-Nenetsk Region, Case No A81-4139/2009, 10 September 2009.

<sup>24</sup> See *OOO Rosich v Viktor Turlakov*, Case No 8711/08, Supreme Arbitrazh Court, 28 August 2008. This decision upheld both judgments of the Arbitrazh Court of Tomsk Oblast and the Federal Arbitrazh Court of the Western Siberia Region.

<sup>25</sup> See *Else S.p.A v FSK Keystone*, Case No KG-A40/7725-03, Federal Arbitrazh Court of the Moscow Region, 6 November 2003; and the earlier decision of the Moscow City Arbitrazh Court, Case No A40-9791/03-68-87, 3 June 2003. The decision of the Federal Arbitrazh Court highlights that the correct name of the institution is “International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation”.

<sup>26</sup> The ICAC Rules have broadly similar requirements. See ICAC Rules, ch 1, art 2(1), para 1.

<sup>27</sup> Russian Arbitration Act, ch 1, art 1(2).

<sup>28</sup> *Ibid*, ch 1, art 1(4).

Russian Arbitration Act does not apply where a specific legal provision prevents the use of arbitration or imposes an alternative and compulsory dispute resolution method. Types of disputes that are generally seen as non-arbitrable are:

- bankruptcy (including claims against debtors after a bankruptcy is declared);
- subsoil disputes; and
- disputes in relation to state property.

### 3.4 Separability

3.4.1 The Russian Arbitration Act provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement. The fact that the main contract may be null and void therefore does not invalidate the arbitration clause as a matter of law.<sup>29</sup> This is an important precondition for the arbitral tribunal's power to rule on its own jurisdiction.<sup>30</sup>

### 3.5 Mandatory and non-mandatory provisions

3.5.1 The Russian Arbitration Act identifies non-mandatory provisions through wording such as "unless otherwise agreed by the parties" or "the parties are free to agree." This language indicates that the parties to an arbitration agreement have the discretion to make their own arrangements on procedural matters. Express provisions in the arbitration agreement between the parties will take precedence over the non-mandatory provisions of the Russian Arbitration Act. However, where provisions are mandatory, the parties have no discretion to amend them or exclude their application by agreement.

3.5.2 Non-mandatory provisions include:

- the power of the arbitral tribunal to order interim protective measures;<sup>31</sup>
- the seat, date of the commencement and language of proceedings;<sup>32</sup>
- the number and the procedure for the appointment of arbitrators;<sup>33</sup> and
- the procedure for the conduct of the arbitral proceedings.<sup>34</sup>

3.5.3 In addition, the Russian Arbitration Act provides that where a provision of the Russian Arbitration Act (other than in respect of the law applicable to the substance

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<sup>29</sup> *Ibid.*, ch 5, art 16(1).

<sup>30</sup> See section 5.1 below.

<sup>31</sup> Russian Arbitration Act, ch 4, art 17.

<sup>32</sup> *Ibid.*, ch 5, art 20–22.

<sup>33</sup> *Ibid.*, ch 5, art 19.

<sup>34</sup> *Ibid.*, ch 4, art 17.

of the dispute) affords the parties discretion to agree on a particular issue, they may authorise a third party to exercise that discretion.<sup>35</sup> This relates, in particular, to institutional arbitration, where the parties may confer discretion on the arbitral institution (e.g. the right to appoint the arbitral tribunal on their behalf) by adopting the institutional rules in the arbitration agreement.<sup>36</sup> The Russian Arbitration Act further clarifies that, where the parties are free to agree on a particular issue, they may do so by incorporating specific (institutional or ad hoc) arbitration rules into their agreement by reference, which are then regarded as containing the agreement of the parties.<sup>37</sup>

## 4. Composition of the arbitral tribunal

### 4.1 Constitution of the arbitral tribunal

- 4.1.1 The Russian Arbitration Act provides that the parties to an arbitration agreement are free to determine the number of arbitrators. If the parties have not agreed to the number of arbitrators, three arbitrators shall be appointed.<sup>38</sup> The Russian Arbitration Act also provides that, unless otherwise agreed by the parties, nationality cannot be used as grounds for disqualifying a potential arbitrator. It is therefore possible to appoint foreign nationals as arbitrators for the purpose of international arbitral proceedings in Russia.<sup>39</sup>
- 4.1.2 The Russian Arbitration Act gives the parties freedom to agree on the procedure for appointing the arbitrators.<sup>40</sup> If one of the parties fails to comply with the agreed procedure then the Russian Arbitration Act provisions regarding arbitral appointments shall apply.<sup>41</sup>
- 4.1.3 The Russian Arbitration Act sets out the following appointment procedure to be followed in the absence of agreement by the parties. If the arbitral tribunal is comprised of three arbitrators, each party shall appoint one arbitrator and the two party-appointed arbitrators shall jointly appoint the third arbitrator. If a party fails to appoint its party-appointed arbitrator within 30 days of receipt of a request from the other party to do so, or if the two party-appointed arbitrators fail to

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<sup>35</sup> *Ibid.*, ch 1, art 2.

<sup>36</sup> See ICAC Rules, ch 5, art 17.

<sup>37</sup> Russian Arbitration Act, ch 1, art 2.

<sup>38</sup> *Ibid.*, ch 3, art 10.

<sup>39</sup> *Ibid.*, ch 3, art 11(1).

<sup>40</sup> *Ibid.*, ch 3, art 11(2).

<sup>41</sup> *Ibid.*, ch 3, art 11(4) and 11(5). See paragraphs 4.1.4–4.1.6 below.

agree on the appointment of the third arbitrator within 30 days of their appointment, then the President of the Russian Chamber of Commerce and Industry (**RCCI President**) will make the requisite appointment. The RCCI President will also make the appointment if the parties fail to agree on the appointment of a sole arbitrator.<sup>42</sup>

- 4.1.4 The Russian Arbitration Act provides for a number of situations where the parties may fail to follow the appointment procedure, including:
- where the parties have agreed an appointment procedure in their arbitration agreement but one of the parties does not comply with the agreed procedure;
  - where the parties, or the two party-appointed arbitrators, fail to reach agreement on the identity of the third arbitrator; or
  - where a third party (including an arbitral institution) does not fulfil the functions delegated to it in accordance with the agreed procedure.<sup>43</sup>
- 4.1.5 In these instances any party may request that the RCCI President takes the necessary measures to complete the appointment of the arbitrators, unless the arbitration agreement provides another mechanism for securing an appointment.<sup>44</sup> Any measures taken by the RCCI President to complete the constitution of the arbitral tribunal are not subject to appeal.<sup>45</sup>
- 4.1.6 In appointing an arbitrator, the RCCI President will have regard to the qualifications required of the arbitrator by the agreement of the parties and to such other considerations as are likely to ensure the appointment of an independent and impartial arbitrator. Moreover, where the RCCI President is to appoint either the sole arbitrator or the chair, the Russian Arbitration Act obliges him to take into account whether it is advisable to appoint an arbitrator of a nationality other than those of the parties to the dispute.<sup>46</sup>
- 4.1.7 The ICAC Rules contain general provisions on arbitrators including the requirements as to their impartiality and independence and their specialist knowledge in settling disputes.<sup>47</sup> ICAC maintains an approved list of arbitrators that is available on its website (in English and Russian)<sup>48</sup> and may be requested in hardcopy. However,

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<sup>42</sup> Russian Arbitration Act, ch 3, art 11(3).

<sup>43</sup> *Ibid.*, ch 3, art 11(4).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, ch 3, art 11(5).

<sup>46</sup> *Ibid.*

<sup>47</sup> ICAC Rules, ch 2, art 3(1).

<sup>48</sup> ICAC List of Arbitrators [<http://www.tpprf-mkac.ru>] (accessed 1 December 2011).

persons not included on that list may still be appointed to act as arbitrators in ICAC arbitral proceedings.<sup>49</sup>

- 4.1.8 In ICAC arbitral proceedings the rules in relation to the formation of the arbitral tribunal are set out in chapter five of the ICAC Rules. Unless otherwise agreed by the parties,<sup>50</sup> the ICAC Rules provide for an arbitral tribunal to consist of three arbitrators: one arbitrator appointed by each party and a chair appointed by the ICAC Presidium.<sup>51</sup> The ICAC Presidium has exclusive authority to appoint a chair. In addition, the ICAC Rules provide for the nomination of a case reporter by the chair of the arbitral tribunal (or the sole arbitrator) and the appointment of the case reporter by the ICAC Presidium.<sup>52</sup> The function of the case reporter is to keep a record of the proceedings, closed sessions of the arbitral tribunal and execute the orders of the ICAC President and the arbitral tribunal.

## 4.2 Procedure for challenging and substituting arbitrators

### *Challenge of arbitrators*

- 4.2.1 Arbitrators are required to disclose any circumstances occurring prior to their appointment and throughout the arbitral proceedings that may give rise to reasonable doubts as to their impartiality or independence.<sup>53</sup> Arbitrators are required to disclose circumstances such as participation in conferences sponsored by either party (or its counsel) to the arbitration.<sup>54</sup>
- 4.2.2 Arbitrators may only be challenged if grounds exist that give rise to justifiable doubts as to their impartiality or independence or if the arbitrators do not have the qualifications required by the agreement of the parties.<sup>55</sup> The parties are free to agree on additional grounds for challenge to those expressed in the Russian Arbitration Act.
- 4.2.3 A party is precluded from challenging its own party-appointed arbitrator if the circumstances giving rise to the challenge were known to the party at the time of appointment.<sup>56</sup>

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<sup>49</sup> ICAC Rules, ch 2, art 3(4).

<sup>50</sup> The ICAC Presidium also has discretion to determine whether a sole arbitrator is appropriate. To reach its decision the ICAC Presidium will consider the complexity of the case, amount of the claim and other circumstances.

<sup>51</sup> ICAC Rules, ch 5, art 17.

<sup>52</sup> *Ibid.*, ch 2, art 7(1).

<sup>53</sup> Russian Arbitration Act, ch 3, art 12(1).

<sup>54</sup> See *Yukos Capital S.a.r.l. v NK Rosneft*, Case No KG-A40/6775-07, Federal Arbitrazh Court of the Moscow Region, 13 August 2007; the earlier decisions of the Moscow City Arbitrazh Court, Case Nos A40-4577/07-8-46 and A40-4582/07-8-47; and the subsequent decision in Case No BAC-14955/07, Supreme Arbitrazh Court, 10 December 2007.

<sup>55</sup> Russian Arbitration Act, ch 3, art 12(2) and ICAC Rules ch 5, art 18(1).

<sup>56</sup> Russian Arbitration Act, ch 3, art 12(2).

*Procedure for challenging an arbitrator*

- 4.2.4 The parties are free to agree on the procedure for the challenge of arbitrators.<sup>57</sup> In the absence of an agreed procedure, the Russian Arbitration Act requires the challenging party to inform the arbitral tribunal of the reasons for the challenge in writing within 15 days of the constitution of the arbitral tribunal, or within 15 days of the date on which the challenging party learned of the circumstances giving rise to the right of challenge. If a challenged arbitrator does not step down voluntarily or if the other party to the arbitration objects to his/her removal, the challenge will be decided by the arbitral tribunal.<sup>58</sup>
- 4.2.5 If an arbitrator is challenged in accordance with either the procedure agreed by the parties or that provided by the Russian Arbitration Act and such challenge is not successful, the Russian Arbitration Act provides that a party may, within 30 days of receiving notice of the decision rejecting the challenge, request the RCCI President to decide the challenge. The RCCI President's decision is not subject to further appeal. Pending the RCCI President's decision on the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the proceedings and make an award. However, should the challenge subsequently succeed, any such award may be set aside.<sup>59</sup>
- 4.2.6 If an arbitrator can no longer perform his/her functions, or if for any other reason an arbitrator fails to fulfil his/her duties, the Russian Arbitration Act provides that the arbitrator's mandate terminates upon resignation or if the parties agree to remove the arbitrator.<sup>60</sup> If the parties fail to agree on the removal of the arbitrator and the situation remains unresolved in this regard, either party may request the RCCI President to intervene and decide on the termination of the arbitrator's mandate.<sup>61</sup>
- 4.2.7 The Russian Arbitration Act clarifies that an arbitrator may withdraw from office in the event of a challenge without such withdrawal being taken to imply acceptance by the arbitrator that the grounds for a challenge were valid.<sup>62</sup>

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<sup>57</sup> *Ibid.*, ch 3, art 13(1).

<sup>58</sup> *Ibid.*, ch 3, art 13(2).

<sup>59</sup> *Ibid.*, ch 3, art 13(3).

<sup>60</sup> *Ibid.*, ch 3, art 14(1).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, ch 3, art 14(2).

- 4.2.8 Under the ICAC Rules a party may challenge an expert or interpreter on the basis of reasonable doubts to impartiality or independence.<sup>63</sup> However, the ICAC Rules provide further grounds for the termination of arbitrators' appointments, such as removal by agreement of the parties or removal by the ICAC Presidium (upon an application of a party) for the failure to fulfil their duties.<sup>64</sup>

*Substitution of arbitrator(s)*

- 4.2.9 In the event that an arbitrator's mandate is terminated, the Russian Arbitration Act requires that the appointment of a substitute arbitrator is made in accordance with the same procedure used to appoint the arbitrator being replaced.<sup>65</sup>
- 4.2.10 For arbitrations under the ICAC Rules, an arbitrator whose mandate is terminated shall be replaced by the respective reserve arbitrator (if any). In the event that no reserve arbitrator is available, the replacement arbitrator will be appointed in accordance with the ICAC Rules.<sup>66</sup> The ICAC Rules further provide that the ICAC Presidium has the discretion to carry on with the case with the remaining tribunal if the replacement is sought after the end of the hearings. The ICAC Presidium will take into account the circumstances of the case, the opinions of the arbitrators and the opinion of the parties prior to making its decision.<sup>67</sup>

### **4.3 Arbitration fees and expenses**

- 4.3.1 The Russian Arbitration Act does not address arbitrators' fees and expenses. In ad hoc arbitral proceedings, these are matters for agreement between the parties and the arbitrators. In institutional arbitral proceedings, the amount and procedure for payment of the arbitration fees will be set out in the rules and cost schedules of the relevant arbitral institution.
- 4.3.2 The ICAC Rules set out detailed provisions for fees in relation to: the amount of the registration and arbitration fees; the procedure for their payment; their allocation as between the parties; and the procedure for covering the other costs of the arbitral proceedings.<sup>68</sup>

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<sup>63</sup> ICAC Rules, ch 5, art 18(4).

<sup>64</sup> *Ibid.*, ch 5, art 19.

<sup>65</sup> Russian Arbitration Act, ch 3, art 15.

<sup>66</sup> ICAC Rules, ch 5, art 20(1).

<sup>67</sup> *Ibid.*, ch 5, art 20(3).

<sup>68</sup> *Ibid.*, ch 5, art 14 and the Schedule of Arbitration Fees and Costs.

4.3.3 The registration fee in ICAC arbitral proceedings is currently a fixed fee of USD 1,000.<sup>69</sup> The arbitration fees, which cover the general expenses of ICAC, the Secretariat and the arbitrators' fees, are calculated on a sliding scale that depends primarily on the value of the claim and that of any counterclaim. The ICAC Rules provide for different fee amounts depending on the currency of the claim. Accordingly, any claim expressed in Russian Roubles will apply Rouble fees.<sup>70</sup> However, if a claim is expressed in a currency other than Russian Roubles, the arbitration fee will be expressed in USD.<sup>71</sup> By way of example, an arbitration fee of USD 2,600 shall be charged if the value of a claim does not exceed USD 10,000 whereas arbitration fees for claims in excess of USD 10,000,000 will be the sum of USD 74,600, plus 0.12% of the amount over USD 10,000,000.

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

5.1.1 Under both the Russian Arbitration Act and the ICAC Rules, an arbitral tribunal has the power to rule on its own jurisdiction including any objections to the existence or the validity of the arbitration agreement.<sup>72</sup> The Russian Arbitration Act requires that objections to the arbitral tribunal's jurisdiction must be raised no later than the submission of the statement of defence regardless of whether the objecting party has appointed or participated in the appointment of an arbitrator.<sup>73</sup>

5.1.2 Equally, any argument that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the arbitral tribunal exceeds the scope of its authority.<sup>74</sup> An arbitral tribunal may, however, admit an objection later if it considers the delay in raising the objection justified.<sup>75</sup> If a challenge to jurisdiction is not made during the course of the arbitral proceedings, an application to set aside a resulting award may be dismissed.<sup>76</sup>

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<sup>69</sup> ICAC Rules, Schedule of Arbitration Fees and Costs, art 2.

<sup>70</sup> *Ibid.*, art 3(1).

<sup>71</sup> *Ibid.*, art 3(2).

<sup>72</sup> Russian Arbitration Act, ch 4, art 16(1) and ICAC Rules, ch 1, art 2(4).

<sup>73</sup> Russian Arbitration Act, ch 4, art 16(2).

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> See *OOO Intercare v Berlin-Chemie/Minarini Pharma GmbH*, Case No KG-A40/6468-08, Federal Arbitrazh Court of the Moscow Region, 31 July 2008; and the earlier decision in the proceedings Case No A40-4877/08-40-44, Moscow City Arbitrazh Court, 19 May 2008.

5.1.3 An arbitral tribunal may rule on the challenge to its jurisdiction either as a preliminary issue by an award on jurisdiction or in its final award on the merits.<sup>77</sup> If the arbitral tribunal determines the issue of jurisdiction by an interim award, either party may, within 30 days of receipt of notice of the ruling, request the competent court to rule on jurisdiction. Such a court ruling is not subject to further appeal.<sup>78</sup> Pending the outcome of the court proceedings, the arbitral tribunal may continue the arbitral proceedings and render an award.<sup>79</sup> However, any such award is subject to being set aside if the court subsequently finds that the arbitral tribunal lacked or exceeded its jurisdiction.

## 5.2 Power to order interim measures

5.2.1 The Russian Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal may at the request of either party order interim measures of protection that it deems necessary for securing the claim concerning the subject matter of the proceedings. The arbitral tribunal may require any party to provide adequate security in connection with such measures.<sup>80</sup>

5.2.2 The ICAC Rules contain similar provisions. In particular, at the request of either party, the arbitral tribunal may order such interim measures to secure the subject matter of the claim as it deems necessary.<sup>81</sup> Such an order may take the form of an interim award.<sup>82</sup> The arbitral tribunal may request a party to provide appropriate security in connection with such measures.<sup>83</sup>

# 6. Conduct of proceedings

## 6.1 Commencing an arbitration

6.1.1 Subject to the agreement of the parties, arbitral proceedings in respect of a particular dispute are deemed to commence on the date on which the respondent receives the claimant's request for arbitration.<sup>84</sup> By comparison, under the ICAC

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<sup>77</sup> Russian Arbitration Act, ch 4, art 16(3).

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, ch 4, art 17.

<sup>81</sup> ICAC Rules, ch 6, art 36(1).

<sup>82</sup> *Ibid.*, ch 6, art 36(3).

<sup>83</sup> ICAC Rules, ch 6, art 36(2). The Draft Amendments remove the current interim measures provisions of the Russian Arbitration Act and replace them with provisions which are very similar to art 17 of the Model Law (2006) (see CMS Guide to Arbitration, vol II, appendix 2.1). However, provisions relating to the recognition and enforcement of interim measures set out in the Model Law (2006) are not envisaged by the Draft Amendments. Draft Amendments, ss 4–5.

<sup>84</sup> Russian Arbitration Act, ch 5, art 21.

Rules, an arbitration will commence at the time the claimant files its statement of claim.<sup>85</sup> In ICAC arbitral proceedings, the actual date of commencement is either the date on which the statement of claim is delivered to ICAC or, if sent by post, the post date.<sup>86</sup>

## **6.2 General procedural principles**

- 6.2.1 The two key procedural principles under the Russian Arbitration Act are that:
- (i) the parties shall be treated equally (without preference) and each party shall be given a full opportunity to present its case;<sup>87</sup> and
  - (ii) subject to the mandatory provisions of the Russian Arbitration Act, the parties have autonomy to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. In the absence of such agreement, the arbitral tribunal may, subject to the mandatory provisions of the Russian Arbitration Act, conduct the proceedings in a manner it considers appropriate.<sup>88</sup>

- 6.2.2 Under the ICAC Rules, the parties are free to agree on the procedure of the arbitration. However, if such agreement is not reached, the arbitral tribunal shall conduct the proceedings in such a manner as it considers appropriate, ensuring that the parties are treated with equality and that each party is given a fair opportunity to protect its interests.<sup>89</sup>

## **6.3 Seat, place of hearings and language of arbitration**

### *Seat and place of arbitration*

- 6.3.1 Under the Russian Arbitration Act, the parties are free to agree on the seat of the arbitration. Failing such agreement, the seat of the arbitration shall be determined by the arbitral tribunal, taking into account the circumstances of the case and the convenience of the parties.<sup>90</sup>
- 6.3.2 The ICAC Rules provide that the seat of the arbitration shall be Moscow, although the parties or the arbitral tribunal may agree to hold hearings and other sessions in a place other than Moscow with the agreement of the Executive Secretary of the ICAC (if necessary).<sup>91</sup>

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<sup>85</sup> ICAC Rules, ch 3, art 8(1).

<sup>86</sup> *Ibid.*, ch 3, art 8(2).

<sup>87</sup> Russian Arbitration Act, ch 5, art 18.

<sup>88</sup> *Ibid.*, ch 5, art 19.

<sup>89</sup> ICAC Rules, ch 6, art 26(2).

<sup>90</sup> Russian Arbitration Act, ch 5, art 20(1).

<sup>91</sup> ICAC Rules, ch 6, art 22(1).

*Language of arbitration*

- 6.3.3 Parties may agree on the language or languages to be used in the proceedings.<sup>92</sup> In the absence of such agreement, the arbitral tribunal shall determine the language or languages to be used. Such agreement or determination shall, unless provided otherwise, apply to any written/oral submissions made by the parties, to any hearings and any awards, decisions or other communications by the arbitral tribunal.<sup>93</sup>
- 6.3.4 The Russian Arbitration Act provides that the arbitral tribunal may in appropriate circumstances order that any documentary evidence submitted by the parties be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.<sup>94</sup> The arbitral tribunal is not obliged to order the translation of documents into the language of the arbitration and the Constitutional Court of the Russian Federation has held that documents in a language other than the language of the arbitration do not prejudice any of the constitutional rights of a party, provided that the arbitral tribunal does not object to such documents.<sup>95</sup>
- 6.3.5 Although Russian is the default language of proceedings under the ICAC Rules, the parties are free to agree on a different language.<sup>96</sup> Furthermore, the ICAC Rules provide that documents (excluding written evidence) submitted by the parties in the arbitral proceedings shall be either in the language of: the arbitration; the contract; or the correspondence between the parties. Written evidence shall be submitted in the language of the original document.<sup>97</sup> Like the Russian Arbitration Act, the ICAC Rules permit ICAC (whether of its own volition or at the request of a party) to request that documents submitted in a language other than the language of the arbitration are translated at the expense of the party submitting such documents.<sup>98</sup>

**6.4 Multi-party issues**

- 6.4.1 The ICAC Rules contain an express provision for the joinder of third parties to the arbitral proceedings. Such joinder is possible only with the consent of the parties and the written consent of the third party proposed to be joined to the proceedings.

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<sup>92</sup> Russian Arbitration Act, ch 5, art 22(1).

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*, ch 2, art 22(2).

<sup>95</sup> See *Claim of OOO Voshod*, Case No 1310-O-O, Constitutional Court of the Russian Federation, 19 October 2010.

<sup>96</sup> ICAC Rules, ch 6, art 23(1).

<sup>97</sup> *Ibid.*, ch 6, art 23(2).

<sup>98</sup> *Ibid.*

The request for joinder of a third party must be made before the deadline for the submission of the respondent's defence.<sup>99</sup>

6.4.2 The Russian Arbitration Act contains no express provision on the participation of third parties in the proceedings. It follows that joinder of third parties will only be possible if all parties agree to do so, whether in ad hoc or ICAC arbitral proceedings.

## 6.5 Oral hearings and written proceedings

6.5.1 The Russian Arbitration Act provides that, subject to any contrary provision in an arbitration agreement, the arbitral tribunal has the authority to decide whether to hold oral hearings for the presentation of evidence or oral argument or whether the proceedings should be conducted only on the basis of written submissions and other materials submitted by the parties.<sup>100</sup> However, the arbitral tribunal shall hold an oral hearing at relevant stages of the arbitration upon the request of a party to the arbitration, subject only to contrary provisions of the arbitration agreement.<sup>101</sup> The Russian Arbitration Act requires that the parties are given sufficient advance notice of any hearing (including procedural hearings) and of any meeting of the arbitral tribunal for the purpose of taking evidence.<sup>102</sup>

6.5.2 Under the ICAC Rules, the default rule is that the arbitral tribunal shall hold a hearing to enable the parties to present and argue their case in the light of the evidence presented in the proceedings.<sup>103</sup> The ICAC Rules also require that the parties are notified of the place and time of a hearing so as to afford them at least 30 days to prepare for and appear at the hearing.<sup>104</sup> However, the parties may agree on shorter notice periods. The arbitral tribunal may hold further hearings if the circumstances so require.<sup>105</sup> In ICAC arbitral proceedings the parties may, however, choose to waive their right to an oral hearing and conduct the arbitral proceedings solely on written submissions.<sup>106</sup>

6.5.3 Although the Russian Arbitration Act does not require the arbitral tribunal to keep formal minutes of the arbitral proceedings, the ICAC Rules provide that minutes of

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<sup>99</sup> ICAC Rules, ch 6, art 28.

<sup>100</sup> Russian Arbitration Act, ch 5, art 24(1).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, ch 5, art 24(2).

<sup>103</sup> ICAC Rules, ch 6, art 32(1).

<sup>104</sup> *Ibid.*, ch 6, art 32(2).

<sup>105</sup> *Ibid.*, ch 6, art 32(3).

<sup>106</sup> *Ibid.*, ch 6, art 34.

arbitration hearings must be kept and that such minutes must contain a description of the proceedings at the hearing.<sup>107</sup> Both parties have the right to review these minutes. At the request of either party, the arbitral tribunal may amend or change the minutes if it considers the request to be justified.<sup>108</sup>

## 6.6 Default by one of the parties

6.6.1 Unless otherwise agreed by the parties, under the Russian Arbitration Act default by a party occurs in the following circumstances:

- where the claimant fails to submit its statement of claim within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal must terminate the proceedings;
- where the respondent fails to submit its statement of defence within the time period agreed by the parties or determined by the arbitral tribunal, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission by the respondent of the claimant's allegations; and
- where a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make an award on the basis of the evidence before it.<sup>109</sup>

6.6.2 The ICAC Rules equally provide the arbitral tribunal discretion to continue the proceedings and make an award in the event that a party who has been duly notified of the hearing fails to appear.<sup>110</sup> However, the ICAC Rules also permit a defaulting party to request in writing that the arbitral tribunal adjourns the proceedings for good reason.<sup>111</sup>

## 6.7 Taking of evidence

6.7.1 The Russian Arbitration Act contains only limited provisions on the subject of evidence. Generally, each party is required to prove the facts on which it relies in support of its claim or defence by the usual means of evidence, which include: documents; real evidence (e.g. sample goods); witnesses; and expert opinions.

6.7.2 The Russian Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of the evidence submitted by the parties.<sup>112</sup> Furthermore,

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<sup>107</sup> *Ibid*, ch 6, art 33(1).

<sup>108</sup> *Ibid*, ch 6, art 33(2).

<sup>109</sup> Russian Arbitration Act, ch 5, art 25.

<sup>110</sup> ICAC Rules, ch 6, art 32(3).

<sup>111</sup> *Ibid*, ch 6, art 32(4).

<sup>112</sup> Russian Arbitration Act, ch 5, art 19(2).

any documents, statements or other information provided by one party to the arbitral tribunal must be communicated to the other party.<sup>113</sup>

6.7.3 The ICAC Rules expressly require that each party prove the circumstances on which it relies in support of its pleaded case. The arbitral tribunal may request a party to submit additional evidence. The arbitral tribunal may, at its discretion, order the conduct of an expert examination, request the submission of evidence by third parties and summon and hear witnesses.<sup>114</sup> In ICAC arbitrations, the arbitrators are free to evaluate the evidence at their discretion.<sup>115</sup>

6.7.4 The ICAC Rules further state that all documents submitted to ICAC by one party to the arbitration should be sent by the ICAC Secretariat to all other parties. The parties shall also receive expert reports and other documentary evidence on which the award may be based.<sup>116</sup>

## 6.8 Appointment of experts

6.8.1 The Russian Arbitration Act contains provisions specifically dealing with experts appointed by the arbitral tribunal.<sup>117</sup> Unless otherwise agreed by the parties, an arbitral tribunal has the power to:

- appoint one or more experts to report to it on specific issues determined by the arbitral tribunal; and
- require that a party provide the tribunal-appointed expert with any relevant information or to produce (or provide access to) documents, goods or other property for inspection.<sup>118</sup>

6.8.2 The Russian Arbitration Act also provides that, unless otherwise agreed by the parties, the expert shall after delivery of his report, at the request of a party or if the arbitral tribunal considers this necessary, participate in a hearing where the parties have the opportunity to put questions to the tribunal-appointed expert or to present their own expert witnesses to give evidence on the points in issue.<sup>119</sup>

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<sup>113</sup> *Ibid*, ch 5, art 24(3).

<sup>114</sup> ICAC Rules, ch 6, art 31(1).

<sup>115</sup> *Ibid*, ch 6, art 31(4).

<sup>116</sup> *Ibid*, ch 4, art 16(2).

<sup>117</sup> Russian Arbitration Act, ch 5, art 26.

<sup>118</sup> *Ibid*, ch 5, art 26(1).

<sup>119</sup> *Ibid*, ch 5, art 26(2).

## 6.9 Confidentiality

- 6.9.1 The Russian Arbitration Act does not contain an express confidentiality provision. In ICAC proceedings, however, there is an obligation on the arbitrators, case reporter, experts and ICAC Secretariat to keep confidential any information that they become aware of by virtue of the arbitral proceedings.<sup>120</sup> Importantly, this obligation of confidentiality does not expressly extend to the parties in dispute.
- 6.9.2 In addition, the ICAC Rules clarify that the arbitration hearings shall be conducted in private, unless the parties consent and direct the arbitral tribunal to allow the attendance of persons not participating in the proceedings.<sup>121</sup>

## 6.10 Court assistance in taking evidence

- 6.10.1 The Russian Arbitration Act allows the arbitral tribunal or a party to an arbitration (with the approval of the arbitral tribunal) to request assistance from a competent court in the Russian Federation in taking evidence. The court may execute the request, in accordance with its rules on taking evidence.<sup>122</sup>

# 7. Making of the award and termination of proceedings

## 7.1 Choice of law

- 7.1.1 In 2002, the third part of the Russian Civil Code containing rules on conflict of laws (**Civil Code**) was introduced.<sup>123</sup> The Civil Code provides rules for defining the governing law where relations involve a “foreign element”.<sup>124</sup> Under the Civil Code, the relevant existing legislation is used to establish the governing law by international commercial arbitrators (i.e. Russian international treaties and the Russian Arbitration Act).<sup>125</sup> Furthermore, the Civil Code defines the procedure for construction of foreign law and sets out the principal conflict of laws rules.
- 7.1.2 The Russian Arbitration Act sets out how the arbitral tribunal is to determine the law applicable to the substance of the dispute.<sup>126</sup> It requires the arbitral tribunal to decide the dispute in accordance with the law chosen by the parties as applicable

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<sup>120</sup> ICAC Rules, ch 6, art 25.

<sup>121</sup> ICAC Rules, ch 6, art 32(1).

<sup>122</sup> Russian Arbitration Act, ch 5, art 27.

<sup>123</sup> The third part of the Civil Code was adopted by Federal Law No 146-FZ dated 26 November 2001 and came into force on 1 March 2002.

<sup>124</sup> Civil Code, part 3, art 1186.

<sup>125</sup> *Ibid.*

<sup>126</sup> Russian Arbitration Act, ch 6, art 28.

to the substance of their dispute. Any reference to the law or legal system of a state shall be construed as directly referring to the substantive law of that state and not to its conflict of laws rules.<sup>127</sup>

- 7.1.3 In the absence of a choice of law by the parties, the arbitral tribunal shall apply the law determined by it in accordance with the conflict of laws rules which it considers applicable.<sup>128</sup> The arbitral tribunal may decide to apply the conflict of laws rules from the Civil Code. Under the Civil Code, should the parties fail to choose the governing law, the law of the country where a main executor under a contract is located shall be applied.<sup>129</sup>
- 7.1.4 This introduces an element of uncertainty for the parties, as their substantive rights and obligations may differ substantially depending on the applicable law. It is therefore always preferable for the parties to include an express choice of law provision in their agreement. Doing so will, to the greatest possible extent, also help the parties (or the appointing authority) identify and appoint arbitrators with the requisite legal knowledge from the outset of the proceedings.
- 7.1.5 The Russian Arbitration Act also requires the arbitral tribunal to decide the matter in accordance with the terms of the underlying agreement between the parties. The arbitral tribunal should take into account the trade customs applicable to the particular transaction in the arbitration.<sup>130</sup>
- 7.1.6 Choice of law issues are also likely to be subject to the supervisory function of the Russian courts. The Supreme Arbitrazh Court held that a decision of the arbitral tribunal on the choice of law can be reviewed by the state courts. The court did not adopt the conventional approach to hold that the choice of law is a substantive issue and should be left to the arbitral tribunal.<sup>131</sup>

## **7.2 Timing, form and content of award**

- 7.2.1 The Russian Arbitration Act provides that an award shall be made in writing and shall be signed by the arbitrator(s). If the arbitral tribunal consists of more than one arbitrator the signatures of a majority of the arbitrators will suffice, provided that an explanation is provided for the omission of any signatures.<sup>132</sup>

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<sup>127</sup> *Ibid*, ch 6, art 28(1).

<sup>128</sup> *Ibid*, ch 6, art 28(2).

<sup>129</sup> Civil Code, part 3, art 1211.

<sup>130</sup> ICAC Rules, ch 6, art 26(1).

<sup>131</sup> See *OJSC Efirnoe v LLC Delta Villmar CIS*, Case No BAC-11861/10, Supreme Arbitrazh Court, 13 January 2011.

<sup>132</sup> Russian Arbitration Act, ch 6, art 31(1).

- 7.2.2 The award must state the reasons on which it is based, whether the claim is allowed or disallowed, the amount of the arbitration fees and costs, and their allocation between the parties.<sup>133</sup> The Russian Arbitration Act further requires the award to be dated and to state the seat of arbitration as agreed by the parties or determined by the arbitral tribunal.<sup>134</sup> The award will be deemed to have been made at that seat. The parties shall receive a signed copy of the award.<sup>135</sup>
- 7.2.3 The ICAC Rules allow the arbitral tribunal to declare the proceedings closed and proceed to making an award when all the facts relating to the dispute have been sufficiently clarified. The award shall be made in a closed session of the arbitral tribunal and decided by a majority of votes. If a majority cannot be reached, the chair of the arbitral tribunal shall make the award.<sup>136</sup> The ICAC Rules also provide for content of the award in detail.<sup>137</sup>

### 7.3 Settlement

- 7.3.1 If the parties settle their dispute in the course of the arbitral proceedings, both the Russian Arbitration Act<sup>138</sup> and the ICAC Rules<sup>139</sup> require that the arbitral tribunal terminates the proceedings and, if requested by the parties (without the objection from the arbitral tribunal), records the settlement in the form of an award on agreed terms. The Russian Arbitration Act and the ICAC Rules provide further clarification that an award on agreed terms shall state that it is an award and comply with the requirements as to form and content of an award.<sup>140</sup> An award on agreed terms has the same status and effect as an award on the merits of the case.

### 7.4 Power to award interest and costs

- 7.4.1 Under the Russian Arbitration Act the fees and costs of the arbitration must be assessed and allocated as between the parties in a costs order forming part of the award.<sup>141</sup> Currently, there is no established practice in ad hoc arbitral proceedings pursuant to which the winning party may claim reimbursement of all or part of its legal costs and other expenses. However, arbitral tribunals will, in practice, exercise their discretion in relation to such claims upon an application of a party and may make an award for reimbursement of costs and expenses.

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<sup>133</sup> *Ibid*, ch 6, art 31(2).

<sup>134</sup> *Ibid*.

<sup>135</sup> *Ibid*, ch 6, art 31(4).

<sup>136</sup> ICAC Rules, ch 7, art 38.

<sup>137</sup> *Ibid*, ch 7, art 39.

<sup>138</sup> Russian Arbitration Act, ch 6, art 30(1).

<sup>139</sup> ICAC Rules, ch 7, art 41(1).

<sup>140</sup> Russian Arbitration Act, ch 6, art 30(2) and ICAC Rules, ch 7, art 41(2).

<sup>141</sup> Russian Arbitration Act, ch 6, art 31(2).

- 7.4.2 By contrast, in ICAC proceedings the arbitration fees and other additional costs (such as expert witness or translators' fees, travelling expenses, etc) shall be borne by the losing party<sup>142</sup> or apportioned between the parties pro rata depending upon their respective success or failure if a claim or counterclaim succeeds only in part.<sup>143</sup> In addition, the winning party is entitled to reimbursement of its reasonable legal costs and expenses (including the cost of legal representation) from the losing party.<sup>144</sup>
- 7.4.3 The ICAC Rules also require that the arbitral tribunal includes in its award the amount of the arbitration costs and fees in the case and the apportionment of such costs as between the parties.<sup>145</sup>

## 7.5 Termination of the proceedings

- 7.5.1 Under the Russian Arbitration Act, the arbitral proceedings are terminated either by a final award or by an order of the arbitral tribunal.<sup>146</sup> Furthermore, the arbitral tribunal is required to make an order terminating the arbitral proceedings when:
- the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises that the respondent has a legitimate interest in obtaining a final settlement of the dispute;
  - the parties agree to terminate the proceedings; or
  - the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.<sup>147</sup>
- 7.5.2 Although the arbitral tribunal's mandate will be terminated, it will nevertheless have the authority to correct or interpret the award, make an additional award or resume proceedings where a matter is referred back by the Russian courts in setting aside proceedings.<sup>148</sup>
- 7.5.3 The ICAC Rules similarly provide for the termination of the proceedings through the final award on the merits. Alternatively, the arbitral tribunal may issue an order for termination of the proceedings, although it must comply with the same requirements as a final award on the merits.<sup>149</sup>

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<sup>142</sup> ICAC Rules, Schedule of Arbitration Fees and Costs, art 6(1).

<sup>143</sup> *Ibid*, art 6(2).

<sup>144</sup> *Ibid*, art 9.

<sup>145</sup> ICAC Rules, ch 7, art 39.

<sup>146</sup> Russian Arbitration Act, ch 6, art 32(1).

<sup>147</sup> *Ibid*, ch 6, art 32(2).

<sup>148</sup> *Ibid*, ch 6, art 32(3).

<sup>149</sup> ICAC Rules, ch 7, art 37 and 44.

## 7.6 Correction, clarification and issuance of a supplemental award

- 7.6.1 Under the Russian Arbitration Act, each party may (within 30 days of receipt of the award)<sup>150</sup> request that the arbitral tribunal corrects any errors in computation, any clerical or typographical errors, or any errors of a similar nature.<sup>151</sup> If so agreed by the parties, the arbitral tribunal may also provide an interpretation on a specific point or part of the award. The request for correction or interpretation of the award must be made with notice to the other party. The Russian Arbitration Act also empowers the arbitral tribunal to correct an award on its own initiative within 30 days of the date of the award.<sup>152</sup>
- 7.6.2 If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Any such correction or interpretation shall form part of the original award.<sup>153</sup> The Russian Arbitration Act gives the arbitral tribunal discretion to extend the time period within which to make the correction, interpretation or supplemental award, if necessary.<sup>154</sup>
- 7.6.3 Unless otherwise agreed by the parties, each party also has the right (within 30 days of receipt of the award) to request that the arbitral tribunal makes a supplemental award on claims presented in the arbitral proceedings but omitted from the award.<sup>155</sup> The request must be made with notice to the other party. If the arbitral tribunal considers the request to be justified, it shall render a supplemental award within 60 days.
- 7.6.4 The rules as to the form and content of the award also apply to the correction or interpretation of the original award or to a supplemental award.<sup>156</sup>
- 7.6.5 The ICAC Rules provide for the correction, interpretation or making of a supplemental award in ICAC arbitral proceedings.<sup>157</sup> These rules are similar to the provisions of the Russian Arbitration Act, with only minor differences on the timing.<sup>158</sup>

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<sup>150</sup> A different time limit may be set by the parties.

<sup>151</sup> Russian Arbitration Act, ch 6, art 33(1).

<sup>152</sup> *Ibid*, ch 6, art 33(2).

<sup>153</sup> *Ibid*, ch 6, art 33(1).

<sup>154</sup> *Ibid*, ch 6, art 33(4).

<sup>155</sup> *Ibid*, ch 6, art 33(3).

<sup>156</sup> *Ibid*, ch 6, art 33(5).

<sup>157</sup> ICAC Rules, ch 7, art 43.

<sup>158</sup> Under the ICAC Rules, either party can apply for the correction of an award within a reasonable time rather than the 30 days prescribed by the Russian Arbitration Act.

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

8.1.1 The Russian Arbitration Act highlights the important principle of non-intervention by the courts (i.e. that the courts shall not intervene in arbitral proceedings except where expressly permitted by the Russian Arbitration Act).<sup>159</sup>

8.1.2 In addition, the Russian Arbitration Act confers authority for the exercise of most functions in support of the arbitral process to the RCCI President rather than to the courts. This reinforces the position of arbitration as essentially a private and autonomous dispute resolution process.<sup>160</sup> Nevertheless, in certain clearly-defined circumstances, the availability of court assistance remains necessary to ensure the effectiveness of arbitration as a dispute resolution mechanism.

### 8.2 Stay of court proceedings

8.2.1 The Russian Arbitration Act requires a court to stay any court proceedings at the request of a party, if the subject matter of the court claim contains an arbitration clause. However, the court is not required to stay proceedings if it finds that the arbitration clause is null and void, inoperative or incapable of being performed. Any request by a party shall be made no later than when the relevant party submits its first statement to the court on the substance of the dispute.<sup>161</sup> If a party fails to object to the jurisdiction of the court, the arbitration agreement will be deemed terminated and the court will assume the full jurisdiction to resolve the dispute.<sup>162</sup>

8.2.2 The Russian Arbitration Act further provides that arbitral proceedings may be commenced or continued notwithstanding any court proceedings. An award may also be made prior to the decision of the court on jurisdiction.<sup>163</sup>

### 8.3 Preliminary rulings on jurisdiction

8.3.1 If, contrary to a party's plea, the arbitral tribunal makes a preliminary ruling that it has jurisdiction,<sup>164</sup> the complaining party will have the right to request (within

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<sup>159</sup> Russian Arbitration Act, ch 1, art 5.

<sup>160</sup> *Ibid*, ch 1, art 6(1).

<sup>161</sup> *Ibid*, ch 2, art 8(1).

<sup>162</sup> See *OOO Ponate ARD v Hochtief Aktiengesellschaft*, Case No KG-A40/3239-08, Federal Arbitrazh Court of the Moscow Region, 4 May 2008 (reversing the decision of the Moscow City Arbitrazh Court, Case No A40-68740/06-83-495, 13 January 2008).

<sup>163</sup> Russian Arbitration Act, ch 2, art 8(2).

<sup>164</sup> *Ibid*, ch 4, art 16.

30 days after having received notice of that ruling) a competent court to rule on the issue of jurisdiction.<sup>165</sup>

- 8.3.2 Furthermore, the court will determine the issue of jurisdiction if court proceedings are commenced and the other party invokes an arbitration agreement regarding the subject matter of the court proceedings.<sup>166</sup> The court may proceed with litigation only if the arbitration clause is null and void, inoperative or incapable of being performed.

#### **8.4 Interim protective measures**

- 8.4.1 Although the arbitral tribunal has the power to order interim measures (unless otherwise agreed by the parties),<sup>167</sup> the Russian Arbitration Act clarifies that it is not prohibited for a party to request a court (at any stage of the proceedings) to order interim measures of protection or for a court to grant such measures.<sup>168</sup> The court will decide in accordance with the general principles of Russian procedural law whether to grant interim protective measures in support of an arbitration claim. It is noted, however, that although the power to grant interim measures is available to the courts, the courts have been reluctant to enforce interim measures for security for costs.<sup>169</sup>

- 8.4.2 In ICAC arbitral proceedings, the ICAC Rules provide that if a party has requested a competent court to order interim protective measures and the court has granted such measures, then that party shall immediately inform ICAC of such measures.<sup>170</sup>

#### **8.5 Obtaining evidence and other court assistance**

- 8.5.1 An arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the competent court to provide assistance in obtaining evidence for use in the arbitral proceedings.<sup>171</sup> The court may execute such request on the basis of the general Russian procedural rules on taking and securing evidence.

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<sup>165</sup> *Ibid*, ch 4, art 16(3).

<sup>166</sup> *Ibid*, ch 2, art 8(1).

<sup>167</sup> *Ibid*, ch 4, art 17.

<sup>168</sup> *Ibid*, ch 2, art 9.

<sup>169</sup> See *OAO Maslodelno-Surodelniy Kombinat "Mihaylovskiy" v OOO Agropromishleniy Holding "Moloko"*, Case No A12-12532/03-C47, Federal Arbitrazh Court of the Povolzhskiy Region, 9 December 2004; the earlier decision of the Volgogradsk Region Arbitrazh Court; *ZAO Azovskaya Sudoremontnaya Kompaniya v OOO Union*, Case No F08-4725/2004, Federal Arbitrazh Court of the North Caucasus Region, 20 October 2004; and the earlier decision in *OOO Union v FGUP Eyskiy Sudoremontniy Zavod, OOO Status-S and ZAO Azovskaya Sudoremontnaya Kompaniya*, Case No A32-21321/2004-31-385, Krasnodar Region Arbitrazh Court, 26 August 2004.

<sup>170</sup> ICAC Rules, ch 6, art 36(4).

<sup>171</sup> Russian Arbitration Act, ch 5, art 27.

## 9. Challenging and appealing an award through the courts

### 9.1 Jurisdiction of the courts

- 9.1.1 Russian procedural law provides that state courts have jurisdiction to consider applications to set aside awards made in Russia.
- 9.1.2 The procedures for challenging and enforcing awards were updated as the new procedural codes took effect. On 1 September 2002, the new Arbitrazh Procedural Code<sup>172</sup> came into force, followed by the new Civil Procedural Code on 1 February 2003.<sup>173</sup> The Arbitrazh Procedural Code governs proceedings at the *arbitrazh* courts, which generally hear business-related disputes whereas the Civil Procedural Code regulates proceedings in the common courts, typically relating to disputes concerning individuals. Common courts also have jurisdiction over certain economic disputes provided they do not fall within the jurisdiction of the *arbitrazh* courts.
- 9.1.3 The *arbitrazh* court decisions are typically made at the first level arbitrazh courts or third level (Federal) *arbitrazh* courts.<sup>174</sup> However, it is not uncommon for a number of arbitration related decisions to reach the highest level (Supreme Arbitrazh) or the Constitutional courts for an ultimate ruling.
- 9.1.4 The new codes now contain detailed regulations for challenging and enforcing domestically rendered awards and recognition and enforcement of foreign awards.
- 9.1.5 Under article 232 of the Arbitrazh Procedural Code, a foreign award may be challenged on the grounds set out by an international treaty or the Russian Arbitration Act.

### 9.2 Appeals

- 9.2.1 Awards are not subject to appeal under the Russian Arbitration Act. Recourse to a court against an award may be made only through an application for setting the award aside in accordance with the provisions of the Russian Arbitration Act.<sup>175</sup>

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<sup>172</sup> Implemented by Federal Law No 95-FZ dated 24 July 2002.

<sup>173</sup> Implemented by Federal Law No 138-FZ dated 14 November 2002.

<sup>174</sup> The reason for not including an intermediary level of appellate court is due to a procedural peculiarity. An initial arbitration-related claim (e.g. enforcement) should be filed with the first level courts but an appeal to any decision of a first level court should be filed directly with a federal level court.

<sup>175</sup> Russian Arbitration Act, ch 7, art 34(1). This part of the Russian Arbitration Act is also subject to the Draft Amendments. See Draft Amendments, s 6.

### 9.3 Applications to set aside an award

9.3.1 An award may only be set aside if the party making the application establishes that:

- one of the parties to the arbitration agreement was under some legal incapacity, or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement or, in the absence of such choice, under the laws of the Russian Federation;
- a party was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was for some other reasons unable to present its case;
- the award was made with respect to a dispute which was not covered by the arbitration agreement, or does not fall within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- the constitution of the arbitral tribunal or the arbitral procedure was inconsistent with the arbitration agreement between the parties, unless such agreement was in conflict with a mandatory provision of the Russian Arbitration Act, or in the absence of an agreement, was not in accordance with the provisions of the Russian Arbitration Act;<sup>176</sup> or

if the court finds that:

- the subject matter of the dispute was not capable of settlement by arbitral proceedings under the laws of the Russian Federation; or
- the award is inconsistent with the public policy of the Russian Federation.<sup>177</sup>

9.3.2 The Russian Arbitration Act provides that an application for setting aside an award must be made within three months of the date of receipt of the award by the party making the application. If a request for correction, interpretation or for a supplemental award has been made to the arbitral tribunal, the three-month time period commences from the date the request has been disposed of by the arbitral tribunal (by rejecting the request or by making the correction, interpretation or supplemental award).<sup>178</sup>

9.3.3 Furthermore, the court has discretion to suspend the setting aside proceedings in appropriate circumstances at the request of a party for a specified period of time

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<sup>176</sup> Russian Arbitration Act, ch 7, art 34(2)(1).

<sup>177</sup> *Ibid*, ch 7, art 34(2)(2).

<sup>178</sup> *Ibid*, ch 7, art 34(3).

in order to provide the arbitral tribunal with an opportunity to resume the arbitral proceedings or to take such other steps as may remove the grounds for setting aside the award.<sup>179</sup>

## 10. Recognition and enforcement of awards

- 10.1.1 The Russian Arbitration Act does not draw a distinction between the recognition and enforcement of domestic and foreign awards or the grounds on which they may be refused.
- 10.1.2 The Russian Arbitration Act provides that regardless of the country in which it was made, an award shall be recognised as binding and, upon application in writing to the competent court, shall be enforced in Russia.<sup>180</sup> The Russian Arbitration Act requires the application to be supported by the authenticated original award and arbitration agreement or by certified copies thereof. If either of these documents is made in a foreign language, certified translations into Russian must also be provided.<sup>181</sup>
- 10.1.3 Recognition and enforcement of an award may only be refused on the grounds which correspond to the grounds on which an award may be set aside, namely:
- one of the parties to the arbitration agreement was under some legal incapacity or the arbitration agreement was invalid under the law chosen by the parties as the governing law of the agreement or, in the absence of such choice, under the laws of the country where the award was made;
  - the party against whom the award was made was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was for some other reason unable to present its case;
  - the award was made with respect to a dispute which was not covered by the arbitration agreement or does not fall within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the arbitration agreement; however, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
  - the constitution of the arbitral tribunal or the arbitration procedure was inconsistent with the arbitration agreement between the parties or, in the

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<sup>179</sup> *Ibid*, ch 7, art 34(4).

<sup>180</sup> *Ibid*, ch 7, art 35(1).

<sup>181</sup> *Ibid*, ch 7, art 35(2). The Draft Amendments suggest that the requirement for the provision of the arbitration agreement should not be mandatory under the Russian Arbitration Act. See Draft Amendments, s 7.

- absence of an agreement, was not in accordance with the laws 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 court of the country in which (or under the laws of which) that award was made;<sup>182</sup> or

if the court finds that:

- the subject matter of the dispute was not capable of settlement by arbitral proceedings under the laws of the Russian Federation; or
- the award is inconsistent with the public policy of the Russian Federation.<sup>183</sup>

10.1.4 The Arbitrazh Procedural Code contains a rule that foreign court decisions and awards are to be recognised and enforced in Russia if one of Russia's international treaties or federal laws requires it. Russia is a signatory to the New York Convention<sup>184</sup> and the 1961 European Convention. Therefore, recognition and enforcement of foreign awards in Russia is conducted in accordance with these conventions. It is more difficult to enforce or seek recognition of foreign commercial judgments (than awards) due to the fact that Russia has still not ratified or entered into bilateral treaties for enforcement of foreign commercial judgments with some leading economies (e.g. Great Britain, the USA, Canada, etc). This is yet another reason for referring disputes to international arbitration rather than to the courts of the relevant foreign state.

10.1.5 The Russian Arbitration Act provides that if a local court, in the country in which an award is granted, receives an application to set aside or suspend that award, then the court where recognition or enforcement is sought may, if it considers it appropriate, adjourn its decision until the challenge has been heard. Alternatively, it may also order the other party to provide security upon application by the party seeking recognition or enforcement of the award.<sup>185</sup>

10.1.6 Recent cases have highlighted that a respondent may not object to the jurisdiction of the Russian courts in granting enforcement on the grounds of invalidity of the award, unless a previous application to set aside the award has been made.<sup>186</sup>

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<sup>182</sup> Russian Arbitration Act, ch 7, art 36(1).

<sup>183</sup> *Ibid*, ch 7, art 36(2).

<sup>184</sup> See CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>185</sup> Russian Arbitration Act, ch 7, art 36(2).

<sup>186</sup> See *Odfjell SE v. JSC PO Sevmarsh*, Case No A05-10560/2010, Federal Commercial District Court for the North West, 10 March 2011; *Living Consulting Group AB v. LLC Sokotel*, Case No A56-22667/2010, Federal Commercial District Court for the North West, 29 April 2011; and *Hipp GmbH & Co Export KG v. LLC SIVMA Detskoye Pitaniye, and CJSC Sivma*, Case No BAC-1787/11, Supreme Arbitrazh Court, 4 April 2011.

## 11. Special provisions and considerations

### 11.1 Consumers

11.1.1 Consumers in Russia may not use international arbitration to resolve consumer disputes.

### 11.2 Employment law

11.2.1 Russian legislation provides that employment disputes must be decided by an employment commission or a state court, not by arbitration.

### 11.3 Real estate rights

11.3.1 Previously, Russian courts held that disputes in relation to the extension of leases or rights in relation to immovable property in general were non-arbitrable. A number of cases established different grounds for this conclusion. These cases demonstrate that generally, the requirements for state registration of immovable rights should only be determined by state courts.<sup>187</sup>

11.3.2 In May 2010, the Supreme Arbitrazh Court referred a case to the Constitutional Court of the Russian Federation relating to a domestic arbitration concerning mortgages of immovable property.<sup>188</sup> The referral seeks to clarify certain sections of the Law “On Mortgages (collateral on property)”,<sup>189</sup> which provide that disputes may be resolved by “courts”. Section 118 of the Russian Constitution<sup>190</sup> (and its interpretation by the Constitutional Court)<sup>191</sup> provides that “arbitration courts” are deemed to be an alternative method for the settlement of civil disputes and not part of the Russian judiciary. However, the Civil Code and the AC provide that civil disputes (in general) may be heard by either a “court” or an “arbitration court”.

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<sup>187</sup> See for example, *ZAO Kalinka Stockmann v Smolensky Passazh and ZAO Mosstroyekonombank*, Ruling No BAC-17481/08, Supreme Arbitrazh Court, 19 May 2009. This ruling was given in relation to Case No A40-28757/08-25-228, originally decided by the Moscow City Arbitrazh Court and its appeal to the Federal Arbitrazh Court of the Moscow Region, Case No KG-A40/9294-08-1,2, 13 October 2008.

<sup>188</sup> See two recent cases with similar facts: *OOO Kommercheskiy Bank Ekonomicheskogo Razvitiya “Bank Kazani” v OOO Torgoviy Alliance and OOO BulgarRegionSnab*, Case No BAC-530/10, Supreme Arbitrazh Court 18 May 2010 (as well as the preceding decisions of the lower courts, Case Nos A65-9868/2009-SG5-52 and A65-9868/2009); and *OOO Kommercheskiy Bank Ekonomicheskogo Razvitiya “Bank Kazani” v OOO DataDot-Zakamye and OOO BulgarRegionSnab*, Case No BAC-634/10, Supreme Arbitrazh Court, 18 May 2010 (as well as preceding actions in lower courts, Case Nos A65-9867/2009-SG5-52 and A65-9867/2009).

<sup>189</sup> Federal Law No 102-FZ dated 16 July 1998.

<sup>190</sup> The Russian Constitution was adopted on 12 December 1993 and came into force on 25 December 1993. It was amended by the Laws on the amendment of the Constitution of the Russian Federation, Nos 6-FKZ and 7-FKZ dated 30 December 2008.

<sup>191</sup> Decision of the Constitutional Court No 377-O-O, 4 June 2007.

- 11.3.3 To clarify this apparent conflict in legislation, the Supreme Arbitrazh Court requested that the Constitutional Court decide whether an “arbitration court” is capable to hear disputes in relation to mortgages of immovable property notwithstanding that an “arbitration court” is not deemed to be part of the Russian judiciary.
- 11.3.4 The Constitutional Court ruled that domestic arbitral tribunals may decide civil law disputes relevant to real estate (including mortgage foreclosure).<sup>192</sup> However, this Constitutional Court ruling concerned domestic arbitral proceedings and it is not clear yet whether similar authority may be granted to international arbitral tribunals in deciding disputes concerning real estate in Russia.

## 12. Concluding thoughts and themes

- 12.1.1 There is a long tradition in Russia of resolving international commercial disputes by arbitration. In the form of the Russian Arbitration Act, Russia has adopted an appropriate framework for such arbitrations which follows the internationally recognised standard set by the Model Law (1985).<sup>193</sup> Russia is also demonstrating acceptance of the development of the Model Law (2006)<sup>194</sup> by promoting the Draft Amendments.
- 12.1.2 Today, most commercial disputes involving foreign parties or concerning foreign direct investment in Russia are dealt with by way of private arbitration rather than through the Russian court system. This may be an indication that arbitration in Russia is increasingly accepted as meeting the demands of the modern business world.

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<sup>192</sup> Decision of the Constitutional Court No 10-P, 26 May 2011.

<sup>193</sup> See CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>194</sup> *Ibid.*

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