

The arbitration agreement.

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Chapter 3. The Arbitration Agreement

§3.01. Nature and Significance of the Arbitration Agreement

It is a well-established rule that commercial arbitration stems from an agreement to arbitrate, which is a prerequisite and a basis for the arbitral procedure. The entire process, from its inception to the award, originates in the agreement of the parties. A valid agreement determines whether the courts can assist arbitration, e.g. in adopting interim measures, obtaining evidence, and enforcing arbitral awards.¹

[A] Voluntary and Compulsory Arbitration

Arbitration is compulsory when the law requires certain disputes to be resolved by an arbitral tribunal, whether or not the parties consent to forego the usual legal remedies. This sometimes takes place on a statutory basis, and in some jurisdictions, such as England and Scotland,² statutory arbitration remains prominent. In Russia, it is virtually unknown. The highest courts of Russia - the Supreme Commercial Court,³ the Supreme Court,⁴ and the Constitutional Court⁵ - often emphasised that parties must refer their disputes to arbitration voluntarily.

There are two possible exceptions in Russia to the general rule against compulsory arbitration. The first one is a legacy of the Soviet times – the Moscow Convention 1972 ‘On the Resolution by Arbitration of Civil Law Disputes Resulting from Relations of Economic, Scientific and Technical Cooperation’. Concluded between governments of socialist countries

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¹ *Commentary to the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation' (Clause-by-clause, Academic and Practical Commentary)*, Commentary to Article 7, §4 (O.Yu. Skvortsov, M.Yu. Savransky, eds), (Moscow, Statut 2016) [Kommyentarii k Fyederalnomu zakonu 'Ob arbitrajye (tryetyeiskom razbiratelstvye) v Rossiiskoi Fyederacii' (postatyeinyi, nauchno-praktichyeskii) / pod ryed. O.Yu. Skvortsova, M.Yu. Savranskogo. M.: Statut, 2016. Kommyentarii k statye 7, §4].

² See, e.g.: Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary*, 406-409 (5th ed., Wiley Blackwell 2014).

³ Decree of the Presidium of the RF Supreme Commercial Court of 13 December 2011 No 9807/11; *The Review of the Legal Positions of the Presidium of the RF Higher Commercial Court on Private Law Matters (February 2012)*, 4 *The Herald of the Supreme Commercial Court* (2012) [Obzor pravovyh pozicii Pryezidiuma VAS RF po voprosam chastnogo prava. Fyevral 2012 g. Vvestnik Vysshyego Arbitrajnogo Suda RF, 2012, N 4].

⁴ Ruling of the RF Supreme Court of 24 April 2017 No 305-KG17-323, case No A40-179125/2016; Ruling of the RF Supreme Court of 16 August 2016 No 304-ES16-9029, case No A03-20164/2015.

⁵ Decree of the RF Constitutional Court of 18 November 2014 No 30-P 'On Verification of the Constitutionality of the Provisions of Article 18 of the Federal Law 'On Arbitration in the Russian Federation', Clause 1 of Section 3 of Article 239 of the Commercial Procedure Code of the Russian Federation and Section 3 of Article 10 of the Federal Law 'On Non-Commercial Organisations' in Connection with a Complaint by the Open Joint Stock Company 'Sberbank of Russia'.

under the auspices of the Council for Mutual Economic Assistance, this Convention required the disputes arising between organisations from the contracting states in the course of economic and scientific-technical cooperation to be resolved in the Court of Arbitration at the Respondent's national Chamber of Commerce. The jurisdiction of state courts in such cases would be ousted regardless of whether or not the parties ever agreed to arbitrate; in other words, arbitration was compulsory.

Most of the signatory countries have repealed the Convention during the 1990s, after the fall of the Soviet Union and the dismantling of the Council for Mutual Economic Assistance. As a formal matter, Bulgaria, Mongolia, Cuba, Slovakia and Russia remain bound by the Convention, although in a very long time there had been no opportunities for Russian courts to apply it. Many Russian⁶ and foreign⁷ commentators argued convincingly that the Convention, at least de facto, was no longer in force. Some reports suggest, however, that the International Commercial Arbitration Court (ICAC) at the RF Chamber of Commerce and Industry continues, from time to time, to establish its jurisdictions under this Convention.⁸ Many of the ICAC awards published within the last twenty years (in a redacted form) did consider the Convention, but there was almost invariably also a written arbitration agreement between the parties, which spared the arbitrators a necessity to reach any conclusion as to whether the Convention could still be a sole basis for the tribunal's jurisdiction.⁹

Thus, there remains some room for debate about the legal force and importance of the Moscow Convention 1972, although it becomes harder and harder to come across a published example of its application.

The second possible exception to the rule against compulsory arbitration concerns investor-state dispute resolution. This kind of arbitration, where the relevant international treaty requires a host state to arbitrate if a private investor brings an arbitral claim, remain a special case. Jan Paulsson famously termed it 'arbitration without privity,'¹⁰ and some Russian commentators consider it compulsory.¹¹ However, in investment arbitration, the host state

⁶ See, e.g.: Belov A.P., *International Commercial Law*, 240-241 (Moscow, 2001) [Belov A.P., *Myejdunarodnoye pryedprinimat'yelskoye pravo*. - M., 2001. S. 240-241]; Vladimir Khvalei, *History, Fate and Role of the Moscow Convention*, 7 (2012) [Vladimir Khvalei, *Istoriya, sudba i znacheniye Moskovskoi Konvencii*. S. 7 (2012)] <http://www.arbitrations.ru/userfiles/file/Publications/Publications/MoscowConventionArticle.pdf> (accessed 13 June 2018).

⁷ See, e.g.: *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, 145 (E. Gaillard and J. Savage, eds), (Kluwer Law, The Hague, 1999) and the sources cited therein.

⁸ Petrosyan R.A., *Procedural and Connected Matters in the Work of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry*, in *International Commercial Arbitration: Contemporary Problems and Solutions. A Compilation of Articles Dedicated to the 80th Anniversary of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry*, 302-304 (A.A. Kostin, ed., Moscow, Statut 2012) [Petrosyan R.A., *Procyessualnyye i svyazannyye s nimi voprosy v dyeyat'yelnosti MKAS pri TPP RF / Myejdunarodnyi kommyerchyeskii arbitraj: sovryemyennyye problemy i ryesheniya: Sbornik stat'ey k 80-lyetiyyu Myejdunarodnogo kommyerchyeskogo arbitrajnogo suda pri Torgovo-promyshlyennoi palatyey Rossiiskoi Fyedyeracii / pod ryed. A.A. Kostina. M.: Statut, 2012. S. 302-304].*

⁹ See, e.g., ICAC award of 26 June 2007, case No 98/2006; ICAC award of 2 June 2005, case No 131/2004.

¹⁰ Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.-Foreign Investment L.J. 232 (1995).

¹¹ Zvereva N.S., *The Interplay Between Alternative Methods of Dispute Settlement and Civil Procedure in Russian and French Law*, §74(6) (V.V. Yarkov, ed., Moscow, Statut 2017) [Zvereva N.S. *Vzaimodeystviye al'tyernativnykh*

does consent to the possibility of future arbitral claims by investors, albeit not in a contract with every particular investor but a treaty with a fellow state.

[B] Regulation of the Arbitration Agreement

The amount of statutory material devoted to arbitration agreements increased significantly in the Arbitration Act 2015 compared to its predecessor – the Arbitration Act 2002, as well as compared to the UNCITRAL Model Law on International Commercial Arbitration.¹² Article 7 of the 2002 Act (Form and Substance of an Arbitration Agreement) included only four sections, whereas the equivalent Article 7 of the current Act (Definition, Form and Interpretation of an Arbitration Agreement) now contains no less than twelve.

This increase in the volume of regulation was partly a consequence of adopting the 2006 amendments to the Model Law. The Russian legislator implemented some of the Model Law Article 7 (option I) provisions in the Arbitration Act 2015 Article 7(1) to 7(5), albeit doing so in a somewhat conservative manner.¹³ Another reason for the increased length of Article 7 was the inclusion of the novel rules on interpretation of arbitration agreements.¹⁴

[C] Arbitration Agreement in the Domestic and International Context

The legislation on domestic and international arbitration in Russia remains, at least in some aspects, dualistic. Two different statutes regulate arbitration: the Arbitration Act 2015 and the Law of the Russian Federation ‘On International Commercial Arbitration’ of 7 June 1993 (the ICA Act 1993). One might call this a dualism of international and domestic arbitration regimes, although the relationship between the two statutes is more complicated than that.

First, the ICA Act 1993 applies to international commercial arbitration, while the Arbitration Act 2015 governs all its other types, i.e. any arbitration that does not satisfy the statutory definition of ‘international commercial arbitration’. Thus, the 2015 Act governs arbitration in the ‘residual’ category of cases.

Second, the 2015 Act applies to international commercial arbitration in enumerated matters, for which the ICA Act 1993 contains no specific rules, i.e. those arising in connection with:

- the establishment and operation of permanent arbitral institutions in the territory of the Russian Federation;

myetodov uryegulirovaniya sporov i grajdanskogo sudoproizvodstva v prave Rossii i Francii / pod ryed. V.V. Yarkova. M.: Statut, 2017].

¹² Text of the Model Law is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed 13 June 2018).

¹³ See below, §3.03 of this chapter.

¹⁴ See below, §3.05 of this chapter.

- the custody of materials concerning the past cases;
- the making of entries in official registers in the Russian Federation where it is necessary for the enforcement of arbitration awards;
- the relationship between mediation and arbitration;
- the requirements to arbitrators;
- the liability of arbitrators and permanent arbitral institutions.

The concluding provisions in Chapter 12 of the Arbitration Act 2015 dealing with matters such as its application to pre-existing arbitration agreements and arbitration proceedings ongoing at the date of its entry into force also apply to both kinds of arbitration.

Before 2015, the dualism was very significant. It resulted, among other things, in the different definitions and legal regimes of an arbitration agreement in the context of international commercial arbitration, and arbitration agreement in the 'residual' category of cases. The legal term in Russian for an arbitration agreement in international commercial arbitration was '*arbitrazhnoe soglasheniye*', which was a calque (a literal word-for-word translation) of the term 'arbitration agreement'. The legal term in Russian for an arbitration agreement in the 'residual' category of cases was '*treteyskoye soglashenie*' representing another, more 'complete' way of translating the term 'arbitration agreement' into Russian - equally acceptable linguistically, but slightly different nevertheless. The text of the relevant articles in the two statutes diverged, so the difference went beyond the mere linguistics, sometimes resulting in a de facto differential treatment of very similar legal phenomena. The Russian procedural codes - the Code of Civil Procedure and the Commercial Procedure Code - used the term '*treteyskoye soglashenie*' to refer to both kinds of agreement, which further complicated the matters and led to more confusion in the court practice.¹⁵

With the enactment of the Arbitration Act 2015, the legislator attempted to simplify this conundrum. First, the terminology in both statutes was streamlined, so currently both Acts use the same term '*arbitrazhnoe soglasheniye*'. Second, the 2015 amendments to Article 7 of the ICA Act 1993 made it resemble very closely Article 7 of the 2015 Act, with only a few differences.

These circumstances point strongly toward the legislative intention to eliminate, as far as possible, the differences between arbitration agreements in the two contexts, and to recognise their identical legal nature.

Perhaps as an unfortunate oversight, the Russian procedural codes continue, in some cases, to use the term '*treteyskoye soglashenie*.' One may hope, however, that this discrepancy will now only be of minor significance, and will be corrected at the first opportunity.

The further analysis in this chapter, unless otherwise specified, will apply equally to arbitration agreements in domestic and international context.

¹⁵ Kotelnikov A.G., *The Legal Nature and Effects of an Arbitration Agreement: An Abstract of a Doctor of Law Dissertation*, 11-13 (Ekaterinburg, 2008) [Kotelnikov A.G., *Pravovaya priroda i poslyedstviya zaklyucheniya arbitrajnogo soglasheniya: Avtoryef.diss...k.yu.n. – Ekaterinburg, 2008. S. 11-13*].

[D] Definition of the Arbitration Agreement

Article 7(1) of the Arbitration Act 2015 defines arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract, or a separate document.

This statutory text mirrors the Option I of the UNCITRAL Model Law Article 7(1). While amending the Model Law in 2006, the Commission put forward two alternative approaches. The first one followed the structure of the original 1985 text. Like the New York Convention, it required a written agreement but deemed the recording of its content in various additional ways acceptable to meet the requirement of writing. The broad wording of the Option I encompassed most electronic formats. In deviation from the New York Convention Article II(2), there was no need to establish an exchange of messages between the parties, as long as the content of the agreement was recorded in some form. The second approach (Option II) imposed no formal requirements on the arbitration agreement at all, leaving the matter to the contract law of the enacting State.¹⁶

The elements of this definition are uncontroversial and have been accepted in Russian law for a long time. It contains two essential components.

First, Article 7(1) emphasises the need for a ‘defined legal relationship’ between the parties, thus avoiding any encroachment on the right of access to justice. A prominent Russian arbitration scholar A.I. Vitsyn addressed the importance of this requirement as far back as in 1856. He argued against the suggestion that ‘entire regions should sign arbitration compromises among themselves’ because such an agreement would be nothing but an establishment of a court, which is only permissible by the authority of the government and not through private initiative.¹⁷

Second, the definition contains three broad permissions.

- (1) The agreement may concern ‘all or certain disputes’ in respect of a legal relationship – for example, an arbitration clause in a contract may with equal legitimacy refer to ‘all disputes that may arise out of this contract’ or ‘*payment* disputes that may arise out of this contract’.
- (2) The agreement may concern present or future disputes (‘which have arisen or which may arise’); it will not affect the enforceability of the clause.¹⁸
- (3) Finally, the nature of a dispute does not have to be contractual (‘whether contractual or not’), as long as it is arbitrable as a matter of law. For example, it is

¹⁶ *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration* 28, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (accessed 14 June 2018).

¹⁷ Vitsyn A.I., *On Arbitration in Russian Law* (Moscow, 1856) 24 [Vitsyn A.I. O tryetyeiskih sudah po russkomu pravu. M., 1856. S. 24.].

¹⁸ For more details on this distinction, see below, §3.04[B] of this chapter.

perfectly acceptable for the parties to include into the purview of their arbitration agreement the disputes that arise from a non-contractual relationship, such as delict (tort) or unjust enrichment, whether on their own or in connection with an identified contract.

According to Article 7(12) of the Arbitration Act 2015, if an arbitration agreement refers to a set of arbitration rules, they become an inseparable part of the agreement. The previous Act contained the same provision (Article 7(3) of the Arbitration Act 2002), and the doctrine¹⁹ and court practice²⁰ recognised its effects for a long time.

The new provision in the 2015 Act is the second sentence of Article 7(12), which stipulates that the rules of a permanent arbitral institution cannot include the terms that, according to this Act, only a direct agreement of the parties can bring into force. This provision introduced the important notion of a 'direct agreement'. §3.04 of this chapter will discuss this matter in more detail.

[E] Effects of the Arbitration Agreement

The Russian doctrine commonly considers the effects of an arbitration agreement in line with the classic René David's framework,²¹ distinguishing between the positive (enabling) and negative (precluding) effects. Positive effects include the arising of the parties' obligation to refer their disputes to arbitration and the emergence of the tribunal's jurisdiction. Negative effects encompass the competent court's obligation to refer the relevant disputes to arbitration and the parties' obligation to refrain from starting an action in an otherwise competent national court.²²

The central and most important effect of a valid arbitration agreement is the ousting of the courts' jurisdiction to hear the case. The Russian procedural law does not enable any court to compel arbitration.²³ However, the procedural codes stipulate that the statement of claim shall be left without consideration if there is an agreement between the parties to refer the dispute to arbitration, and one of the parties, no later than on the day of filing its first application on the merits of the dispute, raises an objection on this ground.²⁴ The court leaves the claim without consideration unless it finds that the agreement is null and void, inoperable, or incapable of being performed. This rule follows Article II of the New York Convention 1958 and Article 8 of the UNCITRAL Model Law.

¹⁹ Kurochkin S.A., *Domestic and International Commercial Arbitration*, 83 (Moscow, Statut, 2017) [Kurochkin S.A. Tryetyeiskoye razbiratel'stvo i myejdunarodnyy kommyercheskyy arbitraj. M.: Statut, 2017. S. 83].

²⁰ See, e.g., the Ruling of the Supreme Commercial Court of the Russian Federation of 19 December 2011 No 14325/11.

²¹ René David, *Arbitration in International Trade*, 232 (Springer, 1985).

²² *Commentary to the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation' (Clause-by-clause, Academic and Practical Commentary)*, supra note 1, Commentary to Article 7, at §10-11.

²³ Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure*, 37 (Juris, 2013).

²⁴ Article 148(1)(5) of the Commercial Procedure Code, Article 222 of the Civil Procedure Code.

In Russian civil procedure, leaving a claim without consideration is the ‘soft’ form of ending the court process, allowing the parties to commence the proceedings anew if the relevant grounds cease to exist.²⁵ Its ‘hard’ counterpart is the termination of proceedings where the repeated claim between the same persons, on the same subject matter and the same grounds becomes barred. The court will terminate the proceedings, for example, if it finds that there is a judgment with a *res judicata* effect between the parties. Another ground for the termination of the proceedings is an award of an arbitration tribunal rendered in the dispute between the same parties, on the same subject matter and the same grounds, unless a competent court has earlier refused to enforce or has set aside the award.²⁶

[F] Legal Nature of the Arbitration Agreement

The debates about the legal nature of the arbitration agreement in Russia traditionally revolve around the combination of substantive and procedural legal elements in it. It is common to proceed from the assumption that an arbitration agreement contains both aspects. It is contractual by genesis, and procedural in its jurisdictional character.²⁷ This ‘mixed’ (or *sui generis*)²⁸ theory does receive an occasional challenge. For example, some courts treat an arbitration agreement as a purely procedural mechanism and therefore refuse to apply any Civil Code rules to it.²⁹ However, the majority of experts agree that the ‘mixed’ theory describes the legal nature of arbitration most accurately. The Constitutional Court also confirmed the co-existence of substantive and procedural legal elements in an arbitration agreement in its Decree,³⁰ and courts often reference it to justify the application of the Civil Code rules to the invalidity of arbitration agreements.³¹

In particular, the following matters relevant to the agreement are thought to be substantive (contractual):

- Legal capacity of the parties;
- The form of the arbitration agreement;
- Validity and invalidity of the arbitration agreement.³²

²⁵ Article 149 of the Commercial Procedure Code, Article 223 of the Civil Procedure Code.

²⁶ Articles 150, 151 of the Commercial Procedure Code, Articles

²⁷ Lebedev S.N., *International Trade Arbitration*, 82 (Moscow, 1965) [Lebedev S.N. *Myejdunarodnyi torgovyi arbitraj*. M., 1965. S. 82].

²⁸ Kostin A.A. and Davydenko D.L., *Chapter 7: Russia*, in Kaj Hober and Yarik Kryvoi, *Law and Practice of International Arbitration in the CIS Region*, 259 (Kluwer Law International 2017).

²⁹ See, e.g., Decree of the Federal Commercial Court for the West-Siberian Circuit of 23 August 2002, case No F04/3024-382/A75-2002; Decree of the Federal Commercial Court for the North-Western Circuit of 29 January 2004, case No A42-914/03-9.

³⁰ Decree of the RF Constitutional Court of 26 May 2011 N 10-П.

³¹ See below, §3.07.

³² Absalyamov A.V., Arsenov I.G., Vinogradova E.A., et al., *Commercial Court Procedure: the Textbook*, 627 (Yarkov V.V., ed., 4th ed., Moscow, Infotropic Media 2010) [Arbitrajnyi procyess: uchyechnik / A.V. Absalyamov, I.G. Arsenov, E.A. Vinogradova i dr.; otv. ryed. V.V. Yarkov. 4-ye izd., pyeryerab. i dop. M.: Infotropik Myedia, 2010. C. 627].

One aspect often classified as procedural is the prohibition of repudiating an arbitration agreement unilaterally.³³

One practical consequence of this classification is that substantive legal matters, in case of a dispute about them, are resolved according to substantive law, and procedural matters – according to procedural law. In turn, this affects the applicable law. If a matter is substantive, private international law rules determine which country's law governs any particular issue. It can be Russian substantive law, i.e. the relevant provisions of the Civil Code and other federal legislation. The conflict of law rules may also lead to the application of foreign law. But if any matter is procedural, the courts will always resolve it under Russian procedural law - the procedural codes, the Arbitration Act 2015, and, where applicable, the ICA Act 1993 - with no reference to foreign law.

§ 3.02. Autonomy of the Arbitration Agreement

The statutory provisions on the autonomy of the arbitration agreement in Russian law follow the UNCITRAL Model Law approach, with some small differences. Article 16(1) of the Arbitration Act 2015 'Competence of arbitral tribunal to rule on its jurisdiction' contains the following rule:

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. An arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not in itself entail the invalidity of the arbitration agreement.³⁴

Article 16(1) of the Arbitration Act 2015 is a mandatory rule, i.e. the parties cannot dispense with the autonomy of the arbitration agreement by their agreement. There appears to be no compelling reason for this, and indeed some national statutes do provide the parties with more flexibility. For example, section 7 of the English Arbitration Act 1996 stipulates that an arbitration agreement shall not be regarded as invalid, non-existent or ineffective because that main agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement, '*unless otherwise agreed by the parties*'. Arguably, the parties would rarely need to exclude the principle of autonomy by their agreement, but there appears to be no compelling reason to forbid it altogether.

In Russian law, 'autonomy' and 'separability' of an arbitration clause have the same meaning. The French concept of the agreement's independence of all national laws (asserting

³³ *Ibid.*

³⁴ Hereinafter in this chapter, the unofficial translations from Russian are by the author, Andrey Kotelnikov.

that the proper analysis of an arbitration agreement should proceed by universally accepted 'substantive rules' without reference to any particular national law)³⁵ was subject of some discussion in the literature.³⁶ However, it never received wide acceptance - neither as a theoretical matter nor in legal practice. The proper analysis of any issue about the arbitration agreement under Russian law should always begin with establishing the applicable law.

Although the preamble to the ICA Act 1993 (but not the Arbitration Act 2015) does acknowledge the role of the UNCITRAL Model Law and the importance of uniform regulation of arbitration in international trade, Russian legislator never implemented Article 2A of the Model Law ('International Origin and General Principles'). Therefore, the possibility of statutory interpretation with reference to the law's international origin and to the need to promote uniformity in its application remains questionable. Commentators often point out the Russian courts' cautious preference for the positivist and literal interpretation of the law.³⁷ Perhaps the higher courts could be more susceptible to the arguments based on the international practice where the law contains a genuine uncertainty, but their likelihood of success would decrease in the lower courts. Under those circumstances, the adoption of this French doctrine calling for the application of loosely defined supra-national principles governing the arbitration agreement would be premature in Russia – as well as in many other countries.

Unlike the previous Arbitration Act 2002 and the UNCITRAL Model Law, the current statutory text does not imply any close connection between the autonomy of an arbitration agreement and the principle of competence-competence. Article 16(1) of the UNCITRAL Model Law reads in relevant part:

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract (emphasis added).

There is indeed no direct logical connection between separability of an arbitration agreement and the competence-competence principle.³⁸ While the autonomy of an arbitration agreement can be instrumental in ascertaining the jurisdiction of the tribunal, it also has other effects. For example, the law applicable to the main contract and the arbitration clause could be different. Likewise, the tribunal could apply the principle of

³⁵ Fouchard, Gaillard and Goldman on International Commercial Arbitration, *supra* note 7, at 132.

³⁶ See, e.g.: Grigoriev T. Yu. and Kolomiets A.I., *The Principle of Autonomy of an Arbitration Clause: the Review of Russian and Foreign Practice*, 2 Herald of Commercial Court Practice 5, 9 [Grigoriev T. Yu., Kolomiets A.I. Princip avtonomnosti arbitrajnoi ogovorki: obzor rossiiskoi i zarubeynoi pravoprinyenitelnoi praktiki // Vvestnik arbitrajnoi praktiki. 2017 . N 2. S. 9].

³⁷ Sultanov A.R. *The Formalism of Civil Procedure and the Standards of Fair Trial*, 3 Herald of Civil Procedure 73, 73-93 (2012) [Sultanov A.R. Formalizm grajdanskogo procyessa i standarty spravyedlivogo pravosudiya // Vvestnik grajdanskogo procyessa. 2012. N 3. S. 73 – 93].

³⁸ Kurochkin S.A., *supra* note 19, at 76.

competence-competence without ever considering the arbitration agreement or its validity in any detail. For instance, this could happen where one of the parties challenges the arbitrability of the dispute. It is uncontroversial that the separability principle may have other consequences that go beyond jurisdictional issues.³⁹ Therefore, this deviation of the Russian statutory text from the Model law is a small but welcome development.

For many years, Russian courts consistently applied the principle of separability of an arbitration clause from other terms of the contract. For example, in *Oleg Troshkov v Zhemchuzhina Urala*,⁴⁰ the Supreme Commercial Court confirmed the reasoning of the lower courts that refused to declare a contract null and void due to the conflict of interest. The courts held that, in relation to the arbitration clause, a separate ground to refuse the lawsuit was its autonomy from the main contract. Since the clause was separable, the statutory rules about the approval of transactions involving a conflict of interest did not apply.

In *GlavPromStroy v Avielen*, the Federal Commercial Court for the North-Western Circuit went as far as to argue that the autonomy of an arbitration agreement is a universally recognised principle of both international and Russian law. According to Article 15 of the Russian Constitution, the universal principles and rules of international law and international treaties are an integral part of the Russian legal system.⁴¹ This statement an *obiter* remark because the literal interpretation of Russian statutory law led to the same conclusion. However, it was a welcome acknowledgement of the importance of separability principle for the Russian law.

The principle of separability will usually salvage an arbitration clause if the court declares the main contract is invalid, but not always. Some grounds for the invalidity will affect both the contract and the arbitration clause - for example, where the entire contract was a forgery.⁴²

It is convenient to consider the principle of autonomy under the following three headings defining its most important practical effects.

First, invalidity or repudiation of the main contract, as well as the fact that it never came into existence,⁴³ as such do not affect the arbitration agreement. Conversely, defects of the arbitration agreement do not invalidate the main contract.

Second, with the expiry of the main contract, the arbitration agreement remains in force unless the parties agree otherwise.⁴⁴

³⁹ UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 76, <http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf> (accessed 22 June 2018).

⁴⁰ Ruling of the Supreme Commercial Court of 30 July 2008 No 9068/08, case No A71-3873/2007.

⁴¹ Decree of the Federal Commercial Court for the North-Western Circuit of 23 October 2009, case No A56-45732/2008.

⁴² Ruling of the Supreme Court of 2 November 2016 N 306-ES16-4741, case No N A65-19616/2015.

⁴³ On the 'not concluded' contracts, see below §3.7[D].

⁴⁴ Information Letter No. 96 of the Presidium of the Supreme Commercial Court of the Russian Federation of 22 December 2005 'Review of Commercial Court Practice in Cases on Recognition and of Writs of Execution for the Enforcement of Arbitral Awards, section 22 [Informacionnoye pismo Pryezidiuma VAS RF ot 22.12.2005 N 96 'Obzor praktiki rassmotryeniya arbitrajnymi sudami dyel o priznanii i privyedenii v ispolneniye ryeshyeni

Third, the law applicable to the main contract and the arbitration agreement, as well as the choice of law rules, can differ.⁴⁵

The Civil Code of Russia contains the choice of law rules for contracts and other substantive obligations. According to Article 1210(5) of the Civil Code, the parties may agree on the applicable law for the contract, or any of its parts. However, if the parties' relationship only concerns one country, the mandatory rules of this country shall apply regardless of the parties' choice of law. For example, a contract between two Russian companies with no foreign investment, the performance of which takes place only in Russia, will be subject to mandatory rules of Russian law even if the parties were to stipulate that the English law governed the contract.

The choice of law rules for arbitration agreements, on the other hand, are contained in a different framework of rules, which includes the New York Convention 1958 and the European Convention on International Commercial Arbitration 1961 to which Russia is a party. The effect of these rules, at least in most cases, is that the law of the arbitral seat (*lex arbitri*) will govern the arbitration clause.⁴⁶ Thus in the example above, if the parties agree to arbitrate their disputes in London, English law will govern the arbitration clause without any reservations about the application of Russian mandatory rules.

Lately, there appears a tendency in the practice of commercial courts to apply a mechanism similar to Article 1210 of the Civil Code to arbitration agreements. In a case known as the *Russian-Singaporean Arbitration case*, two Russian parties in a purely domestic dispute attempted to bypass the requirement of the Arbitration Act 2015 to the operation of permanent arbitration institutions. The arbitration agreement provided for institutional arbitration in Singapore, although in fact Singapore only ever featured on paper in the resolution of the dispute. The sole Russian arbitrator rendered an award in Moscow, and no hearings ever took place outside of Russia. The courts refused the recognition of the arbitral award, holding that since the arbitration took place in Russia, this was effectively a Russian domestic arbitration, so the rules concerning the enforcement of foreign arbitral awards were inapplicable.⁴⁷ The experts criticised this approach for its lack of statutory basis and disregard of the distinction between the seat of arbitration and the hearing venue.⁴⁸ However, it remains likely that the courts might continue to interpret Russian mandatory rules in such a 'protectionist' way in the foreseeable future.

inostrannykh sudov, ob osparivanii ryeshyeniya tryetyeiskikh sudov i o vydachye ispolnityelnykh listov na prinuditelnoye ispolneniye ryeshyeniya tryetyeiskikh sudov' (p. 22)].

⁴⁵ Kurochkin S.A., *supra* note 19, at 76.

⁴⁶ Karabelnikov B.R. *Enforcement and Challenge of International Commercial Arbitration Awards. A Commentary to the New York Convention 1958 and Chapters 30 and 31 of the Commercial Procedure Code 2002 (3rd ed., Moscow, 2008)* [Karabelnikov B.R. Ispolneniye i osparivaniye ryeshyeniya myejdunarodnykh kommyercheskikh arbitrajey. Kommyentarii k Nyu-lorkskoi konvyencii 1958 goda i glavam 30 i 31 APK RF 2002 goda. 3-ye izd., M., 2008].

⁴⁷ Decree of the Federal Commercial Court for the Moscow Circuit of 14 March 2017 No F05-2079/2017, case No A40-219464/16.

⁴⁸ Asoskov A.V. *Can Purely Domestic Disputes Without A Foreign Element Be Referred to Foreign Arbitration?* 115-123, 8 Zakon (2017) [Asoskov A.V. Dopustimo li pyeryedavat chisto vnutryenniye spory byez inostrannogo elyemyenta na razryeshyeniye inostrannogo arbitraja? // Zakon. 2017. N 8. S. 115 – 123].

§ 3.03. The Form of the Arbitration Agreement

Article II(2) of the New York Convention requires an arbitration agreement to be 'signed by the parties or contained in an exchange of letters or telegrams'. Since the Convention opened for signature in 1958, the use of technology in contracting has progressed significantly. The need to accommodate the new practices led, among other things, to the adoption of the UNCITRAL Recommendation regarding the interpretation of article II of the Convention,⁴⁹ and the 2006 edition of the Model Law Article 7. These documents purported to respond to the new challenges by recognising new forms of contracting, in particular, the electronic commerce, in the context of arbitration agreements.

During the arbitration reform in 2015, the Russian legislature has partially followed the UNCITRAL Model Law Option I of Article 7. However, there were two important differences in the final text of the Russian statutes.

First, the Arbitration Act 2015 and the ICA Act 1993 both provide that the agreement must be in writing, but they are more conservative than Option I in recognising the various ways of concluding an arbitration agreement. They list fewer technological means of contracting than their UNCITRAL counterpart and refrain from any mention of a possibility of an oral arbitration agreement.

Second, the new statutes incorporated the additional methods of concluding an arbitration agreement, carrying out other objectives of the arbitration reform 2015. In particular, they make it possible to include arbitration agreements into the Rules of exchanges and clearing organisations, and into the articles of association of a Russian company.

As a result, there are now six distinct methods of concluding an arbitration agreement under the Arbitration Act 2015 and the ICA Act 1993.

[A] A Single Document

The traditional written form of a contract as a single paper document signed by the parties remains the 'golden standard' of business-to-business contracting in Russia, especially where significant sums are at stake. There are signs that the position might be changing. For example, there is now a legislative requirement to conduct the tenders via the Internet, and to sign many types of contracts in the electronic form, in the sphere of public procurement where the sums involved are often considerable.⁵⁰ However, outside the regulated areas and e-commerce as such, for now, there is a preference among Russian lawyers and business managers to err on the conservative and cautious side. With a contract as a single paper

⁴⁹ UNCITRAL Document A/6/17, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session Available at <http://www.newyorkconvention.org/11165/web/files/document/1/5/15978.pdf> (accessed 27 June 2018).

⁵⁰ The Federal Law of 05 April 2013 N 44-FZ 'On the Contractual System in the Procurement of Goods, Works and Services for the State and Municipal Needs'.

document with the signatures of both parties, there is hardly any risk of non-compliance with the formal requirements to the arbitration agreement.

[B] Exchange of Messages

With the exchange of messages, the statutory texts differ in the ICA Act 1993 (governing the international commercial arbitration), and the Arbitration Act 2015 (that regulates arbitration on all other categories of cases). How much do the textual differences reflect a substantive variation in legal requirements?

According to Article 7 of the ICA Act 1993:

3. An arbitration agreement complies with section 2 of this article [*requiring an arbitration agreement to be in writing*]⁵¹ if it is in a form that permits the recording of information contained therein or the accessibility of such information for subsequent use.

4. An arbitration agreement is concluded in the written form via electronic communications if the information contained therein is accessible for subsequent use and its conclusion complied with the law on contracting by an exchange of documents via electronic communications.

Article 7(3) above is very similar to the equivalent Article 7(3) of the Model Law, which provides:

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

On comparing the two provisions, one may notice that, while the Russian statute does not specifically mention the exchange of messages, it omits any reference to the conclusion of an arbitration agreement orally or by conduct. As a matter of general Russian law, oral contracts (as well as the conclusion of oral contracts by conduct and the acceptance of a written offer by conduct) are permissible in principle.⁵² However, Article 161 of the Civil Code makes the written form a mandatory requirement for all transactions between legal persons, legal persons and individuals, and between individuals where the value of the contract is above the modest monetary threshold.

Therefore, in the context of international commercial arbitration, a reference to the conclusion of an arbitration agreement orally or by conduct becomes unnecessary, because written contracts are standard practice in this sphere. At the same time, with this exclusion, it is hard to think of any other way to conclude an arbitration agreement that would not involve an exchange of messages.

⁵¹ Translator's note.

⁵² Articles 158(2), 159 and 438(3) of the Civil Code.

Thus, the exchange of messages becomes a presumed requirement for the conclusion of a valid arbitration agreement under the ICA Act 1993. Article 7(4) reinforces this point by requiring an exchange of messages to conclude an agreement via electronic communications.

The position on the necessity of an exchange of messages is even more straightforward under the Arbitration Act 2015. According to its Article 7(3):

3. An arbitration agreement complies with section 2 of this article [*requiring an arbitration agreement to be in writing*]⁵³ if it is concluded [...] by an exchange of letters, telegrams, telexes, telefaxes or other documents, including electronic documents transferred via the channels of communication, that permit the identification of the other party as the originator of the document.

Here, it is beyond doubt that the exchange of messages is required to conclude an arbitration agreement.

Unlike its UNCITRAL counterpart, the Arbitration Act 2015 does not mention electronic mail or electronic data interchange (EDI) as a legitimate means of concluding an arbitration agreement. The definition is broad enough to cover a wide range of electronic communications, including, for example, an exchange of messages via the companies' official email address. However, Russian practitioners remain cautious about this method, voicing their concern that in practice, only the encrypted documents with an electronic signature might fall under the definition of a 'communications that permit the identification of the other party as the originator of the document'.⁵⁴ The cases where courts had to consider cases involving an arbitration agreement concluded via the email are extremely rare. In one decision, the court did recognise the validity of such an agreement, but the parties, in that case, exchanged the paper versions of the contract after sending each other its scanned versions by email, which made the court's task easier.⁵⁵

The Russian general law on contracting by an exchange of documents via electronic communications does contain the rule identical to the missing part of the UNCITRAL Model Law formula. According to Article 434(2) of the Civil Code, a contract may be concluded by an exchange of [...] electronic documents transferred via the channels of communication that permit the identification of the other party as the originator of the document. 'Electronic documents transferred via the channels of communication' means the information generated, sent, received or stored by electronic, magnetic, optical or similar means, *including electronic data interchange and electronic mail* [emphasis added].

It remains unclear why exactly the mention of EDI and email ended up in the Civil Code but not in the arbitration statutes. From a practical perspective, caution with concluding

⁵³ Translator's note.

⁵⁴ Zhilina M., *From 1 September We Arbitrate by New Rules*, 143-154, 3 *Arbitral Disputes* (2016) [Zhilina M. 1 syentyabrya - v tryetyeiskii sud po novym pravilam // Informacionno-analiticheskiy jurnal 'Arbitrajnyye spory'. 2016. N 3. S. 143 - 154.]

⁵⁵ Decree of the Federal Commercial Court for the Moscow Circuit of 5 September 2016 N F05-12307/2016, case No A40-51713/16.

arbitration agreements via email and EDI remains justified until the relevant court practice emerges.

Only the exchange of documents with an electronic signature will quite certainly comply with the statutory requirements. By a direct legislative prescription, such documents are equivalent to paper versions in all contexts where the law requires a document to be in a 'written form'.⁵⁶ Electronic signatures are the basis of the developing electronic contracting and data exchange in Russia in many spheres, including public procurement. The conclusion of an arbitration agreement via the exchange of documents with a qualifying electronic signature is thus a safe method of observing the requirements of writing under Russian law.

This brief analysis shows, therefore, that the variation of wording in the Arbitration Act 2015 and the ICA Act 1993 does not lead to many significant differences in substance. In both cases, the exchange of messages is necessary. The more traditional telecommunication methods such as telegrams and telex will satisfy the requirement of writing, and so will the document exchange where both parties use a qualifying electronic signature. However, it remains best to be cautious with unencrypted EDI and email.

[C] The Exchange of Statements of Claim and Defence

The exchange of a statement of claim where one party asserts the existence of an arbitration agreement and the other party does not object is a well-known and uncontroversial way of agreeing to arbitrate. It has been part of Russian law for a long time, and the current arbitration statutes contain this important rule. The courts have often cited participation in arbitration without any objections as sufficient ground to confirm the existence of an agreement to arbitrate between the parties.⁵⁷

Russian arbitration statutes also incorporate the Model Law Article 4 on the waiver of right to object. According to this rule, a party who knows that any provision of this Law from which the parties may derogate [...] has not been complied with and yet proceeds with the arbitration without stating his objection [...] shall be deemed to have waived his right to object.

The provisions in the nature of estoppel, in various areas of law, have been subject of a discussion among legal experts in Russia in recent years. The principle of estoppel originates in the English law and describes a prohibition of acting inconsistently with one's previous behaviour, especially where such behaviour became a reason for some official decision. Estoppel is of particular relevance in civil procedural law where it is important to ensure

⁵⁶ Article 6 of the Federal Law of 6 April 2011 N 63-FZ 'On Electronic Signature'.

⁵⁷ Decree of the Presidium of the Supreme Commercial Court of 19 April 2006 N 15973/05, case No A40-38205/05-68-272.

consistency and sanction the parties' opportunistic behaviour.⁵⁸ While estoppel is still not a part of Russian law, estoppel-like legal provisions and reasoning are gaining popularity.

Article V of the European Convention 1961 establishes that the party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed, shall do so during the arbitration proceedings, not later than the delivery of its statement of claim or defence relating to the substance of the dispute. This rule comes into play where the Convention itself applies to arbitration proceedings, i.e. in proceedings between companies and individuals from Russia and another Contracting States of the Convention.⁵⁹

With the adoption of the new legislation in 2015, this rule now became universal in Russian arbitration. Should a respondent participate in the proceedings and fail to raise a timely objection against the tribunal's jurisdiction, he will thereby conclude an arbitration agreement by an exchange of the statement of claim and defence.

[D] Reference to a Document Containing an Arbitration Clause

Reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing if the reference is such as to make that clause part of the contract.⁶⁰

One example of such a document is standard terms of a contract. Before the 2015 reform dramatically reduced the number of permanent arbitration centres in Russia,⁶¹ many large corporations included an arbitration clause to their standard terms. For example, one of the Russian Railways' approved contractual schemes invited their clients to accept a public offer on their website. Such an acceptance referred to the approved form of the contract containing an arbitration clause in favour of a nominated arbitral institution.⁶² After 2015, the use of such mechanisms became less frequent - although this effect might be only temporary.

Another example of a document the parties can incorporate by reference is a separate 'general' arbitration agreement between the parties covering their various legal relationships. Such an agreement can make sense if the parties periodically enter into the same type of contracts. In practice, this method of concluding an arbitration agreement is quite rare.

⁵⁸ Chernykh I.I., *Estoppel in Civil Procedure*, 81-88, 12 *Laws of Russia: Experience, Analysis, Practice* (2015) [Chernykh I.I. *Estoppel v grajdanskom sudoproizvodstvye // Zakony Rossii: opyt, analiz, praktika*. 2015. N 12. S. 81 - 88].

⁵⁹ Article I of the Convention.

⁶⁰ Article 7(5) of the Arbitration Act 2015, Article 7(6) of the ICA Act 1993.

⁶¹ See above, §1.03 of Chapter 1.

⁶² Administrative Order of Russian Railways JSC of 27 February 2014 N 529r 'On the approval of the standard form of the contract for the provision of services to optimise logistic schemes for carriage of railway cars'.

[E] Arbitration Clause in the Rules of Exchanges and Clearing organisations

The rule allowing licensed commodity exchanges, stock exchanges and clearing organisations to include arbitration agreements into their Rules first appeared in Russian legislation in 2011. The legislature recognised that arbitration, with its flexible procedure and availability of expert arbitrators, is uniquely suitable for the resolution of disputes in these fast-moving and specialised markets. This provision was also in keeping with the historical prominence of exchange arbitration in nineteenth-century Russia.⁶³

The effect of such inclusion is that all the participants of trading are deemed to have agreed to arbitrate the disputes among themselves in the nominated arbitral institution.⁶⁴

The exchanges and clearing organisations often do take advantage of this statutory provision. For example, the Trading Rules of the Moscow Exchange provide that all the disputes concerning the conclusion, amendment and termination of transactions concluded under the Rules, as well as the disputes concerning the Rules themselves or their interpretation, shall be resolved by the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs.⁶⁵

[F] Arbitration Clause in a Company's Articles of Association

Many novel provisions of the 2015 reform focus on the arbitration of corporate disputes. One of them concerns arbitration agreements.

An arbitration agreement can be included in the company's articles of association and cover all or certain disputes between the participants of the company and the legal entity itself. Any company can take advantage of this provision, except public joint-stock companies and joint-stock companies with more than a thousand voting shareholders. An important condition for the validity of this kind of arbitration agreement is the unanimous consent of all company members.⁶⁶ Such a corporate arbitration agreement can also extend to the disputes involving third persons, but only if they expressly agree to be thus bound.⁶⁷

One principal limitation associated with the arbitration of corporate disputes is the impossibility of choosing the seat of arbitration. It is a mandatory requirement that arbitration under a corporate arbitration agreement must take place in the Russian Federation.⁶⁸ It

⁶³ See above, §1.01 of Chapter 1.

⁶⁴ Article 7(6) of the Arbitration Act 2015, Article 7(7) of the ICA Act 1993.

⁶⁵ *FX and Precious Metals Market Trading Rules of the Moscow Exchange* (entering into force 2 July 2018) [*Pravila organizovannyh trgov PAO Moskovskaya Birja na valyutnom rynkye i rynkye dragocennyh myetallov (vstupayut v silu s 02.07.2018)*], <https://fs.moex.com/files/1498/28074> (accessed 29 June 2018).

⁶⁶ The requirements to arbitration agreements in articles of association are similar to those in Germany, so the German experience may have influenced the new provisions. See Christian Duve and Philip Wimalasena, *Arbitration of Corporate Law Disputes in Germany*, in: *Arbitration in Germany. The Model Law in Practice* 934-936 (Wolters Kluwer Law and Business, 2nd ed., Nacimiento, Kröll and Bockstiegel (eds)).

⁶⁷ *Commentary to the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation' (Clause-by-clause, Academic and Practical Commentary)*, *supra* note 1, Commentary to Article 7, at §33.

⁶⁸ Article 7(7) of the Arbitration Act 2015, Article 7(8) of the ICA Act 1993.

means, in turn, that Russian courts will be competent to assist the ongoing arbitration and to hear applications to set aside the award.

The choice of foreign law to govern such corporate arbitration agreement would be invalid because of the mandatory requirements of 1202 of the Civil Code. This provision stipulates that the law of the country where the company is registered shall govern the relations between the company and its members. The national company law comprehensively regulates the content of the Russian companies' articles of association.

§ 3.04. Types of Arbitration Agreements

Russian doctrinal sources, like some leading international texts,⁶⁹ commonly classify arbitration agreements according to their form, time of conclusion, and the type of arbitration they envision.⁷⁰ Additionally, there is a lot of normative material on the so-called direct (or express) arbitration agreements and alternative agreements.

[A] A Clause or a Separate Agreement

Depending on the form, one can distinguish an arbitration clause incorporated in a larger document (usually, a contract), and an arbitration agreement drafted as a separate document. For the former but not the latter, the principle of autonomy is important.

[B] Existing or Future Disputes

The time of conclusion, relative to the dispute, allows the classification of agreements into two categories: those relating to a dispute that might arise in the future, and those that refer an already existing one to arbitration (submission agreements). The status of the two categories in current law is equal, although there used to be one exception.

From 2002 to 2015, an arbitration clause contained in a contract where one of the parties produces its terms on a template or another standard form, and the other party has no choice but to accept it by acceding to the contract as a whole (accession contract), was void.⁷¹

The arbitration agreement for an accession contract would only be valid if concluded after the factual basis for the claim has arisen. This measure meant to protect a weaker party in the relationship, because when the dispute begins, the advantages and disadvantages of arbitration become clearer to both parties, thus making an informed and rational choice easier. However, the legislature soon had to make several exceptions to this rule, notably

⁶⁹ See, e.g.: Nigel Blackaby, Constantine Partasides QC, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration*, §2.02 (6th ed., OUP, 2015).

⁷⁰ Kurochkin S.A., *supra* note 19, at 72.

⁷¹ Article 5 of the Arbitration Act 2002; there was never an equivalent rule for international commercial arbitration in the ICA Act 1993.

relating to arbitration clauses in the trading rules of exchanges and clearing organisations. The rule also came under severe criticism from the expert community for being too paternalistic, especially in contracts between entrepreneurs.⁷² The courts applied it willingly enough in the consumer context⁷³ but were often reluctant to do so in commercial disputes.⁷⁴

The new Arbitration Act 2015 eventually abandoned the rule. Thus, accession contracts can now validly include arbitration clauses, and the distinction between arbitration clauses for future disputes and submission agreements is now more theoretical than practical.

[C] Ad Hoc or Institutional Arbitration

The agreement may envision arbitration ad hoc; then the arbitral procedure will be based on the agreement itself and on the ad hoc rules the parties referenced (if any), such as the UNCITRAL Rules. Alternatively, it may envision arbitration at a permanent institution, in which case the institution's rules will govern the procedure. In the Arbitration Act 2015, the rules on ad hoc arbitration became more stringent, and the possibilities of court assistance decreased significantly compared to institutional arbitration.⁷⁵ The parties that agree to ad hoc arbitration, therefore, limit the potential for court assistance and increase the amount of court supervision, in exchange for greater flexibility and confidentiality of the proceedings. The parties to an ad hoc agreement also have a smaller choice of direct (or express) agreements available to them.

[D] Direct Arbitration Agreements

A direct (or express) arbitration agreement is an important novel introduced into Russian law in 2015. According to Article 2(13) of the 2015 Act, the parties may conclude a direct agreement in the enumerated situations. Such an agreement has priority over the institutional rules of arbitration. The enumerated situations include the following:

- (1) In case of a failure of the tribunal appointment procedure, any of the parties may petition the competent court to assist in overcoming this difficulty. However, the parties to an agreement that envisions arbitration at a permanent institution may by their direct agreement exclude any involvement of the court in this matter (Article 11(4) of the Arbitration Act 2015).

⁷² Kuzmina A.V., *Arbitration Clauses in Accession Contracts: Problems of Reforming the Civil and Procedural Legislation*, 4 *Zakon* 121, 123-124 (2015) [Kuzmina A.V., Tryetyeiskiye ogovorki v dogovorah prisoyedinyeniya: problemy ryeformirovaniya grajdanskogo i procyessualnogo zakonodatylstva // *Zakon*, №4, Apryl 2015. S. 123-124].

⁷³ Review of the Practice of the Supreme Court of Russian Federation in the Fourth Quarter of 2011 [Obzor sud'yebnoi praktiki Vyerhovnogo Suda Rossiiskoi Fyedyeracii za chyetyvertyi kvartal 2011 goda].

⁷⁴ See, e.g., Decree of the Presidium of the Supreme Commercial Court of 20 December 2011 N 12686/11, case No N A65-5394/2011 (refusing to treat an energy supply contract between an individual entrepreneur and a provider as an accession contract despite the vast difference in bargaining power).

⁷⁵ For more details, see Chapter 6 below, especially §6.06.

- (2) Where an arbitrator challenge has been unsuccessful under the agreed procedure, a party may refer it to the competent court. Likewise, the parties to an agreement that envisions arbitration at a permanent institution may by their direct agreement exclude this possibility (Article 13(3) of the Arbitration Act 2015). The same rules apply in case of an arbitrator's failure or impossibility to act (Article 14(1) of the Arbitration Act 2015).

With the grounds (1) and (2) above, an interesting issue may arise with the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC at RF CCI) - Russia's most prominent arbitration centre. According to section 11 of the ICAC Rules (Annex 1 to the ICA Act 1993), in ICAC arbitrations the President of CCI shall perform these functions instead of a competent court. At the same time, the relevant Articles 11(3), 11(4), 13(3) and 14 of the ICA Act 1993 do not mention the parties' right to exclude the involvement of the President of ICAC. It would be logical to interpret these rules as allowing such exclusion by the parties' direct agreement since the exclusion of the court's involvement is permissible. However, the courts are yet to test this interpretation.⁷⁶

- (3) Where an arbitral tribunal rules issues an interim award on a party's plea challenging its jurisdiction, this award can be subject to review in a competent court. However, the parties to an agreement that envisions arbitration at a permanent institution may by their direct agreement exclude any involvement of the court in this matter (Article 16(3) of the Arbitration Act 2015).
- (4) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or to conduct the proceedings solely by documents. However, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if so requested by a party, unless the parties have directly agreed that no hearings will take place (Article 27(1) of the Arbitration Act 2015). This direct agreement, unlike many others, is available in both ad hoc and institutional arbitration.
- (5) The parties to an agreement that envisions arbitration at a permanent institution may by their direct agreement stipulate that the arbitral award shall be final as

⁷⁶ Muranov A.I. *The New Recommended Arbitration Agreements of ICAC at the RF CCI 2017: the Comprehensive Analysis of Their Positive and Negative Features, and the Unusual History of Their Publication. The Current 'Shining' of the Absence of an Equivalent Agreement for MAC at the RF CCI*, in: V.A. Kabatov, S.N. Lebedev: *In Memoriam. A Collection of Memories, Articles, Other Materials* 683, 701 (A.I. Muranov, O.N. Zimenkova, A.A. Kostin, eds. Moscow, Statut 2017) [Muranov A.I. *Novyye ryekomyenduyemyye arbitrajnyye soglashyeniya MKAS pri TPP RF 2017 g.: komplyeksnyy analiz ih plusov, minusov, nyeobychnoi istorii ih opublikovaniya. Tyekushyeye 'blistaniye' otsutstviya analogichnogo soglashyeniya dlya MAK pri TPP RF // V.A. Kabatov, S.N. Lebedev: In Memoriam: Sbornik vospominanii, statyei, inyh matyerialov / Nauch. ryed.: A.I. Muranov, O.N. Zimenkova, A.A. Kostin; sost. A.I. Muranov. M.: Statut, 2017. S. 701].*

between the parties. The final arbitral award cannot be subject to an application for setting aside in a competent court (Article 40 of the Arbitration Act 2015).

- (6) Unless the parties to an agreement that envisions arbitration at a permanent institution have directly agreed otherwise, an arbitral institution cannot make the appointment of arbitrators dependent on their belonging to any list of recommended arbitrators (Article 47(1) of the Arbitration Act 2015).

This statutory regulation of direct (express) arbitration agreements is, in itself, a positive development. It has a high potential as an instrument for resolving inconsistencies between institutional rules and the parties' agreements, setting up a clear hierarchy of rules. However, as currently implemented, the main effect of these provisions is increasing the attractiveness of institutional arbitration and decreasing the appeal of ad hoc arbitration in Russia. For example, the parties in institutional arbitration can exclude the possibility of setting an award aside, but the parties in ad hoc arbitration cannot do so. This speaks of a distrust of the Russian legislature to ad hoc arbitration and a preference towards institutional arbitration. Leaving aside the question of whether this preference is justified, one could only point out that the mechanism of a direct (express) agreement could be useful in other contexts as well.

[E] Alternative Arbitration Agreements

An alternative arbitration agreement provides one or both parties, when a dispute arises, with a choice between initiating a case in arbitration or a competent national court. Another kind of an alternative arbitration agreement provides one or both parties with a choice between two or more arbitral institutions enumerated in the agreement.

One could argue that alternative agreements represent a fair and sensible option in some industries and some types of contracts. An obvious example are commercial loan agreements where the lender who extends credit facilities to a borrower ought to be able, in case of default, to select the most appropriate forum to recover the debt depending on the location of the debtor's assets. In some of the more 'liberal' jurisdictions such as England, virtually all types of alternative clauses are valid.⁷⁷ However, the drafters of alternative arbitration agreements should exercise caution if the matter may end up in front of a Russian court.

One type of alternative agreements names several arbitral institutions on an alternative basis, giving the claimant the right to select one of them. There is at least one reported ICAC case where the tribunal assumed jurisdiction under such a clause.⁷⁸ Some

⁷⁷ NB Three Shipping Ltd v Harebell Shipping Ltd [2004] EWHC 2001 (Comm), Deutsche Bank Ag v Tongkah Harbour Public Company Ltd [2011] EWHC 2251 (Comm), Law Debenture Trust Corporation plc v Elektrim Finance BV and others [2005] EWHC 1412 (Ch).

⁷⁸ ICAC Award of 29 October 1996, case No 441/1996.

experts consider such clauses as perfectly valid and enforceable.⁷⁹ Others caution that they may fall prey to the position of the Supreme Commercial Court⁸⁰ requiring the arbitration clause, in case of institutional arbitration, to name a particular arbitral institution at the risk of invalidity.⁸¹

Another type of alternative arbitration agreement envisions a party choosing, when a dispute arises, between arbitration and a competent national court. Such clauses are sometimes termed hybrid, or optional, dispute resolution clauses.⁸² Depending on whether this choice belongs to one or both (all) parties to the agreement, hybrid clauses can be either symmetrical or asymmetrical.

Symmetrical alternative arbitration agreements are perfectly enforceable in Russia. In *Katren v Surgutfarmaciya*, the Presidium of the Supreme Commercial Court confirmed the validity of an agreement that gave the claimant a choice between the Siberian Arbitration Centre and the relevant competent Commercial Court. The court explained this conclusion by the freedom of contract, the entitlement of both parties to make a choice, and the absence of any statutory restriction for such agreements.⁸³

However, several months later, in the famous *Sony Ericsson case*, the Supreme Commercial Court held that asymmetrical arbitration clauses were unenforceable in Russia. The sales agreement between Sony Ericsson and its Russian distributor contained an ICC arbitration clause, which, in addition to the conventional provisions about resolving all disputes in arbitration, gave Sony Ericsson the right to recover any debt via the court of competent jurisdiction. The Russian distributor sought a remedy against Sony Ericsson in the Commercial Court of the City of Moscow, but the court declined to hear the case because there was a valid arbitration agreement between the parties. When the case reached the Supreme Commercial Court, it held as follows:

Thus, a dispute settlement agreement cannot confer the right to apply to the competent court only on one party of a contract (seller) and deprive the other party (buyer) of such a right. Such an agreement is invalid because it violates the balance of rights between the parties. Therefore, a party whose right has been infringed by such a dispute resolution agreement is also entitled to apply to the competent state court, thus realising its guaranteed right of access to justice on an equal footing with its counterparty.⁸⁴

⁷⁹ Nosyreva E.I., *The Consequences of Alternative Arbitration Agreements*, 10-14, 20 *Yurist* (2013) [Nosyreva E.I. *Poslyedstviya zaklyucheniya altyernativnyh arbitrajnyh (tryetyeiskih) ogovorok // Yurist. 2013. N 20. S. 10 – 14*].

⁸⁰ Decree of the Presidium of the Supreme Commercial Court of 27 February 1996 N 5278/95.

⁸¹ Kurochkin S.A., *supra* note 19, at 73.

⁸² Neil Andrews, *Arbitration and Contract Law: Common Law Perspectives*, 19 (Springer, 2016).

⁸³ Decree of the Presidium of the Supreme Commercial Court of 14 February 2012 N 11196/11, case No A75-1836/2011.

⁸⁴ Decree of the Presidium of the Supreme Commercial Court of 19 June 2012 N 1831/12, case No A40-49223/11-112-401.

One could criticise the decision on several grounds, in particular for the lack of clarity on the law applicable to the arbitration clause in question.⁸⁵ However, the excerpt above shows that the Supreme Commercial Court adopted an interesting solution. Instead of invalidating the arbitration agreement in its entirety, the court decided to remedy the then-invalid clause without striking it down. The decision effectively grants both parties the same rights and access to their preferred method of dispute resolution, be it ICC arbitration or litigation before the competent court.⁸⁶

Arguably, this represents a more nuanced solution than the one that the French *Cour de Cassation* adopted in *Madame X v Banque Privie Edmond de Rothschild*.⁸⁷ The French court considered a similar clause in a case involving a bank customer attempting to close her accounts in a local branch of the bank. The court found the entire dispute resolution clause invalid on grounds of unconscionability - which may have been justified given the different facts and context. The underlying rationale based on procedural equality of the parties, however, is very similar.

§3.05. Interpretation of the Arbitration Agreement

One positive development in the Arbitration Act 2015 was the introduction of statutory rules on the interpretation of an arbitration agreement. Those rules will be considered below.

[A] Doubts as to the Agreement's Validity and Enforceability

According to Art 7(8) of the Arbitration Act 2015, 'when interpreting an arbitration agreement, any doubt must be construed in favour of its validity and enforceability'.⁸⁸ This provision is absent from the UNCITRAL Model Law on International Commercial Arbitration, and its precise reach and significance for the Russian law are yet to be determined in the court practice.

This provision appears to draw inspiration in the method of 'effective interpretation', which is indeed a universally recognised rule of interpretation. This method can be traced back to Article 1157 of the French Civil Code, which provided that 'where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective'. This provision has been contained in the French Civil Code since 1804 and is now incorporated in

⁸⁵ Roman Khodykin, *supra* note 23, 28-29.

⁸⁶ Lauren D. Miller, *Is the Unilateral Jurisdiction Clause No Longer an Option: Examining Courts' Justifications for Upholding or Invalidating Asymmetrical or Unilateral Jurisdiction Clauses*, 331, 51 Tex. Int'l L. J. 321 (2016).

⁸⁷ *Cour de cassation [Cass.] Paris, Ass. plen., Sept. 26, 2012, Bulletin des arrêts de la Cour de cassation, Chambres Civiles 2012, 983, M. Charruault.*

⁸⁸ Article 7(9) of the ICA Act 1993 contains the identical rule.

the law of many jurisdictions.⁸⁹ The UNIDROIT Principles of International Commercial Contracts include the same rule in Art 4.5. (All terms must be given effect). When applied to an arbitration agreement, this principle leads to the assumption that the parties could not knowingly intend to include a pathological agreement into their contract.

The method of effective interpretation must not be confused with interpretation *in favorem validatis*, which requires an extensive interpretation of an arbitration agreement, thus giving preference to arbitration over litigation in a competent state court. Thus worded, the principle becomes more questionable, especially when it is applied to the matter of the very existence of an arbitration agreement between the parties. Indeed, a mere allegation that the agreement to arbitrate exists should not raise a presumption that such an allegation is true.⁹⁰

[B] The Default Scope of an Arbitration Agreement

The range of disputes that may arise in any given relationship is impossible to predict with any certainty. Would a disagreement arise during the performance of a contract? Perhaps one of the parties might attempt to obtain a decision declaring some provisions of the contract null and void? Anticipating all the possibilities might be difficult even for an experienced transactional lawyer, let alone an ordinary commercial party acting without legal advice.

This problem does not only affect arbitration in Russia. Courts in many jurisdictions regularly interpret the scope of arbitration agreements, trying to ascertain the parties' intentions. For example, in *Fiona Trust & Holding Corporation v Privalov*,⁹¹ the UK House of Lords had to strike down the distinction the English courts previously drew between 'narrow' arbitration agreements covering only disputes 'out of the contract' and 'wide' clauses that encompassed disputes out of the contract as well as those 'in connection' with the contract.⁹² Lord Hoffman held that construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal.

The prevailing opinion in Germany and Switzerland favours a broad interpretation of arbitration clauses supporting an all-encompassing jurisdiction of the arbitral tribunal.⁹³ Courts in other countries, such as the US, continue to uphold the distinction between wide and narrow clauses.⁹⁴ For instance, in *Cape Flattery Ltd v. Titan Maritime LLC*, the US Court of

⁸⁹ Fouchard, Gaillard and Goldman on International Commercial Arbitration, *supra* note 7, at 258-259.

⁹⁰ *Ibid.* at 262.

⁹¹ *Fiona Trust & Holding Corporation v Privalov* (2007) UKHL 40.

⁹² Irene Welser and Susanne Molitoris, *The Scope of Arbitration Clauses - Or 'All Disputes Arising out of or in Connection with this Contract...'*, 17 Austrian Yearbook on International Arbitration 19, 20 (2012).

⁹³ *Ibid.* at 19.

⁹⁴ *Ibid.* at 21.

Appeals for the Ninth Circuit held that the distinction is long-standing; therefore, the parties are entitled to rely on it when they conclude their agreements.⁹⁵

Under the previous legislation, Russian courts often assumed narrow and literal interpretation of arbitration agreements. The new arbitral legislation introduced two connected rules to remedy the situation.

First, unless the parties agreed otherwise, an arbitration agreement covering disputes arising from a contract, or in connection therewith, extends to any transactions between the parties aimed at the performance, amendment or termination of said contract.⁹⁶

Second, an arbitration agreement contained in a contract extends to any disputes in connection with the conclusion of the said contract, its entry into force, amendment, termination, or validity. It also extends to the disputes arising in connection with an obligation to return everything performed under a contract if it is declared void or not concluded. This rule applies if it does not follow otherwise from the arbitration agreement itself.⁹⁷ The courts have interpreted it, for example, to apply to unjust enrichment obligations connected with the contract.⁹⁸

The approach of the Arbitration Act 2015 thus makes the distinction between wide and narrow agreements virtually non-existent and creates the prerequisites for a more favourable judicial approach to the scope of arbitration agreements.

§ 3.06. Assignment and Succession in Arbitration Agreements

The question whether or not the arbitral clause should follow the fate of the main obligation under the contract, e.g. a monetary debt when it is assigned to a third person, has been contentious in Russia for a long time.⁹⁹

The Civil Code does not require a debtor to agree to the assignment unless the obligation is 'inseparable' from the personality of the creditor. Therefore, a creditor can usually assign a debt without asking the debtor's opinion.¹⁰⁰ On the other hand, a debtor cannot legally substitute himself with the new debtor (this is known as a substitution of a debtor or a transfer of the debt to another person) without the creditor's agreement.¹⁰¹ Transfer of an arbitration clause to a new creditor without the debtor's consent also puts into question the voluntary nature of arbitration, which the highest courts of Russia hold in utmost regard.

⁹⁵ *Cape Flattery Ltd v Titan Maritime, LLC* (U.S. Court of Appeals, 9th Circuit 2011).

⁹⁶ Article 7(9) of the Arbitration Act 2015, Article 7(10) of the ICA Act 1993.

⁹⁷ Article 7(11) of the Arbitration Act 2015, Article 7(12) of the ICA Act 1993.

⁹⁸ Decree of the Ninth Commercial Appeal Court of 23 January 2017 N 09AP-66804/2016, case No A40-122354/16-34-1071.

⁹⁹ See Roman Khodykin, *supra* note 23, at 33-34.

¹⁰⁰ Article 388 of the Civil Code.

¹⁰¹ Article 391 of the Civil Code.

Before the 2015 reform, scholarly opinion was divided. Some commentators argued that the arbitral agreement has a procedural nature distinct from the substantive obligation, and the voluntariness of arbitration should be of paramount importance. Therefore, since the debtor never expressly agreed to arbitrate with the new creditor, the arbitration agreement should become void on assignment. Others pointed out that the method of dispute resolution is but a component of a contractual obligation, and the separation of debts from the method of their recovery is both unnecessary and undesirable. The court practice on this issue was also inconsistent.¹⁰²

Article 12(10) of the Arbitration Act 2015 attempts to settle the discussion. It provides that if a creditor or a debtor changes in a relationship covered by an arbitration agreement, it remains valid for both old and new debtor, as well as for both old and new creditor.¹⁰³ This is a welcome solution for the assignment of commercial debts because the need to obtain the debtor's agreement would impede the liquidity on the market and make investments riskier and thus more costly. On the other hand, it is a far-reaching mandatory rule, covering both assignments of debts and substitutions of debtors in obligations; both contractual and statutory mechanisms, such as company reorganisation and succession; applicable both in commercial and non-commercial relations. In some contexts, one could doubt whether such a firm connection between a substantive obligation and the arbitration agreement is desirable. However, in light of the previous debates and inconsistency, the certainty of this rule is a positive factor.

A related matter is the transfer of rights and liabilities from one permanent arbitral institution to another. This question may arise, for example, if an arbitral institution merges with another or splits into two new institutions. Some arbitration agreements concluded before the event would still reference the institution's old name - do they become inoperable?

The court practice treats the name and identity of a permanent institution as a necessary term of an arbitration agreement. Therefore, attempts of reorganised institutions to apply the usual rules of succession to the arbitral agreements have generally failed.

For example, in 2007, in the course of the ongoing energy reform, OAO Unified Energy Systems of Russia (RAO UES) - the umbrella holding company acting as a semi-governmental regulator for the state-owned energy companies - was merged with another company and ceased to exist. This meant that its permanent arbitral institution, the RAO UES Arbitration Centre, could no longer exist either. Meanwhile, over the years companies in the sector concluded many contracts with arbitral clauses in its favour. In one of its last documents, RAO UES informed the energy companies that their arbitral clauses remained valid, and the disputes under them should be referred to the new centre. Inevitably, some of the respondents later objected to the jurisdiction of the new centre. In a series of cases, commercial courts upheld these objections of the reluctant respondents. They held that RAO

¹⁰² For a review of the main arguments, see: Bevzenko R.S., *Does the Arbitration Clause Survive an Assignment?* 11 Corporate Lawyer (2007) [Bevzenko R.S., *Sohranyayetsya li tryetyeiskaya ogovorka pri ustupkoye tryebvaniya? // Korporativnyi yurist*, No 11, 2007].

¹⁰³ Article 7(10) of the Arbitration Act 2015, Article 7(11) of the ICA Act 1993.

UES was attempting to unilaterally impose its will upon the energy companies that freely agreed to the jurisdiction of the RAO UES Arbitration Centre before, but never consented to arbitrate under the auspices of its successor. The courts did not consider it relevant that some arbitral agreements expressly gave RAO UES the right to reorganise the Arbitration Centre or to determine its successor.¹⁰⁴

After this series of cases, succession between arbitral institutions in Russia became virtually impossible, except in cases where both parties expressly consented to the successor's jurisdiction. The newly created 'successors' of the reorganised arbitral centres thus have to start anew, building their own 'client base' from scratch, and the arbitration agreements in favour of the reorganised centres become inoperable. This remains the position until this day, with only two known exceptions.

One exception is ICAC at the RF CCI, which 'inherited' the arbitration agreements from its predecessor, the Foreign Trade Arbitration Commission (FTAC), by a statutory rule which expressly confirmed the succession in 1993.¹⁰⁵

The second, more recent exception deals with the situation where a permanent arbitral centre fails to obtain the necessary government permit required after the 2015 reform.¹⁰⁶ To avoid making the arbitration agreements inoperable, the law allows such defunct centres to determine their successors from among the arbitral institutions that have successfully obtained a permit.¹⁰⁷

§ 3.07. Defects of an Arbitration Agreement

The description of possible defects of an arbitration agreement in Arbitration Act 2015 and the Russian procedural codes follow the wording of Articles II and V the New York Convention 1958. The courts will give an effect to an arbitration agreement or to an award stemming from an agreement unless they find that the agreement is null and void, inoperative, or incapable of being performed. The first of those three categories (nullity or invalidity) corresponds to the approach of the Civil Code to the invalidity of contracts generally and therefore is a familiar notion for Russian civil lawyers. The other two, however, are otherwise unknown in Russian legal system and their use is confined to arbitration law. Under the Civil Code, arbitral agreements in Russian law can also be 'not concluded'.

[A] Invalid Agreements

There are two categories of grounds for invalidity of an arbitration agreement: those resulting from the non-compliance of an agreement to the dedicated requirements of the

¹⁰⁴ Decree of the Presidium of the Supreme Commercial Court of 23 June 2009 N 1434/09, case No A55-10329/2008.

¹⁰⁵ Annex I to the ICA Act 1993 - the Statute of ICAC.

¹⁰⁶ See Chapter 1 above for more details.

¹⁰⁷ Article 52(6) of the Arbitration Act 2015.

Arbitration Act 2015 and the procedural codes; and those based on the general rules of the Civil Code.

From a doctrinal point of view, this division corresponds to the two positions in court practice. Some judges treat an arbitration agreement as a purely procedural agreement, therefore deeming it impossible to apply the rules of the Civil Code. Those judges will only apply the rules on the invalidity of an arbitration agreement contained in arbitration and procedural law. The others (a majority) believe that there are substantive legal elements in an agreement to arbitrate, and therefore apply the general Civil Code rules to its validity or invalidity.¹⁰⁸

The non-compliance of an agreement to the Arbitration Act 2015 may be formal or substantive. For example, an oral agreement would be void because it contravenes the requirements to its form.¹⁰⁹ Likewise, an arbitration clause in the public joint-stock company's articles of association would be invalid as directly contradicting Article 7(7) of the 2015 Act.¹¹⁰

Procedural codes define the categories of non-arbitrable disputes, such as those arising from privatisation of state and municipal property, public procurement or damage to the environment.¹¹¹ Other federal laws can also occasionally contain the rules on arbitrability, e.g. the Federal Law 'On bankruptcy (insolvency)'.¹¹² An agreement purporting to refer a non-arbitrable dispute to arbitration will also be null and void.¹¹³

The general grounds for invalidity of contracts are set out in Chapter 9 (Articles 166-181) of the Civil Code. Instead of 'invalidity of a contract', the Code operates with the term 'invalidity of a transaction', defining a transaction as 'any action of an individual or legal person directed at the creation, amendment or termination of civil rights and obligations.'¹¹⁴ The Code uses the term 'transaction' because, in addition to bilateral and multilateral transactions (i.e., contracts) it also includes any unilateral acts.¹¹⁵

Perhaps the most 'popular' ground for invalidity of transactions in the Civil Code that may apply to arbitration agreements is the contravention of a transaction to the law or other legal acts (Article 168). Unless a court treats an arbitration agreement merely as a procedural mechanism without any substantive (contractual) elements, a reference to this article often supplements the reasoning grounded in the requirements of the arbitration and procedural

¹⁰⁸ See above §3.1[F]. See also R.S. Bevzenko, S.B. Zainullin, O.N. Kurskova et al., *The Academic and Practical Commentary to the Federal Law 'On Arbitration in Russian Federation' with a Review of Commercial Court Practice (Clause-by-Clause)*, 84 (A.N. Lysenko, A.A. Khorosheva, eds., Moscow, Delovoy Dvor, 2011) [*Nauchno-prakticheskii kommentarii k Fyederalnomu zakonu 'O tryetyeiskih sudah v Rossiiskoi Fyederacii' s obzorom sudyebno-arbitrajnoi praktiki (postatyeyiny)*] / R.S. Bevzenko, S.B. Zainullin, O.N. Kurskova i dr.; pod ryed. A.N. Lysenko, A.A. Khorosheva. M.: Dyelovoi dvor, 2011].

¹⁰⁹ See above §3.03[B].

¹¹⁰ See above §3.03[F].

¹¹¹ Article 33 of the Commercial Procedure Code, Article 22.1 of the Civil Procedural Code.

¹¹² For more details on arbitrability, see Chapter 7 below.

¹¹³ The Review of the Supreme Court Practice No 2 (2015), approved by the Presidium of the Supreme Court of Russian Federation on 26 June 2015 [Obzor sudyebnoi praktiki Vyerhovnogo Suda Rossiiskoi Fyederacii N 2 (2015) (utv. Pryezidiumom Vyerhovnogo Suda Rossiiskoi Fyederacii 26.06.2015)].

¹¹⁴ Article 153 of the Civil Code.

¹¹⁵ Article 154 of the Civil Code.

law. For example, one court used Article 168 to strike down an overly broad clause that failed to specify a particular legal relationship between the parties and the range of disputes to which it applied.¹¹⁶ An agreement relating to a non-arbitrable matter also can be declared invalid under Article 168 of the Civil Code in conjunction with the relevant article of a procedural code or another federal law.¹¹⁷

Russian courts sometimes adopt a more creative stance on Article 168, applying it in conjunction with Article 10 of the Civil Code (misuse of civil rights). This approach allows them to strike down transactions that do not contradict the literal meaning of legal rules but make improper use of otherwise lawful instruments. For example, in one case the court declared invalid an arbitration clause concluded for the use in bankruptcy proceedings and solely aimed at defrauding creditors of an insolvent company.¹¹⁸

The next category is transactions with the aims that contradict the basic notions of law and order, or morality (Article 169 of the Civil Code). The standard for the application of this article is high, and the mere contradiction to the law is insufficient. Along with Article 168, a reference to this article allowed courts to formulate the present requirement that parties in an arbitration agreement cannot nominate a permanent arbitral institution if the institution is affiliated with, and financed by, one of them. Such an agreement would be invalid because it contravenes the law's basic requirement of independence and impartiality in arbitration.¹¹⁹

Another significant group of grounds includes transactions resulting from a material error (Article 178), deception, coercion, threats or duress (Article 179). Claimants under these two articles sometimes allege collusion or conspiracy between the managers who signed an agreement, or between their legal advisors. The burden of proof for such allegations is high, so claims of this kind are rarely successful.¹²⁰

[B] Agreements Incapable of Being Performed

An arbitration agreement may become 'incapable of being performed' where the arbitral institution agreed by the parties ceased to exist or never existed, e.g. because of being inaccurately named.¹²¹ Likewise, severe defects in the agreed procedure of the tribunal formation, which the parties cannot remedy through the usual legal means, will also render

¹¹⁶ Ruling of the Supreme Court of 27 March 2017 N 309-ES17-2079, case No A50-11392/2016.

¹¹⁷ The Review of the Supreme Court Practice No 2 (2015), *supra* note 113.

¹¹⁸ Decree of the Federal Commercial Court for the West-Siberian Circuit of 26 October 2012, case No A67-9053/2006.

¹¹⁹ Ruling of the Supreme Commercial Court of 18 April 2013 N VAS-18412/12 and Decree of the Presidium of the Supreme Commercial Court of 9 July 2013 N 18412/12, case No A73-5201/2011; Decree of the Presidium of the Supreme Commercial Court of 28 June 2011 N 1308/11, case No A40-15962/10-104-120; Ruling of the Supreme Court of 26 October 2015 N 305- ES15-4679, case No A40-91439/2014.

¹²⁰ *See, e.g.*, Ruling of the Supreme Court of 16 June 2017 N 305- ES17-2959, case No A40-66494/16; Decree of the Federal Commercial Court for the Moscow Circuit of 2 February 2010 N KG-A40/14840-09, case No 40-48635/09-132-423.

¹²¹ Roman Khodykin, *supra* note 23, at 25.

the agreement incapable of being performed. It is common in Russian doctrinal sources to equate pathological arbitration agreements with the agreements incapable of being performed.¹²²

[C] Inoperable Agreements

This exception encompasses withdrawal of a consent to arbitrate, cessation or repudiation of an arbitration agreement. An agreement ceases to be operable for a given dispute where an arbitral tribunal has already resolved an identical dispute between the same parties and rendered an award. The arbitral agreement also ceases to be operable where it was contractually limited in time, and the time limit has expired.¹²³

[D] Not Concluded Agreements

According to Art 7(11) of the Arbitration Act 2015, in addition to invalidity and other 'conventional' defects of an arbitral agreement, it could also be 'not concluded'. This notion is a result of the treatment of an arbitration agreement as yet another transaction governed by the Civil Code.

According to Article 432 of the Civil Code, a contract is concluded when the parties reached an agreement on all its necessary terms, in the form required by the law for this type of contracts. The necessary terms are those that the law names as such, and those on which, according to one party's declaration, the parties must agree for the contract to come into existence.

Many rules in the Civil Code and other federal laws name the specific terms that are necessary for the particular categories of contract. For example, a contract for the sale of a plot of land must include the detailed description of the plot with reference to the cadastre (land register), its price, information about any servitudes, and so on.¹²⁴ If any of those terms is absent from the contract, it does not become invalid – it never even comes into existence. It is, in other words, merely a 'not concluded' contract.

The same consequence will ensue if the parties' exchange of an offer and acceptance was defective, for example, where acceptance never reached the offeror. Some contracts only become concluded when the property changes hands (e.g. in a loan agreement between private individuals),¹²⁵ or when a competent authority registers the contract (e.g. in real property transactions).¹²⁶

¹²² Ibid.

¹²³ Id., at 95-96.

¹²⁴ Articles 555-557 of the Civil Code, Article 37 of the Land Code.

¹²⁵ Article 807 of the Civil Code.

¹²⁶ Articles 609 and 651 of the Civil Code. This applies to the real property contracts concluded before 2015; since then, the law has changed.

For all those cases, Russian law developed a specific remedy - a judicial declaration that a contract is 'not concluded', which is a distinct remedy from declaring a contract null and void. The courts cannot apply the Civil Code rules on the invalidity of transactions to contracts that never came into existence in the first place, so their approach to 'not concluded' contracts is somewhat different.¹²⁷

This distinction between void and 'not concluded' contracts also holds in the context of arbitration agreements. A 'not concluded' arbitration agreement is unenforceable, cannot endow a tribunal with jurisdiction to hear a dispute, and an award rendered on the basis of such an agreement is at risk of being set aside. Thus, the effects of an arbitration agreement being invalid and 'not concluded' are very similar. Sometimes, the two categories get mixed in the court practice.¹²⁸

[E] Declaring an Arbitration Agreement Invalid

Until recently, it used to be a contentious issue whether a separate court action to declare an arbitration agreement invalid (or not concluded) was admissible in principle. Some courts¹²⁹ and commentators¹³⁰ argued that, since an arbitration agreement is not a civil contract but a purely procedural agreement, the parties could not challenge it on its own using a separate court claim. The courts could only assess the validity of an arbitration agreement in the proceedings designed explicitly for arbitration, e.g. when they dealt with enforcement or setting aside applications.

However, just like the procedural theory of an arbitration agreement, this view proved unpopular. The majority of courts accepted and heard separate claims seeking to declare an arbitration agreement invalid,¹³¹ and the commentators in the recent years supported this position.¹³² It is a settled practice now that such claims are admissible, and courts can assess the validity of arbitration agreements in separate proceedings as well as while dealing with enforcement and setting aside applications.

¹²⁷ Information Letter No. 165 of the Supreme Commercial Court of the Russian Federation of 25 February 2014 'Review of Commercial Court Practice in Cases Concerning the Declaration of Contracts Not Concluded'.

¹²⁸ For example, in the Ruling of the Supreme Commercial Court of 28 August 2008 N 8711/08, case No A67-438/08, the court said 'the arbitration agreement is not concluded, and therefore invalid'.

¹²⁹ Decree of the Ninth Commercial Court of Appeal of 26 September 2014 N 09 AP-28440/2014, case No A40-106363/11 (vacated on further appeal).

¹³⁰ Kholodenko Yu.V., Andryukova E.V. *Challenging an Arbitration Agreement: the Need for a Single Approach in the Application of the Law*, 4 Treteysky Sud 93-93 (2014) [Kholodenko Yu.V., Andryukova E.V. Osparivaniye tryetyeiskogo soglasyeniya: nyeobhodimost yedinyh podhodov v procyessye pravoprinyeniya // Tryetyeiskii sud. 2014. N 4. S. 93 – 96]; Kostin A.A. and Davydenko D.L., *supra* note 28, at 271.

¹³¹ See, e.g., Decree of the Federal Commercial Court for the North-Western Circuit of 25 July 2008, case No A56-17133/2007; Decree of the Federal Commercial Court for the North-Western Circuit of 3 September 2012, cases No A42-7229/2011 and A42-7231/2011, Ruling of the Supreme Court of 2 December 2015 N 308-ES15-10232.

¹³² Chernikova I.V., *Court Practice in Cases of the Declaration of Arbitration Agreements Invalid*, 1 Arbitral Disputes, 68-74 (2017) [Chernikova I.V. Sudyebnaya praktika rassmotryeniya iskov o priznanii tryetyeiskih soglasyeniya nyedyeistvityelnymi // Arbitrajnyye spory. 2017. N 1. S. 68 – 74].

One exception to this rule concerns the clauses specifying that disputes on their validity shall be resolved in arbitration. In such cases, the courts will usually leave the claim without consideration according to the general rules.¹³³

The application of the Civil Code to the invalidity of arbitration agreements also means that the regular statute of limitation applies to claims seeking to declare an arbitration agreement invalid. If a claimant misses the statutory limit, this circumstance alone will be a sufficient ground to refuse the declaration.¹³⁴ In the absence of exceptional circumstances, the general statute of limitation in Russia is three years since the day the claimant found out or should have found out about the agreement.¹³⁵

¹³³ Ruling of the Supreme Court of 3 August 2017 N 305-ES17-9577, case No A41-70451/2016.

¹³⁴ Ruling of the Supreme Court of 1 February 2016 N 307-ES15-18382, case No A42-8843/2013.

¹³⁵ Articles 196 and 200 of the Civil Code.