KOTELNIKOV, A. 2019. Award. In Kotelnikov, A., Kurochkin, S. and Skvortsov, O. *Arbitration in Russia*. Alphen aan den Rijn: Wolters Kluwer [online], chapter 10. Available from: https://lrus.wolterskluwer.com/store/product/arbitration-in-russia/

Award.

KOTELNIKOV, A.

2019

Chapter 10. Award

§10.1. Definition of Award

An arbitral award is the ultimate result of the proceedings, and parties normally expect their arbitration to end in a final and binding award.[1] It is therefore unsurprising that Article 2 of the Arbitration Act 2015 defines arbitration as a process whereby the tribunal resolves a dispute and renders an award. This definition places a special emphasis on two aspects of the arbitral mechanism: the process and the award.

It is important to distinguish between arbitral awards and other acts and decisions that do not qualify as awards. There are two logical stages in this process. First, a decision maker must review whether the dispute had been submitted and resolved by arbitration and not another method of dispute resolution. Second, it is necessary to ascertain whether the decision is an award and not any other type of decision by the tribunal.[2]

Arbitral awards – but, generally, not other decisions and orders of the tribunal - are capable of enforcement with the assistance of competent national courts. The possibility of enforcing an arbitral award in other jurisdictions under the New York Convention 1958 is the key reason for the popularity of arbitration in international commerce. Enforceability is also crucial in the domestic context because the final and binding character of arbitral awards constitutes domestic arbitration's main difference from, and an advantage over, other methods of alternative dispute resolution. The parties can usually challenge an arbitral award before the relevant national courts; other kinds of the tribunal's orders and decisions, with a few notable exceptions, are not subject to separate challenge proceedings.

Just like the previous Russian legislation, the Arbitration Act 2015 does not contain a definition of an arbitral award, although several individual provisions of this statute do shed some light on its nature.[3] Article 34 of the 2015 Act sets out the detailed requirements to the form and content of an arbitral award. In particular, according to Article 34(2)(8), the operative part of the award contains the tribunal's conclusions on upholding or refusing each of the parties' requests for relief. Article 35 of the Arbitration Act 2015 stipulates that on the matters that do not concern the merits of the dispute, the tribunal shall render an order (and not an award).

At the doctrinal level, I.M. Chupakhin has suggested the following comprehensive definition of an arbitral award, listing its nine essential characteristics:

(1) The arbitral award is, first and foremost, a result of the application of the law, and in order to distinguish it from the acts of other bodies and authorities performing jurisdictional functions – notably, the courts – one must keep in mind the private legal nature of an arbitral tribunal.

(2) An award must follow a procedure agreed by the parties, and this procedure must comply with the mandatory rules of law.

---

[1] Margaret L. Moses, *International Commercial Arbitration*, 201 (3rd ed., CUP, 2017).

[2] *ICCA's Guide to the Interpretation of the 1958 New York Convention. A Handbook for Judges*, 16 (The Hague 2011).

[3] In fairness to the Russian statute, there is no internationally accepted definition of the term 'award' either – *see* Nigel Blackaby, Constantine Partasides QC, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration,* §9.05 (6th ed., OUP, 2015).

(3) Only the arbitrators selected or appointed in the manner agreed by the parties can render an award.
(4) Since arbitration is not a universal or a default method of protecting the individual rights, an arbitral award can only concern the civil legal relationships, provided that there is a valid and enforceable arbitration agreement between the parties.
(5) An arbitral award resolves the dispute on the merits in full or in part.
(6) The arbitral award is final, which implies its immediate entry into legal force and the impossibility of review on the merits (with some exceptions as provided for in the law of some legal systems).
(7) An arbitral award can be set aside by a competent court within a dedicated type of proceedings on a limited number of grounds.
(8) Since an award is the result of the actions of private persons, as a rule, the parties comply with it voluntarily; otherwise, the state may exercise its enforcement powers in the form of an exequatur.
(9) An arbitral award can act as a legally significant fact of both substantive and procedural law.[4]

§10.2. Categories of Award

[A] Partial, Interim and Separate Awards

The authoritative ICCA's Guide to the Interpretation of the 1958 New York Convention, arguably, defines an arbitral award more broadly than the Russian statutory law and doctrine. In order to understand why this is the case, it is useful to start from a review of the international position.

According to the Guide, an award is a decision putting an end to the arbitration in whole or in part, or a ruling on a preliminary issue the resolution of which is necessary to reach a final decision. Consequently, the Guide lists the following arbitral decisions that qualify as awards:

- Final awards putting an end to the arbitration;
- Partial awards that give a final decision on part of the claims and leave the remaining claims for a subsequent phase of the arbitration proceedings;
- Preliminary or interim awards that decide a preliminary issue necessary to dispose of the parties' claims, such as a decision on whether a claim is time-barred;
- Awards on costs;
- Consent awards recording the parties' settlement of the dispute.[5]

This classification is a useful starting point for discussing the different categories of arbitral awards. In international practice, an even wider variety of adjectives is used to describe

[4] Chupakhin I.M., *Arbitral Award: Theoretical and Practical Issues,* 28 (Moscow, 2015) [Chupakhin I.M. Ryeshyeniye tryetyeiskogo suda: tyeoryetichyeskiye i prikladnyye problyemy. M., 2015. S. 28].
[5] *ICCA's Guide to the Interpretation of the 1958 New York Convention. A Handbook for Judges*, *supra* note 2, at 17.

various kinds of arbitral awards, such as 'interlocutory' and 'preliminary' awards. Adding to the confusion, what is referred to as a partial award in some civil law countries is called an interim award in certain common law countries. The courts in different jurisdictions took various positions as to whether each particular type of award could be enforced under the New York Convention.[6]

In an attempt to simplify the terminology and reduce the grounds for refusal of recognition and enforcement, some arbitration rules have introduced a wider notion of a 'separate' award. For instance, the UNCITRAL Arbitration Rules state in Article 34: "The arbitral tribunal may make separate awards on different issues at different times".[7] Likewise, the Rules of the ICAC at the RF CCI provide in paragraph 38 that the arbitral tribunal may make separate awards on individual issues or a part of the claims.[8]

This approach may be of assistance as far as the terminology is concerned, but a national court – which certainly includes a Russian court – would still have to classify such a 'separate' award further to determine its enforceability. 'Separate' awards, therefore, are not a category of an award in its own right in Russia, but rather an umbrella term, which may cover partial and interim awards, as well as the awards on costs.[9]

Russian commentators agree that the tribunal's right to render a separate award implies that such an award must concern the merits of the dispute rather than any procedural aspects of the case.[10] Likewise, Article 35 of the Arbitration Act 2015 stipulates that on the matters that do not concern the merits of the dispute, the tribunal shall render an order (and not an award). Russian legal tradition thus offers a narrower understanding of a term 'separate award', in comparison with its international counterparts. While in other countries the tribunal's decisions on procedural matters may take the form of an award, in Russia such decisions are normally termed 'orders' and denied the status of an arbitral award.[11] For example, there cannot be a separate award on the jurisdiction of the tribunal to hear the case, because statutory law explicitly labels this decision 'an order'.[12] The consequences of a court classifying an award as 'merely procedural' are potentially very serious, because it may result in a refusal to enforce such an award.

It is beyond doubt that Russian law fully recognises final awards (also called 'definitive' awards) that resolve all the issues put before the arbitral tribunal, and such final awards are

---

[6] Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement,* 12(2) ICC International Court of Arbitration Bulletin, 25 (2007).

[7] UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013) http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (accessed 15 January 2019).

[8] *The Rules of Arbitration on International Commercial Disputes*. Appendix No. 2 to Order No. 6 of the Chamber of Commerce and Industry of the Russian Federation of 11 January 2017, paragraph 38 http://mkas.tpprf.ru/upload/iblock/fd9/fd91e3315ec67621225835bc71d3de5e.docx (accessed 14 January 2019)

[9] Chupakhin I.M., *supra* note 4, at 75.

[10] The Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation: Academic and Practical Commentary, §40(2) (Komarov A.S., ed., Moscow, 2012) [Ryeglamyent Myejdunarodnogo kommyerchyeskogo arbitrajnogo suda pri Torgovo-promyshlyennoi palatye Rossiiskoi Fyedyeracii: nauchno-praktichyeskii kommyentarii /pod obsh. ryed. A.S. Komarova. M., 2012. §40(2)].

[11] Chupakhin I.M., *supra* note 4, at 76.

[12] Article 16 of the ICA Act 1993 and Article 16 of the Arbitration Act 2015 use the term *'postanovlenie',* which could also translate to English as a 'decree' but certainly not an 'award' – *see* below at §10(9)(a).

binding and enforceable in this country. Equally, the statutes on both domestic and international arbitration regulate consent awards in line with the international practice (Article 30 of the ICA Act 1993, Article 33 of the Arbitration Act 2015).

The position of partial and interim awards in an arbitration seated in Russia, however, may be slightly less certain. In principle, there is nothing in Russian statutory law to prevent the tribunal from issuing separate, partial and interim awards, as long as they finally resolve some part of a dispute on the merits and are not merely interlocutory or procedural in character. Moreover, some Russian statutes explicitly mention such a possibility. For example, Article 138 of the Code of Inland Water Transport of the Russian Federation provides that a court of law, a commercial court or an arbitration tribunal may rule by passing an interim decision that an advance sum of money should be paid to the salvor of a vessel, being regarded as equitable and reasonable and provided on such conditions. Article 352 of the Merchant Shipping Code of the Russian Federation contains a similar provision.

Russian doctrinal authorities are also quite positive on the potential of interim and partial arbitral awards in the Russian arbitration law, pointing out that such awards could be particularly useful in resolving individual aspects of a dispute. For example, an interim award could declare a transaction void and thus clear the way for a subsequent restitution claim; or it might confirm a fundamental breach of contract thus opening the possibility to seek damages for the non-breaching party.[13]

ICAC at the RF CCI tribunals do use their right to issue separate awards from time to time, and Russian courts do enforce them.[14] However, they do not render such awards very often. To date, there have only been several reported cases where an ICAC tribunal would issue a separate award. It is conceivable that the requirement that such an award must be 'final' and not merely interlocutory or procedural might prompt the tribunals to approach them with caution and, where possible, resolve all the relevant issues in one single final award. The determination of what exactly constitutes a 'final' award, although straightforward in theory, may sometimes present difficulties in practice.

Russian courts argued in one case that only a 'final' (i.e. the 'last' or 'definitive') decision of a tribunal on the merits of a dispute could qualify as a final and enforceable arbitral award. In its Decree No 6547/10 of 5 October 2010,[15] the Presidium of the Supreme Commercial Court considered the application to enforce a Separate Award of an arbitral tribunal acting under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The award required the respondent to reimburse €33,000 to the claimant. This sum represented the respondent's part of the advance payment covering the costs of arbitration. The tribunal specifically noted that such a confirmation of the duty to make advance payment for costs did not preclude the tribunal from allocating the costs as between the parties in the final award on

[13] Skvortsov O.Yu., *Arbitration of Commercial Disputes in Russia: Problems, Tendencies, Prospects,* 520 (Moscow, Wolters Kluwer, 2005) [Skvortsov O.Yu. Tryetyeiskoye razbiratyelstvo pryedprinimatyelskih sporov v Rossii: problyemy, tyendyencii, pyerspyektivy. M.: Wolters Kluwer, 2005. S. 520].

[14] *See,* e.g., the Decree of the Federal Commercial Court for the Moscow Circuit of 7 August 2017 No F05-10967/2017, case number N A40-32661/2017. It is worth pointing out that in this case, the winning party in arbitration requested the enforcement of two awards simultaneously: a Final Award and a Separate Award.

[15] Decree of the Presidium of the Supreme Commercial Court No 6547/10 of 5 October 2010, case number A56-63115/2009.

the merits. The Presidium of the Supreme Commercial Court noted that the Separate Award in question was of a provisional character and therefore did not constitute a final award enforceable under the New York Convention. According to the Presidium, in this case, the Separate Award has not yet become binding on the parties (Article V(1)(e) of the New York Convention 1958), and the matter of costs should properly be addressed in the final arbitral award on the merits of the dispute. The court added that interim awards, including orders of the tribunal resolving other procedural matters (allocating costs of arbitration, determining the tribunal's jurisdiction to deal with the dispute, adopting interim measures) are unenforceable in the territory of the Russian Federation.[16] The judgment did not explore in detail the requirements of Swedish law (*lex arbitri)* to the categories arbitral awards, nor did it consider any prominent case law from other counties on this matter.

In another case, though adopted earlier and by a lower court, the petition to enforce an interim award by a sole LCIA arbitrator was successful. In this 2005 case, the tribunal ordered specific performance (delivery of crude oil) and payment of expenses in an award specifically entitled an 'interim' award. Without any further discussion of this fact, the court granted the enforcement.[17]

An additional complication might emerge from the new wording of the requirements to an award in the Arbitration Act 2015. According to its Article 34(2)(8), the operative part of an award must contain the tribunal's conclusions on upholding or refusing *each* of the parties' requests for relief (emphasis added). Article 31 of the ICA Act 1993 that governs international commercial arbitration is less categorical in this regard, saying only that an award must contain the conclusions on granting or refusing the requests for relief. It remains to be seen whether this new wording would be interpreted as an argument against partial and interim awards as such, or, hopefully, as a requirement that applies only to final (dispositive) awards putting an end to the proceedings but does not preclude the tribunal from issuing other types of awards. As a practical matter, since the requirements of Article 34 are default and not mandatory, i.e. the parties are free to modify these requirements by their agreement, this question will not arise where the arbitration agreement, or the institutional or ad hoc rules incorporated by reference into such agreement, specifically empower the tribunal to issue partial, interim or separate awards.

[B] Award on Agreed Terms

If the parties settle the dispute during arbitral proceedings, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms shall be made in accordance with the general requirements to the form and contents of an arbitral award and shall state that it is

[16] On the impossibility of enforcing the tribunals' orders dealing with interim measures, the earlier position of the Supreme Commercial Court remains unchanged until this day, and courts often reference it. *See* Information Letter No 78 of the Presidium of the Supreme Commercial Court of 7 July 2004 'Review of Commercial Court Practice Concerning Preliminary Interim Measures of Protection' (para 26) [punkt 26 Informacionnogo pisma Pryezidiuma Vysshyego Arbitrajnogo Suda Rossiiskoi 70yedyeracii ot 07.07.2004 N 78 "Obzor praktiki primyenyeniya arbitrajnymi sudami pryedvarityelnyh obyespyechityelnyh myer"]. The 2006 amendments to the UNCITRAL Model Law concerning the interim measures have not been adopted in Russia.

[17] Ruling of the Commercial Court of Moscow Oblast of 20 January 2005, case number A41-K1-25659/04.

an award. Such an award has the same status and effect as any other award on the merits of the case.

The above provision originating in the UNCITRAL Model Law on International Commercial Arbitration had been reproduced in both the 2015 Arbitration Act (Article 33) for domestic arbitration and the ICA Act 1993 (Article 30) for international commercial arbitration. One difference between the two statutes is that whereas the ICA Act 1993, following the Model Law, provides that the tribunal shall adopt an award on agreed terms *unless* it has an objection thereto, the Arbitration Act 2015 contains no such condition. Its predecessor, the Arbitration Act 2002 that governed domestic arbitration until the 2015 reform, also did provide the tribunal with a power to control the parties' discretion.[18]

Unfortunately, there is no published drafting history explaining this omission in Article 33 of the Arbitration Act 2015. Therefore, it is difficult to ascertain whether the omission was intentional, and if so, what it means in terms of the procedure for recording the parties' settlement in Russian domestic arbitrations.

So far, commentators of the new Act did not pay much attention to the distinction between the old and new wording. For example, one authoritative commentary to the 2015 Act[19] draws a parallel with the litigation in state commercial courts and courts of general jurisdiction, where it has long been a tradition to provide the court with a degree of control over the parties' discretion in settling a dispute. According to Article 141 of the Commercial Procedure Code and Article 39 of the Code of Civil Procedure, the parties' settlement agreement does not enter into force unless and until approved by the court. The court shall refuse its approval if the terms of the agreement are illegal (contravene the law) or violate the rights and legitimate interests of other persons who did not take part in the proceedings.

If recording the parties' settlement of a dispute in domestic arbitration is indeed subject to the same controls and limitations as settlement agreements in national litigation, as the authors of the above Commentary suggest,[20] this requires an explanation that has to lie in the domain of statutory interpretation. One possible explanation for this legislative omission might lie in the tribunal's general power to conduct the arbitration in such manner as it considers appropriate (Article 19 of the 2015 Act), in conjunction with its discretion as to the content of the arbitral award (Articles 31 and 34 of the 2015 Act). In addition, it is common ground in Russian doctrine that the tribunal's role in dispute resolution goes beyond that of a parties' mere agent, and includes public elements akin to those of the judiciary.[21]

The above interpretation, derogating from the literal meaning of the statutory language, may not be watertight. However, as a matter of legislative policy, it is, in our view, a preferable one. One of the declared rationales for the 2015 arbitration reform was the need to prevent any

[18] Article 32(3) of the Arbitation Act 2002.

[19] *Commentary to the Federal Law 'On Arbitration (Arbitral Proceedings) in the Russian Federation' (Clause-by-clause, Academic and Practical Commentary),* Commentary to Article 33, §2 (O.Yu Skvortsov, M.Yu. Savransky, eds), (Moscow, Statut 2016) [Kommyentarii k Fyedyeralnomu zakonu 'Ob arbitrajye (tryetyeiskom razbiratyelstvye) v Rossiiskoi Fyedyeracii' (postatyeinyi, nauchno-praktichyeskii) / pod ryed. O.Yu. Skvortsova, M.Yu. Savranskogo. M.: Statut, 2016. Kommyentarii k statye 33, §2].

[20] Id.

[21] *Commercial Litigation: a Textbook*, 643 (V.V. Yarkov, ed., 7th ed., Moscow, 2017, author of the chapter I.G. Renz) [*Arbitrajnyi procyess: Uchyebnik / otv. ryed. V.V. Yarkova. 7-ye izd. M., 2017. C. 643. Avtor glavy – I.G. Renz*].

misuse of arbitration by unscrupulous parties.[22] It is, unfortunately, not entirely uncommon in Russia that the parties engage in 'staged trials' where no actual dispute exists between them, but rather with a purpose of obtaining an enforceable court ruling approving their settlement agreement, which they can later use against third parties.[23] Just as Russian national courts occasionally decline to grant their approval for in-court settlement agreements, arbitral tribunals in domestic arbitration ought to possess a similar control mechanism at their disposal. Nevertheless, with the current wording of Article 33, a tribunal that resists the request of both parties and refuses to record their settlement in the form of an award on agreed terms may have to answer some difficult questions.

Another aspect of the same problem arose in the context of international commercial arbitration, where an ICAC tribunal felt that it was unable to approve the parties' settlement agreement in its entirety. Having pointed out that the proposed agreement goes beyond the limits of the original statement of claim and covers other relations between the parties the tribunal proceeded to record part of that agreement as an award on agreed terms. An application to enforce this award was later unsuccessful. The court held that if the arbitrators have an objection to the proposed terms that the parties agreed between themselves, they must either continue the proceedings and render an ordinary arbitral award, or suggest that the parties modify their agreement so that it would become acceptable to the tribunal in its entirety. An award that records only part of the agreement is neither an award on agreed terms nor a regular arbitral award, which makes it unsuitable for enforcement.[24]

Where the parties reach a settlement at the post-award stage, in the process of enforcement, a question arises as to the form in which they can record such settlement. The three possible alternatives are treating such an agreement as a purely private contract valid only as between the parties and carrying no enforcement status, recording it in the competent national court whereupon the settlement agreement would become enforceable as a judgment, or allowing the arbitral tribunal to record it. In 2012, the Supreme Commercial Court held that for the purposes of recording the parties' settlement, the arbitral tribunal that rendered the award could reconvene and approve this settlement agreement, thus giving it the same status as that of a 'regular' arbitral award.[25] This amounted to a new exception to the general rule that, upon rendering an award, the tribunal loses its authority and becomes *functus officio.*

§10.3. The Making of Arbitral Award

After the close of the proceedings, the tribunal renders an award. If there is more than one arbitrator on the tribunal, the award is adopted, according to the general rule, by a majority of arbitrators. According to Article 34 of the Arbitration Act 2015, all members of the tribunal must

[22] See above, Chapter 1.

[23] Nestoliy V., *Openness – a Guarantee of Justice,* 45 EJ-Jurist 6, 9 (2012) [Nestoliy V. Glasnost - garantiya spravyedlivosti // EJ-Yurist. 2012. N 45. S. 9].

[24] The Decree of the Federal Commercial Court for the North-Western Circuit of 7 October 2015 No F07-7179/2015, case number No A56-14627/2015.

[25] Decree of the Presidium of the Supreme Commercial Court of 7 June 2012 No 16434/11, case number A58-1799/2011.

sign the award, including the dissenting arbitrators. A dissenting opinion is then attached to the award.

It is customary in Russian arbitration, as it is the norm in the national litigation, to announce the operative part of the award upholding or refusing each of the parties' requests for relief at the end of the final arbitral hearing.[26] After that, the tribunal proceeds to make a reasoned award and send it to the parties. Unlike the procedural codes imposing strict deadlines on the national courts, arbitral legislation does not limit the arbitrators in the length of time they can take drafting the final award. However, with the general trend towards combating delay, institutional rules may provide for such a deadline.

Some arbitral institutions adopt the procedure of a preliminary internal scrutiny of an award, aiming to ensure the quality and enforceability of the award. Before signing the award, the tribunal sends its draft to the institution that may direct the attention of the arbitral tribunal to any formal discrepancies, as well as to any matters going into the merits of the dispute, without encroaching on the independence of the arbitrators. Members of the tribunal do not sign the award until its institutional approval.

In international practice, such a procedure is famously adopted in ICC Rules,[27] as well as in Singapore International Arbitration Centre Rules.[28] It is relatively uncommon in Russia, but the ICAC Rules provide for its abbreviated version. According to §40 of the ICAC Rules, before the award is signed, the arbitral tribunal shall, within a reasonable time in advance, deliver the draft award to the Secretariat. The Secretariat may, without infringing on the independence of the arbitrators to make the award, direct the attention of the arbitral tribunal to discrepancies found, if any, between the draft award and the formal requirements provided by these Rules or other ICAC regulations and rules. If such discrepancies are not rectified, the Secretariat may inform the Presidium of this.[29]

§10.4. Contents of an Award

Article 34 of the Arbitration Act 2015 formulates the requirements to the contents of an arbitral award. These are default requirements, i.e. the parties in their agreement are free to modify them as they see fit. Under the general rules, an award must contain the following:

(1) *The date of an arbitral award.* The award is deemed to be adopted on the date indicated in the document itself. Sometimes, institutional rules may modify this rule. For example, the ICAC Rules provide that the date of the award shall be the date of the last signature affixed thereto by an arbitrator of the arbitral tribunal.[30]

(2) *The seat of arbitration.* The parties may designate the seat in their agreement or design a procedure for its determination. Otherwise, the tribunal has the right to determine the seat. The Russian doctrine draws a clear distinction between the juridical seat of arbitration and a venue of the hearings.[31] Therefore, the tribunal is free to hold a hearing in any location; this will not, as a rule, influence the juridical seat of arbitration.

---

[26] Kurochkin S.A., *Domestic and International Commercial Arbitration*, 156 (Moscow, Statut, 2017) [Kurochkin S.A. Tryetyeiskoye razbiratyelstvo i myejdunarodnyi kommyerchyeskii arbitraj. M.: Statut, 2017. S. 156].

[27] Article 34 of the ICC Rues of Arbitration (current as of 1 March 2017), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_34 (accessed 7 February 2019).

[28] Rule 32 of the Singapore International Arbitration Centre Rules 2016, http://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule32 (accessed 7 February 2019).

[29] *The Rules of Arbitration on International Commercial Disputes*, *supra* note 8, at paragraph 40.

[30] Ibid., at paragraph 37.

[31] Kurochkin S.A., *supra* note 26, at 154.

(3) *The composition of the arbitral tribunal and the procedure that led to its selection or appointment*.

(4) *Name and address of the parties in arbitration*. The information about the parties in the award relies on that supplied by the parties themselves. According to Article 3 of the Arbitration Act 2015, unless the parties agreed otherwise, documents and other parties shall be sent to the last known address of an organisation or the home address of an individual. Such documents and materials are deemed delivered in the day of delivery or an attempt to deliver them, even if the party in question no longer lives or conducts business at this address. In the context of litigation, the equivalent wording of the procedural codes in relation to organisations, including companies, has been interpreted primarily with the registered address of a company in mind, which for Russian organisations is freely available to the public as a part of the Unified State Register of Legal Entities. With foreign organisations, one option that the Supreme Court recommended to the lower courts was to consult the official Internet websites of registering authorities in the respective foreign countries containing information about the registered address of a party.[32]

(5) *The substantiation of the tribunal's jurisdiction*. In the award, the tribunal should address the matter of jurisdiction and explain its reasons for arriving at the conclusion that it had jurisdiction to hear the dispute. According to Article 16 of the Arbitration Act 2015, a party may raise a plea that the arbitral tribunal does not have jurisdiction until its first submission on the merits of the dispute. If the tribunal does not rule on this plea as a preliminary matter, it must include its reasoning in the award on the merits.

(6) *Claimant's submissions and respondent's objections, as well as any motions raised by the parties*. An award should describe the requests that the parties made and the grounds on which they relied, together with any objections of the opposing party, according to the statement of claim and the answer to the statement of claim. The tribunal should arrive at a conclusion on each claim and objection and reflect this in the award.

(7) *Circumstances of the case, evidence and legal rules*. The arbitrators should record in the award the factual circumstances they considered proven; the evidence on which their conclusions relied; and the applicable legal rules on the basis of which the tribunal arrived at its conclusions. It is very common in Russia that the tribunal will resolve the case on the basis of Russian law. In cases where the parties selected foreign law to govern their relations, the tribunal will apply the parties' chosen rules of law. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules that it considers applicable.

(8) *The operative part of the arbitral award* containing the tribunal's conclusions on upholding or refusing each of the parties' requests for relief.

(9) *Distribution of the costs of arbitration between the parties*. The provisions dealing with costs are also included in the operative part of the award. The tribunal will ascertain the overall amount of costs incurred in the process of arbitration and designate the party liable for the payment of such costs, in proportion to the tribunal's decision as to which party, and to what extent, prevailed on the merits, taking into account any agreement of the parties as to costs. The detailed rules on costs of arbitration and their distribution between the parties are contained in Article 22 of the 2015 Act.

(10) *An award may also contain the time limits and the procedure for the parties' compliance with its operative part*, e.g. where the sums awarded are to be paid in instalments.

[32] Decree of the Plenum of the Supreme Court of Russian Federation of 27 June 2017 N 23 'On the Consideration in Commercial Courts of Economic Disputes Arising from Relations with a Foreign Element'.

The ICA Act 1993 governing international commercial arbitration contains fewer requirements to the contents of an award. According to Article 31 of this Act, the arbitral award shall state reasons on which it is based, the conclusions on upholding or refusing the claims, the quantification of arbitration fees and other costs, and their distribution between the parties. The award should also state its date and the place of arbitration.

The institutional rules may prescribe more detailed requirements for arbitral awards. For example, ICAC Rules require arbitral awards to contain:

- case number;
- date of the award;
- place of arbitration;
- the composition of the arbitral tribunal and its formation procedure;
- names (last name, first name and patronymic, if any), place of location (place of residence) of the parties to arbitral proceedings;
- a brief description of the conduct of arbitral proceedings;
- claims and statements of defence of the parties;
- substantiation of the jurisdiction of the arbitral tribunal;
- circumstances of the case established by the arbitral tribunal, evidence on which the conclusions of the arbitral tribunal on these circumstances are based, and legal norms applied by the arbitral tribunal when making an award;
- reasons for the award, with reference to the applicable legal norms;
- conclusions of the arbitral tribunal on the granting or dismissal of the claim;
- amounts of arbitration costs of the case and apportionment thereof between the parties; and
- signatures of the arbitrators.[33]

An arbitral award must contain the reasons on which it is based. If the arbitral award rendered in Russia does not contain the reasons on which it is based, it may be a ground for its challenge or refusing its enforcement. Neither the Arbitration Act 2015 nor the ICA Act 1993 authorise tribunal to resolve disputes *ex aequo et bono* or as *amiable compositeurs.* Likewise, enforcement of an unreasoned foreign arbitral award may be refused in Russia if the court establishes that the national arbitral law of the seat required the award to contain reasons.

§10.5. Legal Effects of an Award

As far as the parties in arbitration are concerned, an arbitral award is final and binding for them, meaning that both parties are under an obligation to comply with its operative part, and neither of the parties is at freedom to challenge the findings of an arbitral tribunal on its merits.

The extent to which arbitral awards should have *res judicata* effect for subsequent legal and arbitral proceedings is more controversial. The issue has been in the spotlight of international debate over the last decades. An important step forward in this area had been made in the International Law Association Report on *Res Judicata* and Arbitration. Among other things, the Report suggested that national law does not necessarily have to govern the *res judicata* effect of an arbitral award, and it can instead be determined under the transnational rules applicable to international commercial arbitration.[34] In practical terms, this means that foreign courts and

[33] The Rules of Arbitration of International Commercial Disputes, *supra* note 8, at paragraph 37. Kurochkin, *supra* note 26, at 167.

[34] *ILA Final Report on Res Judicata and Arbitration*, 25 Arbitration International 67 (2009).

tribunals might hold that awards made in Russia possess *res judicata* effect regardless of the position of the national law on the issue. Russian national courts, however, have not been known to employ similar reasoning to date.

The effect of a *res judicata* decision is that it disposes finally and conclusively of a dispute in question so that the same subject matter cannot be relitigated between the same parties.[35] National laws differ as to the precise rules that apply to this effect of *res judicata,* in particular on what exactly constitutes the 'same subject matter'. Another aspect of *res judicata* belongs to the realm of evidence and concerns the question of whether the parties are entitled to rely on - or are they at freedom to challenge in subsequent proceedings - the factual determinations made in an earlier judgment.[36] Russian doctrine treats these two effects or *res judicata* as two aspects of the legal force of judgments and arbitral awards;[37] for simplicity, these will be termed 'preclusive effect' and 'evidential effects' of an award in this chapter.

Article 150 of the Commercial Procedure Code and Article 220 of the Code of Civil Procedure define the preclusive effect of arbitral awards in national litigation. They stipulate that a competent court shall terminate legal proceedings if it finds that there exists an arbitral award rendered in a dispute between the same parties, about the same subject matter, and on the same grounds, except where a court has earlier refused the enforcement of such an award or set it aside.

Thus, as a general rule, arbitral awards preclude the litigation of further identical claims in national courts. It is logical that an award that has been set aside by a competent court loses its effect because after the entry into force of the respective judgment the award becomes a legal nullity – with a possible though highly unusual exception of enforcement of an annulled award in other countries.[38]

The argument is similar where the court refuses to enforce an arbitral award. This rule is best understood in conjunction with Article 240 of the Commercial Procedure Code that defines the consequences of a refusal to enforce an arbitral award. According to paragraphs 3 and 4 of this article, a refusal to enforce an arbitral award does not prevent the parties from re-initiating arbitral proceedings if the possibility of such reference has not been lost, or from starting legal proceedings in the commercial court according to the general rules.

Different rules apply to cases where the court refused the enforcement of an award in full or in part on one of the following grounds:

(1) Invalidity of the arbitration agreement;
(2) The award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration;
(3) Non-arbitrability of the subject matter of the dispute;
(4) An inconsistency of award with the public policy of the Russian Federation.

---

[35] Peter Barnett, *Res Judicata, Estoppel and Foreign Judgment,* para 1.11 (OUP, 2011).

[36] *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 564 (HL), per Lord Guest.

[37] *International Commercial Arbitration: a Textbook,* 764 (O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov, academic eds., 2nd ed., Moscow, 2018, author of the paragraph A.V. Asoskov) [Myejdunarodnyi kommyerchyeskii arbitraj: uchyebnik / Nauch. ryed.: O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. M., 2018. S. 764. Avtor paragrafa A.V. Asoskov].

[38] This is unusual but not unheard of for the awards in Russian-seated arbitration. A recent example is *Yukos v Rosneft,* Amsterdam Court of Appeal, 28 April 2009, case No. 200.005.269/01 where the Dutch court granted enforcement of an award earlier set aside in Moscow.

In such cases, the parties are free to begin legal proceedings in the commercial court according to the general rules but are unable to return to arbitration under the same arbitration agreement.

This regulation explains why an arbitral award the enforcement of which has been denied by a competent court loses its preclusive effect in Russian national litigation. In the foundation of the claim preclusion effect lies the presumption that the previous judgment or arbitral award is final as between the parties, which is not the case where enforcement of an award has been denied.

A condition required for an arbitral award's preclusive effect is the test of 'triple identity',[39] which in Russian procedural law means the identical claim, the identical legal grounds of this claim, and the same parties. By definition, therefore, arbitral awards have no preclusive effect for the third parties who did not sign an arbitration agreement and did not take part in arbitral proceedings. As the Supreme Commercial Court explained, this conclusion follows from the content of the right of access to justice guaranteed by Article 6 of the European Convention on Human Rights and Article 46 of the Russian Constitution, which provides each party with a right to be heard in an adversarial court hearing. In the absence of an opportunity to present its objections and its position on the subject matter of a dispute, a person cannot be bound by the conclusions in the arbitral award.[40]

Turning to the evidential effect of *res judicata*, Russian legislation does not contain any provisions that would relieve the interested parties of their burden of proof in relation to the facts established in an arbitral award (Article 69 of the Commercial Procedure Code, Article 61 of the Code of Civil Procedure). State courts are bound neither by the facts that that arbitral tribunal established nor by their conclusions.[41] Other arbitral tribunals (even if identical in their composition), likewise, are not bound by previous awards.[42] The lack of the evidential *res judicata* effects in arbitral awards has been confirmed by the Supreme Commercial Court[43] and consistently applied in subsequent judgments.[44]

One could argue, however, that the awards that have been enforced by a competent court do, to a certain extent, possess evidentiary *res judicata* effect. In this case, the circumstances relating to the dispute that that competent court reiterated in its judgment will have *res judicata* effect according to the general rules of procedural law, thus indirectly giving a similar effect to portions of the underlying award.[45] In this case, according to the national rules of civil procedure, the 'triple identity' test is not required. It would be enough that both parties are the same in the previous and the subsequent proceedings, regardless of their subject matter and legal grounds.[46]

It has been suggested that arbitral tribunal should voluntarily adopt the approach whereby the previous arbitral awards have evidential *res judicata* effect in subsequent

---

[39] See Gary Born, *International Commercial Arbitration*, 2886 (Hague, 2009).

[40] Decree of the Presidium of the Supreme Commercial Court of Russian Federation of 11 February 2014 N 15554/13, case number A40-116181/12-11-1051.

[41] Kurochkin, *supra* note 26, at 189.

[42] Ibid.

[43] Decree of the Presidium of the Supreme Commercial Court of Russian Federation of 18 March 2014 N 16918/13, case number A40-164314/12.

[44] *See,* e.g., the Decree of the Federal Commercial Court for the Moscow Circuit of 25 April 2014, case number A40-52599/13-129-284; the Decree of the Federal Commercial Court for the North-Western Circuit of 18 September 2014, case number A66-4423/2013.

[45] Yarkov V.V., *Legal Facts in Civilistic Process,* 175 (Moscow, 2012) [Yarkov V.V. Yuridichyeskiye fakty v civilistichyeskom procyessye. M., 2012. S. 175].

[46] See Article 69 of the Commercial Procedure Code, Article 61 of the Code of Civil Procedure.

arbitrations between the same parties.[47] This has been the prevailing approach in the published practice of ICAC at the RF CCI.[48] Thus, the evidential *res judicata* effects may also arise in Russian arbitration in its 'soft' form, as part of an attempt to achieve legal consistency on the part of arbitrators, rather than as a strict legal rule.

§10.6. Correction and Interpretation of an Award. Additional Award

According to Article 37 of the Arbitration Act 2015, within thirty days of receipt of the arbitral award, unless the parties agreed another time period, a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature. The arbitral tribunal may correct any error of this type on its own initiative within thirty days of the date of the award.

If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

This provision represents a verbatim adoption of the UNCITRAL Model Law wording and is also identical to its counterpart in the ICA Act 1993 regulating international commercial arbitration.

The procedure of correction and interpretation of the award cannot be deployed to change the mistaken pronouncements of the tribunal regarding the facts, and its conclusions on the merits of the claim. It has been rightly pointed out that such requests pose a dilemma for the tribunal that needs to distinguish very carefully between the need to ensure clarity through this statutory mechanism and the attempts to review the tribunal's conclusions or lead new arguments in support of the parties' positions.[49]

According to the prevailing international practice, the term 'errors in computation, any clerical or typographical errors' must be understood literally. There is no need for an error to be significant and affect the conclusions of the tribunal or lead to any doubts as to the correctness of the award. Any errors of such nature must be corrected, however minor and insignificant they might seem.[50]

There are two most common technical approaches to the correction of an award. First, the tribunal may prepare a new, updated and corrected edition of the same arbitral award, acknowledging the fact of the amendment and other details relating to its correction. Secondly,

---

[47] *International Commercial Arbitration: a Textbook, supra* note 37, at 765.

[48] See *Awards 9, 41, 45, 61, 75, 87* in: *Practice of the ICAC at the RF CCI 2004-2016: for the 85th Anniversary of the ICAC* (A.N. Zhiltsov, A.I. Muranov, eds, Moscow, 2017) [*Ryeshyeniya 9, 41, 45, 61, 75, 87 // Praktika MKAS pri TPP R70: 2004-2016: K 85-lyetiyu MKAS (pod ryed.* A.N. Zhiltsova, A.I. Muranova*, M.: 2017*).

[49] Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, 201 (2nd ed. NY, 2012).

[50] See G. Nerdrum, *Correction of Errors in Arbitral Awards,* 260*,* in: *International Commercial Arbitration: Contemporary Problems and Solutions: A Collection of Articles in Honour of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation 80th Anniversary* (Kostin A.A., ed.) [Nerdrum G., Ispravlyeniye oshibok v arbitrajnyh ryeshyeniyah // Myejdunarodnyi kommyerchyeskii arbitraj: sovryemyennyye problyemy i ryeshyeniya: Sbornik statyei k 80-lyetiyu Myejdunarodnogo kommyerchyeskogo arbitrajnogo suda pri Torgovo-promyshlyennoi palatye Rossiiskoi Fyedyeracii / Pod ryed. A.A. Kostina. M., 2012. S. 260].

the tribunal can prepare a separate additional award pointing out the errors and offering their correction. Russian commentators expressed a preference for the second option, particularly in the view of the possibility of the chairperson of the arbitral tribunal correcting and signing such an award alone, due to its technical nature.[51]

Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award.

The same article 37 of the Arbitration Act 2015 contains another provision often found in other countries' statutory provisions concerning the setting aside of arbitral awards. According to paragraph 6 of this Article, if the court considering an application to set aside or enforce an award suspends the proceedings for a period of time in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings and eliminate the grounds for setting aside or refusing to enforce the award, the tribunal may resume the arbitral proceedings on the request of a party submitted during such suspension of the proceedings. Paragraph 7 of the same Article 37 of the Arbitration Act 2015 envisions that the result of such resumption of the proceedings may be an additional award.

Considering the location of the above rules within the 2015 Act, one may conclude that, in deciding whether it is appropriate to suspend the legal proceedings for this purpose, the competent court will be guided by the same considerations as described above in relation to the correction and interpretation of an award. Namely, the potential action that the tribunal might undertake should not entail a dramatic change of the tribunal's conclusions, nor should it be used for correcting any factual mistakes in the tribunal's reasoning. Instead, this procedure will be most appropriate for ensuring that the arbitral award is clear, unambiguous and free of any errors in computation, any clerical or typographical errors. Likewise, this procedure will be appropriate to deal with claims presented in the arbitral proceedings but omitted for any reason from the award.

However, the procedural codes hint at a potentially broader range of actions that the tribunal may be required to perform if a court has suspended the legal proceedings to give it an opportunity to eliminate the grounds for setting aside or refusing to enforce the award. For example, according to Article 232 of the Commercial Procedure Code, the court may suspend the proceedings for this purpose if the application to set aside an award is made on the grounds of the lack of proper notice of the appointment of an arbitrator or of the arbitral proceedings; or inability otherwise to present the applicant's case; or on the grounds that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the federal law. As a practical matter, such drawbacks of the award may go beyond being merely technical ones, and the resumption of arbitral proceedings may result in the adoption of a new award, as well as correction or amendment of the original award.[52]

---

[51] Zykov Roman, *International Arbitration in Sweden: Law and Practice,* 176 (Moscow, 2014) [Zykov R.O. Myejdunarodnyi arbitraj v Shvyecii: pravo i praktika. M., 2014. S. 176].

[52] *International Commercial Arbitration: a Textbook,* 760 (O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov, academic eds., 2nd ed., Moscow, 2018, author of the chapter I.P. Greshnikov) [Myejdunarodnyi kommyerchyeskii

Correction, interpretation and amendment of an award may lead to additional expenses. However, the tribunal, as a rule, cannot claim any additional fees for these actions.[53]

§10.7. Other Decisions and Orders in Arbitration

The decisions of an arbitral tribunal, according to the Russian legislation on both international and domestic arbitration, come in two main forms: awards and orders. In addition to those, legislation and the Rules of permanent arbitral institutions also mention other forms of documents, such as 'requests' and notifications'. A separate category of arbitral decisions does not originate from the tribunal but instead comes from various officials and committees within the structure of a permanent arbitral institution.[54] We shall discuss these three categories below.

[A] Orders of the Arbitral Tribunal

An order is the act of an arbitral tribunal dealing with matters that do not concern the merits of the dispute and the essence of the parties' claims. Instead, orders resolve various procedural, technical or financial issues that arise during the proceedings.

To begin with, the matter of terminology deserves some attention. According to Article 35 of the Arbitration Act 2015, on the matters that do not concern the merits of the dispute, the tribunal shall render an order ('*postanovlenie*'). This Russian word '*postanovlenie*' is often translated into English as 'decree'.[55] The ICA Act 1993 also uses this term.

A further terminological confusion stemmed previously from the Arbitration Act 2002 that, unlike the ICA Act 1993, used the term '*opredelenie*' (ruling) to denote the same type of decisions by the tribunal. Article 37 of the 2002 Act provided that on the matters that do not concern the merits of the dispute, the tribunal shall render a ruling ('*opredelenie*'). Since the entry into force of the Arbitration Act 2015 that replaced the 2002 Act, the discrepancy has now disappeared.

The UNCITRAL Model law (on which the Russian ICA Act 1993 relies) terms such decisions as 'orders', e.g. in Article 32. Since the word 'order' in the Model Law was translated as '*postanovlenie*' in the ICA Act 1993,[56] this book also uses the term 'order' to mean the broad range of acts that concern arbitral proceedings but do not resolve the dispute on the merits.

The legislation explicitly mentions the following orders of the arbitral tribunal:

- an order on the tribunal's jurisdiction to resolve the case (Article 16 of the ICA Act 1993 and Article 16 of the Arbitration Act 2015);

---

arbitraj: uchyebnik / Nauch. ryed.: O.Yu. Skvortsov, M.Yu. Savransky, G.V. Sevastyanov. M., 2018. S. 760. Avtor glavy I.P. Greshnikov].

[53] Kurochkin, *supra* note 26, at 190.

[54] *International Commercial Arbitration: a Textbook, supra* note 52, at 729.

[55] *See,* e.g., MAC Award No 8/2002 of 10 February 2003 and MAC Award No 51/1992 of 5 July 1995 in: *From the Practice of the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation 1987-2005,* 197-213 and 318-344 (Sergey Lebedev, Andrey Loboda and Dmitry Filimonov, eds., Moscow, 2009). Quoted according to: Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure,* 133 (Juris, 2013) [Iz praktiki Morskoi arbitrajnoi komissii pri Torgovo-promyshlyennoi palatye Rossiiskoi Fyedyeracii za 1987-2005 gg./Pod ryed. S.N. Lyebyedyeva, A.I. Lobody, D.B. Filimonova. Moskva, Statut, 2009, S. 197-213, 318-344. Tsit. po: Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure,* 133 (Juris, 2013)].

[56] Roman Khodykin, *Arbitration Law of Russia: Practice and Procedure,* 133 (Juris, 2013).

- orders and other acts of the tribunal concerning interim measures (Article 17 of the ICA Act 1993 and Article 17 of the Arbitration Act 2015);
- an order for the termination of the arbitral proceedings (Article 32 of the ICA Act 1993 and Article 36 of the Arbitration Act 2015);
- orders concerning costs of arbitration (Article 22 of the Arbitration Act 2015);
- an order referring the parties to mediation (Article 49 of the Arbitration Act 2015).

Due to the broadly permissive wording of Article 35 of the 2015 Act, the Rules of arbitral institutions and tribunals themselves may adopt other categories of orders, so the list above is not exhaustive.[57]

As a practical matter, orders of an arbitral tribunal in Russia often mirror those in the armoury of the national civil procedure, in particular, the commercial procedure. Thus, by analogy with the Commercial Procedure Code that regulates litigation in Russian commercial courts, arbitral tribunals commonly utilise:

- *an order on the acceptance of the statement of claim*. In Russian commercial procedure, plaintiff's first communication with the court is in the form of a statement of claim. If this document satisfies the formal requirements, the court makes an order on the acceptance of the statement of claim, which initiates the proceedings in the case (Articles 125-127 of the Commercial Procedure Code). In arbitration, statement of claim may not be the first document that claimant exchanges with the respondent, tribunal or the arbitral institution. However, unless the parties agreed otherwise, the arbitral proceedings in respect of a particular dispute commence on the date on which the respondent receives a statement of claim (Article 21 of the ICA Act 1993). If the claimant fails to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings (Article 25 of the ICA Act 1993). Unlike the Model Law, those articles of the ICA Act 1993 do not differentiate between a 'request for arbitration' and a 'statement of claim'. Just as it is the practice in the national civil and commercial procedure, often only a statement of claim is required; preliminary requests for arbitration are less common in Russia. This, of course, is subject to any provisions to the contrary in the applicable arbitration rules. The Arbitration Act 2015 also fails to mention a request for arbitration and provides instead a detailed set of formal requirements to a statement of claim in Article 25.
- *An order on the preparation of the case for arbitral proceedings*. Such an order would usually summon the parties or their representatives for a preliminary hearing and offer them to disclose the evidence to prove their claims and objections. Such an order could broadly be in line with a similar type of orders in the commercial civil procedure (Articles 133-135 of the Commercial Procedure Code).
- *An order setting a hearing date* (by analogy with Article 137 of the Commercial Procedure Code) where the tribunal summons the parties to a hearing.
- *Orders on joinder or separation of claims* (by analogy with Article 130 of the Commercial Procedure Code), where an agreement of the parties or the applicable rules allow this. The Russian statutory arbitration law does not explicitly mention joinder and separation of claims but they are possible as a matter of practice.[58]
- *An order on the suspension of the proceedings* (by analogy with Articles 143-147 of the Commercial Procedure Code). Suspension of the proceedings means their temporary stay for an indeterminate period, until the circumstances that caused the suspension

[57] *International Commercial Arbitration: a Textbook, supra* n. 52, at 733.

[58] *See*, e.g., the Decree of the Federal Commercial Court for the Moscow Circuit of 13 September 2016 No F05-13069/2016, case number No A40-41858/16; the Decree of the Federal Commercial Court for the Urals Circuit of 08 December 2016 N F09-10934/16, case number No A60-32732/2016.

cease to exist. A frequently used ground for the suspension is the impossibility of resolving the case at hand until another case in the Constitutional Court of the Russian Federation, a court of general jurisdiction or a commercial court, comes to its conclusion. Article 45 of the Arbitration Act 2015 requires permanent arbitral institutions to include the relevant provisions on the suspension of the proceedings in their Rules, otherwise leaving them to regulate the matter as they see fit.

The practice of issuing *procedural orders* of a complex character, addressing multiple matters and dealing with a plethora of issues at once, is fairly common in the international practice, e.g. in the LCIA, ICC and SCC. This practice is also becoming more widespread in Russia, in particular in ICAC at the RF CCI.[59] Typically, such procedural orders contain some or all of the following provisions:

- A timetable for the proceedings, including the time(s) and place(s) of oral hearings;
- A suggestion for each party to produce the original documents on which it relies, as well as the documents confirming the right of representatives to act on behalf of the respective parties (powers of attorney, minutes of company boards, and so on) at the oral hearing;
- A reminder for each party to disclose all the evidence on which they intend to rely in good time before the hearing, and a suggestion to produce the list of such evidence by a particular date;
- A suggestion for the parties to produce certain documents or classes of documents that the tribunal deems particularly relevant, e.g. the documents proving the applicable interest rates in the relevant country where the claimant seeks to recover interest or the translation of documents in foreign languages;
- A request for the parties to produce their written comments on various aspects of the case;
- A suggestion for the respondent to produce a statement of defence or the statement of a counterclaim, if applicable;
- A suggestion for both parties to put forward any motions or requests of procedural nature;
- A suggestion for both parties to consider the opportunities for settling the dispute, in particular with the assistance of a mediator;
- A reminder of the parties' entitlement to produce their comments on the other side's motions, statements and documents from the other parties, as well as the procedural order of the tribunal, by a certain date.[60]

The crucial feature of the tribunal's orders that distinguishes them from arbitral awards is that they are not capable of enforcement nationally or under the New York Convention 1958, and the parties cannot challenge them on their own, independently of the resulting award. The parties can only bring their objections before the court in the proceedings on setting aside or enforcing the award. Both of these rules are, however, subject to some statutory exceptions.

The parties can challenge two categories of the tribunal's orders in front of a competent court independently of the final award:

- an order refusing a challenge of an arbitrator (Article 13 of the Arbitration Act 2015 and Article 16 of the ICA Act 1993);

- an order where the arbitral tribunal rules as a preliminary question that it has jurisdiction to consider the case (Article 16 of the Arbitration Act 2015 and Article 16 of the ICA Act 1993).

[59] *International Commercial Arbitration: a Textbook, supra* n. 52, at 734.
[60] Id.

Other categories of procedural orders may be called into question only after the final award has been made, for example as evidence of bias or lack of due process. Just like in other jurisdictions, it is advisable to put one's objections against an order to the tribunal first to increase or, indeed, preserve the chances of such an argument succeeding in the court at a later stage.[61] Article 4 of the Arbitration Act 2015 stipulates that a party shall be deemed to waive its right to object if it continues to participate in arbitral proceedings without raising a timely objection.

[B] Requests, Notifications and Subpoenas

In some cases, instead of referring to the documents originating from the tribunal as 'orders' ('*postanovlenie')*, the drafters of Russian arbitration statutes used other terms, such as 'requests', 'notifications' and 'subpoenas'. Typically, this means that the acts in question serve a more technical purpose (however important it may be) and do not as such determine the rights and obligations of the parties.

An important example of this kind of acts is the *request for assistance in obtaining the evidence*. According to Article 27 of the ICA Act 1993 and Article 30 of the Arbitration Act 2015, an arbitral tribunal in an arbitration administered by a permanent arbitral institution, or a party with the tribunal's permission, may request the competent court to provide assistance in the obtaining of evidence. Procedural legislation (Article 74.1 of the Commercial Procedure Code and Article 63.1 of the Code of Civil Procedure) regulates the actions of a competent court that considers such requests. The court performs the request within thirty days unless it considers that there is a ground for refusal to perform it. Such grounds include the possibility of infringing the rights of third parties that do not participate in arbitration; non-arbitrability of the dispute; the information in question beings classified as a state secret, or a commercial, banking or other protected secret. A refusal to perform the request is not subject to appeal.

These provisions concerning court assistance to arbitration are relatively novel and have been introduced in the course of the arbitration reform 2015. Albeit limited (denying ad hoc arbitration this possibility, making the court refusal non-appealable, etc.), they represent an important step in the development of arbitration in Russia.[62]

Notifications and subpoenas are, essentially, technical acts usually regulated by the Rules of permanent arbitral institutions. They allow the tribunal to keep the parties and other interested persons informed about the course of the ongoing proceedings, the constitution of the tribunal, upcoming hearings and so on.[63] The term 'subpoena' (*'povestka'*) can be deceptive as it does not imply any power of the arbitral tribunal to enforce the attendance of any persons, be it witnesses or the parties themselves as it does in the national civil procedure. Instead, this seems to be yet another example of the use of similar terminology across the distinct contexts of civil procedure and arbitration.

The acts within this category are not subject to a challenge in court independently of the arbitral award. However, they are far from being inconsequential. Their absence or defects, for example, often form the basis of a successful challenge of the final award, for example, due to the lack of notification or the 'lack of due process'.

[61] Nigel Blackaby, Constantine Partasides QC, Alan Redfern, and Martin Hunter, *supra* n. 3, at §9.08.
[62] *International Commercial Arbitration: a Textbook, supra* n. 52, at 731.
[63] Ibid. at 732.

[C] Acts by the Officials and Committees of Permanent Arbitral Institutions

Officials and bodies of permanent arbitral institutions perform many important functions ensuring that the arbitral proceedings commence and follow their course in an efficient manner. In most cases, the Rules of arbitral institutions define and enumerate their powers and the range of acts they adopt. Just like those that originate with the tribunal, the acts of said officials and bodies may take the form of orders. Other common terms are protocols, rulings, decisions, and so on.

Chairpersons or presidents of permanent arbitral institutions, their presidiums, and the appointment committees typically exercise some discretionary powers that have a procedural significance in arbitration.

Some institutional rules empower the presidium of an arbitral institution to deal with the matters arising during the constitution of a tribunal, challenges of arbitrators and replacements within the tribunal after its appointment. In other institutions, those matters may be within the competence of a chairperson or an appointment committee.[64]

The Rules of the ICAC at the RF CCI empower the Presidium to deal with a broader range of matters. For instance, the Presidium can adopt decisions on the consolidation of arbitral proceedings.[65] It can also make an order on the termination of arbitral proceedings where the issue of the possibility of arbitrating a dispute at the ICAC arises before the formation of an arbitral tribunal and it is manifestly impossible for the dispute to be considered in full or in part by the ICAC.[66]

In the Arbitration Centre at the Russian Institute of Modern Arbitration, the Board discharges the functions of an appointments committee.[67]The Board is a permanent collective body of the Centre performing the functions of appointment and challenge of arbitrators and termination of their mandate as well as other functions,[68] such as the adjustment of the arbitral fees on an application of a party.[69]

The acts within this category are also not subject to a direct challenge in court independently of the arbitral award, but their absence or defects may form the basis for a successful challenge of the final award.

§10.8. Terminating Arbitral Proceedings without Issuing an Award

One type of orders deserves particular attention because it represents an exception to the general rule that arbitration ends in a final and binding award. Ordinarily, a final award terminates the proceedings and the mandate of the arbitral tribunal. In addition, the proceedings can also terminate without the tribunal issuing an award.

It is normally the task of a tribunal to issue an order on the termination of arbitral proceedings, although there may be some exceptions. We mentioned one such exception above: the Presidium of the ICAC at the RF CCI can make an order on the termination of arbitral

[64] Ibid. at 732.

[65] *The Rules of Arbitration on International Commercial Disputes*, *supra* note 8, at paragraph 12.

[66] Ibid. at paragraph 25.

[67] Article 1 of the *Arbitration Rules of the RIMA at the Autonomous Non-Profit Organisation 'Institute of Modern Arbitration'* of 20 December 2016, as amended on 20.09.2017, https://centerarbitr.ru/en/arbitration-rules/ (accessed 14 January 2019).

[68] Ibid., Article 2.

[69] Ibid., Article 9.

proceedings if the issue arises before the formation of an arbitral tribunal and it is manifestly impossible for the dispute to be considered in full or in part by the ICAC.[70]

The tribunal may issue an order on the termination of the proceedings on its own initiative or at the motion of either party in the arbitration. The legislation contains four grounds for the termination of arbitral proceedings, which are identical for domestic and international arbitration in the Russian Federation, and broadly coincide with those in the UNCITRAL Model Law:

(1) Where the mechanism of arbitral appointment agreed by the parties fails to produce a result, and the parties' agreement excludes the possibility of appointment by a competent court (Articles 11 and 36 of the Arbitration Act 2015, Articles 11 and 32 of the ICA Act 1993). Such an exclusion is only possible in institutional but not in ad hoc arbitration. In the case of a total failure of the appointment procedure, there is no need for an order terminating the proceedings, and the claimant can start a case in a competent court according to the general rules of the procedural law.
(2) Where the claimant withdraws his claim unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute.[71]
(3) The parties agree on the termination of the proceedings.[72]
(4) The arbitral tribunal finds that the continuation of the proceedings has for any reason become unnecessary or impossible.[73]

The ICAC Rules provide some examples of cases where the latter ground for the termination of proceedings might apply. A common reason, for instance, is the passivity of the claimant that makes it impossible for the proceedings to move forward for more than six months.[74]

The continuation of the proceedings also becomes unnecessary or impossible if the tribunal finds that there is a decision of a competent court or an arbitral award between the same parties, concerning the same subject matter where the claimant relied on the same grounds as in the case at hand.[75]

Each party must receive a copy of an order on the termination of the arbitral proceedings with the signatures of the arbitrators according to the statutory requirements and any requirements of the applicable rules of arbitration.

The mandate of the arbitral tribunal terminates with the termination of the proceedings, subject to the rules concerning the interpretation and correction of an award, additional awards, and the resumption of proceedings on a request of a competent court hearing the case on a challenge of an award or its recognition and enforcement (Article 37 of the Arbitration Act 2015). Where the proceedings are terminated by an order of the tribunal – as opposed to a final arbitral award – the exceptional circumstances listed above are unlikely to arise, thus the tribunal's mandate terminates permanently.

The statutory law of Russia does not give the parties a right to challenge an order on the termination of the proceedings, and a competent court would refuse to hear such a claim.[76] Such orders can only indirectly become a focus of a court's attention if one of the parties were to allege at a later stage that the court must stay the proceedings in favour of arbitration.

---

[70] *The Rules of Arbitration on International Commercial Disputes, supra* note 8, paragraph 12.
[71] Article 36 of the Arbitration Act 2015, Article 32 of the ICA Act 1993.
[72] Id.
[73] Id.
[74] The Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation: Academic and Practical Commentary, *supra* note 10, at §45(4).
[75] Kurochkin, *supra* note 26, at 124.
[76] *See,* e.g., the Ruling of the Supreme Court of the Russian Federation No 5-G01-28 of 23 March 2001.

There had been cases in the practice of Russian courts showing that claimants might be able to recover from an arbitral institution the fees they paid to initiate the case if the tribunal terminated the proceedings for lack of an arbitral agreement between the parties.[77] This line of cases seems somewhat anomalous and perhaps merits further discussion to determine whether the grounds for such a judicial approach were sound. However, it does also serve as a useful reminder that the view of arbitration as a provision of services may remain prominent among the Russian judiciary, despite the pronouncements to the contrary.[78]

[77] The Ruling of the Supreme Commercial Court of the Russian Federation No VAS-6065/11 of 11 May 2011, case number A40-33705/10-68-311.

[78] *See,* e.g., the Decree of the Commercial Court of the Moscow Region of 17 March 2015 in case number A40-117713/2014 (refusing to treat the resolution of disputes in arbitration as a service that would require the institution to charge the value added tax).