# ARTICLES

## A COMPARATIVE ANALYSIS OF THE LEGAL REGULATION OF INTERNATIONAL COMMERCIAL ARBITRATION IN RUSSIA AND MAINLAND CHINA

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*This article examines international commercial arbitration, one of the most popular methods for the resolution of disputes that arise in the context of international commercial relations. The volume of trade between Russia and China has been gradually increasing in recent years, which testifies to the fact that the study of international commercial arbitration legal regulation in both nations is extremely relevant. The authors examine the concept of international commercial arbitration entities, as well as the sources of legal regulation that govern their establishment and operation in Russia and Mainland China. In addition, the procedures for case consideration, the elaboration of arbitration agreements, the rules for the creation of an arbitration commission, the requirements for arbitral awards and other aspects are investigated. The authors come to the conclusion that the regulations governing international commercial arbitration are similar in the two countries and are based on international law and national legal acts. Both Russia and China have adopted the norms outlined in the United Nations Commission on International Trade Law (UNCITRAL) Model*

*Law into their legal systems although to different degrees. Both countries provide similar arbitration agreement norms and support the arbitration clause autonomy principle. The difference lies in the fact that China does not follow the competence-competence principle (the arbitrators' power to determine their own competence to consider a certain dispute). Instead, the issue is referred either to the arbitration commission or to the state court for resolution. On the other hand, arbitrators in Russia have the right to determine their competence by themselves. According to Chinese law, a party requires arbitration court mediation in order to be able to submit a request for provisional protection measures to the state court, while under Russian law a direct request is allowed. In China, the norms for the recognition and enforcement of a foreign arbitration award by the court do not provide for the court's ruling to be challenged; the refusal of the recognition and enforcement shall be possible only after the award has been considered by the Supreme People's Court of the People's Republic of China. In Russia, the legislation allows for both challenging and refusing the decision to recognize and enforce the award.*

*Keywords: international commercial arbitration; UNCITRAL Model Law; Russia; Mainland China; arbitration agreement; arbitration commission; arbitration award.*

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## Introduction

International commercial arbitration is currently considered to be one of the most popular and efficient methods of international dispute settlement. The economic development of countries leads to the emergence of disputes at both national

and international levels.[1] The Russian Federation (RF) and the People's Republic of China (PRC) also use international commercial arbitration as a means of dispute resolution. The development of international commercial arbitration procedures is still in progress in both countries as new sources of law are adopted and the number of disputes continues to grow.

The comparative analysis of the two countries' legislation allows for the identification of the advantages and disadvantages of the current legal regulation procedures, which is a way to close normative gaps in the national legislation and improve some of the existing provisions based on the positive examples from international law. The findings can serve as the basis for future research as well as be used in practice.

## 1. International Commercial Arbitration in Russia and Mainland China: Law Theory Analysis

There is no mention of the concept of international commercial arbitration in any of the international agreements or in the legal acts of Russia or China. The legal doctrine, in turn, also lacks a uniform definition of the term although the differences in its interpretation are not great since most definitions are based on the main features of international commercial arbitration. It is important to note that non-Russian legal literature does not typically provide definitions of international commercial arbitration and only speaks about its distinctive attributes.

B.R. Karabelnikov defines international commercial arbitration as a method of international dispute resolution and an alternative to the national court system of dispute settlement. The author singles out a range of important characteristics, for example, the obligatory character of the arbitration agreement, the appointment of impartial arbitrators, the final and binding character of the arbitration award and cooperation between an arbitration tribunal and national courts for the execution of the arbitration award.[2]

In S.A. Kurochkin's opinion, international commercial arbitration is the process of resolving disputes that arise within the framework of international economic relations when one of the counterparties is located in a foreign state.[3]

N.Yu. Erpyleva describes international commercial arbitration as an arbitration court that either operates on a regular basis or is created for each case separately, and the main purpose of which concerns the resolution of international commercial

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[1] Pieter Sanders, *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions* 112 (1983).

[2] *Карабельников Б.Р.* Международный коммерческий арбитраж: учебник [Boris R. Karabelnikov, *International Commercial Arbitration: Textbook*] 32 (2013).

[3] *Курочкин С.А.* Третейское разбирательство и международный коммерческий арбитраж [Sergey A. Kurochkin, *Domestic and International Commercial Arbitration*] 27 (2021).

disputes by providing an award that is binding for the parties to the deal.[4] S.V. Nikolyukin suggests an almost identical definition.[5]

The authors tend to give similar definitions of international commercial arbitration, based for the most part, on explaining its prominent features that are also reflected in the legislation. The main features are as follows: (a) a foreign component, that is, the parties to the agreement, shall reside or be located permanently in different countries (Art. 1, cl. 1, para. a of the European Convention on International Commercial Arbitration);[6] (b) an arbitration agreement between the parties is obligatory (Art. 1, cl. 2 of the UNCITRAL Model Law on International Commercial Arbitration[7]); (c) the award determined by the international commercial arbitration shall be binding (Art. 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958; hereinafter the New York Convention)).[8]

The major advantages of international commercial arbitration stem from its purposes that are aimed at making an arbitration resolution simpler and more open.

One of the purposes of international commercial arbitration is to achieve the independence of arbitration resolution which is possible due to the following factors: the ability to choose a pre-determined arbitration tribunal and impartial arbitrators, the application of international law and the use of international legal procedures and rules.

According to N.D. Eriashvili, Yu.A. Ivanova and R.I. Komilzhonov, international commercial arbitration can indeed be considered as an alternative to the narrower, country-specific approaches to dispute resolution.[9]

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[4] *Ерпылева Н.Ю.* Международные арбитражные соглашения: понятие, виды и основания действительности // Юрист. 2010. № 2. С. 60 [Natalia Yu. Erpyleva, *International Arbitration Agreements: Concept, Types and Grounds for Reality*, 2 Lawyer 56, 60 (2010)].

[5] *Николюкин С.В.* Международный гражданский процесс и международный коммерческий арбитраж: учебник [Stanislav V. Nikolyukin, *International Civil Procedure and International Commercial Arbitration: Textbook*] 131 (2017).

[6] Европейская конвенция о внешнеторговом арбитраже (заключена в г. Женеве 21 апреля 1961 г.) // Вестник ВАС РФ. 1993. № 10 [European Convention on International Commercial Arbitration of 21 April 1961, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, No. 10].

[7] Арбитражный регламент ЮНСИТРАЛ (принят в г. Нью-Йорке 28 апреля 1976 г.) // СПС «КонсультантПлюс» [UNCITRAL Arbitration Rules of 28 April 1976, SPS "ConsultantPlus"] (Mar. 1, 2022), available at https://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=wotQo0Tf1bWdOwG9&cacheid=8111A4DE8AE3454D359023E70AB603BA&mode=splus&rnd=bswqqA&base=INT&n=15032#LPvQo0TgBzAJ9ucE1.

[8] Конвенция Организации Объединенных Наций о признании и приведении в исполнение иностранных арбитражных решений (заключена в г. Нью-Йорке в 1958 г.) // Вестник ВАС РФ. 1993. № 8 [United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1993, No. 8].

[9] *Эриашвили Н.Д., Иванова Ю.А., Комилжонов Р.И.* Международный коммерческий арбитраж: понятие, виды, правовая природа // Образование и право. 2021. № 2. С. 253 [Nodari D. Eriashvili et al., *International Commercial Arbitration: Concept, Types, Legal Nature*, 2 Education and Law 252, 253 (2021)].

The chance to choose any arbitration tribunal for dispute settlement proves to be one of the biggest advantages of the institution in question[10] as it eliminates any potential partiality on the part of the "domestic tribunals" representing either of the disputing parties.[11]

The arbitration parties play an important role in the selection of arbitrators. One of the advantages is that the parties possess the autonomy of will to choose any number of arbitrators of any specialization, nationality and so on. Moreover, the arbitrator shall meet the impartiality and independence criteria as indirectly mentioned in Article 12, clause 1 of the UNCITRAL Model Law on International Commercial Arbitration.[12]

Another advantage of international commercial arbitration is the opportunity to employ basic rules and norms adapted for their use in all countries and jurisdictions.[13] By choosing the arbitration resolution method, the parties avoid conflicts of law[14] or conflicts with local legal procedures.

One goal of international commercial arbitration is the obligatory enforcement of foreign arbitral awards. A strong point of international commercial arbitration is the quick and efficient enforcement of awards with fewer exceptions than in the state courts. The latter is possible due to the fact that there are more than 140 contracting states to the New York Convention.[15]

Another goal of international commercial arbitration is to ensure that awards are legally binding. International commercial arbitration has had very few cases of awards being reversed. The court's review of the award generally includes various procedural aspects, while there are rarely any changes in essence as a result.[16] That rule has both advantages and disadvantages. On the one hand, the lack of the court review stage means shorter settlement time and lower legal expenses. On the other hand, an erroneous decision is very hard to correct. However, the advantages ensured

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10 Gary B. Born, *International Commercial Arbitration* 31 (2nd ed. 2014).

11 Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (2008).

12 *Supra* note 7.

13 David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 30–31 (2nd ed. 2013).

14 *Кискачи М.А.* Использование Принципов УНИДРУА в международном коммерческом арбитраже в отсутствие соглашения сторон об их применении // Электронное приложение к «Российскому юридическому журналу». 2019. № 2 [Maria A. Kiskachi, *Use of the UNIDROIT Principles in International Commercial Arbitration in the Absence of Agreement Between the Parties on Their Application*, 2 Electronic Supplement to the Russian Legal Journal (2019)] (Mar. 14, 2022), available at http://electronic.ruzh.org/?q=ru/system/files/%D0%9A%D0%B8%D1%81%D0%BA%D0%B0%D1%87%D0%B8%20%D0%9C.%D0%90..pdf.

15 *Ланшакова А.Ю.* Преимущества рассмотрения споров в международном коммерческом арбитраже // Вестник ОмГУ. Серия «Право». 2013. № 1(34). С. 166–169 [Anna Yu. Lanshakova, *Advantages of Dispute Resolution in International Commercial Arbitration*, 1(34) Herald of Omsk University. Series "Law" 166, 166–69 (2013)].

16 Born 2014, at 34.

by the binding character of the arbitral award appear to outweigh the possible inconveniences.[17] The discussed goal is confirmed by the existing court practice. For example, the award of the Singapore Arbitration Court states that

> there are many reasons why the parties may prefer the arbitration resolution of disputes … Prompt enforcement of the arbitration award in all the countries whose citizens are parties to the agreement as well as the final and binding character of the award without further reversal.[18]

Low expenses and quick settlement in comparison with the general jurisdiction courts are also goals of international commercial arbitration.[19] It is hard to say whether the former is achievable as the price is a rather subjective matter and arbitration is not always a more cost-effective option than a public court. International commercial arbitration necessitates that the parties bear all expenses, including paying consideration to the arbitrators and reimbursing the logistical fees (transport, accommodation at the place of arbitration, etc.). As a result, the assertion that international commercial arbitration has low costs is a controversial statement as the costs of using general jurisdiction courts vary depending on the country.[20] As for the speed of the settlement, the elimination of the review stage allows us to meet our goal of completing the settlement in the shortest amount of time possible.

The choice of international commercial arbitration as the dispute resolution body allows for a higher level of confidentiality in comparison with the general jurisdiction courts. The degree of confidentiality is usually rather low in national courts due to the main principles of the state: the transparency of the trials and their openness to the public. For example, Article 130 of the Constitution of the People's Republic of China contains provisions on the openness of trials in the People's Courts.[21] Article 10 of the Civil Procedure Code of the Russian Federation also includes provisions on the openness of trials.[22] Unlike national courts, international commercial arbitration allows the parties to stipulate the desired level of confidentiality in the arbitration agreement. The confidentiality of international commercial arbitration is mentioned

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17 *ContiChem LPG v. Parsons Shipping Co., Ltd*., 229 F.3d 426 (2d Cir. 2000).

18 *Tjong Very Sumito and Others v. Antig Investments Pte Ltd*. [2009] S.G.C.A. 41.

19 Born 2014, at 35.

20 Lanshakova 2013.

21 Constitution of the People's Republic of China, adopted at the 5th session of the 5th National People's Congress and promulgated for implementation by the announcement of the National People's Congress on 4 December 1982 (Mar. 14, 2022), available at http://www.lawinfochina.com/display.aspx?id=436178e5d0b17482bdfb&lib=law.

22 Гражданский процессуальный кодекс Российской Федерации от 14 ноября 2002 г. № 138-ФЗ // Собрание законодательства РФ. 2002. № 46. Ст. 4532 [Civil Procedure Code of the Russian Federation No. 138-FZ of 14 November 2002, Legislation Bulletin of the Russian Federation, 2002, No. 46, Art. 4532].

as an important feature in the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration."[23]

No uniform definition of international commercial arbitration can be found in either theoretical sources or in legal practice. However, the following are its most commonly recognized features: the presence of parties from different countries; the existence of an arbitration agreement and the presentation of the final and legally binding arbitration award. The purposes and advantages of international commercial arbitration are nearly identical and aim for a greater autonomy of parties and more independent dispute resolution.

As for the sources of international commercial arbitration legal regulation, there is a two-step system. Firstly, there are international normative instruments that have been ratified by both Russia and China. Secondly, there are the countries' individual national legislations.

The twentieth century witnessed the rise of international commercial arbitration. At that time, the international community already saw the necessity of adopting a normative instrument that would regulate international commercial arbitration. The first of such instruments is the Protocol on Arbitration Clauses (signed in Geneva on 24 September 1923)[24] and the Convention on the Execution of Foreign Arbitral Awards (signed in Geneva on 26 September 1927).[25] The mentioned instruments set the basis for modern international commercial arbitration, having established some major concepts for the commercial arbitration, such as an arbitration agreement, an arbitration award and the enforcement of an arbitral award.

The elaboration of international commercial arbitration was put on hold during World War II but resumed development after the hiatus. Several international agreements were concluded that now define the essence of international commercial arbitration. The New York Convention is among such agreements. The creation of the New York Convention was the first step towards the unification of the international

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[23] Постановление Пленума Верховного Суда Российской Федерации от 10 декабря 2019 г. № 53 «О выполнении судами Российской Федерации функций содействия и контроля в отношении третейского разбирательства, международного коммерческого арбитража» // Российская газета. 2019. 25 дек. № 291 [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 53 of 10 December 2019. On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration, International Commercial Arbitration, Rossiyskaya Gazeta, 25 December 2019, No. 291].

[24] Протокол об арбитражных оговорках (подписан в г. Женеве 24 сентября 1923 г.) [Protocol on Arbitration Clauses of 24 September 1923] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/register_texts_vol_ii.pdf.

[25] Конвенция об исполнении иностранных арбитражных решений (подписана в г. Женеве от 26 сентября 1927 г.) [Convention on the Execution of Foreign Arbitral Awards of 26 September 1927] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/register_texts_vol_ii.pdf.

laws on international commercial arbitration. Russia and China both implemented the right to arbitration clauses during the ratification process. China implemented two of the available clauses: the reciprocity clause on the mutual obligation to recognize and enforce foreign arbitral awards made in a foreign state's territory and the commercial clause. The reciprocity clause was initially implemented by the Union of Soviet Socialist Republics (USSR), and later by Russia.[26]

The 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter the UNCITRAL Model Law) is an important source of international commercial arbitration regulation as well.[27] The instrument is not legally binding. The UNCITRAL Model Law aims at helping states create uniform legislation on international commercial arbitration. The Russian Federation currently uses the UNCITRAL Model Law as the basis for its domestic legislation on international commercial arbitration. The UNCITRAL Model Law norms were largely adopted in the Federal Law titled "On International Commercial Arbitration" of 7 July 1993 No. 5538-I (hereinafter the RF ICA Law).[28] As for the People's Republic of China, only a few administrative entities, such as Hong Kong and Macau, have officially integrated the norms of the UNCITRAL Model Law into their legislation. Although Mainland China incorporated the UNCITRAL Model Law norms into its Law "On Arbitration," it never notified the UNCITRAL Secretariat that it would abide by these norms.

In the Russian Federation, the main source of legal regulation for international commercial arbitration is the abovementioned RF ICA Law, which is applied to international commercial arbitration should the arbitration settlement take place in Russia. However, a range of provisions from the law shall be used when the settlement takes place outside of the country (Arts. 8, 9, 35 and 36). If the RF ICA Law fails to cover certain arbitration issues, the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" shall be used.[29]

In the People's Republic of China, the main source of legal regulation for international commercial arbitration is the PRC Law "On Arbitration" of 31 August 1994.[30] This

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[26] *Supra* note 8.

[27] Типовой закон ЮНСИТРАЛ о международном торговом арбитраже (принят ЮНСИТРАЛ 21 июня 1985 г.) [UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/07-87000_ebook.pdf.

[28] Закон Российской Федерации от 7 июля 1993 г. № 5338-I «О международном коммерческом арбитраже» // Российская газета. 1993. 14 авг. № 156 [Law of the Russian Federation No. 5338-I of 7 July 1993. On International Commercial Arbitration, Rossiyskaya Gazeta, 14 August 1993, No. 156].

[29] Федеральный закон от 29 декабря 2015 г. № 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» // Российская газета. 2015. 31 дек. № 297 [Federal Law No. 382-FZ of 29 December 2015. On Arbitration (Arbitration Proceedings) in the Russian Federation, Rossiyskaya Gazeta, 29 December 2015, No. 297].

[30] Arbitration Law of the People's Republic of China, adopted on 31 August 1994 (Mar. 5, 2022), available at https://wipolex.wipo.int/ru/legislation/details/6598.

is a mixed law, as it regulates both internal and international arbitration. Another piece of legislation that regulates international commercial arbitration is the 29 October 2010 Law "On the Legislation Applicable to Civil Relations with Foreign Participation."[31] The said normative act is a source of international private law and complements the law on arbitration.

Interviews with international economic actors and their lawyers, both in Russia and in China, reveal that incorporating all norms into a single legal act or creating a separate section in an already existing legal document proves to be the most efficient method of international arbitration legal regulation on a national level.[32] The majority of the respondents spoke in favour of a single legal act on international commercial arbitration.

Aside from the legal regulations, both in Russia and in China, there are high court pronouncements that contain interpretations of the international commercial arbitration norms. In Russia, the major sources are as follows: The Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 No. 53 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration"[33] and "Overview of the Court Practice Concerning the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration" (adopted by the RF Supreme Court Presidium on 26 December 2018).[34]

In 2006, the PRC People's Court published the interpretation of the arbitration law application procedure,[35] which mostly concerns the norms of the 2006 UNCITRAL Model Law. In 2015, "The Supreme People's Court's Interpretation Concerning the Civil Procedure Law of the People's Republic of China" was published that also contains a range of provisions on arbitration settlements as well as international commercial arbitration.[36]

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[31] Law of the People's Republic of China on the Legislation Applicable to Civil Relations with Foreign Participation, adopted on 28 October 2010 (Mar. 5, 2022), available at https://wipolex.wipo.int/en/legislation/details/8423.

[32] The research was conducted with the assistance of the Southwest University of Political Science and Law (Chongqing, China), September 2021–January 2022, N-21.

[33] *Supra* note 23.

[34] Постановление Президиума Верховного Суда Российской Федерации от 26 декабря 2018 г. «Обзор практики рассмотрения судами дел, связанных с выполнением функций содействия и контроля в отношении третейских судов и международных коммерческих арбитражей» // Бюллетень Верховного Суда РФ. 2019. № 9 [Resolution of the Presidium of the Supreme Court of the Russian Federation of 26 December 2018. Overview of the Court Practice Concerning the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration, Bulletin of the Supreme Court of the Russian Federation, 2019, No. 9].

[35] Supreme People's Court's Interpretation Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, adopted on 26 December 2005 (Mar. 5, 2022), available at http://www.bjac.org.cn/english/page/ckzl/htf3.html.

[36] Supreme People's Court's Interpretation Concerning the Civil Procedure Law of the People's Republic of China, adopted on 30 January 2015 (Mar. 5, 2022), available at https://ipkey.eu/sites/default/

Apart from the abovementioned judicial guidance, there are arbitration rules and regulations. Arbitration regulations are documents determining the dispute procedure. The arbitration regulations serve to clarify and interpret the arbitration law provisions as well as aim at creating a mechanism to consider and settle disputes and are binding for the parties that have accepted them. Almost any arbitration centre that considers international commercial arbitration disputes has its own set of regulations. In Russia, the most well-known international commercial arbitration regulations belong to the RF Chamber of Commerce and Industry.[37] In China, the international commercial arbitration regulations of China's International Economic and Trade Arbitration Commission (CIETAC) hold this distinction.[38] The present paper will look into the content and application of these rules and regulations.

Among the bilateral agreements regulating China and Russia's relationship, it is worth mentioning "The Protocol of General Conditions for the Delivery of Goods from the USSR to the People's Republic of China and from the People's Republic of China to the USSR"[39] signed in 1990. The agreement regulates the delivery of goods between the two countries. Currently, the validity of the agreement is a subject of debate. Russia never claimed its legal continuity. However, neither party declared its termination either.[40] It is probably safe to conclude that the Protocol is no longer legally binding, but the conditions stipulated therein can be used in an agreement by the parties. Proof of the disposition character of the Protocol can be found in court practice as well. In Russia, a decision of the Arbitration Court of the Amur Region mentions the use of the Protocol only at the request of the parties to the agreement.[41]

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files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf.

37 Регламент Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации (утвержден Приказом ТПП РФ от 18 октября 2005 г. № 76) [Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, adopted on 18 October 2005] (Mar. 5, 2022), available at https://mkas.tpprf.ru/ru/reglamentmkas.php.

38 China International Economic and Trade Arbitration Commission Arbitration Rules, adopted on 4 November 2014 (Mar. 5, 2022), available at http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en.

39 Инструкция Внешторгбанка СССР от 25 декабря 1985 г. № 1 «О порядке совершения банковских операций по международным расчетам» // СПС «КонсультантПлюс» [Instruction of the Vneshtorgbank of the USSR No. 1 of 25 December 1985. On the Procedure for Performing Banking Operations for International Settlements, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_5153/.

40 *Цзэньцзюнь К.* Международный коммерческий арбитраж в Китае (материковый Китай, Гонконг, Макао и Тайвань): дис. … канд. юрид. наук [Kuan Tszentszyun, *International Commercial Arbitration in China (Mainland China, Hong Kong, Macau and Taiwan)*, PhD thesis] 175 (2008).

41 Решение Арбитражного суда Амурской области от 19 ноября 2013 г. № А04-6934/2013 // Судебные и нормативные акты РФ [Decision of the Arbitration Court of the Amur Region No. A04-6934/2013 of 19 November 2013, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

All in all, international commercial arbitration as we know it today has been developing since World War II. Nowadays, international commercial arbitration in Russia and China is based on international law, national legislation and bilateral agreements. Moreover, the resolutions and interpretations of the supreme courts as well as arbitration regulations complement the main laws and help to unify the enforcement of the law. The national legislation can be improved by including all international commercial arbitration norms in a single legal act.

## 2. Particularities of International Commercial Arbitration in Russia and Mainland China: Arbitration Agreement and Arbitration Commission

An arbitration agreement forms the core of international commercial arbitration. An arbitration agreement is binding for the parties and, should a dispute arise, does not allow that the parties to avoid arbitration settlement.[42] The validity of an arbitration agreement depends upon many factors. The present paper will consider the definition, the form and the autonomy of the arbitration agreement.

Article 7 of the UNCITRAL Model Law provides the definition of an arbitration agreement, which is stated to be an agreement between parties according to which all or some disputes that may occur between the parties in the course of doing business shall be considered by an arbitration body.

Arbitration agreements fall into two types. It is either an arbitration clause, that is, an arbitration agreement incorporated into the main agreement, or a separate document. Both options possess equal legal power. An arbitration agreement, regardless of its form, supposes that the case shall be considered by an arbitrator rather than a state court.[43]

The definition suggested by the Russian legislation is identical to that of the UNCITRAL Model Law (Art. 7 of the RF ICA Law). The definition of an arbitration agreement vis-à-vis the Chinese legislation is similar to that given in the UNCITRAL Model Law as well, although it does not copy it word for word. In accordance with Article 16 of the PRC Law "On Arbitration," arbitration agreements can assume the form of arbitration clauses or separate arbitration agreements concluded in writing. The arbitration law also specifies conditions for the arbitration agreement's validity, such as expressing the will to have disputes considered by an arbitration body; choosing the arbitration subject matter and selecting the arbitration commission.

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[42] *Гаврилов В.В.* Арбитражная оговорка и определение применимого права в международном коммерческом арбитраже // Актуальные проблемы международного гражданского процесса: материалы международной конференции [Vyacheslav V. Gavrilov, *Arbitration Clause and Definition of Applicable Law in International Commercial Arbitration* in *Actual Problems of International Civil Procedure: Materials of the International Conference*] 183–190 (2003).

[43] Overview of the Court Practice, *supra* note 34.

The requirement of a pre-selected arbitration commission is uncommon in the majority of jurisdictions. This provision allows institutional arbitration to be conducted in certain places and prohibits ad hoc arbitration until 2016. In 2016, the Supreme People's Court of the PRC published "The Conclusion of the Provision of Judicial Safeguards for the Construction of China Pilot-Free Trade Zones."[44] This judicial guidance allowed ad hoc arbitration, but in a limited capacity. Such arbitration shall only be possible in disputes between residents of the free trade zone; the arbitration body, its composition and procedures shall be specified as well (Art. 9).

Article 7 of the UNCITRAL Model Law provides two variants of an arbitration agreement. The first one insists on the obligatory written form of the agreement. Oral agreements or implicative action are not considered as options. However, the second type of agreement, included in Article 7 of the UNCITRAL Model Law in 2016, does not present the conclusion in writing as an absolute imperative. The creators of the UNCITRAL Model Law have not shown any special inclination towards any of the different agreement types provided in Article 7. The national legislatures of both Russia and China have opted for the first type of arbitration agreement recognized by the UNCITRAL Model Law, that is, the one concluded in writing. There are several reasons why the written agreement has been chosen as the preferable option. Firstly, the parties exclude the possibility of dispute settlement in a state court. Secondly, the written form is proof enough of the fact that the parties have agreed to use arbitration as their preferred means of dispute resolution.[45] Article 7 of the UNCITRAL Model Law as well as the national legislation do not limit the Variant I arbitration agreement to a simple written form but also allow other forms that ensure the documentation of the relevant data and its further use (Art. 7, cl. 3 of the RF ICA Law). The interpretations offered by higher courts provide the following list of agreement forms that are considered to be written: electronic messages correspondence,[46] including telegraph, telefax, fax and email, as well as electronic documents with a clearly traceable sender.[47]

Article 7, clause 5 of the RF ICA Law also considers a lawsuit and a response to it as a viable means of an agreement conclusion should one of the parties mention an existing arbitration agreement between them and should the other party fail to deny it. Meanwhile, neither the PRC Law "On Arbitration" nor the interpretations

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[44] Opinions on the Provision of Judicial Safeguards for the Construction of China Pilot-Free Trade Zones, Conclusion of the Supreme Court of 2016 No. 34 (Mar. 5, 2022), available at https://www.ichongqing.info/business/policies-regulations/opinions-on-providing-judicial-safeguard-for-the-construction-of-china-chongqing-pilot-free-trade-zone-formulated-by-liangjiang-new-area-peoples-court/.

[45] *Коломиец А.И.* Письменная форма арбитражного соглашения – пережиток прошлого или необходимость? // Вестник арбитражной практики. 2017. № 4(3). С. 3–11 [Anna I. Kolomiets, *Is a Written Arbitration Agreement a Relic of the Past or a Necessity?*, 4(3) Bulletin of Arbitration Practice 3–11 (2017)].

[46] Supreme People's Court's Interpretation, *supra* note 35.

[47] Overview of the Court Practice, *supra* note 34.

given by the Supreme People's Court on some issues pertaining to the application of the arbitration law of the People's Republic of China indicate the lawsuit-response exchange as a valid form of the arbitration agreement conclusion. However, considering there is no explicit prohibition or acknowledgment of various types of written agreements, the abovementioned form of concluding an agreement can be seen as acceptable. The inclusion of such a possibility in the Chinese legislation could be a significant improvement as it would ensure that the norms on the forms of an arbitration agreement are more precise and unambiguous.

One of the major features of international commercial arbitration is the autonomy of the arbitration agreement. The autonomy of the arbitration clause implies its independence from the main agreement, while the invalidity of the agreement does not automatically entail the invalidity of the arbitration clause (Art. 16 of the UNCITRAL Model Law and Art. 16 of the RF ICA Law). The provision according to which the legal relationship between the plaintiff and the defendant through an arbitration clause shall be considered separately from the rest of the agreement[48] is also backed by clause 3 of the Supreme Court Resolution No. 53 of 10 December 2019[49] and by court practice. The PRC Law "On Arbitration" mentions the arbitration clause as well. According its Article 19, an arbitration clause operates separately from the main agreement, and any changes in the latter shall not affect the former. The content of the article is also explained in clause 10 of the "Interpretation of Some Issues on Application of the Arbitration Law."[50]

The invalidity of the arbitration clause shall be considered separately. An arbitration clause can be considered void in the event of defective will or violations of the law concerning the content and form of the arbitration agreement.[51]

The arbitration agreement autonomy principle originates in the competence-competence principle, which recognizes the arbitrators' power to determine their own competence to consider a certain dispute.[52] This means that even if the main

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48 Решение Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации от 13 марта 2014 г. по делу № 102/2013 [Decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation No. 102/2013 of 13 March 2014].

49 *Supra* note 23.

50 Supreme People's Court's Interpretation, *supra* note 35.

51 Решение ВТАК при ТПП СССР от 9 июля 1984 г. Конфиденциальное дело № 109/198 (в/о «Союзнефтеэкспорт», г. Москва, против «Джок Ойл, Лтд», Бермуды) // Вестник международного коммерческого арбитража. 2007. № 2. С. 135–167 [Decision of the VTAK at the USSR Chamber of Commerce of 9 July 1984. Confidential Case No. 109/198 (*V/O Soyuznefteexport, Moscow, v. Jock Oil Ltd., Bermuda*), 2 Bulletin of International Commercial Arbitration 135, 135–167 (2007)].

52 *Еремин В.В.* Подходы к определению арбитрабельности: соотношение арбитрабельности, подведомственности и компетенции // Актуальные проблемы российского права. 2019. № 8(105). С. 95–107 [Victor V. Eremin, *Approaches to Determining Arbitrability: Relationship Between Arbitrability, Jurisdiction and Competence*, 8(105) Actual Problems of Russian Law 95, 95–107 (2019)].

agreement is declared void, only the arbitration body can decide whether or not the arbitration clause is valid. Both Article 16 of the UNCITRAL Model Law and Article 16 of the RF ICA Law contain this provision.

The law in Mainland China does not fully agree with this principle. According to Article 20 of the PRC Law "On Arbitration," if there are doubts concerning the validity of the arbitration agreement, a party has the right to apply to the arbitration commission or the People's Court for clarification. If one party applies to the arbitration commission and the other to the People's Court, the dispute is to be resolved by the People's Court. When compared to Russian legislation, the following differences can be seen: firstly, the validity of the arbitration clause is determined by the arbitration commission, not the arbitrators themselves; secondly, the validity of the arbitration clause can be determined by the People's Court, whose decision shall take precedence over that of the arbitration commission in the event of a conflict. The above contradicts one of the main advantages of arbitration, namely, its independence from the state courts. Such a provision is believed to make China less attractive as a venue for arbitration. A possible solution would be to include a provision in Chinese legislation requiring an independent arbitral award on the validity of the arbitration agreement. The first step was already taken in 2015 when a provision was added to the CIETAC Regulations which provides that the arbitration commission shall have the right to determine the existence and validity of the arbitration agreement. Consequently, the parties agree not to refer the dispute over the validity of the arbitration agreement to the People's Court and to have the issue resolved by the arbitration commission alone.

That is to say, both China and Russia follow the autonomy principle, although Mainland China, unlike Russia, does not support the competence-competence principle, instead referring the issue to either the arbitration commission or the People's Court.

When it comes to determining the validity of the arbitral agreement, one should turn to Article 7, clause 9 of the RF ICA Law, according to which all doubts shall be resolved in favour of its validity. This provision is a step aside from the literal construction principle and allows the recognition of agreements with minor defects as being legally valid. Similar provisions on the validity of an agreement can be found in the "Supreme People's Court's Interpretation Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China."[53] The Chinese legislation provides a clearer definition for every type of dispute, thereby allowing for a wider range of cases in which faulty arbitration agreements shall be recognized as valid. Such an approach appears clearer and more specific, making it a better option, and so its application to Russian legislation shall be considered.

An arbitration agreement is one of the key elements of international commercial arbitration. Arbitration centres try to elaborate an "ideal" and uniform arbitration agreement as well as eliminate possible obstacles that may hinder the case consideration.

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[53] *Supra* note 35.

An example of a flawed arbitration clause that led to the rejection of dispute settlement in the International Commercial Arbitration Court for the Russian Chamber of Commerce (ICAC) can be found in ICAC's award of 5 October 2010 in Case No. 81/2010.[54] The parties had the right to pass the arbitration case to ICAC or Uzbekistan's commercial court. In the plaintiff's opinion, the clause was optional and allowed for both ways of resolving the dispute. However, ICAC recognized Uzbekistan's commercial court as the appropriate dispute resolution body and rejected the case.

Another example of a faulty arbitration clause is the case described in clause 13 of the Overview of Court Practice for the Resolution of Disputes Involving Foreign Citizens.[55] According to the arbitration agreement, the parties agreed on a "Paris Institution" as the arbitration body but failed to indicate the specific place in the arbitration clause. In the end, the arbitration court ruled that the agreement could not be fulfilled and the dispute was considered *ad rem* by a state court.

To avoid such inconveniences, arbitration courts publish their own sets of rules and recommend that they should be followed (although it is not obligatory). As mentioned before, both ICAC[56] and CIETAC[57,58] have their own sets of recommendations.

The legislation, both in China and in Russia, contains the norms from the UNCITRAL Model Law. However, unlike China, Russia has implemented the majority of the UNCITRAL Model Law norms.

The two countries have similar interpretations of an arbitration agreement. However, the PRC Law "On Arbitration" specifies stricter conditions for the agreement's validity. Both countries only recognize written agreements (although they adhere to a broad interpretation of the term "written"). Both support the arbitration clause autonomy principle, but the People's Republic of China does not follow the competence-competence principle, preferring instead to refer the competence issues to either the arbitration commission or the People's Court. In addition, China

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54 Споры с контрагентом в международном коммерческом арбитраже // Юрист компании. 23 декабря 2015 г. [Disputes with a Counterparty in International Commercial Arbitration, Lawyer of the Company, 23 December 2015] (Mar. 5, 2022), available at https://www.law.ru/Article/3945-spory-s-kontragentom-v-mejdunarodnom-kommercheskom-arbitraje-neprivychnye-nyuansy.

55 Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 16 февраля 1998 г. № 29 «Обзор судебно-арбитражной практики разрешения споров по делам с участием иностранных лиц» // Вестник ВАС РФ. 1998. № 4 [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 29 of 16 February 1998. Overview of Court Practice for the Resolution of Disputes Involving Foreign Citizens, Bulletin of the Supreme Arbitration Court of the Russian Federation, 1998, No. 4].

56 Рекомендуемые арбитражные соглашения // Международный коммерческий арбитражный суд при Торгово-промышленной палате Российской Федерации [Recommended Arbitration Agreements, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation] (Mar. 5, 2022), available at https://mkas.tpprf.ru/ru/clause.php.

57 China International Economic and Trade Arbitration Commission, Model Clause (1) (Mar. 5, 2022), available at http://www.cietac.org/index.php?m=Article&a=show&id=2644&l=en.

58 *Id.* Model Clause (2).

provides a more detailed interpretation of faulty arbitration clauses, which helps to reduce the number of arbitration cases that are rejected.

The arbitration commission is an international commercial arbitration body. The purpose of the arbitration settlement is to make a just and final award. The achievement of that purpose depends upon the arbitrators.[59]

Let us proceed to the issue of arbitrators in international commercial arbitration. Article 7 of the UNCITRAL Model Law states that, unless otherwise agreed, three arbitrators shall be appointed. The RF ICA Law contains similar instructions, although it highlights that the number of arbitrators shall be uneven (unless otherwise specified by law). The PRC Law "On Arbitration" allows for the consideration of a case by either one or three arbitrators.

The parties can, however, appoint the arbitrators themselves, either within the framework of the arbitration agreement or in the course of the arbitration proceedings.

While the Chinese legislation allows for either one or three arbitrators, the Russian legislation allows for more than these two options, although they are the most popular ones. The advantage of having three arbitrators is that each party can choose one of the three arbitrators. This is stipulated in Article 11, clause 3, paragraph 1 of the RF ICA Law as well as in Article 31 of the PRC Law "On Arbitration." The third arbitrator (who, as a rule, will also serve as the president) can be selected by the parties, by the other two arbitrators or by the arbitration commission. Additionally, the two arbitrators already nominated by the parties shall choose the third arbitrator. According to ICAC, the president of the arbitration commission can be appointed, that is, the third arbitrator shall be selected by the Nomination Committee for Arbitration of International Commercial Disputes from the existing list of arbitrators (Art. 16, para. 7).

The nomination process for the arbitrator who will preside over the case is different in the People's Republic of China. In accordance with Article 31 of the PRC Law "On Arbitration," the parties either appoint the arbitrators jointly or delegate the task to the president of the arbitration commission. The norms regarding the election of the president of the arbitration commission provided by the CIETAC Regulations prove noteworthy and can be implemented in the Russian legislation. The CIETAC Regulations provide a broader interpretation of the above as, according to the regulations, each party submits a list of one to five arbitrators for the position of the president. Furthermore, the latter is chosen by looking for overlapping names in the lists. If there are several incidences, the CIETAC president shall choose the most suitable arbitrator as regards the essence of the case, the arbitrator's experience and other factors. If no names coincide, the CIETAC president alone shall appoint the chair of the arbitration (Art. 27 of CIETAC).

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[59] *Тер-Овакимян А.А.* Правовой статус арбитров в международном коммерческом арбитраже: автореф. дис. … канд. юрид. наук [Anna A. Ter-Ovakimyan, *Legal Status of Arbitrators in International Commercial Arbitration*, Abstract, PhD thesis] 4 (2018).

As a rule, a sole arbitrator is chosen in cases of simple disputes or those that involve a small amount of money. In Russia, Article 16, paragraph 2 of ICAC establishes that a case can be resolved by a sole arbitrator if the claimed amount is below US$50,000 (or equivalent), excluding penalty fees or recovery of the arbitration expenses. Furthermore, a sole arbitrator shall be appointed if there are other circumstances based on which ICAC has the right to appoint a sole arbitrator for the purpose of dispute settlement. In China, the CIETAC Regulations do not stipulate any conditions upon the basis of which the sole arbitrator shall be chosen. Should the parties agree otherwise, the names of three arbitrators shall be nominated.

To conclude, in both countries single-member and three-member arbitration panels are the most popular types. Russia allows a larger number of arbitrators as long as their total number is uneven, whereas China does not provide any other options at all. Both China and Russia allow the parties to choose the arbitrators by themselves. China's procedure for the election of the chair arbitrator appears more efficient and independent and has the potential to improve the Russian legislation if implemented. In addition, in default of the parties' expressed will, the arbitration commission shall appoint the arbitrators itself, taking into consideration the complexity and type of case as well as any other relevant factors.

Disputes can be settled through international commercial arbitration only if the arbitrator meets certain requirements. These said requirements can be divided into formal and ethical ones.

The formal criteria include age, education and a clean criminal record, among others. The following criteria for international arbitration are established in Russia: a university degree in law attested by a standard certificate recognized in the Russian Federation; twenty-five years old; mental capacity; and a clean criminal record. In some instances, a person cannot be chosen as an arbitrator because of their status (for example, if the person is a judge, as stated in Art. 3, cl. 3, para. 1 of the Federal Constitutional Law "On the Status of Judges in the Russian Federation"[60]), as well as a person whose authority as a judge, lawyer or notary public, among others, has been suspended due to misconduct (Art. 11, cls. 6–11 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation") cannot be nominated as an arbitrator either. The university degree requirement is obligatory only in the case of the sole arbitrator. Should there be an arbitration panel, only one arbitrator is obliged to possess a university degree (Art. 11, cl. 7 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation").

The Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation" stipulates a degree in law as one of the requirements for arbitrators; however, it fails to specify the level of education, for instance a bachelor's or master's

[60] Закон Российской Федерации от 26 июня 1992 г. № 3132-I «О статусе судей в Российской Федерации» // Российская газета. 1992. 29 июля. № 170 [Law of the Russian Federation No. 3132-I of 26 June 1992. On the Status of Judges in the Russian Federation, Rossiyskaya Gazeta, 29 July 1992, No. 170].

degree. The issue is settled as regards the state courts by the Federal Constitutional Law "On the Status of Judges in the Russian Federation"[61] which says that a person shall qualify to become a judge if they have a master's degree in law only if they have also completed bachelor studies in the same field.

On the one hand, arbitration allows the parties to exercise their free will when choosing the arbitrators. On the other hand, international commercial arbitration tends to consider complicated and expensive cases that require certain qualifications. In our opinion, a minimal required qualification should be determined for arbitrators in both national and international arbitration by means of the Plenum resolution or in the Supreme Court's practice overview.

In China, the formal criteria for arbitrators include eight or more years of work experience in arbitration (after having taken the state exam and obtaining qualification in law) or as a lawyer or a judge. A PhD working as a law teacher or a person with work experience in commerce can qualify as an arbitrator as well (Art. 13 of the PRC Law "On Arbitration").

The PRC Law "On Arbitration" does not specify any age requirements for arbitrators. However, due to the work experience requirements (that shall be preceded by prior training), a person younger than twenty-five years of age cannot become an arbitrator. For example, Article 4, clause 6 of the PRC Law "On Judges in the People's Republic of China" states that to qualify as an arbitrator one shall have a bachelor's degree in law and two years of experience in the legal field or a master's degree in law or PhD and one year of experience working as a lawyer.[62]

The People's Republic of China determines only one criterion for the arbitrator to meet, which is work experience in a specific field. However, the criterion also implies the obligatory higher education training required to work in the legal field, as well as the minimum age condition which cannot be too low even if all of the previous requirements are met. The Russian Federation does not include work experience in the list of qualification requirements for arbitrators. The lack of strict and detailed requirements for arbitrators, although based on the autonomy of the parties' will to determine the arbitrators' choice within the framework of the arbitration agreement, appears to result in a less competent case consideration. That is why minimal obligatory requirements for arbitrators should be established via bilateral agreements. Basic legal training and work experience in a specific field shall be included among such requirements.

There are a number of moral and ethical standards for arbitrators to uphold. Article 11, clause 5 of the RF ICA Law specifies independence and impartiality, whereas Article 13 of the PRC Law "On Arbitration" indicates honesty and decency.

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61 Law of the Russian Federation No. 3132-I, *supra* note 60.

62 中华人民共和国法官法2005年05月26日 [Law on Judges in the People's Republic of China of 26 May 2005] (Mar. 5, 2022), available at http://www.gov.cn/banshi/2005-05/26/content_1026.htm.

Russia borrowed the criteria from clause 12 of the UNCITRAL Model Law. China has its own criteria. Despite the fact that the criteria are not identical, their similarity can hardly be denied either, since they are aimed at the independence and fairness of the justice system.

Unlike state courts, arbitration is based on the parties' free will. The parties can stipulate additional requirements for arbitrators. Article 11, clause 1 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation," states the possibility of such additional requirements, although the wording of the above norm is sometimes criticized. A.I. Zaytsev remarks that since the parties are free to use any criteria for the arbitrator's nomination (for example, religious denomination or sexual orientation), searching for the candidates and then determining whether or not they meet the set criteria may turn out to be no easy task.[63]

The PRC Law "On Arbitration" does not indicate that the parties introduce additional criteria for arbitrators, but as long as it fails to expressly prohibit it either, the parties can, in fact, establish additional criteria that can touch upon various aspects (e.g. nationality or availability) and shall be included in the agreement.[64] Some requirements are not included in the agreement, such as professional knowledge, qualification and work experience, but can be considered by the parties.[65]

However, only the criteria specified by law shall be deemed obligatory. Additional criteria can be introduced at the request of the parties if they wish to do so.

The independence of international commercial arbitration is also ensured by the opportunity to reject or withdraw an arbitrator due to circumstances that have come to light only after the nomination. The above provision can be found in Article 12 of the RF ICA Law and Article 34 of the PRC Law "On Arbitration." The Russian law is identical to Article 11 of the UNCITRAL Model Law.

While in Russian law the criteria for removing an arbitrator appear to be rather vague since any circumstances that raise doubts about the arbitrator's impartiality and independence can become the basis for their withdrawal, Chinese law imposes stricter conditions, which include the arbitrator's kinship or other ties to one of the parties or their representatives, the arbitrator's partiality and the arbitrator's receiving gifts from the parties or their representatives. The inclusion of similar provisions in

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[63] *Зайцев А.И.* Кто может быть арбитром в соответствии с ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации» // Современные тенденции развития гражданского и гражданского процессуального законодательства и практика его применения. 2016. Т. 3. С. 466 [Alexey I. Zaytsev, *Who Can Be an Arbitrator in Accordance with the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation*," 3 Modern Tendencies in the Development of Civil and Civil Procedural Legislation and the Practice of its Applications 465, 466 (2016)].

[64] *Скворцов О.Ю.* Правовое положение арбитров в международном коммерческом арбитраже // Вестник Санкт-Петербургского университета. Право. 2011. № 1. С. 102 [Oleg Yu. Skvortsov, *Legal Status of Arbitrators in International Commercial Arbitration*, 1 Bulletin of St. Petersburg University. Law 99, 102 (2011)].

[65] Ter-Ovakimyan 2018, at 173.

the Russian legislation will ensure a more transparent arbitrator selection process as well as an independent and impartial trial.

The Russian Federation Chamber of Commerce and Industry's Order No. 39 "On the Rules on the Impartiality and Independence of Arbitrators"[66] interprets cases in which the arbitrator's impartiality is unclear. Such cases fall into two types: firstly, those in which there are circumstances that hinder the fair consideration of the case (for example, an arbitrator having kinship ties to one of the parties, their representative, an expert or a witness; the arbitrator having an employment relationship with one of the parties, their representative, etc.) and secondly, those with circumstances that do not necessarily hinder the fair consideration of the case but that should be disclosed to the parties (for example, a close relationship between a party or their representative and the arbitrator; the arbitrator's work as one of the parties' legal representative in a non-arbitration case up to three years prior to the proceedings). Article 30 of the CIETAC Regulations obliges the arbitrator to disclose any facts or circumstances that can put under question their impartiality.

All in all, both Russia and China specify similar circumstances that prevent an arbitrator from participating in international commercial arbitration. The main difference is that China has established certain strict criteria for the removal of the arbitrator in the PRC Law "On Arbitration," whereas Russia, via legislation, only sets general norms with a more detailed interpretation provided in the Chamber of Commerce and Industry's Order No. 39.

Arbitration proceedings in international commercial arbitration begin with the filing of a lawsuit. According to Article 8 of the ICAC Regulations and Article 11 of CIETAC, the date of the lawsuit's receipt by the arbitration commission shall be considered as the beginning date of the arbitration proceedings. Article 21 of the PRC Law "On Arbitration" provides a list of conditions under which a party can approach an arbitration body. These requirements are as follows: an arbitration agreement shall be concluded; the plaintiff shall be able to expose claims, facts and reasoning; and the arbitration commission shall have the competence to consider the case. The RF ICA Law makes no mention of any specific circumstances under which a party shall have the right to an arbitration settlement. Nonetheless, Article 23 of the RF ICA Law states that upon having filed a lawsuit, the party shall reveal the circumstances on which its claim is based, the subject matter of the dispute and the desired compensation. The provision does not expressly indicate that an arbitration agreement shall be concluded despite the fact that it is a basic requirement for the parties to settle a dispute with an arbitration body. Both countries recognize the

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[66] Приказ Торгово-промышленной палаты Российской Федерации от 27 августа 2010 г. № 39 «О Правилах о беспристрастности и независимости третейских судей» // СПС «Гарант» [Order of the Chamber of Commerce and Industry of the Russian Federation No. 39 of 27 August 2010. On the Rules on the Impartiality and Independence of Arbitrators, SPS "Garant"] (Mar. 5, 2022), available at https://base.garant.ru/199168/.

right to change, amend or withdraw the lawsuit (Arts. 23 and 32 of the RF ICA Law, Art. 27 of the PRC Law "On Arbitration").

Arbitration proceedings may take the form of either an oral hearing or written proceedings conducted on the basis of the documents (Art. 39 of the PRC Law "On Arbitration," Art. 24 of the RF ICA Law). The Chinese legislation establishes that closed arbitration hearings shall be held, while public hearings shall only take place upon the agreement of the parties and unless no state secrets are involved (Art. 40 of the PRC Law "On Arbitration"). The RF ICA Law does not specify any requirements as to the form of the hearing. However, the ICAC Regulations advise that a closed-door hearing shall be held unless otherwise agreed by the parties (Art. 32, cl. 1 of the ICAC Regulations). Closed-door sessions are a manifestation of the confidentiality principle. Thus, both countries follow the same approach regarding the confidentiality and publicity of arbitration proceedings.

The main difference between arbitration proceedings in China and those in Russia is that the plaintiff is considered to have dropped the claims if they are absent at the hearing without reasonable excuse. Should the defendant be absent, the case shall be considered without them (Art. 42 of the PRC Law "On Arbitration"). The RF ICA Law does not distinguish between the absences of the parties. If a party fails to attend the hearing or submit any documents, the arbitration court shall make the award based on the available evidence (Art. 25 of the RF ICA Law). The PRC Law "On Arbitration" displays a more stringent attitude to the parties' attendance at the hearings, especially the plaintiff's.

International commercial arbitration both in China and in Russia requires the parties to provide proof of the cited legal facts (Art. 42 of the PRC Law "On Arbitration" and Art. 27 of the ICAC Regulations). Both countries allow the arbitration body to collect the evidence on its own (Art. 43 of the PRC Law "On Arbitration" and Art. 27 of the RF ICA Law). In the Russian Federation, the collection of evidence for international commercial arbitration is conducted by the state (arbitration) courts that hand the evidence over to the arbitration institutions (Art. 74.1 of the Arbitration Procedure Code of the Russian Federation). In the People's Republic of China, the law makes no mention of the state courts. At the same time, there is mention in the legal literature that the collection of evidence for international commercial arbitration can be conducted through the state courts and that this practice is not widespread. The proof procedure is, thus, relatively similar in the two countries, though it has a more detailed legal description in Russia.

The legislation of both countries allows for an assessment to be conducted by an expert on behalf of the arbitration court (Art. 44 of the PRC Law "On Arbitration" and Art. 26 of the RF ICA Law). According to Article 44 of the CIETAC Regulations, Chinese or foreign organizations or natural entities (nationality not specified) may serve as experts. Neither the RF ICA Law nor the CIETAC Regulations express any requirements for experts. Furthermore, both countries allow court-initiated examinations, although in China the procedure is better explained.

International commercial arbitration courts and state courts may work cooperatively if the arbitration institution requests the state court to ensure provisional measures of protection. According to Articles 46 and 28 of the PRC Law "On Arbitration," a party has the right to request that the arbitration court take provisional measures of protection as regards the evidence or property if there is a risk of destruction, the evidence proves hard to obtain or the future arbitral award execution may pose difficulties.

The arbitration commission directs the request for the protection of evidence to the People's Court of the main (first) instance, in accordance with the location of the property. Article 23, clause 3 of the CIETAC Regulations empowers the arbitration court to take measures of protection of its own accord whenever it deems necessary.[67] However, the Civil Procedure Code of the People's Republic of China does not recognize the measures of protection taken by arbitration institutions and shall not enforce them.[68] In other words, the execution of the protection measures taken by an arbitration court of its own accord is not of a binding nature and is not recognized by the state courts.

According to Article 17 of the RF ICA Law, the arbitration court has the authority to institute measures of protection for evidence or property if one of the parties requests it. Article 90, clause 3 of the Arbitration Procedure Code allows a party to request provisional measures of protection from the state (arbitration) court of first instance closest to the arbitration institution in question or to the location of the party's property. Since Article 90 of the Arbitration Procedure Code includes both Russian and international commercial arbitration institutions, the arbitration court has the authority to take provisional measures of protection if the case is being considered by an international commercial arbitration located outside of Russia.[69] However, the provisional measures of protection initiated by the arbitration courts are not of a legally binding nature and are not recognized by the state courts as being enforceable.

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[67] *Кобахидзе Д.И.* Регулирование обеспечительных мер в международном коммерческом арбитраже: сравнительный анализ законодательства Англии, Китая и России // Журнал зарубежного законодательства и сравнительного правоведения. 2017. № 6(67). С. 87–92 [David I. Kobakhidze, *Regulation of Interim Measures in International Commercial Arbitration: A Comparative Analysis of the Legislation of England, China and Russia*, 6(67) Journal of Foreign Legislation and Comparative Law 87, 87–92 (2017)].

[68] Interim Measures in China, How to Ensure Safeguarding of Your Interest, CMS Expert Guide to Interim Measures, 29 November 2018 (Mar. 5, 2022), available at https://cms.law/en/int/expert-guides/cms-expert-guide-to-interim-measures/china.

[69] Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 9 июля 2013 г. № 158 «Обзор практики рассмотрения арбитражными судами дел с участием иностранных лиц» // СПС «КонсультантПлюс» [Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 158 of 9 July 2013. Overview of the Practice of Consideration by Arbitration Courts of Cases involving Foreign Persons, SPS "ConsultantPlus"] (Mar. 5, 2022), available at http://www.consultant.ru/document/cons_doc_LAW_149878/.

That is to say, both Russia and China recognize the right of the arbitration courts to take provisional measures of protection of their own accord, although these measures are of a recommendatory character as there is no legally set procedure for their enforcement. In the People's Republic of China, the arbitration parties are permitted to direct their request to the state courts only through the arbitration court itself located within the PRC. This is because the legislation does not provide for a procedure to directly request the introduction of the protection measures from the state court. As a result, if the dispute is considered in another country, a Chinese court will not be able to take any provisional protective measures. In the Russian Federation, a direct request to the state court for provisional measures of protection is stipulated by the legislation, which means that, even if the dispute is considered by an overseas institution, the party still has an opportunity to request the provisional measures of protection.

In Russia, mediation is allowed at all stages of arbitration. The parties may request the court to issue a ruling on the mediation process, in which case the hearing will be postponed in accordance with their request. At the parties' request, the court shall issue a ruling on the mediation process while the hearing is postponed accordingly. If the mediation is successful, the mediation agreement can be approved by the arbitration court as an arbitration agreement on mutually agreed terms (Art. 49 of the Federal Law "On Arbitration (Arbitration Proceedings) in the Russian Federation").[70] Although mediation is permitted in Russia, it shall be conducted by entities other than the Arbitration Commission, and the hearing shall not take place until the mediation process is completed.

In China, the legislation provides a different mediation procedure for arbitration. The difference is that mediation shall be conducted by the court as a part of the arbitration dispute settlement and the judge can take on the role of the mediator[71] (Art. 51 of the PRC Law "On Arbitration" and Art. 47 of CIETAC). If the mediation fails, the parties can have the dispute considered by the previous arbitrators. It is important to note, however, that the parties shall not be permitted to refer to the facts disclosed by the other party in the course of the mediation process (Art. 47, cl. 9 of CIETAC). The fact that the court's consideration and mediation is conducted by one and the same judge is believed to be a negative factor that may affect the judge's impartiality.[72]

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[70] *Supra* note 29.

[71] *Русакова Е.П.* Особенности процедуры посредничества в Китае // Правозащитник. 2016. № 2. С. 4 [Ekaterina P. Rusakova, *Features of the Mediation Procedure in China*, 2(4) Human Rights Defender 4 (2016)].

[72] *Чан П.* Коммерческая медиация в современном Китае: общий обзор // Коммерческая медиация: теория и практика: сборник статей [P. Chan, *Commercial Mediation in Modern China: General Overview* in *Commercial Mediation: Theory and Practice: Collection of Articles*] 61 (Svetlana K. Zagainova & Vadim O. Abolonin eds., 2012).

As we can see, the People's Republic of China, unlike the Russian Federation, has the mediation option imbedded in the arbitration process and provides the parties with a simple procedure should they choose to use it. The unification of the Russian and Chinese legislation appears to be the right step that can improve arbitration in both countries. Although some scholars are of the opinion that having one person serve as both the arbitrator and the mediator has a negative impact on the impartiality of the case consideration.[73]

The norms that regulate an arbitration agreement are similar in the two countries, although the People's Republic of China has stricter validity conditions. Both China and Russia only recognize the written arbitration agreement (however, the term "written" is understood broadly) and support the independence of the arbitration clause. The main difference lies in the fact that China does not follow the competence-competence principle, instead referring the issue to either the arbitration commission or the People's Court.

Furthermore, the normative regulation of the arbitration commissions is similar in the two countries. In Russia, the parties can choose any uneven number of arbitrators, while in China either one or three arbitrators shall be nominated. Although both countries have a list of requirements that an arbitrator shall meet, China's conditions only include work experience in the legal field.

The arbitration procedure is similar in both Russia and China and includes starting a lawsuit, the courts' right to collect evidence of their own accord, initiating evaluations carried out by experts and conducting mediation. The main difference is that in China, a party may only request the provisional measures of protection through the arbitration court, while in Russia a party can make a direct request to the state court. China has the mediation process integrated into the arbitration settlement procedure, and the process can be conducted by the same arbitrators who were nominated for the arbitration hearing. Russia also provides for mediation, but as a separate method of dispute settlement.

### 3. Arbitration Award as a Key Element of Dispute Resolution in International Commercial Arbitration in Russia and Mainland China

The arbitration process shall result in the making of an award, which is the main purpose of the process. Despite the fact that the parties come to arbitration voluntarily and the award is supposed to be fulfilled of their own free will, the award shall also comply with the New York Convention and the national legislation of the countries in which the award is enforceable.[74]

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[73] *Бенова В.И.* Медиация как альтернативный способ разрешения международных коммерческих споров: автореф. дис. … канд. юрид. наук [Victoria I. Benova, *Mediation as an Alternative Way of Resolving International Commercial Disputes*, Abstract, PhD thesis] 18 (2013).

[74] Karabelnikov 2013, at 244.

The arbitration process can have three possible results: the making of the award, the termination of the arbitration proceedings or a voluntary settlement concluded by the parties before the award has been made.

The final arbitral award is the most frequent outcome of arbitration. According to the Russian legislation (Art. 29 of the RF ICA Law) and the Chinese legislation (Art. 53 of the PRC Law "On Arbitration"), if there is a panel of arbitrators to consider the case, the award shall be made in conformity with the majority's opinion. In the absence of agreement among the arbitrators, the decision shall be taken by the president (Art. 53 of the Law "On Arbitration" and Art. 36, cl. 3 of the ICAC Regulations). These same provisions provide an opportunity for any arbitrator who disagrees with the final award to have the dissenting opinion published alongside the main one. For example, the president of the arbitration commission included a dissenting opinion in ICAC's award of 26 March 2004 No. 62/2003. According to the opinion, the arbitration commission failed to establish the validity of the arbitration agreement, and as a result ICAC did not have the competence to consider the case.[75] However, a dissenting opinion of an arbitrator does not affect the validity of an arbitration agreement.

Should the award be made by a sole arbitrator, the award shall contain the conclusions obtained during the consideration of the case.

The arbitral award shall have a number of features that confirm its validity. According to Article 54 of the PRC Law "On Arbitration," the arbitration award shall contain the parties' claims, the facts of the dispute; an explanation of the award; the award itself; the expenses distribution and the date of the award. Based on the disposition principle, the parties have the right not to specify the facts of the dispute. In addition, according to Article 49 of the CIETAC Regulations, the arbitral award shall indicate the place of arbitration.

The RF ICA Law is based on Article 31, clause 2 of the UNCITRAL Model Law, although it does not copy them verbatim but rather complements them. In accordance with Article 31, clause 2 of the RF ICA Law, the arbitration award shall contain the explanation of the award, the decision on the acceptance or rejection of the demands, as well as the distribution of the expenses between the parties. The date and place of arbitration shall be indicated too. Article 37, clause 1 of the ICAC Regulations establishes the requirements for the arbitral awards that are as follows: the composition of the panel of arbitrators (or the sole arbitrator), names and locations of the parties, the parties' requests, the court's competence to hold arbitration proceedings, the case number and a brief description of the proceedings.

Unlike Chinese law, Russian law does not provide that the parties can abstain from including any of the obligatory items in the arbitral award. It is possible for

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[75] Решение Международного коммерческого арбитражного суда при Торгово-промышленной палате Российской Федерации от 26 марта 2004 г. по делу № 62/2003 [Decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation No. 62/2003 of 26 March 2004].

this to occur due to the confidentiality of the arbitral award and the opportunity to indicate the main results in a generalized way.

The rules set by the Chinese legislation are not as strict. The main items are the same in both countries, but the Chinese legislation does not demand that the case number, its summary, the names and locations of the parties and the arbitration commission's competence as regards the subject matter of the dispute be specified.

Apart from the case summary, which is both of a technical and of a legal character and intends to provide a better visual perception of the case, all the other requirements that are absent in the Chinese legislation but present in Russian legislation are of a technical nature. Their inclusion is not considered obligatory by China. Article 138 of the Civil Procedure Code of the People's Republic of China[76] (hereinafter the CPC of the PRC) does not mention these elements as obligatory either.

Article 31 of the UNCITRAL Model Law and Article 31 of the RF ICA Law require that the arbitral award shall be in written form and feature the arbitrators' (or the sole arbitrator's) signature. The PRC Law "On Arbitration" does not contain any indications of the obligatory nature of the written arbitral award. Nevertheless, in our opinion, the written form is implied even though it is not expressly mentioned. This can be confirmed by Article IV of the New York Convention, which indicates that it is due to the objectified form of the arbitral award that a foreign arbitral award can be recognized and enforced.[77]

Overall, both countries use a broad interpretation of the UNCITRAL Model Law when dealing with the major elements of the arbitral award. The obligatory items are similar in the two countries. However, Russia has more detailed technical requirements.

Settlement is a possible outcome of international commercial arbitration both in Russia (Art. 30 of the RF ICA Law) and in China (Art. 49 of the PRC Law "On Arbitration"). The Russian legislation has copied Article 30 of the UNCITRAL Model Law verbatim, while the Chinese norm has its own original wording, although there are hardly any essential semantic differences. Should settlement be the case, "An award on agreed terms shall be made …" (Art. 30, cl. 2). Such an award has the same status and effect as any other arbitral award. If one of the parties refuses to fulfil the terms of the settlement agreement, the party that awaits the fulfilment has the right to request that the court enforce the fulfilment.

One of the particularities of ICAC and CIETAC decision-making is that the decision is reviewed by the secretariat of the arbitration centre. Neither the UNCITRAL Model Law nor the ICAC and CIETAC Regulations contain such a provision. It is not, however,

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[76] Civil Procedure Code of the People's Republic of China, adopted on 9 April 1991 (Mar. 5, 2022), available at https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn029en.pdf.

[77] *Грешников И.П.* Решение международного коммерческого арбитража (отдельные аспекты) // Ученые записки юридического факультета. 2012. № 24-25. С. 48 [Igor P. Greshnikov, *The Decision of International Commercial Arbitration (Selected Aspects)*, 24-25 Academic Notes of the Faculty of Law 45, 48 (2012)].

typical of only the beforementioned arbitration regulations but exists in a number of arbitration institutions (e.g. cl. 32.3 of the Arbitration Regulations of the Singapore Arbitration Centre[78]). Article 40 of the ICAC Regulations and Article 51 of CIETAC provide that the arbitration commission should submit its own draft of the arbitral award to the secretariat of the arbitration institution, which without interfering with the arbitrator's independence checks whether the award complies with the said arbitration institution's requirements. The secretariat's examination of the awards made by the arbitration commission helps to ensure that the award meets the legal regulations criteria as well as minimizes the number of corrections.

Arbitration proceedings can also be terminated. Unlike the arbitral award or settlement on agreed terms, the termination of the arbitration proceedings is not the arbitration's final award and shall not entail any legal consequences.[79]

Article 32 of the RF ICA Law provides three conditions for the termination of arbitration proceedings (also Art. 32 of the UNCITRAL Model Law Regulations), which are as follows: the plaintiff's withdrawal of their claims (unless there are objections from the defendant); the parties' agreement on the termination of arbitration and the arbitration tribunal's decision that the proceedings are not necessary or impossible (the list of grounds according to which the arbitration proceedings can be unnecessary or impossible shall be open to the public and determined by the court for each case separately[80]).

The PRC Law "On Arbitration" does not include any conditions to terminate the arbitration proceedings. However, this institution is reflected in the Chinese legislation, namely in Article 136 of the CPC of the PRC and Article 46, clause 3 of CIETAC. The CIETAC Regulations recognize the withdrawal of all claims by both the plaintiff and the defendant as the only basis for the arbitration termination.

Thus, it is possible to terminate the arbitration proceedings both in Russia and in China, although there are more grounds for the termination in Russia.

Russia and China cite the same grounds to terminate the arbitration, which are the arbitral award, a settlement on mutually agreed terms and the termination of the proceedings. The two countries specify obligatory elements of the arbitral award

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78 Arbitration Regulations of the Singapore Arbitration Centre of 1 August 2016 (Mar. 5, 2022), available at https://www.siac.org.sg/images/stories/Articles/rules/2016/SIAC%20Rules%202016%20(Russian%20version)_Complete.pdf.

79 *Рожкова М.А.* О некоторых аспектах вынесения международным коммерческим арбитражем решения на согласованных условиях и его принудительном исполнении // Вестник международного коммерческого арбитража. 2016. № 2. С. 12 [Marina A. Rozhkova, *On Some Aspects of the Issuance of an Award by International Commercial Arbitration on Agreed Terms and its Enforcement*, 2(8) Bulletin of International Commercial Arbitration 12 (2016)].

80 Определение Верховного Суда Российской Федерации от 24 апреля 1998 г. № 5-Г98-28 // Судебные и нормативные акты РФ [Determination of the Supreme Court of the Russian Federation No. 5-G98-28 of 24 April 1998, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

that are interpreted broadly as regards the UNCITRAL Model Law, although there are more detailed technical requirements in Russia.

The making of the arbitral award is the final stage of the arbitration proceedings. But receiving the award does not necessarily mean having it executed. The party that awaits the execution has the right to request that the court recognize the award and enforce its fulfilment by the other party should they refuse to fulfil it voluntarily.

Voluntary fulfilment of the award made by the international commercial arbitration is the simplest way that does not require any additional actions from the parties. As stated in the Resolution of 3 April 2007, No. 14715/06 on Case No. A33-29391/2005 of the Presidium of the Supreme Court of Arbitration of Russia, the awards of the International Commercial Arbitration shall be considered binding and final for their voluntary execution.[81]

The PRC Law "On Arbitration" does not have any provisions to normatively regulate the recognition and enforcement of a foreign arbitration award. Such issues are regulated by the CPC of the PRC and, to a greater degree, by the New York Convention. The Russian regulation is based on section 7 of the RF ICA Law and chapter 31 of the Arbitration Procedure Code of the Russian Federation (hereinafter the APC of the RF).[82]

Should a party refuse to fulfil the arbitral award voluntarily, the party in favour of whom the award was made has the right to demand that the court of the defendant's country enforce the award. Article 241 of the APC of the RF provides that international commercial arbitration awards shall be recognized and enforced if the recognition and enforcement are stipulated by the Russian Federation international agreement and federal law. Article 267 of the CPC of the PRC provides for the recognition and enforcement of international arbitration awards if such recognition and enforcement of international arbitration awards is established by international agreements to which the PRC is a party or based on the reciprocity principle.

Both China and Russia ratified the New York Convention with the addition of the reciprocity clause (Art. 3, cl. 1 of the New York Convention), which states that the parties agreed to recognize and enforce only the awards made by the institutions of the other party to the agreement. The People's Republic of China applies the reciprocity principle to all kinds of disputes independently of the New York Convention. The Russian Federation, meanwhile, fails to establish requirements for the reciprocity principle in its Arbitration Procedure Code, which shall only be

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[81] Постановление Президиума Высшего Арбитражного Суда Российской Федерации от 3 апреля 2007 г. № 14715/06 по делу № А33-29391/2005 // Судебные и нормативные акты РФ [Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 14715/06 on Case No. A33-29391/2005 of 3 April 2007, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

[82] Арбитражный процессуальный кодекс Российской Федерации от 24 июля 2002 г. № 95-ФЗ // Российская газета. 2002. 27 июля. № 137 [Arbitration Procedure Code of the Russian Federation No. 95-FZ of 24 July 2002, Rossiyskaya Gazeta, 27 July 2002, No. 137].

considered a serious flaw that must be corrected, since modern practice generally favours bilateral rather than multilateral agreements as the former prove to be more flexible and adaptable to the interests of the parties. The only federal law to mention the reciprocity principle in the defect of other regulatory methods is Article 1, clause 6 of the Federal Law "On Insolvency (Bankruptcy)."[83] Even so, the law only specifies the recognition of the award, not its legal enforcement.[84]

Despite the fact that a foreign arbitral award that was made by a non-contracting state to the New York Convention can be recognized and enforced based on the reciprocity principle in the People's Republic of China, there were no such instances prior to 2018,[85] mainly due to the large number of contracting states to the New York Convention. Worth mentioning are the Provisions adopted at the second forum of the member arbitrators of the Association of Southeast Asian Nations that took place in 2017. According to clause 7 of the Provisions, countries that do not have bilateral agreements on the recognition and enforcement of foreign civil and commercial judgments can take the reciprocal relationship with other countries as a presumption, should there not have been any prior refusal of the recognition and enforcement of a foreign award.[86] To put it another way, the "presumed reciprocity" principle is currently in effect in China. These provisions are a step in the right direction that will facilitate the recognition and enforcement of foreign awards made by non-contracting states to the New York Convention.

In Russia, the request to recognize and enforce a foreign arbitration award shall be submitted to the arbitration tribunal of the RF subject (Art. 242 of the APC of the RF), whereas in China, the request shall be submitted to an intermediate People's Court (CPC of the PRC). In both countries, the request shall be submitted in the debtor's place of residence (or current location) or in the place of location of their property.

The party that is seeking the recognition and enforcement of an arbitral award shall submit the copy of the arbitral award (duly notarized and signed by the parties) as well as the documents confirming the conclusion of the arbitration agreement

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83 Федеральный закон от 26 ноября 2002 г. № 127-ФЗ «О несостоятельности (банкротстве)» // Российская газета. 2002. 2 нояб. № 209-210 [Federal Law No. 127-FZ of 26 November 2002, Rossiyskaya Gazeta, 2 November 2002, No. 209-210].

84 *Ерпылева Н.Ю., Максимов Д.М.* Признание и приведение в исполнение иностранных судебных решений: национальное и региональное измерение // Право. Журнал высшей школы экономики. 2017. № 2. С. 203 [Natalia Yu. Erpyleva & Dmitry M. Maksimov, *Recognition and Enforcement of Foreign Judgments: National and Regional Dimensions*, 2 Law. Journal of the Higher School of Economics 200, 203 (2017)].

85 高晓力. **中国法院承**认和执行外国仲裁裁决的积极实践 // **法律适用** [Gao Xiaoli, *On the Positive Practice of Recognition and Enforcement of Foreign Arbitral Awards by Chinese Courts*, 5 Applicable Law 2 (2018)] (Mar. 5, 2022), available at http://cicc.court.gov.cn/html/1/218/62/164/628.html.

86 **第二届中国**-东盟大法官论坛南宁声**明** [The Second China-ASEAN Justice Forum Nanning Statement, 2017] (Mar. 5, 2022), available at http://www.court.gov.cn/zixun-xiangqing-47372.html.

(Art. 35 of the RF ICA Law) to the court. Article 242 of the APC of the RF stipulates additional requirements for requests for the recognition and enforcement of a foreign arbitration award. These requirements are as follows: the name of the arbitration tribunal, the names and locations of the plaintiff and the debtor, the list of the enclosed documents and so forth. Additional requirements are permitted by Article 3 of the New York Convention that allows the use of the procedural norms of the country in which the recognition and enforcement of the foreign arbitral award is requested.[87]

There is no list of documents required for the recognition and enforcement of a foreign arbitral award in the Chinese legislation. The list of necessary documents can be found in Article 4 of the New York Convention. These are the duly notarized arbitral award or its copy and the arbitration agreement. From our point of view, Article 110 of the CPC of the RF can be applied to the request for the recognition and enforcement of a foreign arbitration award. The provisions specify the obligatory requirements for the lawsuit to proceed, such as the names, locations and occupations of the parties, as well as the claims, facts and arguments upon which each party's position is based. In our opinion, such requirements are commonplace for procedural documents in the People's Republic of China.

As we can see, both countries have similar obligatory requirements for the documents necessary for the recognition and enforcement of foreign awards. Both in Russia and in China, accurate and duly notarized translations of the documents into the language of the country where recognition and enforcement is requested shall be provided.

Upon considering the request for the recognition and enforcement of a foreign arbitral award, the court may refuse the recognition and enforcement. The grounds for the refusal fall into two categories: either the request comes from the party against whom the international arbitration award was made or the court concluded that the recognition and enforcement of the award was impossible.

Article 36, clause 1 of the RF ICA Law and Article 5, clause 1 of the New York Convention determine six grounds for the rejection of the request for the recognition and enforcement of an international arbitration award. The CPC of the PRC does not contain any grounds on which a request for the recognition and enforcement of an international arbitration award can be declined, which means that the New York Convention norms apply. These grounds include the invalidity of the arbitration agreement in accordance with the law of the country and the legislation with which it had to comply; the incapacity of the parties to the arbitral agreement; an undue notification of the party upon the nomination of the arbitrators, the place or date of the arbitration; making an award that does not comply with the conditions of the agreement or is out of its scope; the composition of the panel of arbitrators that

[87] Karabelnikov 2013, at 258.

contradicts the agreement between the parties or the legislation of the country of arbitration; the award made in a foreign state that either has not yet become binding for the parties or has been set aside or suspended.

The following are several cases from court practice where the request for the recognition and enforcement of a foreign arbitral award was refused. As of the time of this writing, there are no known instances of the refusal of such a request due to the incapacity of the parties.[88]

As a rule, the courts rarely allow undue notification as grounds for refusal.[89] Solid evidence is required to refuse the request. For example, in the case *Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.* the Supreme People's Court of the People's Republic of China refused the recognition and enforcement of the foreign arbitral award because one of the parties was not notified by post of the hearing date and place, a fact that was proven by the courier delivery services.[90]

In Case No. A40-217058/2018, dealing with the recognition and enforcement of a foreign arbitral award, one of the parties challenged the recognition and enforcement of a foreign arbitral award on the grounds that they had not been informed of the date and place of the hearings. The Russian tribunal established that after the conclusion of the agreement, the party changed its legal address but failed to notify either the other party or the tribunal of that fact. The tribunal decided that the party that failed to notify the other party of the change of the address should bear the risk of not receiving notifications or not receiving them promptly.[91]

The Russian legislation determines two grounds for the tribunal's refusal of the recognition and enforcement of a foreign arbitral award. The CPC of the PRC does not provide any grounds for such a refusal of the recognition and enforcement of a foreign arbitral award, hence Article 5, clause 2 of the New York Convention shall be applied. Both countries have the same grounds for refusal; either the subject matter of the

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88 International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (2011) (Mar. 5, 2022), available at https://icac.org.ua/wp-content/uploads/ICCAs-Guide-to-the-Interpretation-of-the-1958-New-York-Convention-A-Handbook-for-Judges-2.pdf.

89 Руководство по Конвенции о признании и приведении в исполнение иностранных арбитражных решений (Нью-Йорк, 1958 г.) / Организация Объединенных Наций. 2016 г. [United Nations, Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016)] (Mar. 5, 2022), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/v1604041_ebook-r.pdf.

90 *Aiduoladuo (Mongolia) Co. Ltd. v. Zhejiang Zhancheng Construction Group Co. Ltd.*, [8 December 2009] Min Si Ta Zi No. 46.

91 Определение Судебной коллегии по экономическим спорам Верховного Суда Российской Федерации от 29 декабря 2019 г. № 305-ЭС-19-13455 по делу № А40-217058/2018 // Судебные и нормативные акты РФ [Determination of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation No. 305-ES-19-13455 on Case No. A40-217058/2018 of 29 December 2019, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

dispute does not qualify as a subject of arbitration or the recognition and enforcement of the arbitral award is seen as contrary to the public policy of the country.

Here is an example of the refusal to recognize and enforce an arbitral award due to the subject matter that is incapable of settlement in arbitration: in the case *Wu Chunying v. Zhang Guiwen* the Supreme People's Court of the People's Republic of China concluded that succession shall not be a subject of arbitration based on Article 3, clause 1 of the PRC Law "On Arbitration."[92]

The concept of public policy as a barrier to the recognition and enforcement of a foreign arbitral award is not defined in either the Russian or the Chinese legislation. According to clause 51, paragraphs 2 and 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 December 2019 "On the Cooperation and Control Performed by National Courts as Regards the Settlements by Means of International Commercial Arbitration,"[93] public policy is understood as fundamental (imperative) principles that constitute the economic and political basis of the legal system, the infringement of which can harm the sovereignty or security of the country as well as violate constitutional rights and freedoms of natural and legal entities. However, public policy may not be used as a cover for other grounds for the refusal of the recognition and enforcement of an arbitral award, as this ground for refusal is a means of protection of the most fundamental rights.[94] In its Resolution No. VAS-8786/10 of 3 August 2010, the Supreme Arbitration Court of the Russian Federation refused to review the judicial actions claimed to be inconsistent with public policy based on the grounds that the arbitral award would not entail a result that contradicted the norms of morality and decency and posed a threat to people's lives and the state's security.[95] In the People's Republic of China, public policy is considered infringed if it has negative impact on society. If there is no negative impact, then there has been no violation of public policy. An example of a negative impact would be gambling.[96]

To conclude, both Russia and China provide the same grounds for the refusal of the recognition and enforcement of the award, whether at the request of a party that

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92 *Wu Chunying v. Zhang Guiwen*, Supreme People's Court, China, [2 September 2009] Min Si Ta Zi No. 33.

93 *Supra* note 23.

94 *Муратова О.В., Щукин А.И.* Проблемы признания и приведения в исполнение решений иностранных судов и иностранных арбитражных (третейских) решений // Журнал зарубежного законодательства и сравнительного правоведения. 2019. № 2(75). С. 140–145 [Olga V. Muratova & Andrey I. Shchukin, *Problems of Recognition and Enforcement of Decisions of Foreign Courts and Foreign Arbitration (Arbitration) Decisions*, 2(75) Journal of Foreign Legislation and Comparative Law 140, 140–45 (2019)].

95 Определение Высшего Арбитражного Суда Российской Федерации от 3 августа 2010 г. № ВАС-8786/10 // Судебные и нормативные акты РФ [Determination of the Supreme Arbitration Court of the Russian Federation No. VAS-8786/10 of 3 August 2010, Judicial and Regulatory Acts of the Russian Federation] (Mar. 5, 2022), available at https://sudact.ru.

96 Годовой доклад о коммерческом арбитраже КНР в 2014 г. [PRC Commercial Arbitration Annual Report 2014] (Mar. 5, 2022), available at http://www.cietac.org/Uploads/201602/56cbb883901f0.pdf.

disagrees with the ruling or on the initiative of the court itself. The People's Republic of China does not include such norms in its legislation and instead applies the New York Convention. On the other hand, the Russian Federation has implemented these norms into its internal legislation and they fully coincide with those of the New York Convention.

Making a ruling on the recognition and enforcement of a foreign arbitral award or on the refusal of its recognition and enforcement has its own procedure. In Russian law, the consideration of the recognition and enforcement of a foreign arbitral award shall end with a ruling. The said ruling can be challenged in the cassation instance. Further on, the case may be challenged in the second cassation in the Judicial Chamber on Economic Disputes of the Supreme Court of the Russian Federation. However, the ruling of the court of first instance shall be considered final and, unless it is challenged, binding. This norm applies to both the recognition and enforcement of a foreign arbitral award as well as the refusal thereof.

The People's Republic of China has a different order for the recognition and enforcement of an award. If an intermediate People's Court considers the award to contradict the Chinese legislation or the international agreements in which the PRC takes part, the court has to get the decision approved by a higher-instance court. Should the higher-instance People's Court approve the refusal, the case will be passed to the Supreme People's Court of the People's Republic of China, which has the competence to refuse the recognition and enforcement of a foreign arbitral award.[97] That is to say, the refusal to recognize and enforce a foreign arbitral award shall only be possible through the ruling of the Supreme People's Court that controls all the lower-instance courts. There is currently no procedure to challenge such a ruling (Art. 158 of the CPC of the PRC). The decisions on the recognition and enforcement of an award or refusal thereof are final and cannot be challenged by the parties. The foregoing is widely criticized as such a system prevents the parties from protecting their interests.[98]

In contrast to the Russian Federation, the People's Republic of China does not currently have a procedure to challenge the recognition and enforcement of a foreign arbitral award or refusal thereof.

The procedures for the recognition and enforcement of a foreign arbitral award in Russia and China have both similar and different features. The similarities include the grounds for the refusal of the recognition and enforcement of a foreign arbitral

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[97] **最高人民法院关于人民法院**处理与涉外仲裁及**外国仲裁事**项有关问题的通**知** 1995 **年** 08 **月** 28 **号** [Notice of the Supreme People's Court on the handling by the People's Court of issues related to foreign-related arbitration and foreign arbitration matters, 28 August 1995], at 2 (Mar. 5, 2022), available at http://cicc.court.gov.cn/html/1/218/62/84/661.html.

[98] *Лю Х.* Особые положения о решениях международного коммерческого арбитража и о принудительном исполнении арбитражных решений на территории Китая [H. Li, *Special Provisions on International Commercial Arbitration Awards and Enforcement of Arbitral Awards in China*] 165 (2000).

award specified in Article 5 of the New York Convention. The main differences are, firstly, "the presumption of reciprocity" in the recognition and enforcement of foreign arbitral awards in China and the virtual non-use of the reciprocity principle in Russia. Secondly, the Chinese procedure for the recognition and enforcement of a foreign arbitral award does not allow for the challenging of the court's ruling.

Thus, both countries have rather similar grounds for the termination of the arbitration proceedings as well as the conditions for the recognition and enforcement of foreign arbitral awards. The Russian Federation provides more detailed technical instructions for the obligatory elements of an arbitration agreement and the termination of the arbitration proceedings. Both China and Russia demand an obligatory verification of the arbitral award (arbitral award on agreed terms) by the secretariat of the arbitration centre.

The procedures for the recognition and enforcement of foreign arbitral awards have similar grounds for the refusal of recognition and enforcement in Russia and China. The main differences are that the Chinese legislation does not provide a procedure for the recognition and enforcement of foreign arbitral awards and that the refusal of the recognition and enforcement of an award shall be approved by the Supreme People's Court of the People's Republic of China.

## Conclusion

The comparative analysis of the legal regulations of international commercial arbitration in Russia and Mainland China leads to the following conclusions. The regulations governing international commercial arbitration regulation in the two countries share similar features and are based upon the norms of international law as well as national legal acts. Both China and Russia have adopted the norms of the UNCITRAL Model Law, although to a different degree. The Russian Federation Law "On International Commercial Arbitration" reflects it almost verbatim, while the Chinese legislation implements the UNCITRAL Model Law to a lesser degree.

China and Russia have similar norms on arbitration agreements in that they both accept only the written form (though the written form is understood broadly) and support the arbitration clause autonomy principle. The difference is that the People's Republic of China does not apply the competence-competence principle (the arbitrators' right to determine their own competence to consider an issue), referring the decision on the matter to the arbitration commission or the state courts. The arbitrators in the Russian Federation have the right to determine their own competence.

The Chinese legislation allows for provisional measures of protection to be taken only through an arbitration court's request, while under the Russian legislation a party can file a direct request with a state court. That is, should arbitration take place outside the People's Republic of China, the party will not be able to ensure the provisional measures of protection.

Chinese law has the mediation procedure integrated into the arbitration proceedings and can be conducted by the same arbitrators that consider the case in arbitration. Russian law also provides for mediation; however, it views it as a separate procedure.

The recognition and enforcement of foreign arbitral awards are based on the "presumption of reciprocity" in the People's Republic of China, while in the Russian Federation the reciprocity principle is hardly ever applied.

In China, there exists a different procedure for the recognition and enforcement of foreign arbitral awards which does not provide the opportunity to challenge the court's decision, while the decision to refuse the recognition and enforcement of a foreign arbitral award cannot be made until approved by the Supreme People's Court of the People's Republic of China. In Russia, both the decision to recognize and enforce a foreign arbitral award and the refusal thereof can be challenged.

The legal regulation of international commercial arbitration in Russia seems more dispositional as the parties get more freedom to exercise their will, which reflects the needs and nature of commercial arbitration.

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