

# RUSSIA AS A PLACE FOR ARBITRATION

## Survey by the Russian National Committee of the International Chamber of Commerce (ICC Russia)

### 1. INTRODUCTION

According to an opinion poll conducted by Queen Mary College, University of London in 2010, Moscow is presently perceived as one of the least attractive arbitration venues in the world<sup>1</sup>.

Those findings have prompted the Russian National Committee of the ICC ("ICC Russia") to undertake its own survey in order to find out the reasons behind the negative perception of Russia as a place for arbitration and to identify the steps respondents believe can make the country more appealing as a place for arbitration.

### 2. METHODS

ICC Russia has formed a special task force to draw up a relevant questionnaire (the "Task Force")<sup>2</sup>. The resulting draft was offered for discussion at a public session of ICC Russia's Arbitration Commission on April 25, 2011. Upon being amended and supplemented on the basis of proposals voiced during those deliberations, the final text of the questionnaire was approved by the Arbitration Commission of ICC Russia

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<sup>1</sup> See transparencies 2, 17, and 20 on the Queen Mary University of London survey. The findings are accessible at [http://www.whitecase.com/files/upload/fileRepository/2010International\\_Arbitration\\_Survey\\_Choices\\_in\\_International\\_Arbitration.pdf](http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf)

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and presented to the target audience on September 12, 2011 during the ABA Third Annual Conference on the Resolution of CIS-Related Business Disputes.

The poll was announced on the following websites:

[www.iccwbo.ru](http://www.iccwbo.ru)

[www.arbitrations.ru](http://www.arbitrations.ru)

[www.globalarbitrationreview.com](http://www.globalarbitrationreview.com)

Further announcements followed in the arbitration groups on the LinkedIn, Facebook, Professional.ru, and Vkontakte.ru social networks and on the Kluwer arbitration blog.

The Treteisky Sud [Arbitration Court] journal carried the full text of the questionnaire in one of its issues.<sup>3</sup>

Invitations to take part in the survey were also sent out to members of the following organizations:

1. ICC Russia;
2. German-Russian Chamber of Foreign Trade; and
3. The Anglo-Russian Law Association.

Similar invitations were also forwarded to a number of international arbitration professionals directly.

ICC Russia thus made its best efforts for the survey to cover and involve the broadest possible target audience of specialists concerned with international arbitration in Russia.

The findings of this survey follow below along with a related commentary. The full listings of the replies given to the questions asked are attached as Annex No. 1 to this Survey Report.

### **3. RESPONDENTS**

The field of respondents comprised 112 participants, including 65 (or 58%) resident in the Russian Federation and 47 (or 42%) resident outside the Russian Federation<sup>4</sup>.

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<sup>3</sup> See the [Russian language] article "ICC Russia Initiative: Russia as an Arbitration Venue. Survey Questionnaire by ICC Russia" // Treteisky Sud, 2011. No. 5, pp. 120-128.

As the project aimed to research the perception of Russia as an arbitration venue among foreign professionals even more than Russian professionals, the answers given are broken down into these two categories - one including the replies offered by the respondents resident in the Russian Federation and the other grouping those given by the respondents resident outside the Russian Federation. The former category encompassed both Russian lawyers residing on Russian territory, and foreign legal practitioners living and working in Russia. The latter category covered, among others, Russian lawyers living and working outside the Russian Federation.

The target audience consisted almost entirely of lawyers (with only 3.1% of the Russian respondents and 6.4% of the foreign respondents being without legal training).

A significant number of those polled who are resident in Russia work at foreign companies (33.8%) or at Russian companies with foreign equity participation (13.8%). About one quarter (23.1%) are the staff of Russian companies.

More than 60% of the Russian respondents and close to 50% of the foreign respondents have taken part in international arbitration in Russia. The results of the study thus largely reflect the relevant personal experience of those polled.

The Russian and foreign respondents gained this experience by taking part in the corresponding proceedings as legal counsel (70% and 90%, respectively) or as arbitrators (35% and 38%, respectively).

Nearly one-half of the Russian respondents and over 70% of the foreign respondents have taken part in international arbitration outside the Russian Federation. All such arbitrations reported by Russian respondents included cases "with a Russian component". Foreign respondents reported the presence of "a Russian component" in more than 85% of the respective cases.

#### **4. ARBITRATION RULES**

The participants in the survey were requested to identify the rules that governed the arbitral proceedings they had been involved in and outside Russia, and were asked whether they had been left satisfied with the quality of the arbitration. The resulting answers thus were likewise based on the personal experience of the respondents. The marks they gave were on an ascending five-point scale, with "1" the lowest mark and "5" the highest.

The rules the participants were invited to evaluate included those of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "ICAC RF"), the Maritime Arbitration Commission at the Chamber of Commerce and

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<sup>4</sup> Those respondents who chose to identify themselves are listed in Annex No. 2.

Industry of the Russian Federation (the "MAC RF"), the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC"), the International Chamber of Commerce (the "ICC"), the London Court of International Arbitration (the "LCIA"), and UNCITRAL.

The survey produced a rating list of the arbitration rules favoured during arbitration in Russia as follows:<sup>5</sup>

Russian respondents:

1. SCC - 4.75 (6)
2. LCIA - 4.67 (7)
3. MAC RF - 4.50 (7)
4. ICC - 4.40 (11)
5. UNCITRAL - 4.00 (7)
6. ICAC RF - 3.66 (38)

Foreign respondents:

1. UNCITRAL - 4.80 (5)
2. SCC - 4.13 (8)
3. ICC - 4.10 (10)
4. LCIA - 3.67 (3)
5. MAC RF - 3.67 (3)
6. ICAC RF - 2.81 (16)

As regards arbitral proceedings outside Russia, all of the four rules mentioned by those polled won fairly high scores from both Russian and foreign respondents.

Based on the results of the poll by Russian respondents the rating list is as follows:

1. LCIA - 4.53 (16)
2. ICC - 4.35 (17)
3. SCC - 4.27 (16)

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<sup>5</sup> *Note.* The figures following the name of the particular arbitration institution represent the average rate awarded to its rules and (in brackets) the number of the respondents having rated those rules.

#### 4. UNCITRAL - 4.10 (11)

The poll of foreign respondents revealed the following results:

1. ICC - 4.27 (33)
2. LCIA - 3.91 (22)
3. UNCITRAL - 3.81 (21)
4. SCC - 3.75 (20)

According to the Rules of the ICAC and MAC at the Chamber of Commerce and Industry of the Russian Federation the place of arbitration (the place of holding arbitration sessions) is Moscow<sup>6</sup>, therefore those rules were not featured in the part of the survey regarding international arbitration outside Russia.

### **5. CHOICE OF A PLACE FOR ARBITRATION**

Paris, Stockholm, London, and Moscow proved the most popular with Russian respondents as possible arbitration venues, while their foreign counterparts gave preference to Paris, Vienna, London, and Stockholm, with Moscow coming 7<sup>th</sup>.

Paris, Stockholm, and London thus ended up among the top four choices as arbitration venues for both groups of respondents - a quite predictable finding, considering their status as the major international arbitration centres in Europe.

Russian respondents rated Stockholm practically on a par with Paris, paying tribute to the role traditionally enjoyed by arbitration according to the SCC rules in the resolution of Russian disputes.

Vienna turned out to be much more popular with foreign respondents than Russian ones, and shared second place with London in the preferences of the foreign respondents.

It is noteworthy that Moscow as a place for arbitration featured 4<sup>th</sup> among Russian respondents and 7<sup>th</sup> among foreign respondents (out of the eleven city choices on offer). Russian respondents thus have more positive impressions of Moscow as a place for arbitration compared with their foreign counterparts.

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<sup>6</sup> See. §22 of the Rules of the ICAC at the RF Chamber of Commerce and Industry, par.7 § 2 of the Rules of the MAC at the RF Chamber of Commerce and Industry.

## **6. RUSSIA'S PERCEPTION AS A PLACE FOR ARBITRATION**

The choice of Russia as a place for arbitration by both Russian and foreign respondents appears to be influenced by two principal factors, namely: the governing law in the dispute and the need to make concessions owing to a weaker negotiating stand.

According to the findings from the survey, the majority of respondents would only agree to submit themselves to arbitration in Russia "*if rejection to choose Russia is a deal-breaker*".

It is noteworthy that the numbers of respondents (both Russian and foreign) who are prepared to have their disputes arbitrated in Russia in all cases are rather small.

One important reason why Russian and foreign respondents are wary of Russia as a place for arbitration is that only a few of them see Russia as being arbitration-friendly.

Yet, only relatively a few Russian and foreign respondents definitely consider Russia to be arbitration-unfriendly.

The respondents' perception of Russia is thus free of exceptionally positive or exceptionally negative views.

## **7. RUSSIAN LEGISLATION ON INTERNATIONAL ARBITRATION**

The vast majority of Russian (almost 90%) and over one-half of foreign respondents reported themselves to be familiar with Russia's international arbitration legislation.

Both Russian and foreign respondents put a fairly high value on that legislation and most agreed that it is consistent with international standards, even if being perhaps in need of certain improvement.

Interestingly enough, foreign respondents had a more favourable opinion of the relevant Russian legislation's consistency with international standards and were not as adamant about the need for its improvement.

Russia's legislation on international arbitration thus won a fairly high appraisal, including its appreciation as a positive factor in choosing to have a dispute arbitrated in Russia.

## **8. RUSSIAN STATE COURTS' PRACTICE ON MATTERS RELATED TO INTERNATIONAL ARBITRATION**

The overwhelming majority of Russian and foreign respondents said they are familiar with the practice of Russian state courts in matters related to international arbitration.

Both groups of respondents believe that relevant publications in foreign languages fail to give that practice sufficient coverage.

Both Russian and foreign respondents described the practice of Russian state courts in international arbitration matters as being not uniform or consistent, with Russian respondents being by far more categorical in those assessments.

More than half of the Russian respondents declined to describe state courts' practice as being arbitration-friendly.

Curiously, the pattern of replies among foreign respondents was different: whereas most described Russian state courts' practice as being arbitration-friendly, a significant proportion (one-third of the respondents) gave the opposite answer.

In answer to a question about the way the practice of Russia's state courts influenced its choice of Russia as a place for arbitration, most respondents assessed the impact as favourable, but a considerable percentage of respondents from both groups expressed the opposite view.

Even if recognizing Russian judges' knowledge of legislation and conventions on international arbitration, most Russian and foreign respondents rated that knowledge to be either "good" or "satisfactory".

For the most part, they disagreed that Russian state courts are open to accepting the applicability of foreign law provisions and traditions in arbitral awards (when they differ from those in Russia). Russian respondents were more categorical than their foreign counterparts on that score.

Likewise, a majority of those polled do not agree that Russian state courts hearing cases relating to international arbitration give narrow (not broad) interpretation to the grounds for setting aside arbitral awards provided by law and international conventions or abstain from reviewing international arbitral awards on their merits due to misapplication of the law.

The survey also demonstrated that neither of the two categories of respondents is optimistic about Russian state courts accepting awards issued on the basis of *lex mercatoria* alone. Many, however, had difficulty answering this question, but that was to be expected, considering that there is no relevant Russian state court practice.

No-one among the respondents agreed with a statement that Russian state courts are not given to corruption, the absolute majority choosing the option "definitely no".

Responding to a question whether the respondents agree with a statement that Russian state courts are not influenced by the state authorities, not one respondent answered in the positive. The absolute majority of those polled "definitely disagreed" with this statement.

Russian and foreign respondents were divided on whether Russian state courts hearing cases relating to international arbitration demonstrate a general loyalty to the parties in cases involving both Russian and foreign companies, showing no preference for Russian companies. Only an absolute minority in both groups agreed with a statement on the impartiality of the Russian state courts in such disputes.

## **9. ARBITRATION COURTS IN THE RUSSIAN FEDERATION**

Most Russian and foreign participants in the poll believe that Russian institutional arbitration courts do not give sufficient coverage to their activities, but only 9.5% of the foreign respondents said they would like to get more information on the subject.

A majority of those polled agreed that Russian arbitration courts are generally similar to the world's leading arbitration institutions, with foreign respondents having more positive evaluations.

When asked if the rules of Russian arbitration courts are consistent with the generally accepted international standards, most respondents expressed general consent by opting for the "4" mark, which stands for "essentially agree".

Only a minor share of respondents resident in Russia supported the statement that Russian arbitration courts make it possible to conduct proceedings in other languages and not only in Russian. Foreign respondents were divided on this issue, with the number of those agreeing with the statement and those who "would rather disagree" with it being equal.

Even fewer respondents agreed that institutional arbitration courts in Russia provide adequate case administration, with those resident outside Russia giving a somewhat more negative evaluation of this statement.

A large share of Russian respondents had a high opinion of the transparency of arbitrator appointment procedures at Russian arbitration courts, and a considerable number disagreed with this statement.

The replies of foreign respondents regarding the transparency of arbitrator appointment procedures were more or less equally distributed between evaluations of "2" and "4". A significantly smaller percentage of poll participants residing outside Russia were categorical on the issue by "definitely agreeing" or "definitely disagreeing" with the assertion that arbitrator appointment procedure at Russian arbitration courts is transparent.

Not many respondents agreed that Russian arbitration courts do not limit the possibility for appointing arbitrators who are not on the list of recommended arbitrators. Most of those polled either "definitely disagreed" with this statement or disagreed less strongly.

The respondents were highly concerned about the level of fees payable to arbitrators at Russian arbitration courts, because it was too low to attract leading Russian professionals.

Only a small number of respondents agreed with the statement that Russian arbitration courts set fees that make it attractive for leading foreign arbitration experts to act as arbitrators.

Neither category of respondents agreed with an assertion that institutional arbitration courts in Russia are independent from the organizations under the auspices of which they were organized. Significantly, the answers of respondents resident in Russia were much more negative on this point, with a majority definitely disagreeing with this statement. Foreign respondents were more cautious in their responses, with most opting for average scores when choosing their answers to this question.

In contrast, foreign respondents were more forceful in their evaluation than the Russian respondents in regard to whether Russian arbitration courts are not influenced by state authorities. Whereas the majority of Russian respondents agreed with the statement that institutional arbitration courts in Russia are not influenced by the state authorities, foreign respondents, on the contrary, disagreed with this statement.

Arbitration courts were perceived to have a much lower level of corruption than state courts. Russian respondents were more pessimistic: the majority disagreed with the statement that Russian arbitration courts were not susceptible to corruption. The opinion of respondents residing outside Russia was divided on the issue, with the number of those who agreed and those who disagreed with the statement being almost equal.

## **10. FACTORS THAT INFLUENCE THE CHOICE OF RUSSIA AS A PLACE FOR ARBITRATION**

Russian and foreign respondents had different opinions as to the factors contributing to the submission of a dispute to an institutional arbitration court in Russia.

Most of those resident in Russia pointed to the arbitrators' knowledge of Russian substantive law applicable to a dispute as the most important factor in favour of submitting an international dispute to institutional arbitration court in Russia. Foreign respondents put that factor in 4<sup>th</sup> place, identifying familiarity with arbitration procedure as the main factor, followed by the acceptable time frames of arbitration proceedings. Russian respondents placed the latter factor in the 4<sup>th</sup> position.

The second most important factor for Russian respondents was lower arbitration costs (costs and fees) as compared with arbitration costs abroad - a factor not at all prioritized by foreign respondents.

Both categories of respondents specified their own knowledge of Russian (a circumstance reflective of the pool of Russian as well as foreign respondents taking part in the survey), and the availability of qualified lawyers specializing in arbitration in Russia among the factors positively influencing the choice of Russia as the place for arbitration.

Foreign respondents put cultural facilities on top of the positive factors influencing the choice of Russia as the place for arbitration.

The availability of qualified case administration personnel and transport infrastructure were cited by both groups of respondents as significant factors in favour of choosing Russia as a place for arbitration. The costs (accommodation, premises rental etc) merited average scores among Russian respondents, landing above such factors as political stability and the remoteness from their own location. Respondents resident outside Russia, however, put the latter two factors before the costs.

The crime rate, visa regime and the tax and banking legislation of Russia are not conducive to choosing Russia as a place for arbitration in the opinion of both groups of those polled.

Both categories of respondents singled out the visa regime as the main factor against the choice of Russia as a place of arbitration.

Costs came second for foreign respondents among the adverse factors discouraging the choice of Russia as a place for arbitration. Their Russian counterparts did not share that view, putting such factors as political stability, local infrastructure in general, the availability of qualified case administration personnel, crime rate, and tax and banking legislation before the factor of costs in discouraging the choice of Russia as a place for arbitration.

## **11. EXECUTIVE SUMMARY**

1. Moscow as an arbitration venue was placed 4<sup>th</sup> after Paris, Stockholm, and London in the rating of Russian respondents and 7<sup>th</sup> among foreign respondents (out of the eleven choices on offer).
2. Both Russian and foreign respondents are prepared to opt for Russia as a place for arbitration primarily where the governing law in the transaction in dispute is Russian or where rejection of Russia is a deal-breaker. Only an insignificant percentage of respondents would have their disputes arbitrated in Russia in all cases.
3. Most respondents do not have any manifestly positive or negative attitude to Russia as a place for arbitration, and tend to give average marks.

4. A majority of those polled put a fairly high value on Russian legislation on international arbitration. Foreign respondents have a better opinion of those laws compared to their Russian counterparts.

5. Participants in the poll expressed concern about the practice of Russian state courts in matters related to international arbitration, with more than half of Russian respondents and a significant share of foreign respondents describing it as being arbitration-unfriendly.

6. Respondents listed the following as principal problems with Russian state courts:

(i) dependence on state authorities;

(ii) corruption;

(iii) broad interpretation of grounds under applicable laws and international conventions for setting aside arbitral awards;

(iv) reluctant acceptance of the applicability of foreign law provisions and traditions in arbitral awards (when they differ from those in Russia);

(v) propensity to review arbitral awards on their merits; and

(vi) preferential treatment of Russian parties during dispute resolution.

7. Respondents listed the following as basic problems with Russian arbitration courts:

(i) lack of independence from their founding organizations;

(ii) insufficient quality of case administration;

(iii) difficulties with conducting arbitration in a language other than Russian;

(iv) low fees payable to arbitrators; and

(v) corruption.

8. The principal factors that make foreign residents choose Russia as a place for arbitration include its cultural facilities, the respondents' knowledge of the Russian language, and the availability of qualified lawyers specializing in arbitration – locally.
9. The principal adverse factors preventing foreign respondents from choosing Russia as a place for arbitration include the visa regime, costs (accommodation, premises rental, etc.), crime rate, transport infrastructure, tax and banking legislation, and local infrastructure in general.

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