CONTRIBUTING EDITOR:
Joe Tirado, Garrigues UK LLP

GLOBAL LEGAL INSIGHTS
INTERNATIONAL ARBITRATION – 2022, 8th EDITION

Russia

Dr. Ilia Rachkov, Aram Grigoryan & Sergey Bakhmisov
Nektorov, Saveliev & Partners

Introduction

Foreign and Russian businesses are most likely to choose arbitration as an alternative dispute resolution measure for resolving disputes arising out of high-value and complex cross-border contracts. Over the past year, the number of cases resolved by international arbitration with the seat of arbitration in Russia has increased by 40%. This is due to the fact that arbitration allows disputing parties to resolve their dispute more quickly, at a lower cost, whilst retaining confidentiality. The other advantage of arbitration is that arbitral awards can be recognised and enforced in all member states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "**New York Convention**").

Russia has a dual arbitration system: it distinguishes domestic arbitration from international arbitration proceedings (whether seated in Russia or abroad). Law No. 5338-I "On International Commercial Arbitration" dated 7 July 1993 (the "**Law on ICA**") governs international arbitrations seated in Russia. The Law on ICA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "**Model Law**").

Domestic arbitration proceedings are governed by Federal Law No. 382-FZ "On Arbitration (Arbitration Proceedings) in the Russian Federation" dated 29 December 2015 (the "**Law on Arbitration**"). This Law entered into force on 1 September 2016.

Russia (as a successor of the USSR) is a party to the New York Convention and to the European Convention on International Commercial Arbitration (1961).

In 1960, the USSR made a reservation (which is still in force for Russia) to the New York Convention: our country shall apply the provisions of the New York Convention in respect of arbitral awards issued in the territories of non-contracting states only to the extent to which they treat reciprocally the awards rendered in Russia.

Its noteworthy that Russia (as a successor of the USSR) is still a party to the COMECON Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation (1972). Also, in 1992, Russia signed but never ratified the ICSID Convention (1965).

After the arbitration reform in 2016–2017 and since 1 November 2017, almost all previous arbitration institutions (about 500 Russia-wide) lost their right to administer cases unless they:

1) obtained a special governmental permission from the Ministry of Justice of the Russian Federation; and
2) are recognised as a Permanent Arbitration Institution ("**PAI**") in Russia.

Currently, the following Russian arbitration institutions have obtained the status of a PAI:

- the International Commercial Arbitration Court (the "**ICAC**") – the leading arbitration institution in Russia. It is the successor to the Foreign Trade Arbitration Commission

(the "**FTAC**") created in 1932 as the Soviet Union's response to the *Lena Goldfields* case;[1]
- the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (the "**MAC**");
- the Russian Arbitration Centre at the Russian Institute of Modern Arbitration (the "**RAC**");
- the Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs;
- the National Centre for Sports Arbitration at the autonomous non-profit organisation Sports Arbitration Chamber; and
- the Arbitration Institution at the All-Russian Industry Association of Employers "Union of Mechanical Engineers of Russia".

Moreover, four foreign arbitration institutions have received the status of a PAI in Russia:
- Hong Kong International Arbitration Centre ("**HKIAC**") – since 25 April 2019;
- Vienna International Arbitral Centre ("**VIAC**") – since 4 July 2019;
- Singapore International Arbitration Centre ("**SIAC**") – since 18 May 2021; and
- the ICC International Court of Arbitration (the "**ICC**") – since 18 May 2021.

The ICAC is the most popular choice for administering international arbitrations seated in Russia due to its long history and reputation. Another important and rapidly developing arbitration institution is the RAC. There are no specialised state courts in Russia that are empowered to resolve disputes related to international arbitrations or domestic arbitrations.

Russian courts have only limited functions in the area of arbitration: recognition and enforcement of arbitral awards; and assisting parties in ongoing arbitrations (e.g., powers related to challenge, appointment, and termination of the arbitrators' powers).

Arbitration agreement

An arbitration agreement is "*an agreement between the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in relation to a particular legal relationship or part thereof, whether or not such legal relationship was of a contractual nature*" (Article 7 of the Law on ICA).

The arbitration agreement shall define the terms and conditions and the procedure to be followed by the parties. If the parties fail to agree on any of these terms, the gaps can be filled out, to a certain extent, by the applicable arbitration rules. However, the parties have to agree on at least two compulsory conditions:
1) they must choose arbitration as the method of dispute resolution. The desire of the parties must clearly follow from the agreement – their intention to submit the dispute to arbitration must be explicit; and
2) they must identify the legal relationship in respect of which the disputes may arise (e.g., non-performance or undue performance of a contract).

If the parties did not agree on these two conditions, their arbitration agreement will be deemed non-concluded.

Russian law establishes a rather strict requirement for the form of an arbitration agreement: it must be concluded in writing. However, the Law on ICA, as well as a Resolution of the Plenum of the Supreme Court of the Russian Federation dated 10 December 2019 "On the performance of facilitation and control functions by the courts of the Russian Federation in relation to arbitration and international commercial arbitration" (the "**2019 Plenum Resolution**"), provides a rather extensive list of ways to conclude an arbitration agreement in writing – exchange of emails, etc.

An arbitration agreement can also be concluded if the members of a company adhere to a recommended arbitration clause in the company's charter. It is also possible to enter into an arbitration agreement by exchanging procedural documents, where one party states that there is an agreement and the other does not object to it. This is not a complete list of options for concluding an arbitration agreement in writing.

An arbitration agreement, like a civil law contract, may be declared invalid. The grounds for that are set out by the 2019 Plenum Resolution – an arbitration agreement will be declared invalid by the court if it: (a) contradicts mandatory rules of law; (b) was not concluded in the required form; or (c) was concluded in the presence of a defect of will (deception, threat, violence).

An important feature of an arbitration agreement that is worth mentioning in relation to the invalidity of an arbitration agreement is its separability (principle of autonomy of the arbitration clause or doctrine of severability). This concept means that an arbitration agreement, which is part of the main contract, must be treated as an agreement that is independent of the other terms of the contract and its validity. As follows from the Resolution of the Plenum 2019, the invalidation of the main contract does not automatically invalidate the arbitration agreement.

Another important principle related to the validity of the arbitration agreement is the "*Kompetenz-Kompetenz*" principle. Its essence is that the arbitral tribunal is empowered to independently decide whether it has competence/jurisdiction to consider the dispute submitted to it for resolution, including by checking the validity of the arbitration agreement. Appealing to a state court with a claim to declare an arbitration agreement invalid is an improper way to create obstacles to the ongoing arbitration, because the question of validity of an arbitration agreement falls within the competence of the given arbitral tribunal. Russian state courts shall consider this issue only when the unhappy party is challenging the arbitral award or its recognition and enforcement.

In addition, an arbitration agreement may be inoperative or unenforceable, as also stated in the Resolution of the Plenum 2019. An arbitration agreement is deemed unenforceable if it is not possible to establish the genuine will of the parties with respect to the arbitration procedure they have chosen, or if it cannot be enforced in accordance with the will of the parties. A classic example of an unenforceable arbitration agreement is an agreement that specifies a non-existent arbitral tribunal.

Arbitration procedure

Most of the general rules of the arbitration procedure are set out in the Law on ICA, but the specific details of the arbitration procedure are regulated at the level of the rules of each arbitral institution or – in the case of *ad hoc* arbitration – in the arbitration agreement itself.

As a general principle, the parties may at their discretion agree on the rules of the arbitration procedure. If the parties have not agreed on the rules of the arbitration procedure, the arbitral tribunal may carry out the arbitration in such manner as it considers appropriate.

In particular, the parties may determine the place of arbitration and the language to be used in the arbitral proceedings; in absence of such agreement, the arbitral tribunal shall determine these features itself.

According to the Law on ICA, generally, each of the parties to the arbitration must state the facts supporting its claims on the issues in dispute. The parties should also submit, jointly with their statements of claims, all supporting documents.

The arbitral procedure itself may be conducted with an oral hearing for the presentation of evidence or for oral argument, or it may be conducted on the basis of documents only. However, unless the parties have expressly agreed not to hold an oral hearing, the arbitral tribunal shall hold such a hearing at an appropriate stage of the arbitral proceedings if any of the parties so requests.

An oral hearing shall normally be held in private. Duly authorised representatives of the claimant and the respondent shall attend the hearing. Other persons not participating in the arbitral proceedings may be present at the hearing only with the permission of the arbitral tribunal and with the consent of the representatives of the parties. This rule is intended to ensure the confidentiality of the dispute and the protection of sensitive business information.

Under Article 24 of the Law on ICA, the parties shall be given an advance notice of any hearing for the purpose of inspection of goods, other property or documents. Specific time limits for giving notice shall be laid down in the arbitration rules.

By virtue of Article 24 of the Law on ICA, all statements, documents or other information submitted by a party to the arbitral tribunal shall be delivered to the other party. Any expert evidence or other documents with evidentiary value on which the arbitral tribunal may base its award shall be exchanged by the parties.

It follows from Article 25 of the Law on ICA that, if the parties have not agreed otherwise, where the respondent fails to submit its statement of defence, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; if any party fails to appear at the hearing or to submit documentary evidence, the arbitral tribunal may continue the proceedings and render an award based on the evidence before it.

A party that fails to present its positions and evidence and/or to ensure the appearance of a representative shall bear the risk of adverse consequences for itself due to its conduct in the course of the proceedings, including the risk of rendering an award without regard to such party's position.

Arbitrators

The matters of composition, appointment, challenge, termination of powers and replacement of arbitrators is governed by Section III of the Law on ICA.

Under the general rule (Article 10 of the Law on ICA), the number of arbitrators is three unless the parties agree otherwise. The parties may, at their discretion, determine the number of arbitrators, and, unless otherwise provided by law, the number of arbitrators must be odd (Article 10 para. 1 of the Law on ICA).

Article 11 of the Law on ICA imposes no mandatory restrictions on who may be appointed as an arbitrator; it allows the parties to set their own requirements. The Law on ICA explicitly provides that no person shall be deprived of the right to act as an arbitrator by reason of his nationality, unless otherwise agreed by the parties.

As for the procedure, the parties may, at their own discretion, agree on the procedure for the election and/or appointment of an arbitrator or arbitrators. If there is no such agreement, the general rule is this:

- in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators shall appoint a third arbitrator. If a party fails to appoint an arbitrator within 30 days of receiving the other party's request to do so, or if two arbitrators fail to agree within 30 days of their appointment on the appointment of a third arbitrator, the appointment shall be made by the competent court (upon application by either party); or

- in an arbitration with a sole arbitrator, if the parties fail to agree on the choice of an arbitrator, at the request of either party, the appointment shall be made by the competent court.

The parties may also, by their direct agreement, opt out of the possibility of resolving this issue by a state court. In this case, if the parties or the arbitrators failed to compose the tribunal, the arbitration is terminated, and the dispute can be referred to the competent court (Article 11 para. 5 of the Law on ICA).

However, if the arbitration is administered by a PAI, it may appoint arbitrators.

The competent court must take into account any requirements set by the parties' agreement and such considerations as may ensure the appointment of an independent and impartial arbitrator.

Unless the parties agreed otherwise, the procedure of challenging arbitrators is as follows: the party must, within 15 days after becoming aware of the formation of the tribunal or the grounds for the challenge, inform the tribunal of the reasons for the challenge. If the challenged arbitrator does not resign or the other party does not agree with the challenge, the issue of the challenge shall be decided by the arbitral tribunal. If the application on challenge is rejected, a party may appeal against such rejection in court (if the parties did not opt out such motion).

The Law on ICA does not refer to (nor does it implement) the IBA Guidelines on Conflicts of Interest. However, the parties may implement the IBA Guidelines in their agreement and procedure of appointment of arbitrators. In a dispute in relation to the challenge of arbitrators a party may refer to the IBA Guidelines before the Russian court; however, the court is not obliged to apply them (although in a couple of judgments, Russian courts referred to them).

If an arbitrator becomes legally or *de facto* unable to arbitrate or does not participate in the dispute for an unreasonably long period, his powers shall terminate, provided that the arbitrator resigns, or the parties agree to do so – otherwise, any party may apply to the competent court with an application to resolve the issue of termination of the arbitrator's powers (Article 14 of the Law on ICA).

Article 51 of the Law on Arbitration provides for partial immunity for arbitrators: the arbitrator does not bear civil liability to the parties to the arbitration or PAI in connection with the failure to perform or improper performance of his/her functions and in connection with arbitration. Of course, civil liability for crime (i.e., extortion of bribes, bribe-taking by an arbitrator) is not excused by such immunity.

Neither the Law on ICA nor the Law on Arbitration govern the use of secretaries. Such use is governed by particular rules of the arbitration institutions. Secretaries (referred to as speakers, reporters, or assistants) are appointed by administrative bodies of such institutions.

Interim relief

Both the Law on Arbitration (Article 17) and the Law on ICA (Article 17) stipulate this: unless otherwise agreed by the parties, the tribunal may, upon the application of any party, implement interim measures as it deems necessary. The tribunal may require either party to provide appropriate security in connection with such measures. These Laws have no provisions on emergency arbitrators.

However, under Article 17 para. 2 of the Law on ICA, the parties may also agree (including by reference to the rules of arbitration) that before the arbitral tribunal is formed, the PAI

may implement such interim measures as it deems necessary. Arbitral institutions may do so by appointing emergency arbitrators.

A party may also apply for interim measures in *arbitrazh* (commercial) courts. These are state courts that resolve commercial/economic disputes. According to Article 90 paras 2–3 of the *Arbitrazh* Procedure Code (the "**APC**"), interim measures may be applied by the *arbitrazh* court at the request of a party to the arbitration at the location of the *arbitrazh* court, or at the address or place of residence of the debtor, or the location of the debtor's property. The APC provides for a non-exhaustive list of possible interim measures (the Law on ICA provides no such list):

1) freeze of funds or other property;
2) imposition on the defendant and other persons to perform certain actions relating to the subject matter of the dispute;
3) imposition on the defendant of the obligation to perform certain actions in order to prevent damage to or deterioration of the value of the disputed property;
4) transfer of disputed property for storage to the plaintiff or another person;
5) suspension of collection under the executive or other document disputed by the plaintiff, the collection of which may be carried out in an indisputable manner; and
6) suspension of the sale of property in the event of a claim for the release of property from arrest.

Russian law provides for anti-suit and/or anti-arbitration injunctions only to the benefit of those who have been put on sanctions lists which impedes such claimants from using the initial dispute resolution agreement. In 2020, Article 248.2 of the APC (so-called "Lugovoy Law" –named after a member of the Russian State Duma, Andrey Lugovoy, who allegedly poisoned Alexander Litvinenko in London) introduced a mechanism of anti-arbitration measures allowing persons against whom sanctions have been imposed by foreign states or communities of states (such as the EU) to apply to the Russian *arbitrazh* court for a prohibition on initiating or continuing arbitration proceedings in a foreign court or international commercial arbitration located outside the territory of Russia. This is a very dangerous rule for foreign investors that allows a Russian sanctioned company to overcome the binding effect of a dispute resolution clause in a contract and to use a Russian court instead.

Anti-suit injunctions are not typical for Russian courts and anti-suit injunctions of foreign tribunals are not enforceable in Russia because they are deemed by Russian courts as interlocutory judgments.[2] However, given that there is no explicit prohibition of such measures in Russian law and case law, the parties are free to try to apply for such measure.

Arbitral award

The award has to be in writing, dated and signed by the sole arbitrator or arbitrators. The signatures of most of the arbitrators are sufficient, provided that the reason for the absence of other signatures is indicated.

The arbitral award must specify the seat of arbitration, the reasons on which it is based, the conclusion on the satisfaction or rejection of the claims, the amount of the arbitration fee and costs, and its allocation between the parties (Article 31 of the Law on ICA).

The Law on ICA does not stipulate any time limit for the rendering of the award. The limit is stipulated by the rules of arbitration adopted by certain PAIs. For example, in accordance with the ICAC Rules of International Arbitration, a tribunal should issue an award by the expiration of the term of the arbitration, which is 180 calendar days from the date of commencement of arbitration (i.e., from the date when the tribunal was formed). However, this deadline is only a recommendation.

The parties must be provided with copies of the award. Within 30 days after receipt of the award, unless the parties agree otherwise, the parties have the right to ask the arbitral tribunal to correct typos in the award. The tribunal is obliged to provide explanations or correct errors within 30 days (Article 31 of the Law on ICA).

The Law on Arbitration contains additional requirements for awards of a PAI:

- the composition of the arbitral tribunal;
- the names and the locations (residences) of the parties;
- the basis for the tribunal's jurisdiction;
- the claims, objections and motions of the parties; and
- the factual background of the case, the evidence on which the conclusions of the arbitral tribunal are based, the legal norms that guided the arbitral tribunal when making the award.

Challenge of the arbitration award

A party to an arbitration has the right to file with the Russian competent court an application to set aside an award. The jurisdiction of the courts of common jurisdiction of the Russian Federation includes disputes between individuals who are not involved in commercial relationships. The jurisdiction of the Russian *arbitrazh* courts comprises commercial disputes involving, as a general rule, legal entities and sole entrepreneurs.

Such application must be submitted to the court of first instance within three months from the date of issuance of the award to the party and this application shall be considered by the sole judge. If the court rules to set aside the award, the party is entitled to appeal against it within a month to the court of cassation (second appeal) – the *arbitrazh* court of the relevant court district. Thus, there is no appeal instance court that deals with set-aside applications.

If the cassation court leaves in force the ruling to set aside the award, such resolution can be appealed to the Supreme Court of the Russian Federation as a court of the second (final) cassation instance. However, the chances of success before the Supreme Court are statistically very low.

When considering cases on setting aside awards, Russian courts have no right to double-check the factual background established by the arbitral tribunal, or to review the award on the merits.

The parties may provide by their direct agreement that the award is final, if their arbitration agreement subjects their disputes to a PAI arbitration. The final arbitral award is not subject to setting-aside rulings of state courts.

According to Article 31 of the Law on ICA, the exhaustive list of grounds for the annulment of the award can be divided into two groups, depending on whether the interested party has declared them.

Grounds for the annulment of an award at the request of a party:

- a party to the arbitration agreement was incapacitated, the agreement was invalid under the law to which the parties have subjected it, or – in the absence of any agreement on the law that the agreement should be subjected to – under Russian law;
- a party was not properly notified about the arbitration proceedings, including the date and location of the arbitral tribunal hearing, or for other valid reasons could not submit its explanations;
- an award is made on a dispute that is not provided for by the arbitration agreement or does not fall under its terms, or contains rulings on issues beyond the scope of the arbitration agreement; and

- the composition of the arbitral tribunal or the arbitration procedure did not comply with the arbitration agreement or the requirements of Russian federal legislation.

Russian law also provides for grounds to set aside an award, which shall be checked by the court regardless of the application from an interested party:

- the object of the dispute cannot be the subject of arbitration proceedings in accordance with Russian federal legislation (for example, bankruptcy cases); and
- the arbitral award contradicts Russian public policy.

If rulings on matters covered by an arbitration agreement can be separated from those not covered by such an agreement, only that part of the award that contains rulings on matters not covered by the arbitration agreement may be set aside. That part of the award that contains rulings on matters regarding the rights and obligations of a person who did not participate in the arbitration proceedings is also subject to setting aside.

One of the most frequent grounds for setting aside arbitral awards rendered in Russia is the award's contradiction to Russian public policy. Public policy means fundamental principles of law which have imperative superiority, universality and are of specific social and public importance, and form the basis for the economic, political and/or legal systems of the Russian state.

Russian courts tend to interpret the concept of public policy very broadly and sometimes unreasonably rely on public policy as a ground to set aside arbitral awards. Using this ground, Russian courts also refuse to recognise and enforce arbitral awards that may adversely affect the state budget, antitrust regulations, bankruptcy matters, etc.

Enforcement of the arbitral award

Russia is a party to the New York Convention (1958). The procedure for enforcing arbitration awards is set out in the Russian procedural codes – Section 31 of the APC for commercial cases and Section 45 of the Civil Procedure Code (the "**CPC**") for non-commercial civil cases, as well as Section 8 of the Law on ICA.

A winning party (creditor) is entitled to enforce an award by filing an application with a competent court – at the debtor's place of residence (location) or, if its place of residence or location is unknown, at the place where the debtor's assets are located. A creditor has the right to file such application within three years from the date an award became binding.

The creditor shall enclose with its application an original or duly certified copy of the award and an original or duly certified copy of the arbitration agreement.

The court is required to consider the enforcement application within one month from the date of its receipt, in accordance with the procedural rules governing consideration of claims by courts of first instance, with certain exceptions.

After considering the application, the court issues a ruling recognising and enforcing the arbitral award or denying such recognition and enforcement. The ruling enters into force immediately and can be appealed only by filing a cassation complaint within one month from the date of such ruling.

In 2015, a special procedure for the recognition of foreign awards (without further enforcement) was introduced into the Russian law: foreign arbitration awards that do not require enforcement shall be recognised in Russia without any court proceedings, unless the interested person objects within one month from the date when such person learned of such an award.

Based on statistical data, about 80% of applications for the recognition and enforcement of foreign arbitral awards are being granted in Russia. This means that, in general,

Russian courts are favourable to international arbitration, but there is still a lot of room for improvement.

Reforms of the Russian arbitration laws

On 29 December 2015, President Putin signed into law the bills "On Arbitration" (which we now apply as the Law on Arbitration) and "On Introduction of Changes to Laws … In Connection with Adoption of the Federal Law 'On Arbitration'". From this date, arbitration has been significantly reformed.

These laws entered into force on 1 September 2016, although a number of certain provisions took effect later. The new laws determine the arbitrability of various categories of disputes (so-called "red basket", "yellow basket" and "green basket" of disputes, depending on their arbitrability). By default, civil law disputes are generally arbitrable, with a couple of important exceptions (e.g., family, inheritance, insolvency, privatisation, and some other disputes touching on public power elements). Corporate disputes are generally arbitrable, with a few exceptions (for instance, corporate disputes arising out of share redemption and mandatory tender offer procedures in joint stock companies are not arbitrable).

Under the abovementioned new laws, Russian arbitral institutions will need to obtain a special permit from the Russian government to administer arbitration as a PAI. Russian government grants such permits based on recommendations of a non-governmental advisory body of experts.

A number of important changes were adopted in respect of the arbitral procedure, including new and extensive provisions on arbitration agreements and clauses, and the forms in which they may take. Moreover, new laws introduced this principle: all doubts as to the validity of an arbitration agreement must be resolved in favour of its validity.

Russian state courts are now empowered to assist both domestic and international arbitrations and to supervise them. This includes courts acting as the assistance and supervision authority in matters of arbitrator challenges and appointments.

The Lugovoy Law is a major threat to international arbitration. According to this Law, a US or EU sanctioned person has the right to apply to a Russian court despite the existence of an arbitration agreement to submit disputes to a foreign arbitration institution (for example, ICC, SAC, etc.) or state court. According to the approach of the Supreme Court of the Russian Federation, the imposition of restrictive measures against such a person is a *prima facie* sufficient basis for overcoming the legal force of the arbitration clause (*AO UralTransMash (Russia) vs Pesa Bydgoszcz* (Poland, 2021–2022).

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Endnotes

1. https://jusmundi.com/en/document/decision/de-schiedsgerichtssache-zwischen-lena-goldfields-co-ltd-und-der-regierung-der-u-s-s-r-urteil-des-schiedsgerichts-tuesday-2nd-september-1930.
2. Para. 52 Resolution No. 23 of the Plenum of the Supreme Court of the Russian Federation dated 27 June 2017 "On consideration by *arbitrazh* courts of cases on economic disputes arising from relations complicated by a foreign element"; para. 32 of Information Letter No. 158 of the Presidium of the Supreme *Arbitrazh* Court of the Russian Federation dated 9 July 2013 "Overview of the practice of consideration by arbitration courts of cases involving foreign persons".

Dr. Ilia Rachkov
Tel: +7 495 646 81 76 / Email: ilia.rachkov@nsplaw.com

Ilia Rachkov's (Partner) areas of specialisation are international dispute resolution and international trade law (including international investment law and WTO law).

Since his graduation from the law faculty of the Moscow State University named after M.V. Lomonossov (1996), Ilia has collected substantial experience in advising foreign and Russian companies and state authorities in dispute resolution matters (both before state courts in and outside Russia and *ad hoc* and institutional domestic and international arbitration tribunals), international trade matters, as well as in matters related to capital markets and M&A.

Ilia is included in the list of recommended arbitrators of the Russian Arbitration Center, the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs and the International Arbitration Centre (Nur-Sultan, Kazakhstan). Ilia is a member of the Legal Committee of the Russian-German Chamber of Commerce and a Member of the Scientific Advisory Council on International Law of the Ministry of Justice of the Russian Federation.

Aram Grigoryan
Tel: +7 495 646 81 76 / Email: aram.grigoryan@nsplaw.com

Aram Grigoryan (Associate) conducts complex disputes in the field of international arbitration in the LCIA, LMAA, ICAC at the Chamber of Commerce and Industry of the Russian Federation and in other arbitration institutions, as well as represents interests of Russian and foreign clients in the Russian commercial and general jurisdiction courts. Aram's core competence is in the field of construction (EPC, concession) and financing disputes, bankruptcy, subsidiary liability cases and corporate disputes.

Aram graduated with honours from the Faculty of Law of Lomonosov Moscow State University with a Master's degree.

Sergey Bakhmisov
Tel: +7 495 646 81 76 / Email: sergey.bakhmisov@nsplaw.com

Sergey Bakhmisov (Associate) conducts disputes in courts and arbitrations, including ones with the participation of foreign entities. His experience includes representing clients in arbitration under the rules of LCIA, RAC, ICAC at the Chamber of Commerce and Industry of the Russian Federation.

Sergey is a graduate of the International Law Faculty of the Moscow State Institute of International Relations under the Ministry of Foreign Affairs of the Russian Federation ("**MGIMO**") and the HSE University's Master's Program on International Trade, Finance, and Economic Integration Law.

Nektorov, Saveliev & Partners

Smolensky Passage, 14th floor, 3, Smolenskaya Square, Moscow 121099, Russia
Tel: +7 495 646 81 76 / URL: www.nsplaw.com