IBA International Construction Projects Committee

ADR in Construction

Russia

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Table of Contents

Table of Abbreviations 1
1 Background 2
2 Dispute resolution agreements 8
3 ADR and jurisdiction 12
4 Arbitrators, adjudicators, dispute board members, mediators 14
5 ADR procedure 17
6 Interim measures and interim awards 24
7 Awards, decisions, recommendations, negotiated agreement 26
8 Enforcement of and challenges to awards and decisions 28
9 Trends and developments 30
10 Other Important Issues 31

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Table of Abbreviations

ADR	Alternative Dispute Resolution
Arbitration Law	Law No.5338-1 of the Russian Federation "On international commercial arbitration" dated 7 July 1993 (as amended)
Commercial Court	State Commercial ('Arbitrazhny') Court of the Russian Federation
CPC	Code of Commercial Court Procedure of the Russian Federation
DAB	Dispute Adjudication Board
ICAC	The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
Arbitral Tribunals Law	Law No.102-FZ of the Russian Federation "On arbitral tribunals" dated 24 July 2002 (as amended)
MAC	The Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation
Mediation Law	Law No.193-FZ of the Russian Federation "On alternative procedure of dispute resolution with participation of a mediator (mediation procedure)" dated 27 June 2010 (as amended)
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
SCC	The Supreme Commercial ("Arbitrazhny") Court of the Russian Federation
UNCITRAL Model Law	Model Law on International Commercial Arbitration (as amended in 2006) of the United Nations Commission on International Trade Law

1 Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

There are two prevalent forms of dispute resolution in Russia: litigation in the state-run court system (commercial courts and courts of general jurisdiction) and arbitration. Both have a long history dating back to pre-Soviet time (i.e. the XIX century).

Liberation of the economic and political regime after the collapse of the Soviet Union in the early 1990s has led to an increase in the number of ADR institutions (arbitral tribunals). Their exact number is difficult to assess, though it is estimated to exceed 1,000. Among those most visible and widely-known are the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (**ICAC**) and its "companion" institution – the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (**MAC**), which falls under special regulation.

The 1990s and 2000s have seen an uprise in the application and use of ADR mechanisms, arbitration in particular. Such a development is attributed to apparent advantages of arbitration. Among those frequently cited are: confidentiality of proceedings, relatively high level of professional qualifications of arbitrators, the possibility to appoint arbitrators, promptness of proceedings, less formalistic approach to evidence (e.g. acceptance of e-mail correspondence).

Nevertheless, according to a poll conducted by the Russian Public Opinion Research Center (WCIOM) in July 2013 primarily among lawyers and business people, 37% believe that the existing system of ADR institutions in Russia creates 'pseudo legal' judgments in favor of the stronger or affiliated party. Other problems indicated by respondents are the lack of independent ongoing control (79%), dependence of arbitral tribunals on the entities creating them (78%), lack of liability for arbitrators (71%).

Historically, the arbitrability of particular types of disputes in Russia was questionable. For example, only recently the Constitutional Court of the Russian Federation clarified that real estate disputes, including those related to foreclosure on mortgaged property and state registration thereof, may be subject to arbitration. The long-standing issue of the arbitrability of corporate disputes is still unresolved. As a side note, Russian laws specifically prohibit arbitration for bankruptcy, certain patent, copyright, antitrust and employment disputes.

There are two Federal Laws which primarily regulate arbitration issues in Russia: the Law "On international commercial arbitration" (**Arbitration Law**) and the Law "On arbitral tribunals" (**Arbitral Tribunals Law**).

The Arbitration Law is applicable (i) if a dispute has arisen from international economic relations and at least one of the parties to the arbitration proceedings has its place of business outside Russia, or (ii) if at least one party to a dispute is an enterprise with foreign participation (investment), an international association or an international organization established in Russia, or a participant to such an enterprise, international association or organization.

The Arbitral Tribunals Law regulates arbitration in all cases when the Arbitration Law is not applicable.

Particularly relevant in the context of construction is the issue of whether construction contracts entered into by state companies may include an arbitration clause, as the Federal Antimonopoly Service of the Russian Federation has on several occasions voiced its position that such a clause violates Russian competition law. Despite the fact that this position has not been supported by Russian courts so far, the relevant case law remains rather scarce and may change in the future with the adoption of the new Federal Law regulating public procurement (Law No.44-FZ "On the system of public procurement contracts for products, works and services for state and municipal needs" dated 5 April 2013, coming into effect on 1 January 2014). It is also worth mentioning that at the moment the SCC is reviewing the case involving a contract between a state public institution and a private contractor. In this case the court will have to decide whether public interest and principles of transparency and fairness preclude resolution of public procurement disputes (including construction disputes) through ADR.

These and many other factors greatly affect the choice of the dispute resolution method, including in the field of construction; e.g. if a construction dispute is "closely related to Russia" (which is indeed the case if construction is carried out in Russia), the law chosen by the parties as the governing law for their relations has no impact on the mandatory provisions of Russian law.

Due to the above, resolving disputes by referring them to state courts has been far more prevalent than the use of ADR.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

There are no special laws devoted specifically to construction disputes in Russia, and hence such disputes are resolved through a general procedure. Statutory adjudication is not among instruments used in or familiar for the Russian dispute resolution system.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators?

The statutory framework for international and domestic arbitration primarily consists of the Code of Commercial Court Procedure of the Russian Federation (**CPC**) (as pertains to recognition and enforcement of arbitral awards), Arbitration Law and Arbitral Tribunals Law. With respect to international arbitration, Russia is also a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (**New York Convention 1958**) and the European Convention on International Commercial Arbitration of 1961.

1.4 What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

The Russian Federation is not a common law jurisdiction and, therefore, officially rulings of the higher courts do not have the force of a legal precedent. At the same time, both the SCC and the Supreme Court of the Russian Federation are entitled to issue "guiding explanations" which need to be taken into account by lower courts when resolving similar cases. Despite the fact that such explanations are intended to aid in and set guidelines for interpreting the law, rather than to create actual legal regulations, many Russian lawyers and scholars believe that recently the higher courts have crossed the line between adjudication and lawmaking, thus filling certain gaps and loopholes in legislation. The duality of the Russian court system stemming from the division between commercial courts and courts of general jurisdiction has led to some situations when the two relevant higher courts give different interpretations of the same law. The ongoing judicial reform (consolidation of court branches, see Section 9) is aimed, inter alia, at curing this situation.

The judicial 'activism' of the Russian courts has in practice been accompanied by development of the system of legal precedents, which have de facto become an integral part of modern Russian law.

1.5 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)?

Both state courts and arbitral tribunals render binding decisions in Russia. The main difference between the two in terms of enforcement is that arbitral tribunals have no instruments to enforce their own decisions. Hence, arbitral awards are enforced by state courts which, at the request of the winning party, issue writs of execution.

Decisions of foreign state courts and the awards of arbitral tribunals or international commercial arbitration courts are recognized and enforced in Russia

by commercial courts if the recognition and enforcement of such decisions is stipulated either in an international treaty to which Russia is a party or in federal laws[1]. Furthermore, the SCC has clarified that a motion seeking acknowledgment and enforcement of a foreign award may be granted even in the absence of an international treaty, based on the mutually respected principle of international courtesy. However, there is still a risk that an arbitral award may be cancelled by a state court or its enforcement may be denied.

1.6 Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

Presently, neither adjudication nor expert determination decisions may be enforced under Russian laws, although court practice on this issue is yet to develop. As regards binding decisions of state courts and arbitral tribunals, such decisions must be rendered in compliance with the procedural safeguards established by the relevant laws. Moreover, courts should also respect the principles indicated in the European Convention on Human Rights (e.g. fair trial – Article 6) and the case law of the European Court of Human Rights.

1.7 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

There are no officially established institutions dealing with construction disputes. This means that both state courts and any duly established arbitral tribunals may examine disputes related to construction matters. Arbitral tribunals may consider disputes, as long as an arbitration clause is in place and valid for the parties and the type of dispute is arbitrable.

There are some arbitral tribunals which advertise as being specialized in construction disputes, e.g. the Arbitration Institution of Construction Companies of Moscow (see Section 4 for details). This, however, does not affect their formal status and they are still classified as "general" arbitration institutions.

1.8 How prevalent is mediation for construction disputes in your country?

The parties to a dispute may enter into a settlement agreement or apply other conciliation procedures, including mediation, unless this contradicts federal laws[2]. Pursuant to this provision and in line with the officially supported idea of ADR promotion, the Federal Law "On alternative procedure of dispute resolution with participation of a mediator (mediation procedure)" (**Mediation Law**) was

[1] Article 241(1) of the CPC
[2] Article 138 of the CPC

adopted in 2010. This Law establishes a mediation procedure for settling disputes related, inter alia, to economic activities (which include construction).

However, until now it has not been widely used. One of the reasons for this is that mediation as an official procedure remains unknown to most market players. In addition, unlike a judgment made by a state court or an arbitral tribunal, an agreement reached as a result of mediation would be deemed a private transaction. Therefore, if one of the parties to such an agreement violates it, the other party would have to turn to a court. This is why many fear that mediation would only result in lost time and money. Construction disputes are not an exception.

1.9 What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute review boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested)?

Generally speaking, non-binding dispute resolution is not popular in Russia. This is partly due to psychological reasons: the parties usually negotiate while there is the possibility, even the slightest, to achieve a settlement, but once negotiations fail, as a general rule, the parties are no longer willing to continue any dialogue other than in the course of formal proceedings. For the same reasons, the chance that a non-binding decision will be followed through is very low. This is why dispute recommendation boards, recommendations that become binding after some time if not contested, and other non-binding dispute resolution methods (save for, to a certain extent, mediation – see Section 1.8 above), are not practiced in Russia.

Negotiations are typically used by the parties at the pre-trial stage. As a general rule, the parties to a contract are not obliged to enter into negotiations before filing a claim with a court. However, some special regulations, as well as contractual terms, may provide for a mandatory pre-trial dispute resolution procedure. If this is the case, the dispute can be referred for resolution to a court only after such a procedure has been carried out (and failed).

1.10 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction?

Although the recognition and hence enforceability of the Dispute Adjudication Board's (**DAB**) decisions by Russian courts is unlikely, such decisions may potentially be considered as evidence in subsequent arbitration or court proceedings. However, so far there has been no court practice on this issue.

Although this is yet to be argued before courts, a DAB-type award might in future become enforceable in Russian courts, as long as such an award can be deemed

an arbitral award. At the very least, the parties must agree that the award is final and binding. In addition to that, the parties should also have the same rights in the DAB-type proceedings as they would have in arbitration.

The court is to evaluate evidence according to its inner conviction, based on comprehensive, full, unbiased and direct examination of the evidence in the case[3]. No piece of evidence is to be regarded by the court as having predetermined weight. Based on these principles, DAB decisions will be scrutinized by the court in order to check their relevance, admissibility and reliability. They will also be reviewed and analyzed in light of sufficiency and interrelation with other evidence submitted to the court.

1.11 What would the role of these DAB decisions be for further proceedings?

As noted above, it remains to be seen whether Russian courts will enforce DAB decisions. The outcome largely depends on how the courts assess the DAB itself. If the courts deem the DAB to be a duly established foreign arbitral institution, there will be a limited number of grounds for refusing to recognize and enforce its awards. Among such grounds are: conflict with the public order of the Russian Federation, exclusive competence of the Russian courts over the particular dispute resolved by the DAB, etc.

1.12 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction?

Both arbitration and mediation, as the most common forms of ADR in Russia, have their pros and cons, but their general cost efficiency is difficult to compare. Mediator fees vary from case to case and are most often kept confidential, unless the parties to a dispute decide otherwise. However, it is the general opinion that these fees are lower than those of arbitrators (which, however, also vary in different tribunals). Also, arbitration as such may take longer, which means higher expenses for legal support, etc. On the other hand, enforcement of arbitral awards is reasonably quick (usually 1 to 3 months) and cost-efficient, whereas in the case of mediation the parties may need to enter into additional litigation or arbitration.

1.13 Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

Allocation of costs in arbitration and court litigation is regulated in the same manner. Judicial costs consist of the fee (arbitrators' fee as regards arbitration and state duty as regards litigation in the state court system) and other case-related expenses[4]. Such expenses might include amounts payable to experts,

[3] Article 71 of the CPC
[4] Article 101 of the CPC

specialists, witnesses and interpreters, expenses for inspection of evidence on site, legal and other fees, etc.

As a general rule, costs incurred by the winning party are recovered through the court from the losing party. If the claim is satisfied in part, the costs are placed on the parties to a dispute in proportion to the amount of the satisfied claim.

However, if a party to a case abuses its procedural rights or fails to discharge its procedural duties, the court may place the costs on such a party, regardless of the results of the case consideration.

2 Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement?

In accordance with both the Arbitration Law and the Arbitral Tribunals Law, any arbitration agreement is valid if it satisfies the following conditions:

(a) The arbitration agreement must be executed in writing. This requirement can be met by means of the parties either (i) signing a single document or (ii) exchanging letters, faxes, telegrams or other means of electronic or other telecommunication which provide a record of the agreement;

(b) The parties' will to resolve disputes through (i) arbitration and (ii) a particular tribunal must be expressed unambiguously;

(c) The arbitration agreement must determine the scope of issues to be referred to the arbitral tribunal.

In addition to the above, the Arbitral Tribunals Law requires that:

(d) The arbitration agreement must contain a procedure for forming a tribunal and explicit rules and procedures for the conduct of arbitration proceedings. Unless the parties agree otherwise, a reference to a permanent arbitral tribunal entails making the rules of such a tribunal an integral part of the arbitration agreement;

(e) The relevant contract cannot contain a mediation clause.

2.2 Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause?

The first paragraph of Clause 20.6 of the FIDIC Red Book reads as follows:

"*Unless settled amicably, any dispute in respect of which the DB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:*

(a) arbitration proceedings shall be conducted as stated in the Particular Conditions,

(b) if no arbitration proceedings are so stated, the dispute shall be finally settled by institutional arbitration under the Rules of Arbitration of the International Chamber of Commerce,

(c) the dispute shall be settled by three arbitrators, and

(d) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language]."

Such a clause may be considered a valid arbitration clause as long as it is agreed to in writing. Additionally, the "Particular Conditions" of the contract must specify information about a particular arbitral tribunal authorized to resolve a dispute, or a procedure for establishing it.

It should be noted that Clauses 20.2 – 20.4 of the FIDIC Red Book may be deemed to be mediation provisions, which under the Arbitral Tribunals Law would make the arbitration clause invalid.

2.3 Would this clause prevent a party from seeking interim measures from a competent court?

The Arbitral Tribunals Law entitles any party to seek interim measures from a competent court. This is compatible with an arbitration agreement and would not be deemed to cause termination/rescission of an arbitration agreement.

2.4 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws?

The only restriction is applicable if the terms of an agreement are defined by one of the parties in templates or other standard forms and can only be accepted by the other party by joining the proposed contract as a whole (a contract of adhesion). An arbitration clause with respect to such an agreement shall only be valid if duly agreed to after the occurrence of the cause of action.

This provision is stated in the Arbitral Tribunals Law and corresponds with the provisions of the Russian Consumer Protection Law on the consumer's right to choose an authorized court.

2.5 Is this the same for other forms of ADR?

There are no specific restrictions on enforceability or validity of other forms of ADR as pertains to standard forms of contracts.

2.6 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution?

The use of standard conditions for construction projects is not typical in Russia. This is due to complicated regulations in the field of construction and, at the same time, lack of uniform templates which would be valid under Russian law and at the same time would comply with market practices. Parties generally prepare and negotiate contracts for each specific situation, and specialized companies have their own templates.

Standard forms of construction contracts are mainly used for projects involving the state. Such forms usually refer disputes to state litigation (commercial courts).

2.7 Are other forms of dispute resolution more common in these standard conditions?

No, the most common method for resolving disputes provided for under standard conditions is litigation in state courts.

2.8 Many arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances?

Generally, arbitration agreements do not bind non-signatories. However, the parties usually add the contractor's obligation to bind its subcontractors with arbitration agreements on conditions similar to the principal contract.

2.9 Is this different for other forms of ADR?

Similar to arbitration, agreements on other forms of ADR do not bind non-signatories, but the contractor may be obliged to include similar provisions in agreements with its subcontractors.

2.10 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

Expert determination is most commonly used in the course of a trial. Experts have a specific status set forth at the legislative level and their determination may

be considered as evidence. However, there is no legislation asserting expert determination as such to be a form of ADR in Russia. The expert determination is not binding for the parties even if the procedure is included in the contract as a mandatory clause, as it may be challenged in court.

2.11 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration?

The answer to this question differs for arbitration and litigation.

The Arbitral Tribunals Law and the Arbitration Law do not establish any negative consequences for any party to arbitration if it failed to comply with a pre-trial settlement procedure agreed in the contract.

On the opposite, the CPC provides for negative consequences for a party which failed to comply with the contractual claim procedure[5]. If the court determines that the plaintiff has not followed the pre-trial procedure for settling a dispute with the defendant, when such a procedure is provided for by law or the contract, the court will leave the claim without consideration.

2.12 How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction?

Most often construction agreements embody the following multi-tiered dispute resolution process:

1. Pre-trial procedure implies an amicable settlement of the dispute. For instance, an agreement may oblige a party to file an official notice of claim with the other party and define deadlines and procedure for dealing with such claim. Alternatively, the parties may be obliged to hold negotiations during a certain period, after which (if the negotiations fail) the parties shall be entitled to apply to court.

2. Consideration of the dispute in arbitration or in a state court.

2.13 Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Yes, the multi-tiered dispute resolution clause is common in construction contracts in Russia. There are usually no problems with using this type of clause,

[5] Article 148 of the CPC

unless a party acting in bad faith uses it to merely delay the resolution of a dispute.

3 ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court?

As a general rule, civil cases can be subject to ADR. One of the latest developments in this sphere is the Ruling of the Constitutional Court of the Russian Federation, which overturned the existing court practice where disputes on acknowledgement of title to real estate could be resolved only by state courts. There are several exceptions stated by the law, when civil cases are subject to resolution only by state courts (e.g. bankruptcy cases, corporate disputes), but these exceptions do not include construction projects.

3.2 What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

In the context of construction, all disputes of civil nature may be subjected to ADR. Even if the dispute is already being heard before a state court, the parties are entitled to transfer the case to arbitration up to the moment when the state court makes a decision.

However, construction matters also contain certain relations of public nature (e.g. issuance of permits and approvals, competition and antitrust issues), which cannot be referred to arbitration.

3.3 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

No, there is no such restriction, but, as stated in item 1.6 above, such expert determinations or third party decisions are not binding.

3.4 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (for example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

No, there are no special restrictions on the type of arbitral awards that may be issued. A decision entirely depends on the merits of the dispute and the applicable law.

However, we note that DAB as such is not recognized by Russian laws and, therefore, its decision shall be binding and enforceable only if DAB is formed and acts in accordance with the general procedures applicable to arbitral tribunals.

Article 28 of the Arbitration Law enables the parties at their own discretion to agree on the law or system of rules to be followed by the arbitral tribunal in rendering a decision. At the same time, the Arbitral Tribunals Law (Article 6) sets forth that arbitrators shall follow Russian laws while reviewing the case and making a decision.

3.5 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

No, public entities, as well as all other subjects of law, can settle disputes through ADR. Moreover, some state entities even establish their own arbitral tribunals. At the same time, public institutions (state agencies, etc.) usually refer disputes to state litigation.

3.6 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

By law, state parties participating in civil relations are equal to all other persons (commercial / non-commercial entities, individuals) and have the same scope of rights and obligations.

However, in reality, the obligation of a state party to pay compensation for breaching a civil contract is limited to the amount of funds allocated in the budget of the Russian Federation for paying damages caused by outstanding commitments of state parties (budget immunity). Hence, winning the case does not guarantee that the winning party will be able to collect the full amount of awarded compensation from the state.

3.7 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Procurement disputes as such can be decided by ADR without any special requirements.

At the same time, if such disputes involve matters of corrupt business practices, unfair competition and other issues beyond contractual obligations of the parties, ADR is not applicable.

3.8 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause?

As mentioned earlier (see item 3.4), DAB's jurisdiction is not recognized in Russia and, therefore, this question may be answered with respect to an arbitration clause. This is applicable to item 3.8 as well.

As a general rule, an ADR agreement must be in place with respect to each specific contract between the employer and the contractor (as an alternative, it is possible to enter into a separate ADR agreement covering several contracts). Otherwise, an arbitral award with respect to an issue which was not directly referred to arbitration shall be neither enforceable nor binding.

3.9 If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

If in the process of the arbitration tribunal hearing the case, the parties do not voice any objections as to the tribunal handling the dispute beyond its jurisdiction, it is presumed that the parties by their actions give their implied consent to empower the tribunal to settle the dispute which was not originally subject to its consideration. Hence, such decisions of the tribunal, although made outside its jurisdiction, shall be valid.

4 Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (such as DABs) regarding construction disputes in your jurisdiction?

There are no special rules on arbitrator appointment or the appointment of the tribunals for specifically construction disputes. There are, however, unified rules generally applicable to arbitration institutions in Russia. In particular, such rules are set forth in the Arbitration Law and the Arbitral Tribunals Law, as well as in regulations of particular arbitration institutions.

There are also special rules on appointing mediators, which are set forth in the Mediation Law.

4.2 Do arbitrators, adjudicators etc. need to have special qualifications?

Generally, such special qualifications are not required. However, the parties to a dispute may appoint arbitrators, for example, with a legal and technical background in construction for the purpose of resolving a construction dispute. Also, some of the arbitration institutions positioning themselves as specialized in certain spheres engage arbitrators mostly with the respective background, for example, the Arbitration Institution of Construction Companies of Moscow. Requirements as to the qualifications of the arbitrators may be agreed upon by the parties or stated in the regulations of a particular arbitration institution.

Individuals professionally involved in mediation must hold a higher education degree in any sphere and an additional degree in mediation procedures.

4.3 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators?

There are arbitration institutions positioning themselves as specialized in construction disputes, for example, the Arbitration Institution of Construction Companies of Moscow. The list of its arbitrators with their names, background and specialization is open for the general public (see http://www.mostretsud.ru/index.php/2010-07-01-13-42-46.html).

4.4 Do these institutions appoint the arbitrators or do the parties appoint the arbitrators?

As regards the Arbitration Institution of Construction Companies of Moscow, according to its regulations each party appoints one arbitrator, and the presiding (the third) arbitrator is appointed by the chairman of the institution. If either party fails to timely appoint an arbitrator, an arbitrator is appointed by the chairman of the institution.

4.5 Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list?

As a general rule, the parties are not limited by the list of arbitrators and are free to appoint arbitrators who are not on the list. However, there are exceptions to this rule, e.g. if a dispute is referred to the Arbitration Institution of Construction Companies of Moscow, the parties will have to select arbitrators from the list.

4.6 How are these lists composed?

The lists are composed subject to the law and internal regulations. Arbitrators must comply with the general requirements stated in the law, as well as with the requirements specified in the rules and guidelines of the particular arbitration

institutions. It is also presumed that an arbitrator should have relevant experience in the sphere of construction, but usually this is not formally required.

4.7 Is there a difference with other forms of ADR?

Generally, the procedure is more or less similar for the various arbitration institutions.

As regards mediation, the parties also appoint one or more mediator(s) upon mutual agreement. A specialized entity carrying out mediation procedures may appoint a mediator from its list at request of the parties.

4.8 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer?

A sole arbitrator and the chairman of an arbitral tribunal must have a degree in law. Other arbitrators may be specialized in other spheres (e.g. economy, construction, etc.), which usually depends on the type of dispute being resolved.

4.9 If not, are there requirements that the secretary added to the tribunal must be a lawyer?

No, there is no such requirement.

4.10 Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

The presence of a lawyer (as a sole arbitrator or chairman of a tribunal) is always necessary.

4.11 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession?

This is the general practice, e.g. the majority of arbitrators in the Arbitration Institution of Construction Companies of Moscow have the relevant background and experience.

4.12 Are panels integrated both by lawyers and construction professionals possible/common?

Yes, this is widespread practice for construction disputes.

4.13 Is there a difference with other forms of ADR?

As regards mediation, professional mediators must hold a higher education degree (although not necessarily a law degree) and an additional degree in mediation.

4.14 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Generally, arbitrators and arbitral tribunals may use their own expertise. At the same time, they may appoint experts, provided the parties have not agreed otherwise. In such cases an expert and questions to him are decided upon by the arbitrators or arbitral tribunals taking into account the parties' opinions.

If the tribunal rejects the parties' request to appoint an expert, an award may be challenged in a state court due to a procedural violation.

4.15 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"?

Construction disputes are resolved under rules of law (Russia is a continental law system). Arbitrators must base their decisions on comprehensive examination of the evidence in the case and apply specific legislative provisions.

4.16 Is there a difference with other forms of ADR?

Mediation has a somewhat different focus and approach to resolving disputes between the parties as it is aimed at a procedure that would result in an amicable agreement between the parties.

5 ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules?

Yes, if the Russian Federation is chosen as the seat of arbitration, arbitrators and other persons making binding decisions are required to follow mandatory rules governing the ADR procedure.

A permanent arbitral tribunal, as a general rule, conducts and administers arbitration in accordance with its internal regulations, unless the parties have agreed to apply other rules of arbitration. These rules need to be approved by the organization which established such a permanent tribunal. To the extent not

agreed by the parties and not provided for by the rules of the permanent tribunal or the Arbitral Tribunals Law, the rules of the arbitration proceedings are to be determined by the arbitral tribunal.

The Arbitration Law provides similar regulations. Article 19 establishes the parties' right to agree at their discretion on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

A mediation procedure may be either established by the parties in the respective agreement at their own discretion or incorporated by reference to the mediation procedure rules adopted by the respective organization rendering mediation services[6]. Such rules must, inter alia, specify the process of mediation, including rights and obligations of the parties, specific aspects of the mediation procedure for resolving certain categories of disputes, etc.

5.2 Does a party usually have a right to have legal representation?

Yes, the parties have a right to appoint or engage legal representatives (who do not necessarily need to be lawyers / attorneys at law (advocates)), unless they agree otherwise.

5.3 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

The applicable legislation does not establish a priority as regards written and oral presentations. However, in practice it is recommended to submit evidence in writing.

The parties are usually free to agree on the procedure to be followed, i.e. they may choose either a written or oral procedure or a combination of both. However, they should obey mandatory applicable rules and regulations. For instance, in accordance with ICAC Rules (§ 34), the parties may agree that their dispute be examined and resolved on the basis of written materials only, without holding an oral hearing. The arbitral tribunal may settle the dispute on the basis of written documents in the absence of agreement between the parties to this effect, if neither party requests an oral hearing.

In addition, the parties may submit written evidence. The arbitral tribunal may set a period for the parties to submit their written statements and evidence, so that all parties have a possibility to familiarize in advance with all documents and materials before the oral hearing of the case[7].

The parties may use witness testimonies.

[6] Article 11 of the Mediation Law
[7] § 30 of the ICAC Rules

In accordance with the Arbitral Tribunals Law (Article 29) an expert opinion needs to be submitted in writing. On the opposite, Article 26 of the Arbitration Law provides that an expert opinion may be given either in writing or orally. In both cases, participation of an expert in hearings is not binding (only if a party so requests or if the tribunal considers it necessary). In practice, written submissions are used more often. An oral hearing is usually appointed for clarifying information contained in the submitted documents and is basically an instrument allowing the parties to substantiate their position according to the written submissions.

5.4 Are there rules on evidence in the laws or your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

Russian laws and arbitration rules provide arbitral tribunals with broad discretion in this regard.

An arbitral tribunal is entitled to independently determine the admissibility, relevance, materiality and weight of any evidence[8]. The arbitrators assess the evidence at their sole discretion, based on a comprehensive, full and objective examination of the evidence available in the case.

The arbitral tribunal may order that any documentary evidence be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

If the tribunal considers the evidence to be insufficient, it may suggest that the parties submit additional evidence.

5.5 Is a hearing mandatory for all forms of ADR?

No, a hearing is not mandatory.

In practice, in both domestic and international commercial arbitration, oral hearings are usually held. However, the parties may agree to have their dispute resolved on the basis of written materials only.

The arbitral tribunal may at its own discretion decide whether it is necessary to hold a hearing for presenting evidence or to conduct the proceedings on the basis of documents and other materials. A hearing becomes mandatory if so requested by either party, but if the parties themselves have agreed to exclude the hearings, the arbitral tribunal is not bound by the mandatory hearing rule[9].

[8] Article 19 of the Arbitration Law
[9] Article 24(1) of the Arbitration Law

The Mediation Law does not provide any detailed rules on the form of mediation procedure, since the parties have full discretion in this matter and are free to select the most appropriate method for resolving the dispute with participation of a mediator.

5.6 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) *conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules*". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

Russia is a continental law system and is not familiar with the concept of "natural justice". However, Russian law establishes fundamental principles that are binding for all participants of arbitration and other forms of ADR:

- rule of law;
- confidentiality;
- independence and impartiality of arbitrators and other decision makers;
- competition and equal rights of the parties.

Thus, the arbitral tribunal (as mentioned above, DAB's jurisdiction is not recognized in Russia) would be bound to conduct a hearing in line with the above principles in the meaning of "natural justice."

For ADR this would mean that:

- Each party shall be given an equal opportunity for presenting its position and protecting its rights and interests (Article 27(1) of the Arbitral Tribunals Law, Article 18 of the Arbitration Law).

- All statements, documents or other information submitted to the arbitral tribunal by one party must be communicated to the other party (Article 27(3) of the Arbitral Tribunals Law, Article 24(3) of the Arbitration Law).

- The arbitrator cannot disclose any information of which he/she became aware in the course of the arbitration proceedings, without consent of the parties or their successors (Article 22(1) of the Arbitral Tribunals Law).

- The parties must be given notice of the time and place of the hearing in advance (Article 27(3) of the Arbitral Tribunals Law; Article 24(2) of the Arbitration Law).

5.7 What types of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)?

Most frequently, in construction arbitration the parties engage:

- *technical experts* as regards quality of performed works, design and as-built ("working") documentation, source or origin of a defect, utility systems and services;
- *financial experts* for examining the value and scope of performed works;
- *legal experts* for clarifying specific regulations and compliance therewith by the parties.

5.8 Is there a difference on this topic between arbitration and court litigation in your jurisdiction?

In the course of arbitration and court litigation the parties generally use the same types of experts in construction disputes.

5.9 Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Yes, experts are used in the same manner.

5.10 Are these experts mostly party appointed or appointed by the tribunal?

Experts may be appointed either by the tribunal or by the parties. Hence, unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts on specific issues to be determined by the tribunal[10].

In practice, such experts are mostly appointed by the parties, since they are interested in providing evidence.

5.11 Is there a difference as to the evidential value?
There is no difference in evidential value.

5.12 How are the costs of experts allocated?

As regards domestic arbitration, the costs of experts are allocated by the tribunal in accordance with the agreement between the parties or, if there is no such agreement, in proportion to the satisfied and rejected claims[11].

In case of international commercial arbitration, allocation of the costs of experts differs depending on the arbitral tribunal. For instance, the Rules of ICAC contain

[10] Article 29(1) Arbitral Tribunals Law; Article 26(1) Arbitration Law
[11] Article 16 and 29 Arbitral Tribunals Law

a Schedule of Arbitration Fees and Costs, according to which the respective costs are to be imposed on the losing party, unless the parties have agreed otherwise. If a claim is satisfied in part, the costs are to be charged in proportion to the amount of the award.

5.13 Is the expert supposed to be independent to the parties/counsel?

Unlike the rules on court examination in state litigation[12], the laws governing ADR do not expressly provide any requirements, principles or criteria for experts, though an expert is assumed to be independent, to have an appropriate degree (diploma) and sufficient relevant experience. Experts appointed by a tribunal shall be determined with due consideration of the opinion of the parties, unless the parties agree otherwise[13].

5.14 Does the expert normally give written evidence or oral evidence?

In accordance with the Arbitral Tribunals Law (Article 29(4)), an expert is to submit his/her opinion in writing. At the same time, the Arbitration Law (Article 26) provides that an expert opinion may be given either in writing or orally.

As a practical matter, the expert generally gives evidence in the form of a written expert opinion or report. Should the tribunal need further clarifications, it may request the expert to comment on his/her opinion or report orally.

5.15 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert?

An expert opinion is a form of evidence and the tribunal must assess it. In accordance with the principle of free assessment of evidence, such assessment is made at the arbitrators' discretion, based on a comprehensive, full and objective examination of the evidence available in the case. Hence, it is possible that the tribunal in making its decision may ignore the expert statements.

5.16 Does the tribunal need to give reasons for following or not following the statement of an expert?

As a general principle, the tribunal's decision must be reasoned. However, unlike state litigation, an arbitral tribunal is not obliged to provide reasons for following or not following the statement of an expert.

5.17 Can part of the decision by the tribunal be "delegated" to the expert?

No, there is no such option.

[12] Article 7 of the Federal Law "On the State Forensic Examination Activities"
[13] Article 29(2) of the Arbitral Tribunals Law

5.18 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

"Hot tubbing" is very common in construction arbitration and other ADR methods, especially on complex issues of a highly technical nature.

5.19 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country?

The procedure for site visits as such is not regulated at the legislative level, but the Arbitration Law provides for such an opportunity (Article 20(2)).

5.20 If not, are they allowed/mandatory?

Site visits by a tribunal are allowed. For instance, an arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among the arbitrators, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents[14].

5.21 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

Presence during the site visit is a party's right, but not an obligation. A party may participate in the site visit if it finds it necessary.

5.22 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction?

Witness testimonies in construction arbitrations and other forms of ADR are not common, but may be important depending on the situation.

5.23 Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

There are no restrictions. An arbitral tribunal is free to determine the admissibility, relevance, materiality and weight of any evidence. Arbitrators are to assess the evidence at their sole discretion.

[14] Article 20(2) of the Arbitration Law

5.24 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence?

Arbitrators or tribunals rendering binding awards have no limitations in determining the weight of any evidence.

5.25 Are there any rules on valuation of evidence in the law or in such rules?

There are no specific rules for the evaluation of evidence. As mentioned above, an arbitrator or tribunal rendering binding awards is free to determine the admissibility, relevance, materiality and weight of any evidence. The only requirement is that arbitrators must evaluate the evidence at their sole discretion, based on a comprehensive, full, objective and direct examination of the evidence available in the case.

6 Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction?

Yes, a party to arbitral proceedings may file an application for interim measures with the competent state court at the place of the arbitral proceedings or location of the property in respect of which interim measures are to be taken[15]. The application of interim measures by the competent state court cannot be regarded as being incompatible with the agreement to submit the dispute to an arbitral tribunal or as a waiver of such agreement.

When deciding on whether to apply interim measures, the competent Russian state court will, *inter alia*, check arbitrability of a dispute, validity of an arbitration clause (arbitration contract). It will also consider if any interim measures have been imposed by an international commercial arbitration court and if those measures are being complied with.

We would like to note, however, that despite theoretical possibility to have interim measures adopted by Russian courts, recent court practice shows that the application of interim measures remains rather unlikely. This is primarily caused by general reluctance of Russian commercial courts in applying interim measures, as well as difficulty in proving the necessity of such measures. We note that this statement is true for both arbitration and litigation in state courts.

[15] Article 25 of the Arbitral Tribunals Law

6.2 Are these measures usually decided by the arbitral tribunal or by a judge?

Both the arbitral tribunal and a judge are authorized to decide on these measures. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to apply such interim measure as the arbitral tribunal may consider necessary in respect of the dispute subject matter. The arbitral tribunal may also require any party to provide appropriate security in connection with such measure. In this case, the arbitral tribunal needs to determine on its own as to the interim measures to be applied.

At the same time, an arbitral tribunal, as a non-state jurisdictional authority has no public administrative rights; hence its authority is more to make a suggestion to one of the parties to the dispute not to take any action in respect of the subject of the dispute. Applicable legislation does not provide any negative consequences for non-compliance with such arbitration provisions. Therefore, if a party fails to apply interim measures following the "suggestion" of the arbitral tribunal, the other party usually seeks assistance of a state court, the decisions of which are binding for the parties.

6.3 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated *(g) decide upon any provisional relief such as interim or conservatory measures (...)* The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

In Russia arbitral tribunals are allowed to apply provisional relief in the form of interim measures until the final decision on the dispute is rendered. It is the arbitral tribunal that sets forth the time limits for the proceedings and for rendering a final decision. In most internal statutes of the arbitral tribunals it is stated that employees of the secretariat and arbitrators of such tribunals must take measures to ensure that the proceedings are completed within the shortest possible time.

7 Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

Since the Russian Federation is a party to the New York Convention (1958), binding decisions granted by arbitral tribunals of another country are enforceable in state courts of the Russian Federation.

A decision of an arbitral tribunal is to be followed voluntarily in accordance with the procedure and time limits set forth in the decision. Otherwise, the decision is subject to enforcement under the rules of enforcement proceedings in effect at the time of execution of the arbitral award, on the basis of a writ issued by the competent state court. Generally, the enforcement must be completed within 3 years from the date the writ is issued.

A mediation agreement is enforceable on the basis of voluntary conduct and good faith of the parties; however, protection of the rights that have been violated as a result of non-performance or improper performance of such a mediation agreement is carried out through means provided by the civil law[16]. The Civil Code of the Russian Federation provides for both judicial and non-judicial protection of violated or disputed civil rights. Therefore, protection is granted in accordance with the jurisdictional criteria established in the procedural laws, by a court of general jurisdiction, a commercial court or an arbitral tribunal. The same rules would apply to decisions of the DAB – they would not be directly enforceable as an arbitral award. However, the general measures for protecting violated rights would still apply.

7.2 Does the award or binding decision have to be reasoned?

Yes, it has to be reasoned.

The decision of the arbitral tribunal must specify, *inter alia*:

- the circumstances of the case established by the arbitral tribunal;
- the evidence which led the arbitral tribunal to conclusions on such circumstances;
- laws and other regulations the arbitral tribunal followed through the process of decision making[17].

[16] Article 12 of the Mediation Law
[17] Article 33 of the Arbitral Tribunals Law

The operative part of the decision must contain conclusions of the arbitral tribunal on approval or refusal to satisfy each point of the claim. The arbitral tribunal must also specify the amount of expenses associated with the resolution of the dispute in arbitration, the distribution of these costs among the parties, and, if necessary, the date and manner for execution of the decision.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

An arbitral award must be in writing and signed by the arbitrators comprising the arbitral tribunal, including arbitrator(s) with a dissenting opinion[18]. Separate opinions can be attached to the decision of the arbitral tribunal.

Unlike the procedural laws applicable to state courts (general jurisdiction and commercial), the law does not prohibit the announcement of the dissenting opinion of an arbitrator. Thus, in case of disagreement with the majority, the dissenting arbitrator shall set forth his/her reasons. This, however, does not exempt such an arbitrator from the obligation to sign the decision of the arbitral tribunal in order to indicate his/her participation in the arbitral proceedings.

The Mediation Law does not allow dissenting opinions, since the outcome of the mediation procedure is the mediation agreement which implies mutual consent of the parties to the dispute settlement. The situation with dissenting opinions is unlikely to arise in other available forms of ADR.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

Unless the parties agree otherwise, either party within 10 days after receiving the decision of the arbitral tribunal may apply to the tribunal for clarifications. In this case, the party seeking clarifications shall notify the other party of such application in writing. The arbitral tribunal is to examine the application within 10 days and issue either a ruling on clarification of the decision (without changing its content), which then becomes an integral part of the decision, or a ruling on refusal to clarify the decision.

The arbitral tribunal may correct misprints, typographical or mathematical errors at the request of either party or at its own initiative. The tribunal then issues a respective order, which becomes an integral part of the decision.

The decision of an arbitral tribunal adopted in the Russian Federation may be challenged by either party by filing an application for annulment of the arbitral

[18] Article 33 of the Arbitral Tribunals Law

award with a court of general jurisdiction or a commercial court in accordance with the jurisdictional rules within 3 months from the date the contested decision is received.

8 Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

As long as a third party decision is considered a binding arbitral award, it may be enforced through general procedure, similar to enforcement of foreign court judgments. Legal framework governing enforcement of arbitral awards consists of the New York Convention 1958, CPC, the Arbitration Law and the Arbitral Tribunals Law.

A party seeking to enforce an arbitral award must apply for recognition and/or enforcement to a state commercial court of the region where the debtor is located (registered) or, if the debtor's location (residence) is unknown, where his assets are located. Together with the application for enforcement, the party must submit (i) the duly authenticated original award or a certified copy thereof; (ii) the original arbitration agreement or a certified copy thereof; and (iii) if the award was issued in any language other than Russian, a duly certified translation thereof into Russian.

An application for recognition and enforcement is submitted to a judge who must review it within 3 months. The judge notifies the parties of the place and time of hearings, but failure by one of the parties to appear before the court does not preclude the consideration of the application.

As a general rule, parties applying for enforcement also seek to obtain a writ of execution, an official document issued by the court and giving the applicant the right to attach property of the debtor with assistance of state bailiffs (executors).

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

When it comes to recognition and enforcement of DAB-type awards, Russian law in this field is still under development. At the moment, there is no court practice regarding DAB-type awards.

As mentioned in item 1.10, although this is yet to be argued before courts, a DAB-type award might be enforceable in Russian courts, as long as such an award can be deemed an arbitral award.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Similar to the issue in the previous section, there is no case law at the moment which would support any of the possible answers. However, one might argue that such an award has even better chances of being enforced in Russian courts, as long as it complies with the general requirements specified in the applicable law. In particular, the award must explicitly state that this is an arbitral award that has the same force as any other award rendered on the merits, and shall be enforceable in the same manner (by analogy to settlement agreements entered into in the process of arbitration).

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity?

When enforcement of an award is sought, the opposing party may invoke any of the grounds set out in the New York Convention (1958) to prevent enforcement. Such grounds include, *inter alia*, situations when parties to an arbitration agreement were "under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made." The opposing party, therefore, may select one of the two strategies: either challenge the underlying arbitration agreement, challenge the award itself (due to procedural violations) or its enforcement.

An arbitration agreement may be challenged on any of the traditional grounds available under Russian contract law (cases of fraud, duress, material mistakes, etc).

When it comes to challenging arbitral awards and enforcement thereof, the most widely used ground (and, at the same time, the most controversial one), is contradiction to public order.

Until recently, Russian courts were actively applying the public order grounds for challenging the award. Although these grounds are generally construed very narrowly in other countries, Russian courts sometimes view any irregularity as sufficient grounds for declaring that it contradicts the public order of the country and that, accordingly, such irregularity is sufficient to invalidate the award.

8.5 Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

Yes.

8.6 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

Yes, an aggrieved party may seek remedy in courts, including review on the merits. Russian law does not recognize expert determination as an alternative method of resolving disputes, nor does it treat expert decisions as binding arbitral awards.

9 Trends and developments

a. Judicial system

Over the recent years, the Russian judicial system has been steadily improving, especially the branch of commercial courts. After introduction of the principle of reasonable time for trial and liability for failure to comply with it, proceedings in courts have become less protracted. Procedural rules have been updated and clarified several times in order to unify the procedural practices throughout courts of different regions and different levels.

Another important development of the Russian judicial system is the increasing role of judicial precedents, although officially not recognized so. In this context, the SCC is playing a key role in bringing together conflicting court practice and adopting uniform approaches. Commercial courts almost always follow recommendations of the SCC, but judges in courts of general jurisdiction are to a certain extent reluctant and skeptical about such recommendations.

Yet another major process that will have implications on the entire Russian legal system is the forthcoming merger of the two branches of the Russian court system – commercial courts (more advanced and professional) and courts of general jurisdiction (more conservative and slow). Many legal practitioners have expressed doubts as to whether this reform is actually needed, as they fear that the new system will inherit the disadvantages of the general jurisdiction courts – slower process, lack of unified practice and greater corruption risks. On the other hand, the idea of creating a unified judicial system seems to be a natural step toward the development of the Russian legal system in general.

b. Arbitration

When it comes to ADR, arbitration remains the most widely used method of private dispute resolution. Certain important steps have recently been taken to further improve the arbitration environment in Russia. In particular, over the last few years the SCC made several important decisions, clarifying its position with respect to key issues usually arising in the course of arbitration.

For instance, in 2010 in a groundbreaking ruling, the SCC held that Russian courts are authorized to issue interim measures in support of arbitration processes taking place abroad. Prior to that, Russian courts were unwilling to grant such measures and interpreted relevant provisions of the CPC in a manner limiting its application only to domestic proceedings.

In yet another important and most recent case, the SCC held that choice of jurisdiction clauses are invalid if they give one party the discretion to either submit the dispute to arbitration or to litigate in state courts, without providing the same scope of rights to the other party, because they violate the principle of procedural equality of the parties.

The main statutory source of law in this field is the Arbitration Law which was adopted in 1993 and since that time has not been amended in any way (save for one minor technical change). It is expected though that the Arbitration Law will in the near future be brought in line with the UNCITRAL Model Law. Amendments based on this Model Law have passed the first reading in the Lower Parliament (the 'Duma') in January 2012.

c. Other ADR forms

As described earlier, other ADR methods are not widely used in Russia, and arbitration remains the most popular among them. However, a new federal law on enhancement of reconciliation procedures, that was submitted to the Lower Parliament a year ago for consideration, might create the needed incentives for business to turn to ADR instead of courts and, therefore, make ADR methods more attractive.

10 Other Important Issues

We believe that all important issues are already covered in other sections of this submission.