

ICC ARBITRATION CLAUSE HELD UNENFORCEABLE IN RUSSIA

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In a recent decision, the Russian Supreme Court held that the International Chamber of Commerce's (ICC) standard arbitration clause was unenforceable. We look at what this means for parties seeking to arbitrate their disputes, and how they can maximise the chances of their choice being upheld.

The International Chamber of Commerce (ICC) standard arbitration clause and the Russian court decision

The clause, which [ICC](#) recommends for use by parties who want to submit disputes to arbitration under its rules, provides:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

In its decision, the Supreme Court found that the clause was uncertain because, although it specified that the [ICC](#) Rules should be applied in resolution of the dispute between the parties, it did not specify the institution which should administer the dispute; and so there was uncertainty as to the parties' intentions and the jurisdiction of the arbitrator.

The decision gives a surprisingly formalistic view of the effect of the standard clause, particularly given that the [ICC](#) rules referred to in it provide that:

- **Article 1** - The International Court of Arbitration (the "Court") of the International

Chamber of Commerce (the "ICC")... administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the "Rules"). The Court is the only body authorized to administer arbitrations under the Rules.

- **Article 6** - "By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court".

The finding on the enforceability of the arbitration clause was also arguably unnecessary when the court also considered there were public policy grounds to refuse enforcement of the award under the New York Convention. Its finding in this regard was that the Russian respondent company was bankrupt, and had agreed a settlement with its creditors. In the court's view, it would be contrary to public policy in Russia to allow enforcement of the award because it would amount to an unreasonable demand from one of the creditors outside the scope of the insolvency proceedings, which stood to violate the legitimate interests of the other creditors who had agreed settlement.

Whilst the outcome here appears to have been largely motivated by public policy considerations, it also raises important questions about the practice of using arbitral institutions' standard arbitration clauses for disputes which may have involvement in Russia, whether through counterparty nationality, applicable law, or the likely site of any future enforcement proceedings.

What can parties do to make their arbitration clause enforceable?

Whilst the ICC recommends that parties use its standard clause, it does also make clear that they are free to adapt it to their particular circumstances. Ordinarily this adaptability is used to add more detailed provisions about the conduct of the arbitration, e.g. as to the number of arbitrators, the place of arbitration and the language to be used in the proceedings. The ICC guidance makes it clear that parties should also "take account of any factors that may affect the enforceability of the clause under applicable law. These include any mandatory requirements that may exist at the place of arbitration and the expected place or places of enforcement".

This is an approach which the ICC already counsels for parties who wish to have an arbitration in mainland China, where it says it is prudent to include in their arbitration clause an explicit reference to the ICC International Court of Arbitration, and suggests the following language:

“All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

The decision suggests that parties who are seeking to refer disputes with a Russian connection (be it Russian law, a Russian counterparty, or the possibility that enforcement may later be sought in Russia) should adapt any arbitration clause in a similar way, to make explicit in the arbitration agreement not only that they wish the dispute to be governed by a particular institution's rules, but also that they want that institution to administer the arbitration.

If you wish to find out more, please contact a member of the [International Arbitration team](#).

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