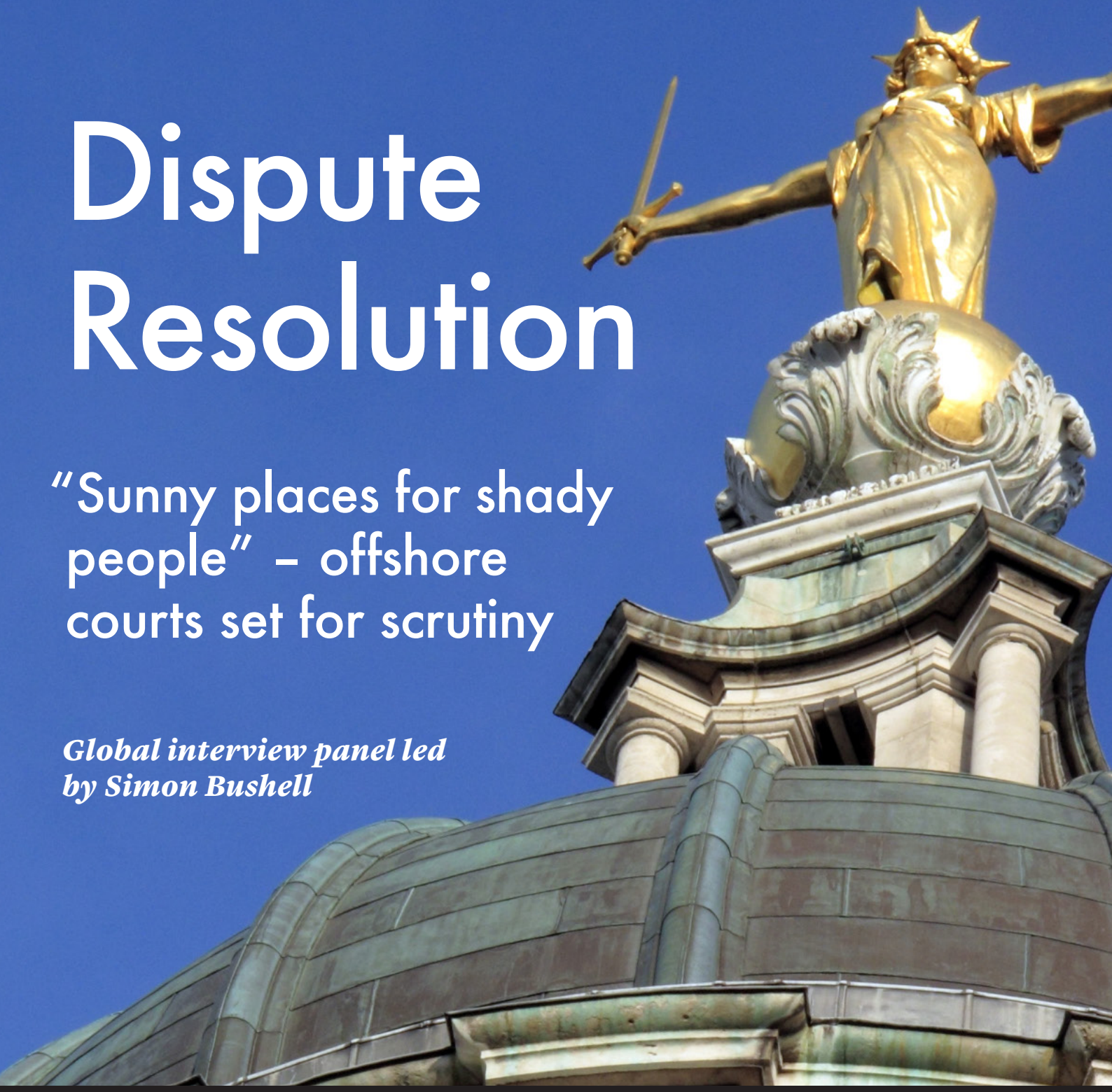
Volume 3 • Issue 7

GETTING THE DEAL THROUGH

market intelligence

Dispute Resolution



"Sunny places for shady people" – offshore courts set for scrutiny

Global interview panel led by Simon Bushell

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Yaroslav Klimov

Andrey Panov

DISPUTE RESOLUTION IN RUSSIA

Yaroslav Klimov, partner and head of the Russia and CIS dispute resolution practice, specialises exclusively in dispute resolution, and has significant experience in international arbitration, cross-border disputes and domestic litigation. A member of the Moscow Bar Association since 1997, Yaroslav is an arbitrator at the Singapore International Arbitration Centre, Pacific International Arbitration Centre, Russian Arbitration Association and the arbitration court of the Moscow International Chamber of Commerce. He has also acted as arbitrator under ICC Rules.

Andrey Panov is a dispute resolution lawyer based in Moscow. A senior associate at Norton Rose Fulbright, he focuses on representing clients in international arbitrations under the rules of various institutions, including the ICC, LCIA, SCC, SIAC and ICAC (Moscow), as well as in ad hoc arbitration. Andrey also successfully appears before all levels of Russian courts in arbitration-related matters, including the enforcement of arbitral awards. He is a councillor at the LCIA European User's Council and the regional representative of the LCIA YIAG for Russia.

Sergey Avakyan is a dispute resolution lawyer based in Moscow. An associate at Norton Rose Fulbright, he exclusively specialises in dispute resolution. Sergey represents Russian and foreign clients in general commercial, construction, insurance and administrative disputes. Sergey is a member of a number of arbitration groups, including the ICC YAF, LCIA and YIAG.

Natalia Klimova qualified as a lawyer in Russia and is based in Moscow, where she is an associate at Norton Rose Fulbright. She specialises exclusively in dispute resolution with a focus on local litigation. Natalia represents clients before the Russian state *arbitrazh* (commercial) courts and courts of general jurisdiction and is experienced in domestic and cross-border corporate disputes.

GTDT: What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes?

YK & SA: Russian parties clearly prefer litigation before Russian courts, though for cross-border projects parties usually select arbitration to ensure any award will be enforceable abroad. There are two branches within the Russian courts system – courts of general jurisdiction (dealing with disputes involving individuals) and *arbitrazh* (commercial) courts for commercial disputes.

Litigation before Russian courts is quick and comparatively cheap, which explains clients' preference for litigation. Also, it is very difficult to obtain interim measures in support of arbitral proceedings.

Nonetheless, arbitration is also relatively popular. Domestic arbitration in Russia does not enjoy the same reputation and respect as international arbitration because of various abuses by users and local arbitral institutions. However, recent arbitration law reform will hopefully improve the situation and make domestic arbitration more trustable. But even now there are quite a few reputable arbitral institutions to refer cases to, particularly in the cross-border context. Thus, if the seat of arbitration is to be in Russia, the default choice for most international clients is the Moscow-based International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, which is the oldest and the most reputable arbitral institution in Russia. Also, the Russian Arbitration Association (established by a significant number of law firms a few years ago) has since 2012 offered administrated arbitration under the UNCITRAL Arbitration Rules.

Sergey Avakyan

Other ADR mechanisms are not that popular in Russia, because clients want the resolution of their dispute to result in a binding decision that is enforceable against the other party, rather than yet another (settlement) agreement that may eventually be breached.

GTDT: Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences?

YK & SA: Over the past decade, choosing a foreign law (primarily English law) as well as a foreign-seated arbitration for cross-border transactions became the common practice for large and medium-sized businesses in Russia. English law has been considered as more comfortable for the structuring of M&A and related deals with Russian participants.

However, recent economic, political and legislative changes have impacted this approach. For instance, following the imposition of sanctions against Russia by the EU and the United States, many Russian companies, especially those with state participation, have started opting for Singapore law (instead of English law) and for the Singapore International Arbitration Centre (SIAC), and sometimes for the Hong Kong International Arbitration Centre (HKIAC) instead of the usual European arbitral centres.

In parallel to this, the Russian Civil Code has been reformed to provide the tools needed in business transactions (for example, rules on representations and warranties). However, this has not brought about a significant switch to Russian law so far.

When drafting dispute resolution clauses, it is worth remembering that the approach of Russian courts to interpretation and enforcement of 'hybrid' clauses (ie, clauses that entitle one of the parties to choose between several fora) remains largely unsettled. Thus, in 2012, the Russian Supreme Arbitrazh Court found that an asymmetrical clause granting the right to choose between litigation and arbitration to only one party to a contract (eg, the buyer or the lender) violates the rights of the other party, and therefore the asymmetrical clause should be deemed invalid. On the other hand, in May 2015, the Supreme Court of Russia upheld a clause that granted the claimant a choice of forum rather than specifying one. Thus, if a hybrid clause is needed, it should not be drafted as a unilateral option available to only one of the parties.

In reality, many Russian judges struggle with foreign-law-governed cases, and therefore the assistance of the parties' counsel in establishing the content of the applicable law is usually needed. Russian offices of international law firms seem to be better equipped to cope with this task, as they

may benefit from a large network of their own specialists located in many relevant jurisdictions. Russian law firms would have to hire co-counsel from such jurisdictions, which could compromise quality or increase costs.

GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?

YK and NK: The dispute resolution market in Russia has become very competitive, particularly following the economic downturn, which on the one hand increased the amount of work, but on the other hand made clients more cost-conscious. The main competition at the moment is between larger Russian law firms and international offices of international law firms. There is also growing competition from specialised dispute resolution boutiques established recently by some of the leading litigators in the market.

At the same time, competition between Moscow and St Petersburg-based firms and regional firms is largely non-existent, as they usually work on different markets. Thus, Moscow and St Petersburg firms usually work on more complex projects, often involving cross-border elements, (ie, disputes where the increased cost would be justified). In contrast, while local firms have the undoubted advantage of charging much lower fees, they would in many cases struggle to deliver the same Western-style quality, and may have significant difficulties in communicating with clients in English. There are, however, new services that may decrease the costs of services even where larger international firms are involved. For example, certain firms offer services studying case files at clients' request and providing copies to Moscow-based lawyers. This is certainly beneficial, particularly if the relevant court is located far from Moscow, such as in the Far East.

The legal profession in Russia remains largely unregulated (with the exception of criminal lawyers). However, in recent years much has been said in favour of a reform that would leave representation before Russian courts in civil and commercial cases only open to advocates and in-house lawyers. The idea is that, hopefully, this would increase the quality of legal representation in Russian courts, which has been needed for quite some time now. If these plans were realised, the number of advocates would increase significantly, but it remains to be seen whether this would improve the quality as well. Hopefully, it would not create any bureaucratic hurdles for experienced practitioners nor be used as a tool for unfair competition.

GTDT: What have been the most significant (by value or impact) recent court cases and litigation topics in your jurisdiction?

NK: Quite recently, the Supreme Court rendered two very important decisions, which may eventually change the landscape of shareholder disputes in Russia. It confirmed the rights of a beneficiary who owns Russian companies through a long chain of foreign (mostly offshore) companies to challenge decisions made during shareholders' meetings or challenge transactions that impact on the rights of the beneficiary as if it were a direct shareholder (cases No. A40-104595/2014 and No. A40-95372/2014).

In these cases, the claimant was a beneficial owner of certain shares in a Russian company and in this capacity filed two claims with the Arbitrazh Court of the City of Moscow challenging (1) a decision of the general shareholders' meeting to appoint a general director and (2) a series of transactions involving the withdrawl of assets effected by that general director. Both claims were rejected by the courts of three instances because only direct shareholders were said to have standing to challenge the decision or the transactions. However, when the cases faced the 'second cassation' in the Supreme Court, the judicial board for economic disputes decided that the courts had not considered all the circumstances of the matter, reversed all judgments and returned the cases for consideration anew. Thereby the Supreme Court defended the rights of beneficial owners and applied what is, for the Russian judicial system, quite an innovative, informal approach. As a result, a month ago the Arbitrazh Court of the City of Moscow reconsidered one of the cases and granted the claim for invalidation of the decision of the shareholders' meeting.

GTDT: What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, the duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

YK, AP & NK: Litigation before Russian courts is relatively inexpensive and quick. The maximum filing fee is capped at around US$3,130 where the value of the claim is above US$550,000. Many companies handle litigation with the assistance of their in-house teams. Even when external counsel are retained, their fees are likely to be lower than in many other jurisdictions, as Russian litigation usually implies fewer time-consuming and costly tasks, such as document production or lengthy hearings for cross-examination of witnesses. In terms of speed, a case before the commercial court may be considered by three instances (first, appellate and cassation) within eight to 12 months, on average, even though some cases may continue the journey through the court instances for years.

Low costs and high speed are what Russian clients are used to. For this reason, they may sometimes be reluctant to agree to arbitration. Also, the negative cost implications, even when the claim is unmeritorious, are very limited, as the courts are very reluctant to order reimbursement of legal expenses in full. For this reason, Russian clients would usually litigate on principle or for tactical reasons in a situation where a foreign client would negotiate a settlement.

However, speed comes at the expense of the quality sometimes. Because of very significant caseload pressures, Russian judges are not very keen on devoting the attention that is required to examine complex factual backgrounds or innovative legal arguments.

One additional disadvantage of litigation before Russian courts is the limited enforceability of the resulting judgment outside Russia. In this respect, international arbitration is a more popular choice for cross-border transactions; however, Russian clients may be surprised sometimes by the costs involved in arbitral proceedings and their duration. At the same time, arbitration, even before Russian-based arbitral institutions, usually offers better opportunities to present your case, particularly if it is facts-intense or governed by foreign law.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

NK & SA: On 2 March 2016, the Russian legislator introduced a number of important amendments to the Arbitrazh Procedural Code. Among merely technical amendments, this law introduced the following significant innovations in commercial litigation.

First, as of 1 June 2016 in most commercial cases the claimants would have to comply with a mandatory pretrial procedure. Thus, a claim may be filed after 30 days from the day of sending the claim or demand letter to the opposing party with a view to settling the matter out of court. Failure to furnish proof of compliance with this requirement will result in the claim being shelved or consequently having to leave it without consideration if the claimant fails to rectify this. While the claimant can then bring a claim anew, this may be risky if the limitation period is about to expire.

Second, there is now a new procedure for enforcement of uncontested debts by court orders. Court orders would be available to enforce outstanding debts of no more than 400,000 roubles arising out of non-performance of a contract and not contested by the debtor. The order will be rendered by the court without holding a hearing within 10 days after the filing of the relevant claim. However, if the respondent

THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

Recently we advised one of our clients after the Russian *arbitrazh* (commercial) courts of first and cassation instances had reviewed an arbitral award on the merits, despite a clear prohibition against doing so, and had refused to enforce the award. So after the client was unsuccessful in the lower courts, we were instructed to prepare and file the cassation complaint to the Supreme Court, following which the case was settled. This case was interesting as it concerned the application of public policy as grounds for refusal of enforcement and a prohibition against the courts reviewing an arbitral award on the merits.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

We would reform the courts of general jurisdiction and bring them up to the more modern standards of the commercial courts. Today the difference between these two main parts of the Russian court system is still obvious: you spend much more time when you litigate in a court of general jurisdiction. The functioning of the cassation and revision instances should become more transparent and efficient for the parties, with deadlines for reviewing the cassation and revision appeals observed much more strictly. The reasoning of judgments and rulings of the courts of general jurisdiction should become more detailed.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

Russian judges still remain overloaded by the number of cases they have to consider. According to market statistics, a Russian judge considers approximately at least 50 cases each month, so parties should not be surprised if the court allocates only 15 minutes to considering their complex case. In these circumstances the parties' representatives should prepare their oral pleadings in a very structured, clear, short format to be able to explain their positions to the judge very quickly. The quality of this preparation should not be underestimated even though the written submission should also be quite detailed.

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objects to rendering the order or denies the existence of the debt, the court resolves the dispute under the standard procedural rules.

Third, there have been certain changes to the simplified court procedure. This procedure is available in disputes over enforcement of debts of no more than 500,000 roubles. Unlike the court orders procedure, the simplified procedure applies even where the respondent contests the debt. The case is resolved on the basis of documents only (ie, without holding a hearing within two months from the filing of the claim).

GTDT: What have been the most significant (by value or impact) recent trends in arbitral proceedings in your jurisdiction?

AP: There are few. First and foremost, sanctions have significantly affected both choice of law and choice of jurisdiction for cross-border transactions. In addition, they have also resulted in a fairly significant turn to the East when it comes to selecting business partners. As a result, we now see more and more arbitration clauses in favour of Asian arbitral institutions, particularly the SIAC and sometimes the HKIAC. Obviously, it will take a few years (on average between two and three) before a new contract results in a dispute, but most likely we will see growth of Russia-related cases in major Asian arbitration hubs in the foreseeable future.

The enhanced PR activities of the major international arbitral centres alerted the potential users to the larger diversity of arbitral institutions and variety of services available under their rules (eg, expedited procedures). At the same time, the economic downturn made the clients more receptive to dispute resolution mechanisms. As a result, more attention is now paid to drafting arbitration clauses and selecting seats of arbitration with various factors weighted. Arbitration clauses are becoming better tailored to the needs of particular transactions, and this should eventually help eliminate disproportionate arbitration costs.

Furthermore, Russian clients these days appear to be more open to amicable settlement of disputes than ever before. The significant costs and duration of arbitral proceedings on the one hand and the falling economy on the other have turned once very litigious Russian companies


Natalia Klimova

into more reasonable ones that are open to business negotiations.

Finally, when a dispute is inevitable, it seems that Russian clients are tending more to use locally based lawyers for their arbitration work. This includes not only Russian offices of major international law firms, but also leading Russian firms and dispute resolution boutiques, many of which have lawyers with relevant experience in cross-border disputes and international arbitration. In the long term, it is likely to lead to a significant improvement in the skills and quality of Russian arbitration practitioners, and in the short to medium term may result in costs savings for clients, as local rates would in many cases be lower than those in Paris or London.

GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

AP & SA: Most of the recent trends related to arbitral proceedings are connected to the recent amendments to the Russian legislation on arbitration, which came into force only recently – as of 1 September 2016. The reform was driven by the desire to develop the Russian arbitration landscape and enhance trust in arbitration as a reliable method of dispute resolution.

In particular, the reform introduces significant changes to the regulation of arbitral institutions functioning in Russia, aiming to get rid of 'pocket' arbitral institutions (created by some of the major corporations for resolution of disputes with their contractual partners) and those institutions used for fraudulent and doubtful purposes. From now on, only non-commercial organisations can establish arbitral institutions and they would need to be registered at the Ministry of Justice and licensed by the Russian government to administer disputes in Russia. Notably, a licence would also be needed by international arbitral institutions for them to administer arbitrations seated in Russia, otherwise they would be considered ad hoc arbitration.

In addition, the amendments brought both international and domestic arbitration regimes into the same framework, largely based on the UNCITRAL Model Law. Until now, domestic arbitration – which had caused the most concerns – was governed by a distinct piece of legislation that had little in common with the law on international commercial arbitration.

The amended laws allow the parties to administered (ie, not ad hoc) arbitrations seated in Russia to opt out from judicial control in certain instances. Most importantly, the parties by their express agreement may exclude recourse to the Russian courts against the award on jurisdiction or on the merits. The laws also aim to provide more certainty as to which disputes can be referred to arbitration, including in relation to corporate disputes.

The amendments should also improve enforcement of arbitral awards in Russia. Thus, starting from 1 January 2017, applications for setting aside and for enforcement will have to be resolved by the first instance within one month (instead of the current three months). The grounds for setting aside and refusing to enforce have also been edited to bring them more in line with the UNCITRAL Model Law.

While these reforms could improve the arbitration landscape in Russia, it still remains to be seen to what extent the courts will be supportive.

GTDT: How popular is ADR (eg, mediation, expert negotiation) as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

AP & SA: ADR is not really popular with Russian parties, because they usually prefer having an award that is enforceable against the opposing party. While Russia adopted the Law on Mediation in 2010, in practice parties have rarely referred to mediation until now.

Sometimes contracts provide for multi-tier dispute resolution, but in most cases they are limited to a requirement to attempt to resolve the dispute through negotiation. Expert determination and dispute resolution boards are frequently used in construction contracts, particularly those modelled after FIDIC. Expert determination is also used in cross-border commodity trading, particularly with respect to determining the sales price in long-term contracts.

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