



## **MOSCOW RULES**

Russian dispute resolution reviewed

## **FRENCH CLASS ACTIONS**

Change to consumer justice

## **ADR IN CONSTRUCTION CLAIMS**

Adjudication reigns supreme

www.cdr-news.com Volume 5, Issue 5 September-October 2014



# RUSSIAN ARBITRATION REFORMS

Repatriating Russian disputes

16.10

Kommersant  
Publishing House &  
Russian Arbitration  
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International  
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CONTACT:  
[DMITRY.BEZUKOV@ARBITRATIONS.RU](mailto:DMITRY.BEZUKOV@ARBITRATIONS.RU)

# Arbitration in Russia:

NEW SOLUTIONS  
FOR BUSINESS

What arbitration business needs today?  
Impact of the Internet and electronic communications for business development (legal aspects)  
On-Line Dispute Resolution Service. The experience of Foreign Institutions  
Consideration of disputes by On-Line arbitration under the RAA rules

**Invited speakers:**

**Mikhail Galperin**, Head of the economic legislation department, Russian Ministry of Justice

**Vladimir Lisin**, Chairman, NLMK

**Michael McIlwrath**, Associate General Counsel – Litigation for General Electric Oil & Gas

Mark Appel, Senior Vice President of ICDR

**Ruslan Ibragimov**, Vice President, Corporate and Legal Matters, Member of the Executive Board, MTS

**Vladimir Khvalei** - RAA Chairman; Partner Baker & Mckenzie

**Mr Loïc E. Coutelier**, Esq. Director of Arbitration and Product Manager, Modria.com



# & time & change

This issue of *CDR* comes at a time of change, as **Edward Machin** departs as editor. Edward's excellence as a writer, undoubted editorial ability, and interest in all aspects of disputes – especially arbitration – mark him out as a legal journalist. As he moves on to a legal career, we at *CDR* wish him well for the future.

Edward taught me much, as did his predecessors, **Ben Lewis** and **Fraser Allan**, in covering change in the disputes market. I look forward to working with our contributors and readers in covering such change in the future and the challenge to clients it represents.


Change and challenge are both present in Russia's relationship with the legal landscape. Recent events in Ukraine have accentuated the need for businesses to re-evaluate Russian relationships. Likewise, law firms have been swift to offer advice on the effective risk management of Russian disputes, both now and in the future.

Both clients and counsel face an uncertain future, given the volatile nature of civil conflict in Ukraine. While the impact of sanctions remains hard to predict, this issue assesses some possible outcomes (page 27), and surveys the support for arbitration given across Russia and the CIS (page 18), while also looking at how Russia has sought to reform its dispute resolution regime (page 31).

How effectively Russia will compete with other centres as a jurisdiction of choice remains an open question, and one to which careful clients will seek an answer sooner, rather than later.

**Ben Rigby**  
Editor

 [ben.rigby@glgroup.co.uk](mailto:ben.rigby@glgroup.co.uk)

 [@Bert\\_Digby](https://twitter.com/Bert_Digby)



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ISSN: 2044-5121

**Editor**  
Ben Rigby  
ben.rigby@glgroup.co.uk

**Consulting Editor**  
Edward Machin  
edward.machin@glgroup.co.uk

**Staff Writer**  
Dahlia Belloul  
dahlia.belloul@glgroup.co.uk

**Staff Writer**  
Andrew Mizner  
andrew.mizner@glgroup.co.uk

**Staff Writer**  
Rebecca Carter  
rebecca.carter@glgroup.co.uk

**Art Director**  
Katrin Adam  
katrin.adam@glgroup.co.uk

**Distribution Manager**  
Mark Carroll  
mark.carroll@glgroup.co.uk

**Account Director**  
Daniel Confessa  
daniel.confessa@glgroup.co.uk

**Group Publisher**  
Richard Firth  
richard.firth@glgroup.co.uk

**Group Editor**  
Fraser Allan  
fraser.allan@glgroup.co.uk

**Group Consulting Editor**  
Alan Falach  
alan.falach@glgroup.co.uk

Published by  
Global Legal Group Ltd  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
www.glgroup.co.uk

**GLG**  
Global Legal Group

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## RUSSIA AND THE CIS

**Steven Finizio** and **Kenneth Beale** of **WilmerHale** survey international arbitration in the Commonwealth of Independent States; London's continued lure for Russian parties; **Fredrik Svensson** and **Fredrik Ringquist** of **Mannheimer Swartling** consider the applicable arbitration law of Russian-related contracts; assessing reforms to Russia's dispute resolution laws; CIS claims beyond the headlines; Russian disputes – the offshore angle



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# eastern

## a p p r o a c h e s

Steven Finizio and Kenneth Beale of WilmerHale survey the current status of international arbitration in the Commonwealth of Independent States

**M**ore than two decades after the fall of the Soviet Union, the economic and political influence of the nine former Soviet republics that together form the Commonwealth of Independent States (CIS) is on the rise. Following the global economic slowdown in 2008 and 2009, most CIS countries' economies are once again growing.

As this growth continues, and as foreign trade involving these countries expands, the use of international arbitration as a mechanism for resolving disputes with CIS counterparties is also likely to increase. In recent years, most CIS countries have become more arbitration-friendly, at least in part to attract foreign investment. All CIS countries are now parties to the New York Convention<sup>1</sup>; many have also modernised their arbitration laws. There also has been rapid growth in the number of arbitral institutions in the region, although most of these institutions have limited experience and foreign parties usually avoid them. All but one CIS country have signed the ICSID Convention, and CIS countries are parties to nearly 400 bilateral investment treaties. All CIS member states are members of the Energy Charter Treaty (ECT), except Russia, which withdrew its provisional acceptance in 2009. To date, nearly forty ICSID and ECT arbitrations have been brought against CIS countries (only Belarus has never faced either type of arbitration), thereby increasing their exposure to international arbitration.

Notwithstanding these developments, many CIS countries still have only limited actual experience with international arbitration, and many CIS countries have limited – and uneven – records with regard to the enforcement of foreign arbitral awards. As a result, international parties are frequently reluctant to agree to arbitrate in the region, at least in part because of concerns about the domestic courts' lack of experience with arbitration, a perceived risk of bias in favour of local parties, and worries about corruption.

In this article, we summarise the status of international arbitration in the CIS on a country-by-country basis.



## Armenia

	Signed	Ratified/Acceded
New York Convention		1997
ICSID Convention	1992	1992
Kiev Convention	1994	1994
Energy Charter Treaty	1994	1997

Armenia acceded to the New York Convention in 1997, ratified the ICSID Convention in 1992 and is a signatory to the Kiev Convention. Armenia also has ratified the ECT and is the only CIS country that has ratified the Treaty's Trade Amendment, which incorporates rules and practices of the World Trade Organization – e.g. regarding non-discrimination and transparency – into the Treaty's trade provisions. Prior to 2006, Armenia's arbitration laws were highly idiosyncratic and diverged significantly from the UNCITRAL Model Law.

In 2006, Armenia adopted a new arbitration law, which largely follows the Model Law. Armenia's 2006 arbitration law follows the New York Convention in providing that foreign arbitral awards are to be recognised and enforced in Armenia, except if one of the limited grounds set out in the New York Convention applies – although, as with most other CIS countries, the Armenian courts have only limited experience with the enforcement of foreign awards.



## Azerbaijan

	Signed	Ratified/Acceded
New York Convention		2000
ICSID Convention	1992	1992
Kiev Convention		2003
Energy Charter Treaty	1994	1997

Azerbaijan acceded to the New York Convention in 2000, ratified the ICSID Convention in 1992, and is a party to the Kiev Convention. Azerbaijan also has ratified the ECT and applies its Trade Amendment provisionally, i.e. to the extent that it is not inconsistent with its constitution, laws or regulations. Prior to 1999, arbitration in Azerbaijan was virtually non-existent. In 1999, the Azeri government adopted an arbitration law that generally conforms to the UNCITRAL Model Law, although courts in Azerbaijan still have little experience with international arbitration.



## Belarus

	Signed	Ratified/Acceded
New York Convention	1958	1960
ICSID Convention	1992	1992
Kiev Convention	1992	1992
Energy Charter Treaty	1994	

Belarus's reputation as "Europe's last dictatorship" and Western economic sanctions targeting it have made it less attractive to foreign investors than other CIS countries, and its courts have relatively limited experience with international arbitration. Belarus ratified the New York Convention in 1960, ratified the ICSID Convention in 1992 and is a signatory to the Kiev Convention. Belarus has not ratified the ECT, although it applies it provisionally. In 1999, Belarus adopted a new international arbitration law based on the 1985 version of the Model Law, although it differs in a number of significant ways.

Belarus's arbitration law states that foreign arbitral awards shall be recognised and enforced in accordance with Belarus's commercial procedural legislation. The Belarusian Commercial Procedure Code provides for the recognition and enforcement when required by international agreements to which Belarus is a party – which means that New York Convention awards should be enforceable in Belarus under that Code.

However, there remain potentially significant limitations under Belarus law regarding the enforcement of foreign arbitral awards. For instance, under a 2005 resolution of the Supreme Commercial Court of Belarus providing general guidance to courts, a foreign arbitral award settling a dispute between two or more Belarusian companies violates the public policy of Belarus and will not, as a result, be recognised. ▶



## Kazakhstan

	Signed	Ratified/Acceeded
New York Convention		1995
ICSID Convention	1992	2000
Kiev Convention	1992	1994
Energy Charter Treaty	1994	1995

Kazakhstan currently has one of the most vibrant economies in the CIS and its legislature has adopted a variety of pro-investment laws. Kazakhstan acceded to the New York Convention in 1995, ratified the ICSID Convention in 2000 and is a signatory to the Kiev Convention. Kazakhstan also has ratified the ECT and applies its Trade Amendment provisionally.

In 2004, Kazakhstan adopted a new law on international arbitration that generally follows the Model Law. Under that law, the definition of what constitutes an international arbitration is narrow, with only disputes involving at least one non-resident of Kazakhstan being considered to be international. This means arbitration between a Kazakh company and a wholly-owned Kazakh subsidiary of a foreign company would be deemed to be a domestic dispute. Kazakhstan's international arbitration law also is limited to contractual disputes.

While in the past Kazakh courts would review the merits of a foreign arbitral award when deciding whether to enforce it, Kazakhstan's law now provides that recognition and enforcement of a foreign award can only be denied for the limited bases set forth in the New York Convention. However, Kazakh courts do not yet have an extensive track record in enforcing foreign awards.



## Kyrgyzstan

	Signed	Ratified/Acceeded
New York Convention		1996
ICSID Convention	1995	
Kiev Convention	1992	1994
Energy Charter Treaty	1994	1997

Kyrgyzstan acceded to the New York Convention in 1996 and is a signatory to the Kiev Convention. Although also a signatory to the ICSID Convention, it has not ratified it. Some of Kyrgyzstan's bilateral investment treaties do, however, provide for arbitration pursuant to the ICSID Additional Facility Rules, thus making it possible for an investor from a country that is a party to one of these treaties – and from a contracting state to the ICSID Convention – to compel Kyrgyzstan to arbitrate under these Rules. Kyrgyzstan has ratified the ECT and applies its Trade Amendment provisionally.

In 2002, Kyrgyzstan adopted a new arbitration law. Prior to 2002, arbitration was virtually non-existent. Indeed, in 1997, the Kyrgyz Constitutional Court abolished the Arbitration Court at the Kyrgyz Chamber of Commerce on the basis that only national courts could perform a judicial function. The 2002 law was intended to make Kyrgyzstan more arbitration-friendly. While the Kyrgyz law contains some provisions similar to those found in the Model Law, the UNCITRAL Secretariat does not consider it to be based on the Model Law. Among other differences, Kyrgyzstan's law does not expressly apply to international arbitration, although it does refer to the enforcement of foreign arbitral awards.

In 2013, the Kyrgyzstan Parliament amended the country's Civil Procedure Code to allow parties to arbitral proceedings to seek interim measures from state courts, provided that the requesting party provides the court with a copy of the statement of claim certified by the applicable arbitral institution. That move nonetheless leaves open the possibility that this provision could be interpreted to preclude interim measures in connection with ad hoc proceedings. While Kyrgyz law provides for the recognition and enforcement of foreign arbitral awards, either may be denied if a Kyrgyz court is considering or has ruled on the same matter, or if it would affect the sovereignty, or threaten the security, of Kyrgyzstan.





## Moldova

	Signed	Ratified/Acceeded
New York Convention		1998
ICSID Convention	1992	2011
Energy Charter Treaty	1994	1996

Moldova acceded to the New York Convention in 1998 and ratified the ICSID Convention in 2011. It also has ratified the ECT and applies its Trade Amendment provisionally. It is not a party to the Kiev Convention.

Prior to 2008, arbitration in Moldova was relatively rare outside of the agricultural sector. In 2008, Moldova adopted new domestic and international arbitration laws designed to make Moldova a more arbitration-friendly jurisdiction. However, those laws differ in a number of important ways from the Model Law. Moldovan law does provide for the recognition and enforcement of foreign arbitral awards, which may only be denied on limited grounds. However, Moldovan courts do not yet have extensive experience with international arbitration or in enforcing foreign arbitral awards.



## The Russian Federation

	Signed	Ratified/Acceeded
New York Convention	1958	1960
ICSID Convention	1992	
Kiev Convention	1992	1992
Energy Charter Treaty	1994	

The approach to international arbitration taken by Russia – the most economically and politically influential CIS member state – has been in a state of flux in recent years. Among other things, new international arbitration legislation has been proposed but not adopted (see page 31); Russia has withdrawn from the ECT; and Russian courts have taken divergent approaches to international arbitration. As a result, notwithstanding its economic and political influence, Russia has not developed as a major international arbitration jurisdiction.

Russia ratified the New York Convention in 1960 and is a signatory to the Kiev Convention. While Russia signed the ICSID Convention in 1992, it has

not ratified it. Likewise, although Russia signed the ECT in 1994, it never ratified it and withdrew from the Treaty in 2009. From 1994 to 2009, Russia applied the Treaty provisionally.

In 1993, Russia adopted a new international arbitration law. While this law closely follows the Model Law, at times the Russian courts have applied it in a restrictive manner. For example, this law states that any civil law dispute is arbitrable unless Federal law provide otherwise. In 2012, in *Maximov v NLMK*, Russia's Supreme Commercial Court used this provision to restrict the arbitrability of disputes arising out of share purchase agreement, holding that under Russia's Arbitrazh (Commercial) Procedural Code, such disputes must be heard by Russian courts.

In early 2014, the Russian Ministry of Justice proposed draft legislation designed to make Russia a more attractive jurisdiction for international dispute resolution. However, this draft legislation has been heavily criticised for, among other things, failing to sufficiently narrow the scope of non-arbitrable disputes in Russia, and it appears unlikely that the Russian Parliament will pass this legislation at any time soon.

Russia's current international arbitration law provides for the recognition and enforcement of foreign arbitral awards, with only limited grounds for denying recognition and enforcement. However, Russian courts have been criticised for too frequently refusing to enforce foreign arbitral awards under the guise of public policy. While "public policy" is not defined under Russian law, some Russian courts have interpreted the public policy exception in the New York Convention broadly to refuse to enforce awards against Russian parties.

In 2013, Russia's Supreme Commercial Court took steps to address this by issuing an information letter that provides a narrower interpretation of that ground for refusing enforcement, although the effect of this letter remains unclear. The perception of the willingness of Russian courts to enforce awards against Russian parties may also be affected by how Russia responds to the Yukos USD 50 billion award made in July 2014 under the ECT, although that case may be too exceptional to draw broader conclusions from Russia's response. ►

Unlike arbitral institutions in other CIS countries, the International Commercial Arbitration Court (ICAC) of the Russian Chamber of Commerce and Industry administers a significant number of arbitrations. In 2012, according to the ICAC, it registered 241 claims with parties from 47 countries, with the majority of non-Russian parties being from Eastern Europe and CIS countries.

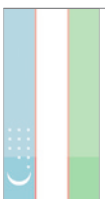


## Tajikistan

	Signed	Ratified/Acceded
New York Convention		2012
Kiev Convention	1993	1994
Energy Charter Treaty	1994	1997

While Tajikistan acceded to the New York Convention in 2012, is a signatory to the Kiev Convention and has ratified the ECT (and applies its Trade Amendment provisionally), it is the only CIS member state that has not signed the ICSID Convention. The status of international arbitration in Tajikistan is uncertain. The country does not have an international arbitration law, and its courts therefore have little experience with either domestic or international arbitration.

Tajikistan's Commercial Procedure Code provides for the recognition and enforcement of foreign arbitral awards, and it sets forth only limited grounds for denying recognition or enforcement. However, Tajik courts have little experience enforcing international arbitral awards.



## Uzbekistan

	Signed	Ratified/Acceded
New York Convention		1996
ICSID Convention	1994	1995
Kiev Convention	1993	1993
Energy Charter Treaty	1995	1995

Uzbekistan acceded to the New York Convention in 1996, ratified the ICSID Convention in 1996 and is a signatory to the Kiev Convention. Uzbekistan also has ratified the ECT and applies its Trade Amendment provisionally. Uzbekistan has no separate international arbitration law, although in 2006 it adopted a new domestic arbitration law loosely based on Model Law principles.

In 2013, the Supreme Economic Court of Uzbekistan issued a resolution regarding the recognition and enforcement of foreign arbitral awards, notwithstanding the absence of a formal international arbitration law. While this resolution reflects an arbitration-friendly approach, Uzbek courts do not yet have extensive experience enforcing foreign arbitral awards.

For most foreign parties, international arbitration remains a more appealing option than litigation when dealing with CIS parties, and the fact that a number of CIS states have adopted arbitration-friendly legislation in recent years reinforces the potential advantages of international arbitration. However, foreign parties are likely to continue to push for arbitration seated outside of the CIS and to have concerns about enforcement of arbitral awards until there is a perception that the CIS courts are committed to properly implementing international arbitration laws and to overcoming perceptions of bias against foreign parties. ■

<sup>1</sup> In addition, seven CIS countries – Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan – have signed the Kiev Convention on the procedure for Resolving Disputes Relating to Business Activities of 1992, which provides for the enforcement of judicial and arbitral awards.

## ABOUT THE AUTHORS



**Steven Finizio** is a partner at WilmerHale in London. His practice focuses on complex commercial and regulatory disputes, and concentrates primarily on international arbitration.

He has advised clients regarding disputes under the rules of most leading international arbitration institutions and in ad hoc proceedings, and also serves as an arbitrator.



**Kenneth Beale** is a counsel in WilmerHale's litigation/controversy department, and a member of the firm's international arbitration practice group. He has represented

clients before most major arbitral institutions, sited at multiple seats and governed by a wide variety of laws, and he has extensive experience representing clients in disputes involving Russia, Eastern Europe and Asia.

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