

RUSSIA AS A PLACE FOR ARBITRATION

Survey by the Russian National Committee of the International Chamber of Commerce – ICC Russia



Vladimir Khvalei
ICC Russia, Chairman
of the Arbitration
Commission

INTRODUCTION

In 2011 – 2012 the Russian National Committee of the ICC (hereinafter, the “ICC Russia”) conducted a survey called “Russia as a Place for Arbitration”¹. During the time that passed since this study, many events have occurred, including the imposition of sanctions by a number of Western countries against certain individuals and companies from Russia. In addition, in 2016–2017, an arbitration reform was carried out, and one of its goals was to strengthen Russia’s position as a possible place for international arbitration.

In order to assess the changes in the respondents’ perception of Russia as a potential place for arbitration, including the results of the reform of the arbitration law, ICC Russia decided to conduct another study.

METHODOLOGY

ICC Russia has formed a special task force to draw up a relevant questionnaire (hereinafter, the “Task Force”)². The resulting draft was offered for discussion at a public session of ICC Russia’s Arbitration Commission on 27 April 2018. Upon being amended and supplemented on the basis of proposals voiced during those deliberations, the final text of the questionnaire was approved by the Arbitration Commission of ICC Russia and presented to the target audience on 31 July 2018 and posted on SurveyMonkey.com on 6 September 2018. ICC Russia would like to thank Vladimir Khvalei (Baker McKenzie), Natalia Gulyaeva (Hogan Lovells) and Andrey Panov (Norton Rose Fulbright) for analyzing and publishing the present study.

¹ The survey analysis in English is available at <http://www.iccwbo.ru/commissions/arbitrazhnaya-komissiya/proekty/rezul-taty-oprosa-arbitrazhnoy-komissii-za-2011-god>

² Task Force members:

Vladimir Khvalei (Baker McKenzie), Task Force chairman; Natalia Gulyaeva (Hogan Lovells); Andrey Panov (Norton Rose Fulbright); Irina Varyushina (Baker McKenzie); Doran Doeh (Dentons); Sergey Petrachkov (ALRUD); Anna Grishchen-kova (AB KIAP); Sergey Morozov (Beiten Burkhardt); Izabella Kharlamova (Baker Botts); Oksana Peters (Tilling Peters); Xenia Khanseidova (Cleary Gottlieb Steen & Hamilton); Marina Akchurina (Cleary Gottlieb Steen & Hamilton); Artem Doudko (Osborne Clarke); Evgeny Samoylov (Debevoise & Plimpton); Olga Nesterova (Debevoise & Plimpton).

The poll was announced on the Russian Law Week and other arbitration-focused events that were held during the time the survey was open.

Personal invitations to take part in the survey were also circulated to professionals in international commercial arbitration by ICC Russia, Russian Arbitration Association and Task Force members.

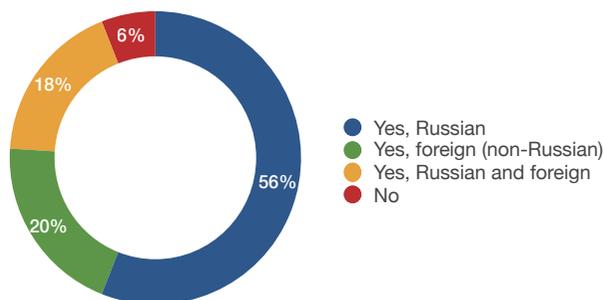
ICC Russia thus made its best efforts for the survey to cover and involve the broadest possible target audience of specialists concerned with international arbitration in Russia.

The findings of this survey along with comments thereon follow below.

RESPONDENTS

The survey was conducted among 168 participants, whose third part (56 participants) were English-speaking respondents. From those participants, who agreed to disclose information about their education, 93 respondents (56.02%) have Russian legal education, 33 (19.88%) – foreign legal education, 30 (18.07%) – both foreign and Russian legal education and 10 (6.02%) do not have legal education:

Do you have a degree in law?

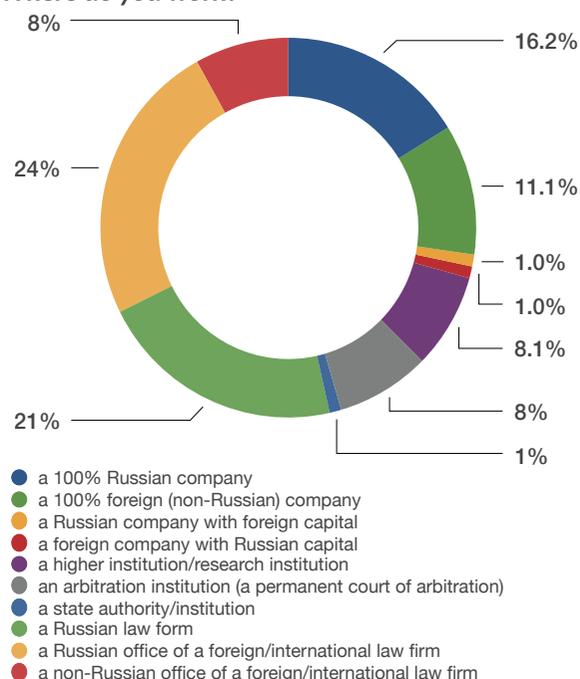


In comparison with the similar survey by ICC Russia of 2012 (herein-after, the “2012 Survey”), the quantity of participants has increased by 56 respondents – 50% (as compared to 112 participants in 2012).

The spheres of professional activity of the respondents are diverse. The majority of respondents work in Russian offices of foreign / international law firms (20.61%) and Russian law firms (18.18%). Just under 15% of respondents are employees of Russian companies (13.94%) and non-Russian offices of

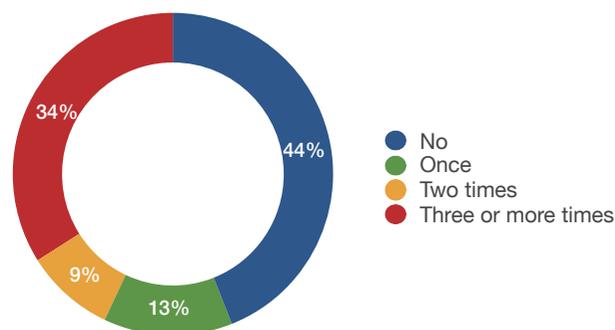
foreign / international law firms (12.73%). Less than 10% of participants work in foreign (non-Russian) companies (9.7%), universities and scientific organizations (7.27%) and arbitration institutions (7.27%):

Where do you work?



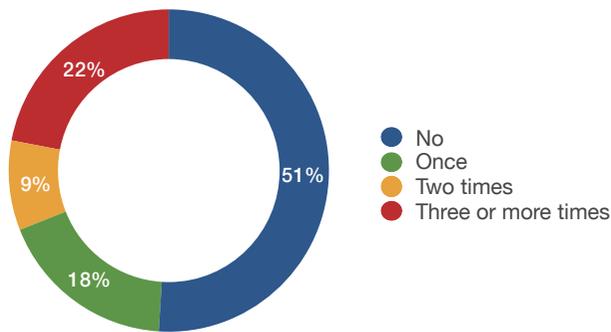
Up to 56% of respondents participated at least once in the past five years in international arbitration proceedings with place of arbitration in Russia, while almost 34% of respondents participated in such proceedings 3 or more times:

Have you taken part in international arbitration proceedings with place of arbitration in Russia (during the last five years)?



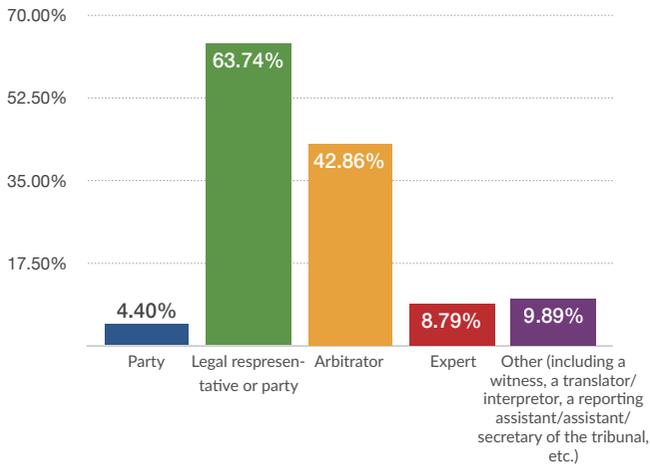
49% of the English-speaking respondents participated in arbitration proceedings with the place of arbitration in Russia, while 22% of such respondents participated in three or more similar proceedings:

Have you taken part in international arbitration proceedings with place of arbitration in Russia (during the last five years)?



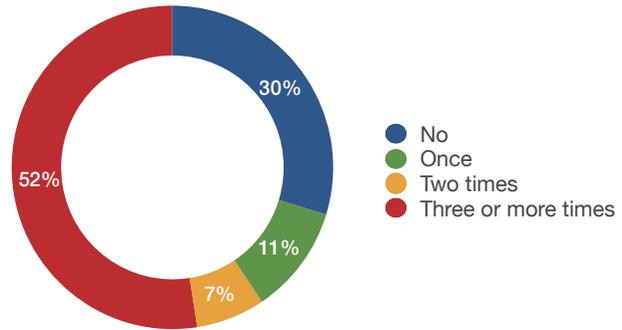
The majority of respondents participated in arbitration proceedings in Russia as a representative of a party (63.74%) or an arbitrator (42.86%). The rest of the respondents participated in international arbitration in a different capacity: as an expert, a witness, or a party to the case:

In what capacity have you taken part in international arbitration proceedings with place of arbitration in Russia?



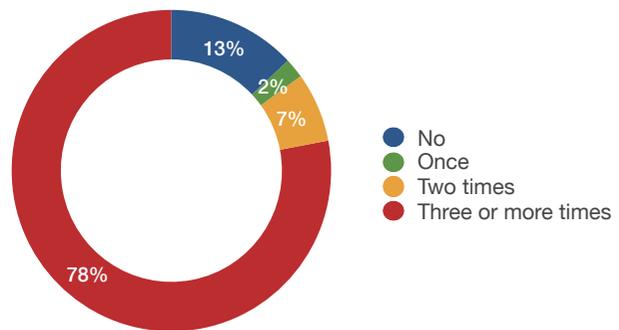
The significant majority of respondents (over 70%) participated in international arbitration proceedings outside the Russian Federation at least once in the last five years, while 52.8% of respondents participated in such proceedings 3 or more times during this period:

Have you taken part in international arbitration proceedings with place of arbitration outside Russia (during the last five years)?



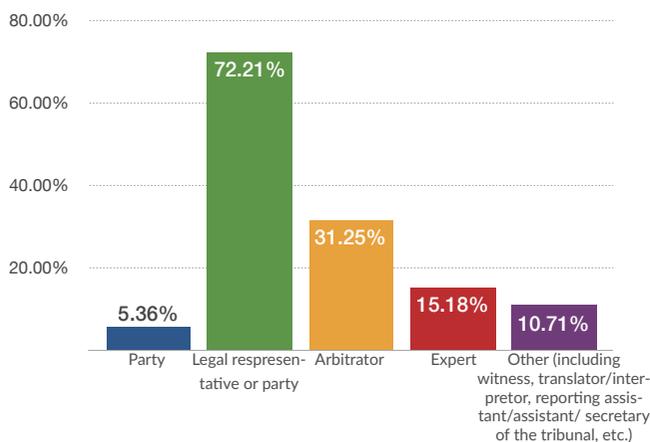
If you look at respondents who completed questionnaires in English, 87% took part in arbitration proceedings outside of Russia for the last 5 years, where over 78% of such respondents were involved 3 or more times:

Have you taken part in international arbitration proceedings with place of arbitration outside Russia (during the last five years)?



In this case, the majority of respondents also participated in such arbitration proceedings as a representative of a party (73.21%) or arbitrator (31.25%):

In what capacity have you taken part in international arbitration proceedings with place of arbitration outside Russia?



On the basis of the above, we can conclude that the survey results are built largely on the responses of specialists with considerable experience in arbitration proceedings both in Russia and abroad. This, in turn, indicates the representativeness of the answers of respondents who have a good understanding of the practices of international arbitration in Russia and abroad.

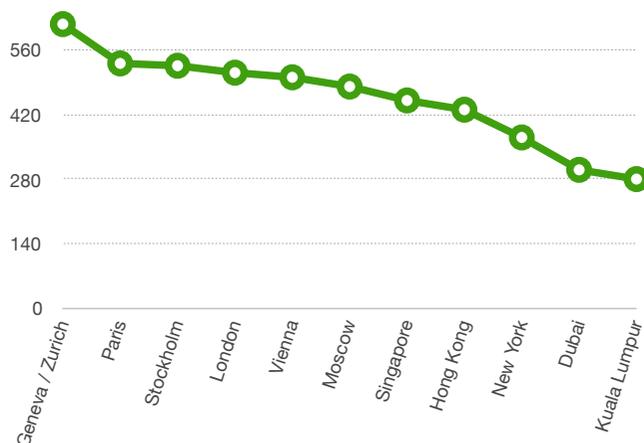
CHOICE OF A PLACE FOR ARBITRATION

Respondents were asked to mark a number of potential places of arbitration on a five-point scale in the order of diminishing attractiveness. Respondents were provided with the following options: Vienna, Hong Kong, Dubai, Geneva / Zurich, Kuala Lumpur, London, Moscow, New York, Paris, Singapore, Stockholm. Respondents had an option to specify other cities. At the end, the cities were placed in the order based on the results of adding up the points obtained by each city.

The top five most popular among the possible places of arbitration with the respondents were (in descending order) Geneva / Zurich, Paris, Stockholm, London and Vienna. Moscow took the 6th place, ahead of Singapore, Hong Kong and New York. The

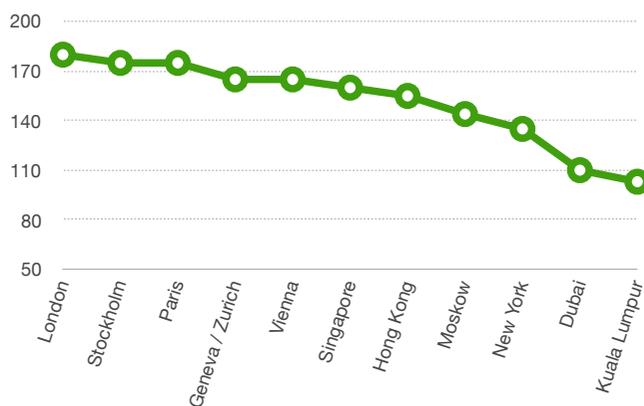
list closes on Dubai and Kuala Lumpur. Compared to the 2012 Survey, Moscow has lost one position.

Preferences with regard to place of arbitration



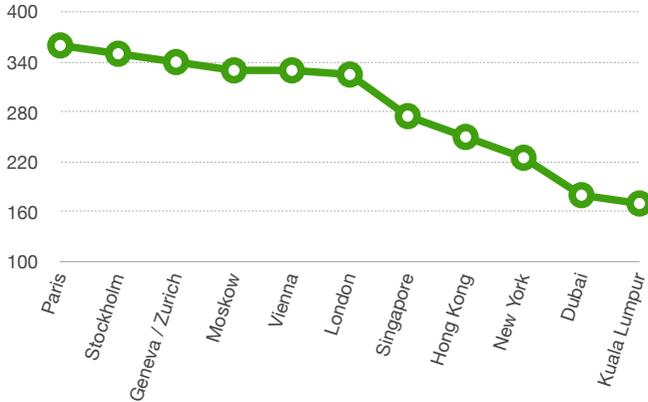
At the same time, among the English-speaking respondents, the five most popular places for arbitration appeared a little different: London, Stockholm, Paris, Geneva / Zurich, Vienna. Moscow took only 8th place, giving way to Singapore, Hong Kong, but overtaking New York. In the 2012 Survey, Moscow ranked seventh:

Preferences with regard to place of arbitration (English-speaking respondents)



Among the Russian-speaking survey participants, the five most popular places for arbitration were also different: Paris, Stockholm, Geneva / Zurich, Moscow and Vienna. London did not reach the top five, slightly yielding to Vienna. As compared to the results of the 2012 Survey, Moscow managed to keep the fourth place among Russian-speaking respondents:

Предпочтения в выборе города в случае согласования места арбитража среди русскоязычных респондентов



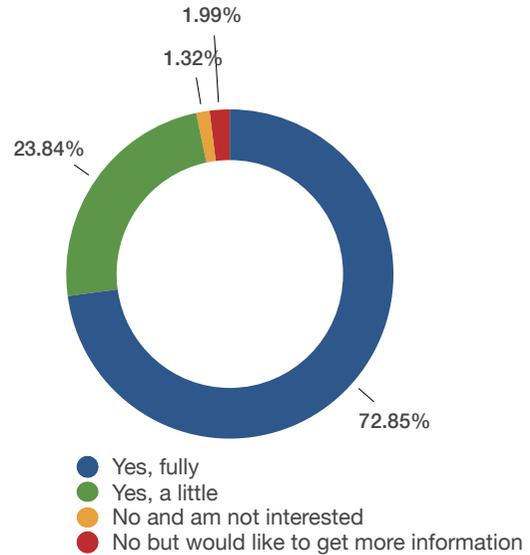
Thus, such voting pattern was expected and reflects the prevailing picture of the traditional and most developed international arbitration centers in Europe. At the same time, it is obvious that Russian-speaking participants are more inclined to choose Moscow as a place for arbitration than English-speaking respondents, although Moscow gained no leading positions. In addition, comparison of the results of this study and the 2012 Survey demonstrates cooling down of foreign respondents towards Moscow as a place for arbitration.

RUSSIAN LAW ON INTERNATIONAL ARBITRATION

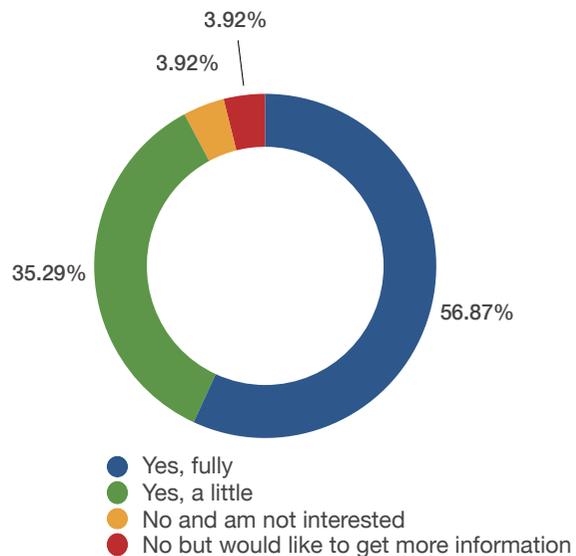
The overwhelming majority of respondents (over 96%) indicated that they are to some extent familiar with the Russian legislation on international arbitration (including changes following the results of the arbitration reform), while 73% of participants said that they were fully familiar with it.

Among English-speaking respondents, 92% indicated that they were familiar with the Russian arbitration law, while almost 57% indicated that they were fully familiar with it.

Are you familiar with the Russian legislation on international arbitration?

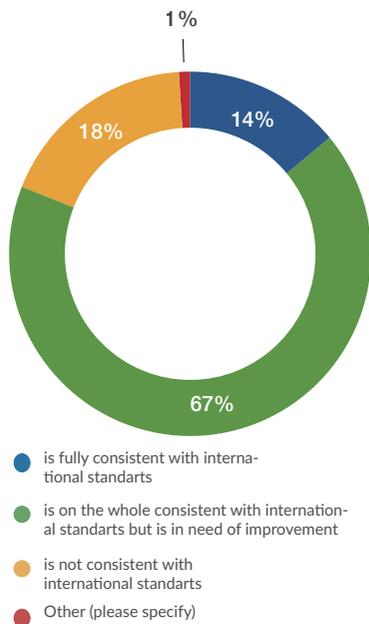


Are you familiar with the Russian legislation on international arbitration? (English-speaking respondents)



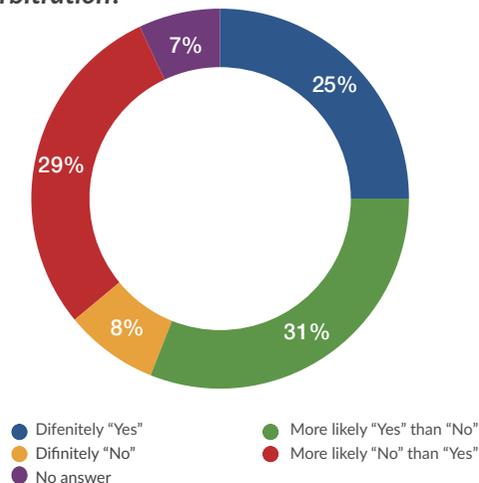
Russian legislation governing international arbitration was highly appreciated: 13.48% of respondents believe that it is fully consistent with international standards, while 67.38% indicated that it is consistent with international standards on the whole but is in need of improvement:

The correct proposition concerning Russian legislation on international arbitration (taking into account the 2016 amendments):



At the same time, the survey also showed that the Russian arbitration legislation influences the choice of Russia as a place of arbitration. More than 55% of respondents indicated that it definitely affects their choice or rather affects their choice than not (24.48% and 30.77%, respectively), while only for 8.39% of respondents it definitely did not influence the choice of Russia as a place of arbitration:

Does Russian legislation on international arbitration influence your choice in favor of Russia as place for arbitration?



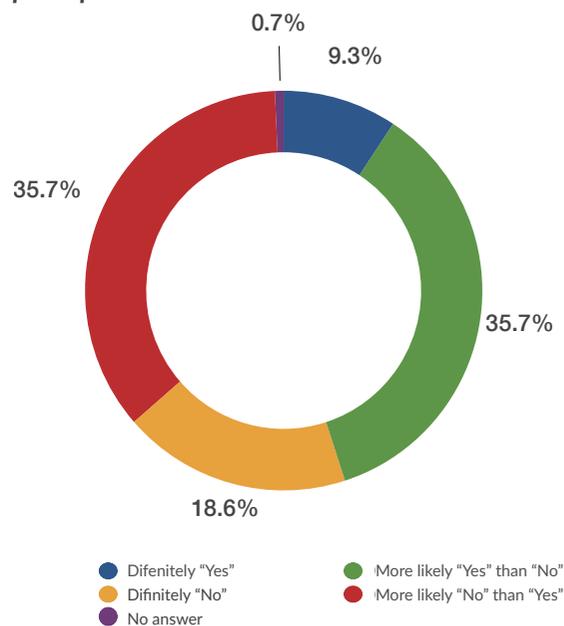
Thus, the Russian legislation on international arbitration was highly appreciated, which, in general, should serve as a positive factor for choosing Russia as the place of arbitration.

ARBITRATION REFORM IN RUSSIA

Respondents were asked to evaluate how the arbitration reform that took place in the Russian Federation affected the attractiveness of Russia as a place of arbitration.

The survey results showed a mixed attitude of respondents to this issue. Nearly 55% of respondents indicated that the reform unlikely made Russia a more attractive place for arbitration (18.57% stated that "definitely not", while 35.71% chose the answer "rather no than yes"). Only 9.29% of respondents thought that the reform definitely made Russia a more attractive place of arbitration, however, 35.71% of those polled thought that it nevertheless improved the attractiveness of Russia:

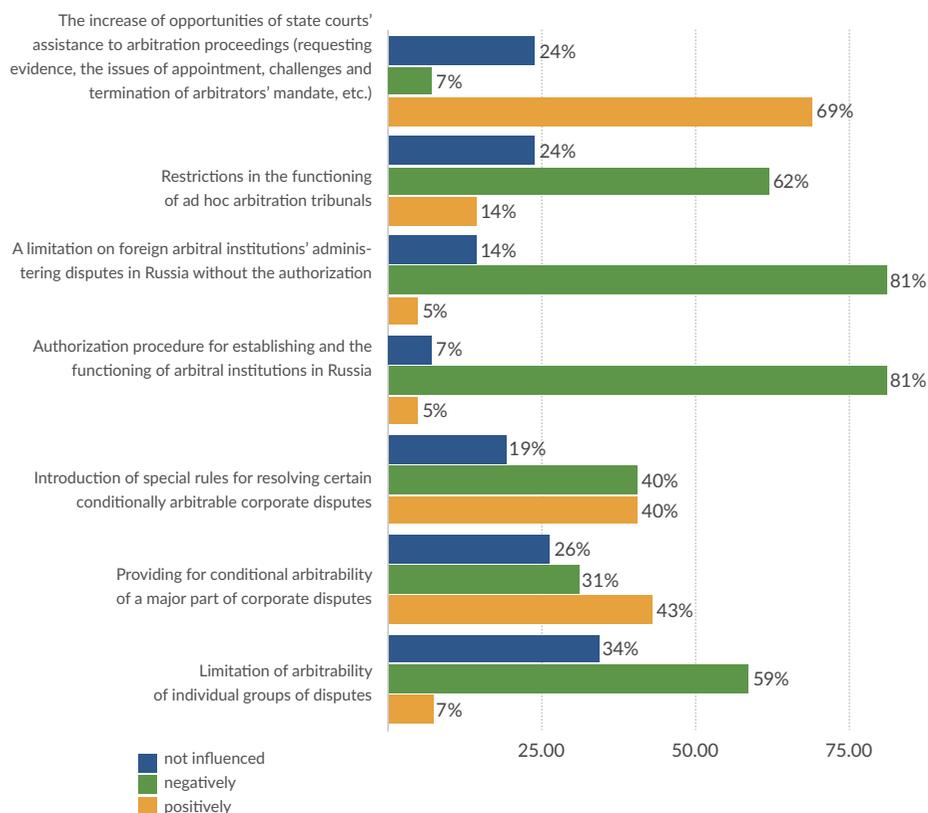
Считаете ли Вы, что арбитражная реформа сделала Россию более привлекательным местом арбитража?



The positive factor for Russia as a place of arbitration is an increase of opportunities of state courts' assistance to arbitration proceedings (requesting evidence, the issues of appointment, challenges and termination of arbitrators' mandate, etc.) – 69.05% of respondents voted for this factor. As another positive factor, more than 40.48% of respondents also noted the provision for conditional arbitrability of a major part of corporate disputes.

As negative factors that make Russia less attractive as a place of arbitration, respondents noted limitation on foreign arbitral institutions' administering disputes in Russia without the authorization (80.95%), limitation of arbitrability of individual groups of disputes (58.54%) and the authorization procedure for establishing and the functioning of arbitral institutions in Russia (54.76%):

Do you think that the following changes introduced by the 2016 arbitration reform influenced the choice of Russia as a place of arbitration:

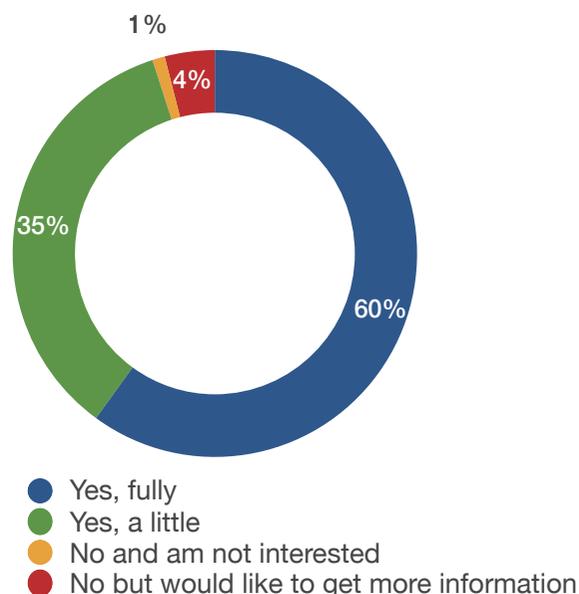


Are you familiar with the practice of Russian state courts in international arbitration matters?

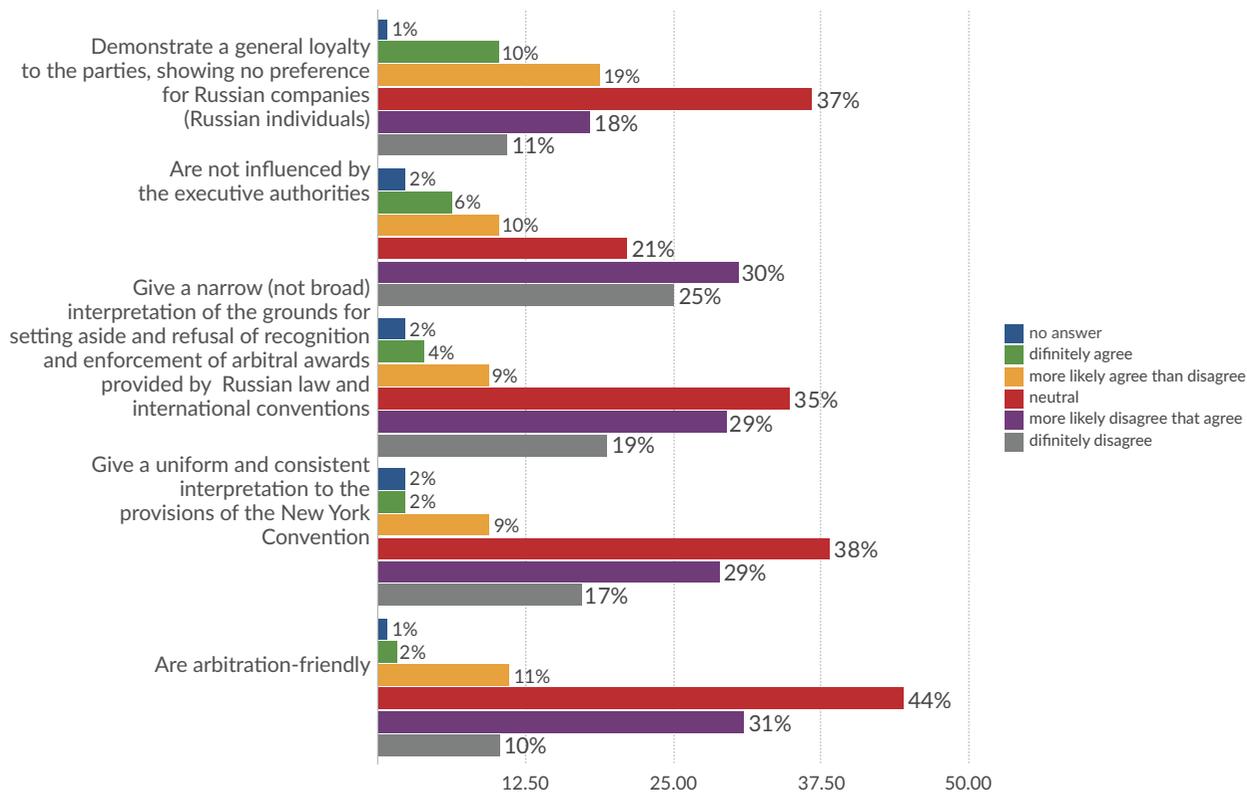
RUSSIAN STATE COURTS' PRACTICE ON MATTERS RELATED TO INTERNATIONAL ARBITRATION

The overwhelming majority of respondents (over 94%) claimed being familiar with the practice of Russian state courts on issues of international arbitration. After that the respondents were asked to answer a series of questions regarding the attitude of Russian state courts to international arbitration proceedings.

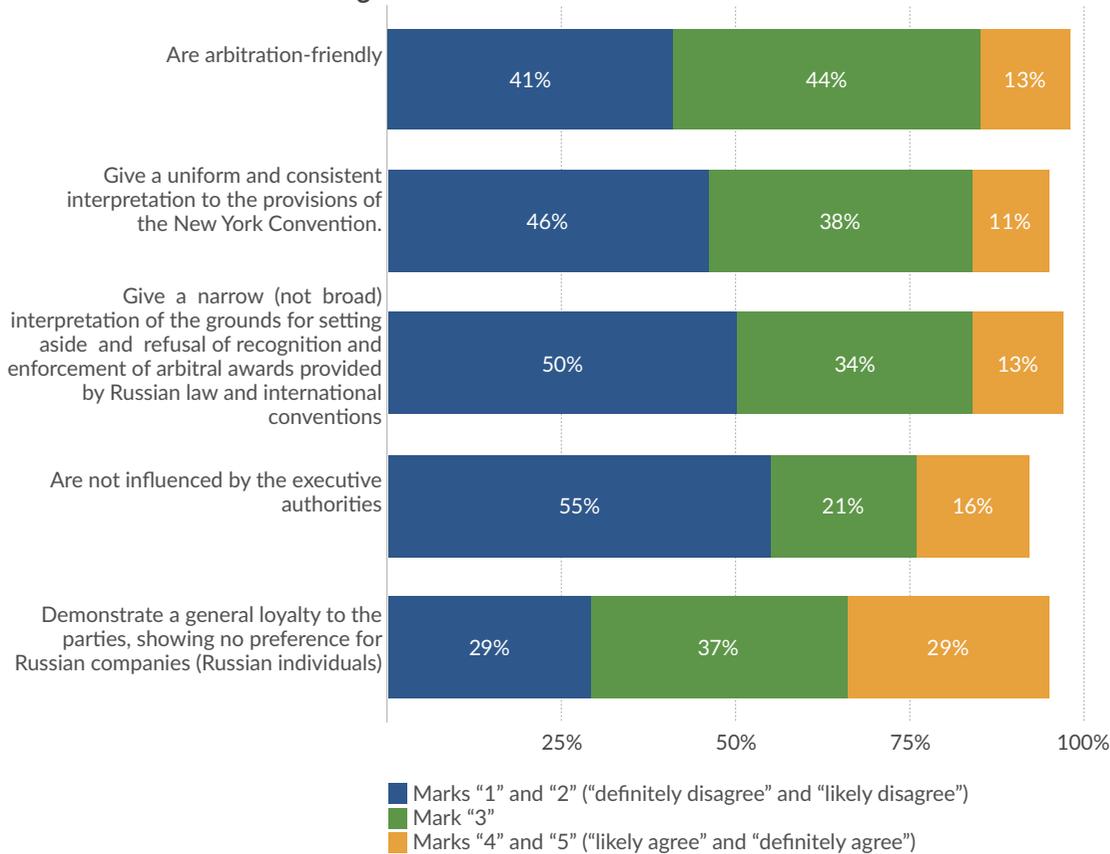
Respondents were asked to rate on a 5-point scale (where 5 means “definitely agree”, and 1 - “definitely disagree”) the statements assessing attitude of Russian state courts to international arbitration. The answers were as follows.



Russian State Courts



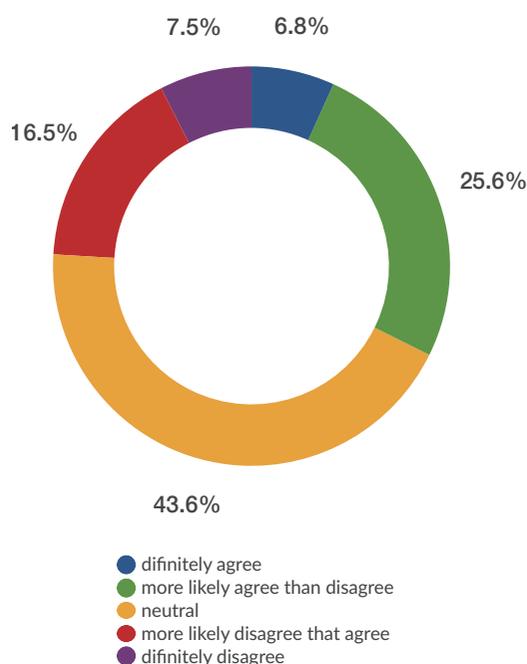
Russian state courts considering cases related to international arbitration:



Thus, a significant proportion of respondents are critical of the activities of Russian state courts. At the same time, the majority of respondents do not agree that the courts are not influenced by the executive authorities and believe that Russian courts broadly interpret the grounds for setting aside or refusing to enforce arbitral awards, and also apply the provisions of the New York Convention in a non-uniform and inconsistent manner.

In addition, 41% of respondents do not agree that Russian courts are arbitration-friendly. As for Russia as a jurisdiction on the whole, 33% disagree that it is arbitration-friendly (while 44% of respondents believe that Russia is neutral with respect to arbitration, and 23% that it is rather friendly):

Do you consider Russia to generally be an arbitration-friendly jurisdiction?



FACTORS THAT INFLUENCE THE CHOICE OF RUSSIA AS A PLACE FOR ARBITRATION

Respondents were asked to indicate factors, which in their opinion, have a positive / negative / neutral effect on Russia’s attractiveness as a place of arbitration.

According to respondents, the following factors contribute to the choice of Russia as a place of arbitration (in descending order):

- Availability of qualified lawyers (including arbitration professionals) who could act as counsel and legal representatives of parties in arbitration;
- The choice of Russian law as the law applicable to the transaction or other relations of the parties to the dispute;
- Availability of qualified lawyers (including arbitration professionals) who could be chosen/appointed as arbitrators;
- Small amount in dispute;
- Transport infrastructure / connections.

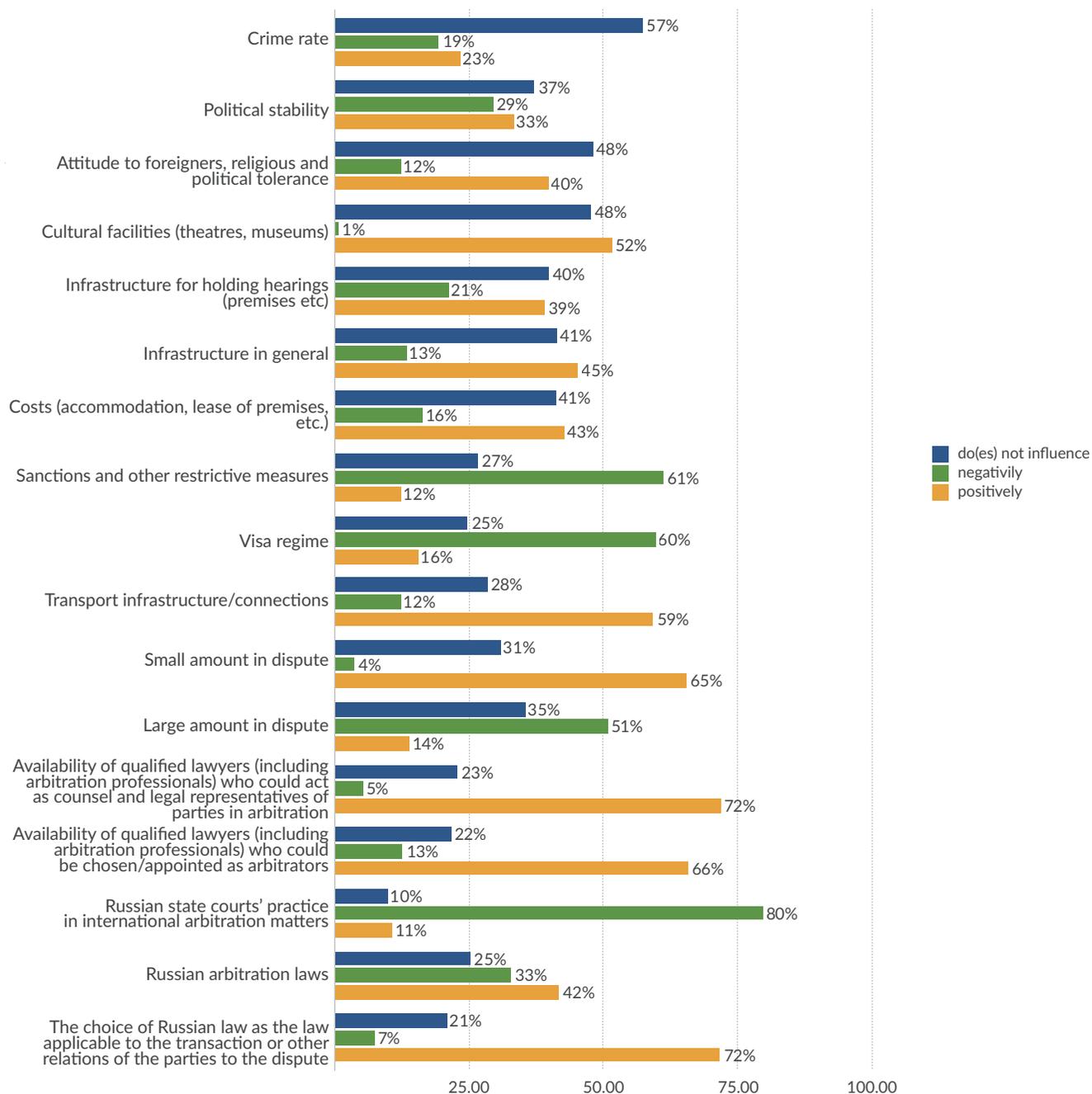
The following factors play against the choice of Russia as a place of arbitration (in descending order):

- Russian state courts’ practice in international arbitration matters;
- Sanctions and other restrictive measures;
- Visa regime;
- Large amount in dispute;
- Russian arbitration laws.

At the same time, the following factors do not affect the choice of Russia as a place of arbitration (in descending order):

- Crime rate;
- Attitude to foreigners, religious and political tolerance;
- Cultural facilities (theatres, museums);
- Infrastructure;
- Political stability.

How the following factors influence your choice in favor of Russia as a place of arbitration?



SELECTION OF RUSSIAN ARBITRATORS

Respondents were asked to indicate conditions under which they would agree to appoint an arbitrator from Russia in a dispute closely related to Russia. The respondents indicated the following as the most likely situations:

- The language of the arbitration proceedings is Russian;
- The applicable law to the dispute is Russian law;
- The proceedings are conducted under the arbitration rules of a Russian arbitral institution;
- In all instances when a dispute is closely connected with Russia.

Respondents also listed the following cases in which they are not inclined to appoint an arbitrator from Russia (in descending order):

- Russian law is not applicable to the dispute in question;
- The proceedings are conducted under the arbitration rules of a foreign arbitral institution;
- The language of the proceedings is not Russian.

EXECUTIVE SUMMARY

1. Among the most attractive places for arbitration, Moscow ranked 6th out of 11 proposed, ahead of both Singapore and Hong Kong. Leadership is kept by the traditional centres of international arbitration, located in Europe (London, Stockholm, Paris, Geneva / Zurich, Vienna). As compared to the 2012 Study, Moscow has dropped one position.

2. The majority of respondents generally have a positive attitude towards the Russian legislation on international arbitration, taking into account the latest legislative innovations. However, it is noted that there are aspects to improve the national regulatory framework and bring it in line with international standards.

3. The majority of respondents do not have a clearly expressed negative or positive attitude towards Russia as a place for arbitration, leaning towards average ratings.

4. Respondents have also showed a mixed attitude towards the results of the arbitration reform in Russia. The positive consequences of the reform are: the increase of opportunities of state courts' assistance to arbitration proceedings (requesting evidence, the issues of appointment, challenges and termination of arbitrators' mandate, etc.) and providing for conditional arbitrability of a major part of corporate disputes. On the other hand, respondents noted that the most negative factors that make Russia less attractive as a place of arbitration are restrictions placed on foreign arbitral institutions' administering disputes in Russia without the authorization, limitation of arbitrability of individual groups of disputes, the authorization procedure for establishing and the functioning of arbitral institutions in Russia.

5. The respondents are concerned about the practice of Russian state courts on issues of international arbitration. However, currently the majority (44%) of respondents believe that Russian state courts are most likely to treat international arbitration as neutral, although 41% of respondents disagree or rather disagree with the statement that Russian courts are arbitration-friendly.

6. At the same time, the majority of respondents disagree that the courts are not influenced by the executive authorities and believe that the Russian courts broadly interpret the grounds for setting aside or refusing to enforce arbitral awards, as well as non-uniformly and inconsistently apply the New York Convention.

7. Despite this, 44% of respondents believe that Russia as a jurisdiction is rather neutral with respect to arbitration, and 23% believe that it is rather friendly; and 33% disagree or rather disagree with such an assessment.

8. The main factors that positively influenced the respondents' choice of Russia as a place of arbitration turned out to be: availability of qualified lawyers (including arbitration professionals) who could act as counsels and legal representatives of parties in arbitration, the choice of Russian law as the law applicable to the transaction or other relations of the parties to the dispute, availability of qualified lawyers (including arbitration professionals) who could be chosen/appointed as arbitrators, small amount in dispute, transport infrastructure / connections.

9. The main factors that adversely affect the choice of Russia as a place of arbitration are: Russian state courts' practice in international arbitration matters, sanctions and other restrictive measures, visa regime, large amount in dispute, Russian arbitration laws.

10. Respondents indicated that they would agree to an arbitrator from Russia in the following situations: the language of the arbitration proceedings is Russian, the applicable law to the dispute is Russian law, the proceedings are conducted under the arbitration rules of a Russian arbitral institution, in all instances when a dispute is closely connected with Russia.

11. Also, respondents indicated situations in which they are unlikely to agree with the appointment of a Russian arbitrator: Russian law is not applicable to the dispute in question, the proceedings are conducted under the arbitration rules of a foreign arbitral institution, the language of the proceedings is not Russian.