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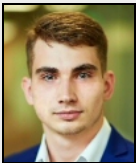
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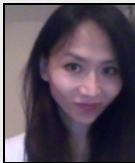
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## Transnational Dispute Settlement at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry by D. Davydenko

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# Transnational Dispute Settlement at the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry

Dmitry Davydenko\*

## Abstract

*The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the 'ICAC') is a recognized arbitral Moscow-based institution with long running experience in administering transnational commercial arbitrations. Most frequently, disputes decided by the ICAC tribunals arise out of commercial contracts of sale of goods, services, works, and lease. This paper follows the history of the ICAC, which was first established and earned international recognition in the early period of Soviet history. The paper offers an overview of the most significant features of the ICAC's present status, organization and proceedings, especially in the light of the recent arbitration law reform in Russia, and presents related statistical data. The issues of applicable law and composition of the arbitral tribunals are also recognized. The paper discusses why this arbitral institution deserves notable attention when choosing a dispute resolution procedure in a case involving at least one party related to Eastern Europe and CIS.*

## 1. Introduction

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) is the oldest<sup>1</sup> operating arbitral institution in Russia and in Eastern Europe, which deals foremost with resolving disputes of transnational nature.

Russian arbitration legislation reform triggered a large-scale revision of relevant regulations of arbitral institutions. In 2017, the Russian Chamber of Commerce and Industry adopted new regulations and rules of the ICAC, including new rules on resolving international commercial disputes (the 'ICAC Rules'). Previous rules came into effect in 2005 and were amended subsequently in 2010 and 2013. The ICAC may now consider a broad range of disputes, including both international and domestic. It adopted separate sets of rules for international commercial, domestic, sport-related and corporate disputes. Outside of this, it issued new rules for administering *ad hoc* arbitrations.

This paper discusses why arbitration under ICAC's Rules deserves articular consideration when choosing a dispute resolution procedure, at least in cases related to Eastern Europe, CIS and East-West disputes. Part 2 of the paper looks at the historical development of the ICAC,

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The author has taken part in more than 50 ICAC proceedings since 2011, initially as tribunal secretary ('reporter') and then as an arbitrator. Apart from that the author has been in 2017 – August 2019 Chief expert of the Arbitration and Mediation Center at the Russian Chamber of Commerce and Industry which provides organisational support of the ICAC (<<http://adr.tpprf.ru/ru/>>).

<sup>1</sup> Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation (<<http://mac.tpprf.ru/en/>>) is even older than the ICAC, but it is a specialized arbitral institution administering disputes which appear in the area of the trade maritime traffic.

which is essential for understanding ICAC's current role and position in Russia, CIS and Eastern Europe. Part 3 offers a statistical overview of the ICAC operation and proceedings. Part 4 discusses peculiarities of the ICAC's organization, rules and procedures. Part 5 outlines the issues of immunity and liability of arbitrators and arbitral institutions (organizations in which they were established).

## 2. Roots and History of the ICAC

The ICAC is rooted deep within early Soviet history. It is the successor to the Foreign Trade Arbitration Commission (FTAC) established in 1932, in what was then known as the Union of Soviet Socialist Republics (USSR).

FTAC was never a state authority. It was established as a special body at the All-Union Chamber of Commerce. The Chamber of Commerce had a status of a 'public organization', close to the concept of a non-governmental organization (NGO).<sup>2</sup> The non-state nature of the FTAC determined how members were appointed. In early years, the FTAC consisted of 15 members appointed by the Presidium of the Chamber from representatives of trade, industrial, transport and other business organizations, as well as persons with special knowledge in the field of foreign trade and foreign trade legislation. The parties selected arbitrators from the members of FTAC, who, in turn, elected an umpire from among themselves. FTAC's first-time award was issued on November 15, 1933.<sup>3</sup>

The role of FTAC was soon recognized transnationally thanks to the publication of awards.<sup>4</sup> Moreover, a number of recognizable bilateral international trade agreements concluded by the Soviet Union in the pre-war period provided for foreign trade disputes resolution by permanent arbitration in the USSR; that is by the FTAC.<sup>5</sup>

From the moment of its creation to the start of World War II, the FTAC arbitral tribunals decided about one hundred disputes. In general, for the first twenty years of its work, the FTAC decided cases involving organizations, institutions and firms from several dozen countries of Europe, Asia, and America.<sup>6</sup> In particular, FTAC's arbitrators considered issues of competence

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<sup>2</sup> Постановление Совета народных комиссаров СССР от 28 мая 1932 года «Об утверждении Устава Всесоюзной торговой палаты» [Resolution of the Council of People's Commissars of the USSR of 28 May 1932 on the approval of the Charter of the All-Union Chamber of Commerce] <<https://tpprf.ru/ru/about/history/tpp75/psn280532/>> accessed 20 August 2019.

<sup>3</sup> The International Commercial Arbitration Court, 'История внешнеторгового арбитража в России' ('History of transnational commercial arbitration in Russia'). <<https://mkas.tpprf.ru/ru/information/About/page3.php>> accessed 20 August 2019.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.* Starting from the following 'Сборник действующих договоров, соглашений и конвенций, заключенных с иностранными государствами. Выпуск VII: Действующие договоры, соглашения и конвенции, вступившие в силу между 1 января 1931 года и 1 января 1933 года' [Collection of effective treaties, agreements and conventions concluded with foreign countries. Issue VII: Effective treaties, agreements, and conventions that entered into force between 1 January 1931 and January 1, 1933] СССР; A V Sabanin (ed), *Народный Комиссариат по Иностранным Дела* [The USSR. People's Commissariat for Foreign Affairs] (State. Publishing House 'Soviet Legislation'/ Гос. изд-во «Советское законодательство» 1933], 228.

<sup>6</sup> The International Commercial Arbitration Court, 'История...' (n 3). See also Alexander I. Muranov (ed), *Международный коммерческий арбитраж: Опыт отечественного регулирования/саморегулирования. К 80-летию юбилею МКАС при ТПП РФ: 1932—2013: Сборник избранных научных, нормативных, архивных, аналитических и иных материалов* [International Commercial Arbitration: Experience of domestic regulation / self-regulation. On the occasion of the 80th anniversary of the ICAC at the CCI of the Russian Federation: 1932–2013: Collection of selected academic, normative, archival, analytical and other materials

and applicable law. There were some cases in which awards were based on the foreign law rather than Soviet law.<sup>7</sup>

In the post-war period until the end of the 1950s, disputes between Soviet foreign trade organizations and foreign trade organizations from Eastern European countries were not common. The next two decades of the FTAC's operation mainly related to the resolution of disputes arising between business entities from the member states of the Council for Mutual Economic Assistance (COMECON), that is, "socialist" States.<sup>8</sup> The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation (Moscow, 26 May 1972) provided for an obligatory resolution of all transnational economic disputes between entities of these States by arbitral institution at the chamber of commerce of the respondent's State. Disputes with organizations, firms and enterprises of other countries began to make up a small proportion during this period.

Intensively developing economic ties between the socialist countries was a predominant factor contributing to a significant increase in the number of cases decided by the FTAC annually; the number of which reached three hundred by the end of the eighties.<sup>9</sup> Despite the insignificance in the number of disputes involving firms from non-socialist countries, those cases were quite often fraught with great difficulty in terms of solving legal problems.<sup>10</sup> FTAC's awards in cases of this category were also of undoubted legal interest and demonstrated the high competence of Soviet arbitrators in the field of economic relations between countries with different socio-economic and legal systems.<sup>11</sup> The list of arbitrators who considered disputes at the FTAC included leading domestic experts in the field of transnational business regulation, both legal practitioners and academics. Those were not only professionals highly qualified in foreign trade, but also highly educated people who, as a rule, also had a command of several foreign languages. This ensured the resolution of disputes on a consistently high level.<sup>12</sup>

Therefore, the FTAC operated throughout the entire Soviet period, notwithstanding the hardest periods of country's life, including war and mass political repression. In particular, the FTAC continued considering cross-border disputes without interruption even during WW2.<sup>13</sup>

The next stage of FTAC's operation, which in 1987 was renamed the Arbitration Court at the USSR Chamber of Commerce and Industry, coincided with a new period in the life of the

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(vol/том 2, Statut/Статут 2012)], 31.

<sup>7</sup> Muranov (n 6).

<sup>8</sup> Council for Mutual Economic Assistance was an intergovernmental economic organization, operating in 1949–1991. It was created by the decision of the economic meeting of representatives of Albania, Bulgaria, Hungary, Poland, Romania, the USSR and Czechoslovakia. See Vladimir V Khvalei, 'Международный арбитраж в странах СЭВ' ['International Arbitration in the COMECON Countries'] in N G Markalova and A. I Muranov (eds), *Арбитраж и регулирование международного коммерческого оборота: российские, иностранные и трансграничные подходы. Liber Amicorum в честь 70-летия А. С. Комарова* [Arbitration and Regulation of International Trade: Russian, Foreign and Cross-Border Approaches. Liber Amicorum in Honor of the 70th Anniversary of A. S. Komarov] (Statut/ Статут 2019) 568 – 588.

<sup>9</sup> The International Commercial Arbitration Court, (n 3).

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> 'Часть XI. Confer! Список избранных решений ВТАК, опубликованных в сокращенном виде. ... Два решения ВТАК времен великой отечественной войны.' ('Confer! List of selected FTAC awards published in an abbreviated form ... Awards of the FTAC in the period of the Great Patriotic War') in Muranov (n 7) 422–428.

whole country, with radical changes in its socio-economic structure and legal system necessitated by the dissolution of the Soviet Union. In particular, since 1995, for the first time in the history of the ICAC, a fair share of foreigners has been included on its list of arbitrators.<sup>14</sup>

To sum up, the ICAC is deeply rooted in Russia and the region. It has operated and succeeded in doing so during hardship despite a dramatically changing political and economic environment.

### 3. A Brief Statistical Overview of the Cases

Throughout the long history of the ICAC, including its predecessors, this tribunal decided about ten thousand disputes.<sup>15</sup> At present, ICAC's annual caseload is about 250–300 international commercial arbitrations involving parties from 40–50 jurisdictions.<sup>16</sup>

Current ICAC Rules of arbitration of international commercial disputes (the 'ICAC Rules')<sup>17</sup> became effective from 27 January 2017 on, after their deposition at the Russian Ministry of Justice.<sup>18</sup> Hundreds of cases have already been decided under these Rules. In particular, in 2018 the ICAC administered 454 cases, in 2017 – 363 cases, though some of those had been initiated before the ICAC Rules became effective and therefore were considered in accordance with the previous Arbitration rules).<sup>19</sup>

Consistently, disputes heard by the ICAC tribunals most often arise from contracts of sale of goods. Indeed, in 2018 such disputes constituted 72 % of the ICAC caseload and in 2017 – 64 %. Other large groups of disputes heard at the ICAC have arisen out of contracts of services and works (16 % in 2018 and 22 % in 2017), loan (5 % in 2018 and 4 % in 2017) and lease (2 % in 2018 and 4 % in 2017).<sup>20</sup>

In about 49% cases, the amount of claim in international cases ranged between 10 000 and 200 000 USD in equivalent. In 23 % cases it constituted 200 000 – 1 000 000 USD. In 15 % of international cases, the amount of claim was 1 – 10 mln USD. In 5 % of cases, it exceeded 10 mln USD.<sup>21</sup>

Notwithstanding the sanctions enacted in 2014–2018 by many States targeting trade with selected Russian entities and business sectors, in 2018 companies from the European Union constituted 45% of all foreign (non-Russian) parties at the ICAC proceedings. 15% parties were

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<sup>14</sup> The International Commercial Arbitration Court, (n 3).

<sup>15</sup> The International Commercial Arbitration Court <<http://mkas.tpprf.ru/ru/>> accessed 26 September 2019.

<sup>16</sup> The International Commercial Arbitration Court, 'В Челябинске открыто Отделение Международного коммерческого арбитражного суда при ТПП РФ' ['A branch of the International Commercial Arbitration Court at the Russian CCI has been opened in Chelyabinsk'] (1 May 2019) <<https://mkas.tpprf.ru/ru/news/v-chelyabinske-otkryto-otdelenie-mezhdunarodnogo-kommercheskogo-arbitrazhnogo-suda-pri-tpf-rf-i293106/>> accessed 20 August 2019.

<sup>17</sup> Rules of arbitration of international commercial disputes (Appendix No. 2 to Order No. 6 of the Chamber of Commerce and Industry of the Russian Federation, 11 January 2017).

<sup>18</sup> For an overview of the ICAC Rules see Dmitry Davydenko, 'New rules of the ICAC at the Russian Chamber of Commerce: what has changed for international disputes?' (*CIS Arbitration Forum*, 2 February 2017) <<http://www.cisarbitration.com/2017/02/02/russian-icac-revises-rules-for-international-disputes-whats-new/>> accessed 20 August 2019.

<sup>19</sup> The International Commercial Arbitration Court. Statistics. <<https://mkas.tpprf.ru/ru/Stat/page.php>> accessed 20 August 2019.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

from the Asian States (other than CIS). 21% of the foreign parties constituted companies from the CIS region.<sup>22</sup>

## 4. Distinguishing Features of the ICAC

### 4.1. *The Special Status of the ICAC*

The ICAC is a statutory arbitral institution in Russia. Its statute constitutes a part of the Russian law ‘On international commercial arbitration’, which substantially replicates the UNCITRAL model law.<sup>23</sup> This is due to historical reasons. Statutes of the ICAC and Maritime Arbitration Commission at the Russian CCI became Annexes to the Law when it was adopted in 1993. After the dissolution of the Soviet Union, this was necessary to ensure the continuity of the arbitral institution which existed at the Soviet Chamber of Commerce and the validity of the relevant arbitration agreements.<sup>24</sup> It also confirmed the right of the ICAC to adopt interim measures upon a party’s request.

Additionally, the ICAC, unlike most other permanent arbitral institutions in Russia, does not require authorization from the Russian Ministry of Justice. Russia has introduced a new legislative regime for domestic and international arbitrations, in force since September 2016.<sup>25</sup> The applicant must meet certain requirements, in particular, its rules must comply with the federal statute, and the institution needs to show a satisfactory reputation and capability of ensuring a high level of administration and financial support.<sup>26</sup> Consequently, under current arbitration legislation, such authorization is as a general rule required. However, both arbitral institutions established long ago are exempt from it: the ICAC and Maritime Arbitration Commission. The rationale behind that is the following: the authorization regime was introduced in 2016 to ensure a high quality of arbitration. The regulation targeted numerous arbitration courts, some with a dubious reputation, established in Russia in the last two decades. Therefore, it made no sense to subject the “old” reputed arbitration institutions to such a regime.

Nowadays, international (‘foreign’) arbitral institutions may administer arbitrations in Russia provided they have obtained an authorization from Russian Ministry of Justice.<sup>27</sup> So far only two foreign arbitral institutions have applied for such authorization: the Hong Kong

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<sup>22</sup> *ibid.*

<sup>23</sup> The Law of the Russian Federation No 5338-1 dated 7 July 1993 “On International Commercial Arbitration” (with amendments dated 29 December 2015) (the ‘Law on International Commercial Arbitration’).

<sup>24</sup> ‘Интервью с А.С. Комаровым о 25-летию Закона РФ «О международном коммерческом арбитраже», о 60-летию Нью-Йоркской конвенции, о судьбах арбитража в России и не только об этом’ «Вестник международного коммерческого арбитража» [‘Interview with A.S. Komarov about the 25th Anniversary of the Law of the Russian Federation “On International Commercial Arbitration,” the 60th Anniversary of the New York Convention, the Destiny of Arbitration in Russia and More’] 2018(1) *Int’l Com Arb Rev* [Вестник международного коммерческого арбитража] 17.

<sup>25</sup> The Federal Law No 382-FZ dated 29 December 2015 on Arbitration (Arbitral Proceedings) in the Russian Federation (the ‘Law on Arbitration’). The latter law mostly regulates domestic arbitral proceedings; the Law on International Commercial Arbitration (as amended).

<sup>26</sup> For a detailed overview *see* Alexei Kostin, Dmitry Davydenko, ‘Arbitration in Russia’ in Kaj Hober, Yarik Kryvoi (eds) *Law and Practice of International Arbitration in the CIS Region* (Kluwer Arbitration 2017) 255 – 310.

<sup>27</sup> Law on Arbitration (n 25) art 44 “The formation and operation of permanent arbitral institutions in the Russian Federation”.

International Arbitration Centre (HKIAC)<sup>28</sup> and the Vienna International Arbitral Centre (VIAC),<sup>29</sup> both being accepted to operate in Russia.

It should be noted that the ICAC is attached to the Russian Chamber of Commerce and Industry (Russian CCI) which is the oldest business association in the country. Russian CCI is a member of many international organizations and has unique, historically developed contacts all over the world.<sup>30</sup> This contributes to the global recognition of the ICAC. As noted above, annually the ICAC administers about 250–300 international commercial arbitrations involving parties from 40–50 jurisdictions.

The opinion of the Russian Chamber of Commerce and Industry (CCI) experts is often taken into account by the Russian Supreme Court in its reasoning regarding arbitration and applicable law, including private international law.<sup>31</sup>

The vast territory of Russia necessitates providing access to arbitration infrastructure in remote regions. The ICAC now has already a network of more than 15 branches throughout Russia. Specifically, branches of the ICAC have been established in Vladivostok, Volgograd, Voronezh, Irkutsk, Kazan, Krasnodar, Moscow region, Nizhny Novgorod, Perm, Rostov-on-Don, St. Petersburg, Saratov, Stavropol, Tyumen, Ulyanovsk, Ufa and Chelyabinsk.<sup>32</sup> This network continues to expand.

## 4.2. Arbitrators and other Neutrals

### 4.2.1. Recommended List of Arbitrators

As known, *tant vaut l'arbitre, tant vaut l'arbitrage* i.e. the quality of the arbitral proceedings primarily depends on specific arbitrators. The ICAC very carefully selects arbitrators to be included in its recommended lists. The recommended list of arbitrators for international commercial disputes currently includes many prominent academics and experienced legal practitioners who are well aware of the realities of doing business in Russia.<sup>33</sup> The list published on the ICAC's website contains information about age and education of the arbitrators, their knowledge of foreign languages, etc. If additional information about potential arbitrators is necessary, interested parties can contact the ICAC Secretariat to obtain it.<sup>34</sup>

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<sup>28</sup> HKIAC, 'HKIAC First Foreign Arbitral Institution Permitted to Administer Disputes in Russia' (9 April 2019) <<https://www.hkiac.org/news/hkiac-permitted-administer-disputes-russia>> accessed 20 August 2019.

<sup>29</sup> VIAC, 'VIAC Recognized as International Arbitration Institution in Russia' <<https://www.viac.eu/en/news/russian-license>> accessed 20 August 2019.

<sup>30</sup> 'Russian CCI, 'CCI of the Russian Federation today' ['ТПП РФ сегодня'] <<https://tpprf.ru/ru/about/>> accessed 20 August 2019.

<sup>31</sup> Russian CCI, 'Вице-президент ТПП РФ Вадим Чубаров принял участие в заседании Пленума Верховного Суда Российской Федерации' ['Vice President of the RF CCI Vadim Chubarov attends a meeting of the Plenum of the Supreme Court of the Russian Federation'] (25 June 2019) <<https://mkas.tpprf.ru/ru/news/vitse-prezident-tpp-rf-vadim-chubarov-prinyal-uchastie-v-zasedanii-plenuma-verkhovnogo-suda-rossiysk-i313549/>> accessed 20 August 2019.

<sup>32</sup> The International Commercial Arbitration Court, 'Отделения' ['Branches'] <<http://mkas.tpprf.ru/ru/otdeleniya/>> accessed 20 August 2019.

<sup>33</sup> The International Commercial Arbitration Court, 'List of Arbitrators' <<http://mkas.tpprf.ru/en/Arbitrators/>> accessed 20 August 2019.

<sup>34</sup> The International Commercial Arbitration Court, 'Contacts' <<http://mkas.tpprf.ru/en/contacts/>> accessed 20 August 2019.

Many arbitrators on the list of arbitrators for international commercial disputes have command of several languages.<sup>35</sup> A practice to conduct arbitral proceedings in English has existed for many years.<sup>36</sup> Indeed, there are numerous non-Russian nationals on the list: roughly 50 out of approximately 150 arbitrators.<sup>37</sup> Female arbitrators currently constitute about 25 % of the list.<sup>38</sup>

#### 4.2.2. *Appointment of Arbitrators*

In line with Russian arbitration legislation, the ICAC has instituted the Nomination Committees (the ‘Committees’) which now appoint the arbitrators instead of the ICAC Presidium, in particular, if parties did not appoint arbitrators themselves. There is a separate Committee for each type of disputes referable to the ICAC: international commercial, domestic, sport-related and corporate disputes. Every Committee consists of persons appearing on the list of arbitrators recommended to hear international commercial disputes at the ICAC.<sup>39</sup> The Committee members are elected by the general meeting of arbitrators included in the list. The members of each Committee must be partly replaced every two years.<sup>40</sup>

The chairperson of the tribunal, is as a rule, appointed by the Committee from among arbitrators appearing on the list.<sup>41</sup> As a practical matter, the chairperson should foremost be in position to conduct proceedings in a balanced manner and reduce the risks of unenforceability of the award. If the party elected a biased arbitrator, the presence of an experienced chairperson will neutralize possible detrimental influence of such person.

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<sup>35</sup> The International Commercial Arbitration Court, (n 33).

<sup>36</sup> Практика МКАС при ТПП РФ: 2004–2016. К 85-летию МКАС (на основе анонимизированных материалов из журналов «Международный коммерческий арбитраж» и «Вестник международного коммерческого арбитража») [Practice of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation: 2004 - 2016. In Commemoration of the 85th anniversary of the ICAC (Based on the Anonymized Materials from International Commercial Arbitration and International Commercial Arbitration Review Journals)] / Науч. ред. и сост.: А.Н. Жильцов, А.И. Муранов; Предисл.: А.С. Комаров; Ред.: П.Д. Савкин; МКАС при ТПП РФ; ИЦЧП им. С.С. Алексева при Президенте РФ; Каф. межд. частн. и гражд. права им. С.Н. Лебедева МГИМО МИД РФ. – М.: Ассоциация исследователей международного частного и сравнительного права [Academic editors and Compilers: A.N. Zhiltsov, A.I. Muranov; Foreword: A.S. Komarov; Editor: P.D. Savkin; International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Alekseev Private Law Research Centre at the President of the Russian Federation; Department of Private International and Civil Law Named in Memory of S.N. Lebedev of the Moscow State Institute of International Relations (MGIMO) at the Ministry of Foreign Affairs of the Russian Federation], Moscow.: Association of Private International and Comparative Law Studies. 2017. – 1565. 1565, 86, 92, 273, 316, 550.

<sup>37</sup> This can be deduced from the List of Arbitrators (*see* n 33).

<sup>38</sup> *ibid.*

<sup>39</sup> The International Commercial Arbitration Court, ‘Nomination Committees’ <<http://mkas.tpprf.ru/en/komitety-po-naznacheniyam/>> accessed 20 August 2019.

<sup>40</sup> The International Commercial Arbitration Court, ‘Regulation on organisational principles of activity of the ICAC’ (Appendix No. 1 to Order No. 6 of the Russian CCI dated 11 January 2017) <<http://mkas.tpprf.ru/en/documents/>> accessed 20 August 2019, para 7 “Nomination Committees”.

<sup>41</sup> ICAC Rules (approved by Order No. 76 of the Chamber of Commerce and Industry of the Russian Federation, 18 October, 2005 as amended by the Order No 28 of the Chamber of Commerce and Industry of the Russian Federation of 23 June, 2010 <<http://mkas.tpprf.ru/en/documents/>> accessed 20 August 2019, para 16(7) “Composition of the Arbitral Tribunal”.



While choosing an appropriate candidate, the Committee considers the nature of the dispute, specialization (that is, which of the potential arbitrators has more expertise in the relevant field), the place of residence of the arbitrators and other relevant factors.<sup>42</sup>

This procedure applies unless otherwise agreed by the parties.<sup>43</sup> It should be noted that if the parties wish that the chairperson be elected by the 2 ‘lateral’ arbitrators, then the parties should expressly indicate this in the arbitration clause or another agreement. Furthermore, if the parties wish the chairperson to be of a ‘neutral’ nationality, or comply with some other criteria, they should indicate this in their agreement.

#### *4.2.3. The ICAC Secretariat*

The ICAC Secretariat monitors the compliance of arbitral awards with formal requirements of law. The secretariat may direct the attention of the arbitral tribunal to the discrepancies between formal requirements provided by the ICAC Rules or other ICAC regulations and the draft award without infringing independence of the arbitrators to rule on a given case. If such discrepancies are not rectified, the Secretariat may notify the presidium of this.<sup>44</sup>

The secretariat and other bodies of the ICAC also take into account the approach of state courts to enforcement and challenging of arbitral awards. According to statistics, the Russian courts grant enforcement of Russian domestic awards more frequently than foreign arbitral awards.<sup>45</sup>

#### *4.2.4. The ICAC “reporters”*

Traditionally, the ICAC has a panel of ‘reporters’ (tribunal secretaries) many of whom are highly qualified. They often have research degrees and/or are legal practitioners plus have a command of at least one language in addition to Russian. Many of these candidates act as tribunal secretaries for years and therefore have vast experience. Although it is the secretariat who formally appoints them, usually the arbitral tribunal (its chairperson) proposes candidates.<sup>46</sup> Professionalism of tribunal secretaries helps to save the time of arbitrators and costs for the parties. Their remuneration constitutes a part of the arbitration fee. The identity of the tribunal secretary in the individual case is communicated to the parties who have the right to challenge this person if in doubt of their impartiality and independence.<sup>47</sup>

### *4.3. Arbitration Rules*

With the Arbitration Rules being not being overly verbose, arbitrators have ample opportunities to decide how to conduct proceedings. ICAC Rules set forth that:

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<sup>42</sup> ‘Наше главное преимущество — это репутация’. Интервью с Алексеем Костиным, Председателем МКАС при ТПП РФ [‘Interview with the Chairman of the ICAC Alexei Kostin: ‘Our main advantage is reputation’)] (2019) 1(77) Legal insight, 20.

<sup>43</sup> ICAC Rules para 16(1) “Composition of the Arbitral Tribunal”.

<sup>44</sup> *ibid* para 40(1) “Announcement of the Award”.

<sup>45</sup> Верховный Суд Российской Федерации [Supreme Court of the Russian Federation], ‘Сводные статистические сведения о деятельности федеральных арбитражных судов за 2018 год’ (‘Summary statistics on the activities of federal arbitration courts for 2018’) <<http://www.cdep.ru/index.php?id=79&item=4890>> accessed 20 August 2019.

<sup>46</sup> The International Commercial Arbitration Court, (n 40) para 11 “Reporters”.

<sup>47</sup> ICAC Rules (n 41) para 17(6) “Challenge of an Arbitrator”.

“The arbitral tribunal shall conduct the arbitral proceedings in accordance with the rules of the applicable legislation on arbitration and the provisions of these Rules. It is possible to deviate from the Rules in cases specified therein. When dealing with issues that are not regulated by either these Rules or the express agreement between the parties, the arbitral tribunal shall, while abiding by the provisions of the applicable law on arbitration, conduct the arbitration as it considered appropriate, and ensure that the parties are treated with equality and that each party is given a reasonable opportunity to protect its interests.”<sup>48</sup>

In particular, arbitrators and parties may agree on different schedules, hold preliminary organizational meetings, etc. This is determined by the arbitrators and is not expressly prescribed by the ICAC Rules or by the ICAC bodies.

Therefore, the ICAC has not declared adherence either to the IBA Rules on the Taking of Evidence in International Arbitration or the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules).<sup>49</sup> Again, it is within the discretion of the arbitral tribunal how to conduct the proceedings in a specific case.<sup>50</sup>

Typical proceedings at ICAC have an important distinguishing feature. In many international arbitration centers in Western Europe and Asia, cases begin with a request for arbitration by the claimant. Such a request can be brief because the party may provide a detailed statement of claim afterwards. In the ICAC, the traditional approach is different. The ICAC Rules do not provide for a request for arbitration, and claimants should be ready to submit a full-fledged statement of claim on the merits at the commencement of the arbitration. Then the respondent, if it considers it necessary, submits an answer (statement of defense) which should be done within time limits specified by the ICAC Rules (in principle within 30 days from the receipt of a copy of the statement of claim but subject to extension at the respondent’s justifiable request).<sup>51</sup> However, this does not normally exclude subsequent submission of additional explanations and modifications of the claim.

As a due notification of the parties is of utmost importance in Russian and in transnational context, the statements of claim, statements of defense, notices of the hearing, arbitral awards, and orders are sent by the secretariat by registered mail with return receipt requested, or otherwise provided that a record is made of the attempt to deliver the mail.<sup>52</sup> Other documents may be sent by registered mail, ordinary mail, or electronically or otherwise, provided that a record is made of the communication sent. In practice, most often, the paper version is sent by mail or by courier service. This is done in order to keep formal evidence of notifying the parties, which may be critical at the stage of enforcement of the arbitral award. The rest of the adversary documents can be communicated in electronic format without restrictions, but are also duplicated by the exchange of paper copies.

Certain features were added to the ICAC Rules adopted in early 2017. They include, in particular, provisions on the range of international disputes referable to the ICAC, joinder and consolidation, the composition of the arbitral tribunal, the parties’ representatives, hearings,

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<sup>48</sup> ICAC Rules (n 41) para 24 “Determination of Procedural Rules”.

<sup>49</sup> The Prague Rules <<https://praguerules.com/>> accessed 20 August 2019.

<sup>50</sup> ‘Наше главное...’ [‘Our main...’] (n 42) 20 – 23.

<sup>51</sup> ICAC Rules (n 41) para 33(1–6) “Expedited Arbitral Proceedings”.

<sup>52</sup> *ibid* para 10 “Mailing and Delivery of Documents”.

and, last but not the least, expedited arbitral proceedings. Some of them will be briefly considered below.

#### 4.3.1. Hearings

According to the new rules after the arbitral reform in 2016, the ICAC needs to notify the parties about the hearing so that each of them receives the notice at least 20 days before the hearing.<sup>53</sup> Under the previous Rules, this period was 30 days.<sup>54</sup> Previously, it was also necessary to keep minutes of each arbitration hearing. Now the arbitral tribunal may decide whether to take minutes of a particular hearing.<sup>55</sup> After the hearing, the arbitral tribunal may request the parties to make additional submissions, to present more evidence or other documents on limited issues related to the claims or defenses, such as arbitration costs that arose in the course of the proceedings.<sup>56</sup>

Unless the parties agreed otherwise, the main working language of arbitral proceedings is Russian and, in the majority of cases, hearings are indeed conducted in Russian. However, the parties may freely choose other languages of arbitration.<sup>57</sup> As mentioned above, a number of arbitral proceedings in the ICAC are conducted in English.

If it is inconvenient for a party's representative or a witness to come to Moscow, there are necessary facilities to hold hearings by video communication. Hearings may also be conducted outside of Moscow and even outside of Russia.<sup>58</sup>

#### 4.3.2. Expedited Arbitral Proceedings

The ICAC Rules direct disputes not exceeding US\$50,000 to be considered needing a sole arbitrator in an expedited manner. Under such expedited procedure, the arbitrator normally must render the award within 120 days of her or his appointment. In contrast, in an ordinary ICAC proceedings such time limit is 180 days.<sup>59</sup> The parties have only one 'round' of submissions unless the arbitrator or, before his/her appointment, the ICAC executive secretary decides otherwise.<sup>60</sup> The arbitrator decides the case solely based on written materials unless a party requests him or her to do so in a timely fashion or he/she decides *sua sponte* to conduct an oral hearing. Even if a party subsequently increases the amount of claim so that it exceeds US\$50,000, the expedited arbitral proceedings may continue.<sup>61</sup>

In view of the complexity and other circumstances of the case, including amendments or supplements to the claims filed earlier by any party, the arbitral tribunal may deem it inappropriate to conduct the expedited proceedings. The proceedings in such a case shall be carried on by the same arbitral tribunal. Before the arbitral tribunal is formed, the ICAC President may decide not to conduct the expedited arbitral proceedings.<sup>62</sup> However, this

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<sup>53</sup> *ibid* para 30(2) "Oral Hearing".

<sup>54</sup> ICAC Rules (n 41) para 32 "Oral Hearing".

<sup>55</sup> *ibid* para 30(7) "Oral Hearing".

<sup>56</sup> *ibid* para 30(8) "Oral Hearing".

<sup>57</sup> *ibid* para 22 "Language of Arbitration of the Rules".

<sup>58</sup> *ibid* para 30(7) "Oral Hearing".

<sup>59</sup> *ibid* para 35 "Duration of the Proceedings in a Case".

<sup>60</sup> *ibid* para 33 "Expedited Arbitral Proceedings".

<sup>61</sup> *ibid* para 6(2) "Statement of Defense".

<sup>62</sup> *ibid* para 33(7) "Expedited Arbitral Proceedings".

provision empowering the arbitral tribunal or the ICAC President to refrain from the expedited proceedings has never yet been applied.

#### *4.3.3. Disciplining the Parties' Representatives*

Today, the parties in the ICAC proceedings are in principle represented by external lawyers rather than by in-house lawyers or other professionals.

The ICAC Rules for international disputes provide that the parties' representatives must follow all the ICAC regulations and comply with the directions of its bodies and authorized persons and the arbitral tribunal. If the parties' representatives fail to do so, the authorized persons of the ICAC or the arbitral tribunal may adopt appropriate measures. In particular, the arbitral tribunal can take such counter-productive conduct of the party representative into consideration while deciding on the allocation of arbitration expenses between the parties. The arbitrator may also make a warning or request the respective party to choose another representative.<sup>63</sup>

After constitution of the arbitral tribunal, a party may replace its representative only provided that such replacement does not create a ground to challenge an arbitrator or to annul/refuse enforcement of the arbitral award.<sup>64</sup>

So far arbitral tribunals have never applied these sanctions to oppose counter-productive conduct of the party representatives. However, such power itself may have a disciplining effect upon them.

#### *4.3.4. Interrogation of Witnesses and Involvement of Experts*

The ICAC proceedings, taking place in a civil law environment, involve fewer important numbers of witnesses, experts, and other parties relevant for arbitral proceedings than an equivalent institution would do in a common law country, due to different approaches to foreign law. The ICAC rules contain only general provisions in this regard. Consequently, the arbitral tribunal, in agreement with the parties, determines a specific scheme for the presentation of evidence. Ultimately, the tribunal decides which approach is the most acceptable in the particular case.<sup>65</sup> Usually, written evidence would suffice.

In practice, at least one party sometimes requests the tribunal to hear a witness or presents an opinion on a technical issue made by the expert which this party appointed. This is permissible under the ICAC Rules and corresponds with the fundamental principle of adversary proceedings. Each party is required to prove the circumstances relied on to support its claims or defenses.<sup>66</sup>

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<sup>63</sup> *ibid* para 26 "Representation of the Parties".

<sup>64</sup> *ibid* para 16 "Composition of the Arbitral Tribunal".

<sup>65</sup> *ibid* para 24 "Determination of Procedural Rules", § 27 "Preparation of the Case for Arbitration" and § 29 "Evidence".

<sup>66</sup> *ibid* para 29 (1) "Evidence".

#### 4.4. Arbitration Fees

It is safe to say that the ICAC has a favorable price-quality ratio. That is a moderate amount of arbitration fees<sup>67</sup> and the proper content of the awards.<sup>68</sup> ICAC arbitration fees are significantly lower than in the case of similar international arbitral institutions, which becomes especially relevant during economic and financial crises.

Under the new Regulation on arbitration costs, the proportion of the percentage of the fees due to the arbitrators and that due to the arbitral institution has changed in favor of the arbitrators. It was previously 30% and became 40%.<sup>69</sup>

Fees are paid by the Chamber of Commerce to the arbitrators only after awards are made. Furthermore, in case of a failure or improper performance of his/her functions by the arbitrator or the reporter - in particular if this entailed unjustified delay of the proceedings - the ICAC Presidium, in the light of specific circumstances, may decide not to pay or reduce the fee.<sup>70</sup> Therefore, the arbitrators have an incentive to prepare the award quickly and diligently.

#### 4.5. Publication of the Awards

Arbitral proceedings and awards are confidential. However, arbitral awards and orders may be published with the consent of the ICAC Presidium on the condition that the names of the parties and other identifying information that may impair the legitimate interests of the parties are removed from the text of the awards.<sup>71</sup> The ICAC regularly publishes collections of anonymized extracts from selected awards. Most interestingly, ICAC awards, as well as courts' judgments on their enforcement or setting aside, are also published and commented in different formats in Russia and abroad.<sup>72</sup> Currently, the Russian CCI also publishes a journal named "Commercial arbitration" which contains extracts from selected ICAC awards with professional commentaries.<sup>73</sup> Therefore, it is possible to grasp the standards of the proceedings and typical approaches of the arbitral tribunals. The parties and the arbitrators themselves often refer to the practice of the ICAC in specific cases, which to some extent ensures the predictability and stability of the practice of dispute resolution.

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<sup>67</sup> It is easy to calculate the fees by means of an online calculator placed at the ICAC website. See The International Commercial Arbitration Court, 'Arbitration costs and fees' <[http://mkas.tpprf.ru/en/arbitration\\_costs\\_&\\_fees/](http://mkas.tpprf.ru/en/arbitration_costs_&_fees/)> accessed 20 August 2019.

<sup>68</sup> Published texts of the ICAC awards can be accessed, eg, here: <<http://mkas.tpprf.ru/ru/materials/>> accessed 26 September 2019 (to see the complete list of all material click "Open More" ("Открыть еще")). See also: <<http://arbitrationreview.ru/praktika-mkas-i-mak/>> accessed 26 September 2019.

<sup>69</sup> Regulation on fees and remuneration for disputes considered in the ICAC <<http://mkas.tpprf.ru/ru/materials/>> accessed 20 August 2019, para 1

<sup>70</sup> 'Regulation on fees...' (n 67) para 12.

<sup>71</sup> ICAC Rules (n 41) para 46 (4) "Confidentiality".

<sup>72</sup> Major sources of publication of the ICAC awards include:

- 'КонсультантПлюс' ('ConsultantPlus') – Russian law database (accessible for a fee);
- 'Вестник международного коммерческого арбитража' ('The International Commercial Arbitration Review') <<http://arbitrationreview.ru/praktika-mkas-i-mak/>> accessed 20 August 2019;
- Zhiltsov and Muranov (n 42).

<sup>73</sup> The International Commercial Arbitration Court, 'Встречайте, первый номер журнала ТПП РФ «Коммерческий арбитраж»' ['Meet the first issue of the CCI RF journal "Commercial Arbitration"'] (12 March 2019) <<https://mkas.tpprf.ru/ru/news/vstrechayte-pervyy-nomer-zhurnala-tpp-rf-kommercheskiy-arbitrazh-i294297/>> accessed 20 August 2019. The 1<sup>st</sup> issue was published in March 2019.

Arbitral tribunals usually do take into account the practice of state courts on the legal issue under consideration. They often look into practice of other arbitral tribunals, in particular in other ICAC awards. In some cases, however, they disagree with the approach taken by their predecessors. The arbitrators can also take into account the doctrinal works of reputable legal scholars. Indeed, many of the persons included in the ICAC lists of arbitrators<sup>74</sup> are authors of academic papers on civil law and private international law.

Russian substantive law is the most frequently applied law in the ICAC proceedings. That said, it allows reaching a fair solution on the same footing with the law of many other countries: Russian substantive law is sufficiently developed and has been lately systematically reformed and modernized in 2013 – 2015.<sup>75</sup> Furthermore, the approach to the interpretation of legal rules in arbitrations is definitely less formalistic and more business-oriented than in state courts.

In addition, Russia is a party to many important international conventions governing cross-border trade, such as the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).<sup>76</sup> There is already a long practice of resolving disputes at the ICAC applying the CISG.<sup>77</sup> The Principles of International Commercial Contracts (the ‘UNIDROIT Principles’), the latest version of which was adopted in 2016,<sup>78</sup> are also applied often in a complementary way to the CISG.<sup>79</sup>

## **5. Immunity and Liability of Arbitrators and Arbitral Institutions (organizations in which they were established)**

Under Russian law, arbitrators enjoy ‘witness immunity.’ They shall not be interrogated as witnesses about the information that became known to them during arbitration.<sup>80</sup>

Regarding the liability, the ICAC Rules specify that not only the arbitrators, but also the reporters, experts appointed by the arbitral tribunal, persons included in the bodies of the ICAC and its authorized officials, the Chamber of Commerce and its employees shall not be liable to parties or other persons for non-performance or improper performance of their functions in

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<sup>74</sup> International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. List of Arbitrators <<https://mkas.tpprf.ru/en/Arbitrators/>> accessed 20 August 2019.

<sup>75</sup> D A Medvedev (ed), *Кодификация российского частного права 2019* [*Codification of Russian private law 2019*] Статут [Statute] 2019] 492.

<sup>76</sup> Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG) <[https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status)> accessed 20 August 2019.

<sup>77</sup> Mikhail G Rosenberg), *Международная купля-продажа товаров: комментарий к правовому регулированию и практике разрешения споров* [*International sale of goods: commentary on the legal regulation and practice of dispute resolution*]. (4th edn, rev and add, Статут [Statut] 2010] 462.

<sup>78</sup> International Institute for the Unification of Private Law, ‘UNIDROIT Principles of International Commercial Contracts 2016’ (Rome 2016).

<sup>79</sup> A S Komarov (trans), *Принципы международных коммерческих договоров УНИДРУА 2004: Пер. с англ* [*The Principles of international commercial contracts UNIDROIT 2004: Translated from English*] (Статут [Statut] 2006).

Interestingly, Russian state courts also apply the UNIDROIT Principles even to domestic Russian cases, to interpret Russian domestic law. See Dmitry Davydenko, ‘Application of the UNIDROIT Principles in the Practice of Russian State Courts’ <<http://www.cisarbitration.com/2018/08/14/application-of-the-unidroit-principles-in-the-practice-of-russian-state-courts/>> accessed 20 August 2019.

<sup>80</sup> Law on Arbitration (n 25) art 21(3) “Confidentiality of the Arbitrator”.

connection with the arbitral proceedings, unless the applicable imperative norms of legislation on arbitration provide otherwise.<sup>81</sup>

Under Russian law, the arbitrator shall not be civilly liable to the parties involved in the dispute, as well as to the arbitral institution in connection with the failure to perform or improper performance of the functions of the arbitrator and in connection with the arbitration. The only exception is a liability under a civil lawsuit in a criminal case that may be brought against the arbitrator in accordance with the Russian legislation, in order to compensate for the damage caused by the crime, if the arbitrator is found guilty in accordance with the law.<sup>82</sup>

However, the rules of the arbitral institution may provide for a possibility of reducing the arbitrator's fee in case of failure to perform or improper performance of his/her functions.<sup>83</sup> As noted above in sec. 4.4, the ICAC Rules do provide for such a possibility.<sup>84</sup> This provision has never been applied so far. However, such possibility itself creates a proper incentive for arbitrators.

By virtue of law, each arbitral institution must be established as a non-profit organization.<sup>85</sup> The law provides that such organization bears civil liability toward the parties to arbitration only in the form of compensation for losses incurred by them as a result of non-fulfillment or improper fulfillment by the arbitral institution of its functions of administering the arbitration or related to the performance of its obligations, if there is intent or gross negligence. Therefore, if no intent or gross negligence has been proved, the organization does not bear liability toward the parties. Such organization does not bear civil liability toward the parties to arbitration for losses caused by the actions (inaction) of the arbitrator.<sup>86</sup>

## 6. Conclusion

The reputation of the ICAC at the Russian CCI has developed over more than eighty-five years of its activity and constitutes an important intangible asset. Many business entities of various states submit their transnational disputes to the ICAC. The generally high standards of arbitral proceedings can be seen from the texts of the awards rendered by the ICAC tribunals, hundreds of which have been published. This is a long tradition that dates back to the early period of the ICAC history.

The ICAC preserved the continuity of its rules for transnational disputes, whilst refraining from revolutionary changes. At the same time, the ICAC gradually yet substantially modernized its rules with due regard to the needs of international commerce, current Russian legislation and its own past practice of resolving disputes. Its rules also correspond to the trends followed by major international arbitral institutions.

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<sup>81</sup> ICAC Rules (n 41) para 45 "Limitation of Liability".

<sup>82</sup> Law on Arbitration (n 19) art 51 "Liability of the Arbitrator".

<sup>83</sup> *ibid.*

<sup>84</sup> *See* sec 4.4.

<sup>85</sup> Federal Law No 382-FZ dated 29 December 2015 on Arbitration (Arbitral Proceedings) in the Russian Federation, art 44 "The formation and operation of permanent arbitral institutions in the Russian Federation".

<sup>86</sup> Law on Arbitration (n 25) art 50 "Liability of a nonprofit organization in which a permanent arbitration institution is established".