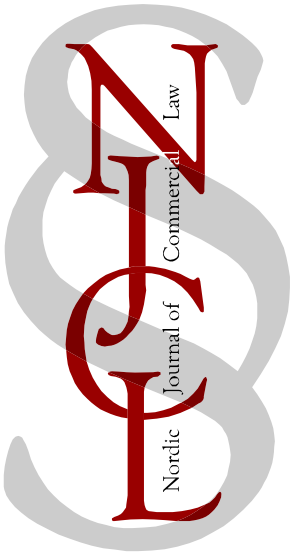

Arbitration under New Rules of the International Commercial Arbitration Court in Moscow

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ABSTRACT

This article is a review of new Rules of the International Commercial Arbitration Court in Moscow, effective since March 1, 2006. The Rules observed the latest developments in international commercial arbitration aiming promotion of an effective and speedy arbitration in Russia. It is natural, that together with the growth of Russian international business transactions the number of commercial disputes has increased accordingly. Having a long history and extensive experience the ICAC has become one of the top venues for international commercial arbitration. It is noted that the number of disputes between non-Russian parties has risen immensely during the last decade. The author trusts that in the light of the existing economic cooperation between Finland and Russia the article will be useful for students, scholars, and practicing attorneys.

1. LEGISLATION

International commercial arbitration in Russia is governed by the Federal Law on International Commercial Arbitration ('Law') of July 7, 1993. The Law is based on the UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985.

The Appendices to the Law lay down the Statute of the International Commercial Arbitration Court in Moscow and the Statute of the Maritime Arbitration Commission. It is a rather unique construction, when the status of an arbitration institute is set out by national legislature. However, as we will see below, both arbitration institutes remain entirely independent from the Russian state.

It is essential to note, that the Russian Federation, as a successor state of the USSR, is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958), ratified in 1960.

2. INTERNATIONAL COMMERCIAL ARBITRATION COURT IN MOSCOW

2.1. Legal Status and Structure

The International Commercial Arbitration Court in Moscow (ICAC) originates in 1932 when the Central Executive Committee and Council of People's Commissars of the USSR passed the Directive establishing the Foreign Trade Arbitration Commission (FTAC) under the National Chamber of Commerce. In 1987 the FTAC was renamed into the Arbitration Court at the Chamber of Commerce and Industry of the USSR. And finally, in 1993 upon the adoption of the

Law "On International Commercial Arbitration" the ICAC was established in its current legal capacity. The ICAC is an independent entity within the structure of the Chamber of Commerce and Industry of the Russian Federation (CCIRF).[1] The ICAC is not a legal person.

There are two organs in the ICAC: the Presidium and the Secretariat. The Presidium's major roles are to study arbitration case law, including that of the ICAC, to promote the ICAC arbitration, to represent the ICAC internationally, to prepare the list of arbitrators for approval of the CCIRF, and others. The Presidium is elected for a 5 year term by the general meeting of the listed arbitrators. The Presidium is led by its Chairman. At the time of this writing, the Chairman of the ICAC Presidium is Professor Komarov A.S.

The Secretariat is the "executive" organ of the ICAC, whose authority includes daily management, paper work for submitted and considered claims, communication to parties, and others. The Secretariat is headed by the Secretary General, who is also present at the meetings of the Presidium.

Additionally, for each case the Secretariat appoints a *rapporteur*, whose main responsibility is to keep the minutes of the meetings, execute the instructions of arbitrators, and other managerial responsibilities.

2.2. Commencement of arbitration

The ICAC arbitration commences with filing of a statement of claim, where a claimant substantiates the jurisdiction of the ICAC, presents its claims, facts, evidence, amount in dispute and calculations for each claim. It should also be noted, that the total amount of a claim includes a compensation of neither arbitral costs nor related costs. A statement of claim shall be duly signed by a claimant, or a person authorized by the claimant. In practice, a sufficient proof of authorization would be a power of attorney or the By-laws of a company, vesting such authority into one of its employees, which is usually its managing director. The Rules require the claimant to be precise about the claim in order to facilitate the proceedings without unnecessary delays. Additionally, in the event a panel of three arbitrators is formed, the claimant may nominate his arbitrator and a substitute.

At this stage all document submissions are done through the Secretariat in five copies, in case the tribunal consists of three arbitrators or in three copies if there is a sole arbitrator. Needless to say, that in multi-party arbitration the number of copies increases accordingly.

The Secretariat may ask the claimant to correct mistakes in the statement of claim within a reasonable period of time, but not more than one month. Should the claimant fail to comply with the request for correction of mistakes within the prescribed time the ICAC renders an award or a resolution on termination of the proceedings.

The Secretariat communicates a copy of the statement of claim to the respondent, and asks to submit the statement of defense within thirty days. In the statement of defense, the respondent

[1] Official web site of the ICAC: http://www.tpprf-mkac.ru/

may raise a counter claim. The Rules foresee consequences for not meeting the deadline. Should the respondent fail to meet the submission deadline, extra costs of the claimant are to be covered by the respondent. As well as the statement of claim, the statement of defense shall be duly signed by the respondent or a person authorized to do so.

The Secretariat communicates documents to the parties to their post addresses. It is crucial that the parties keep their contact information actual, and inform the ICAC of any changes. The parties communicate their submissions by sending registered letters, and the rest might be sent by regular mail, telefax, e-mail and by other means, which may confirm sending.

Both the statement of claim and the statement of defense can be supplemented or altered before the beginning of the first hearing, unless such action delays the proceedings. In these circumstances the tribunal has powers to limit the parties' time for the introduction of changes. The tribunal may attribute related procedural extra costs on a delaying party, as well as reject the introduced changes in the statement in case of an unreasonable delay.

2.3. Arbitration costs

Together with the Rules, the CCIRF adopted the Schedule for arbitration costs ('Schedule'). The arbitration costs are comprised of the registration fees, arbitrator's fees, administrative fees, and any extra fees.

Upon the commencement of arbitration the claimant pays the non-refundable registration fees of USD 1.000; otherwise, the request is not considered as submitted.

The claimant deposits the arbitration costs, calculated on the basis of the Schedule. The same rules apply to the counter claim. The paid registration fees are credited in the total arbitration costs. The Schedule foresees different tables for calculation of the arbitration costs, depending on the currency of the claim – Russian rubles or any foreign currency. For claims in foreign currency the arbitration costs are calculated in the US dollars. However, it is in the discretion of the ICAC to allow variations in the currency of payment. The arbitration costs are calculated according to the Schedule predicated on the size of the claim. To make it clearer, the author suggests the following calculation examples for the claims of USD 100.000 and USD 1.000.000. The arbitration costs for a claim of USD 100.000 are USD 7.770, where USD 3.330 is the arbitrator's fee. The arbitration costs for a claim of USD 1.000.000 are USD 21.420, where USD 9.180 is the arbitrator's fee.

A few remarks shall be given in this respect. The ICAC may increase the arbitration costs if a case appears to be complicated and therefore, requires additional time and work. The ICAC may also reduce the arbitration costs in several circumstances. In particular, if a case is held by a sole arbitrator the arbitration costs are reduced by 20%. If the arbitration is terminated prior to the first session by a motion of the claimant, the arbitration costs are reduced by 50%. If the arbitration is terminated at the first session without rendering an award the arbitration costs are reduced by 25%. In any circumstance, the registration fees are not subject to reduction. The ICAC may also request the party(s) to deposit money for extra costs. For example, if one of the

parties appoints an arbitrator who resides in a place other than the place of arbitration, that party shall make a deposit for the corresponding expenses (traveling, accommodation, visa, etc.).

The arbitration costs, unless otherwise agreed by the parties, are attributed to the losing party. However, if the claim is satisfied only partially, the costs are attributed proportionally between the parties according to the arbitral award. A winning party may also ask the tribunal to impose its legal and other related costs on the losing party. Additionally, for promotion of a speedy dispute resolution, the Schedule adopted the rule where a party delaying the proceedings is accountable for extra costs of the other party.

2.4. Arbitrators and Constitution of the Tribunal

The Rules support commonly accepted requirements of impartiality and independence of arbitrators. For the practical implementation of the requirements, the Rules impose an obligation on each appointed arbitrator to inform the ICAC, at any stage of the proceedings, of any circumstances which may influence his decision making. Each arbitrator also produces a biographical sketch describing the education, work experience, and other relevant facts. The ICAC makes this information available to the parties. As a prerequisite for acting as arbitrator, each appointed person gives within 15 days from the date of appointment a written consent to act as arbitrator under the Rules.

The ICAC makes up a list of arbitrators for a period of 5 years, containing the following information: the names of arbitrators, their education, current employment, research achievements, field of expertise, and working languages. The list names around 200 professionals from different jurisdictions. However, the parties are free to appoint an arbitrator(s) other than from the list.

Unless otherwise agreed by the parties, a panel of three arbitrators is appointed to resolve a dispute. However, it is always in the discretion of the parties to agree on the number of arbitrators. As an exception to the rule, if a case is not complicated, or the amount in dispute is less than USD 25.000, the ICAC may exercise its right of appointment of a sole arbitrator, even though the parties agreed to constitute a panel of three arbitrators. If the parties agreed to submit their dispute to a sole arbitrator, it would be for the ICAC to appoint the arbitrator and a substitute.

When a panel of three arbitrators is formed, each party appoints its own arbitrator and the substitute, and the ICAC appoints the Chairman of the panel and the substitute. The claimant has to exercise his right within 15 days from the day when the ICAC accepts the statement of claim. The respondent appoints the arbitrator within 15 days after receiving the ICAC's notification that the claimant appointed the arbitrator (the name of the claimant's arbitrator is also disclosed). If any of the parties fails to appoint their candidates within the said period, the ICAC appoints a party's arbitrator on its own notion.

2.5. Proceedings

Needless to say, that the Rules adhere to the principle of the adversary proceedings between equal parties. Confidentiality is another corner stone principle resembled in the Rules.

Generally, the proceedings take place in Moscow. Yet, if the parties agree and are ready to cover extra costs, the proceedings can be conducted in any other place. The arbitral tribunal may also decide to hold some sessions out of Moscow if necessary. It should be noted here, that even if the actual place of the ICAC arbitration is outside Russia, the place of arbitration is considered *de jure* Moscow. The sole purpose of that is to subjugate the arbitral proceedings to the Russian Law on arbitration, and define the «nationality» of the award.

It is a general understanding, that speedy proceedings are a fundamental feature of arbitration. The average duration of the proceedings prior to adoption of the new Rules did not exceed nine months. The new Rules reduced the duration, imposing on the arbitral tribunal a 180-day term obligation for rendering an award, beginning from the day when the tribunal was composed. In fact, the duration requirements are not always observed due to many reasons. Therefore, the Rules foresee a possibility of granting an extension by the ICAC upon a request of the arbitral tribunal.

One of the important novelties of the Rules is the right of the parties to choose the language of the entire proceedings. Written submissions, though, are filed in the language of the original documents, or might be translated into the language of the proceedings. As a matter of fact, the old Rules provided only for the language of the hearings, skipping in silence the other stages of the proceedings. In the New Rules this deficiency was eliminated.

The parties to a dispute usually state their case in the oral pleadings. The tribunal may also consider the case solely on the basis of the documents, if the parties so agree. For each session the minutes are kept, which are also available for the parties' insight. If necessary, the parties may request the tribunal to adjourn or suspend the proceedings. The tribunal grants such motion by passing a resolution.

The dynamic growth and acceptance of arbitration worldwide puts the question of clear understanding of interim measures of protection on the agenda. The importance of interim measures of protection in arbitration becomes even more apparent if we consider how fast the today's business is. Clearly, it requires adequate fast and flexible measures to protect interests of businesses.

As a matter of fact, interim measures of protection in arbitration are actively discussed in the legal community nowadays. For instance, the work of the UNCITRAL Working Group II on article 17 of the Model Law is a clear evidence of that. Among the open issues are: the security by a requesting party to cure possible damages of the respondent; forms and types of interim measures; an extent of cooperation between judiciary and arbitral tribunals, and many others. In the absence of the legislative clarity on this question in Russia, the ICAC Rules address some of mentioned matters: a requesting party may be asked to provide a security to cure possible damages of a respondent; the measures are rendered in the form of an interim award; the requesting party is bound to inform the tribunal of any measures taken by the state courts in relation to the subject matter of the arbitration.

2.6. Arbitral award

The provisions of the Rules regarding arbitral awards are similar to those in many international arbitration Rules, therefore we will only give a brief overview of them. Final awards are passed by the majority of votes of the arbitral tribunal. A dissenting arbitrator may give a statement in a separate opinion, which is attached to the final award. The arbitral tribunals are also enabled to render partial awards in relation to some parts of the claim, or deciding upon some of the issues. If during the proceedings the parties reach a settlement, upon a joint request of the parties the tribunal may record it in an arbitral award.

Before signing an award a tribunal communicates a draft award to the Secretariat. The Secretariat checks the draft award for mistakes and deficiencies as to its form, but is not authorized to give its opinion on the merits of the case. Awards are signed by all arbitrators, and if not, the Chairman of ICAC witnesses this fact, and notes the reasons of absence of a signature(s).

The parties may within a reasonable time after receiving an award ask the tribunal to rectify the award. The tribunal has to comply with a 30 day term to introduce its corrections. Additionally, the parties within 30 days may request the tribunal to supplement and interpret the award. The tribunal has 60 days from the date when the request received to issue a supplementary award.

Arbitral awards of the ICAC are confidential, and therefore are not published in their original form. Yet, subject to deleting the names of parties and other confidential information, arbitral awards might be disclosed. In particular, Professor Rosenberg (a member of the Presidium ICAC) compiles Yearbooks of the ICAC awards, some of the awards are also discussed in several Russian arbitration journals. Additionally, CISG related ICAC arbitral awards can be found in English in the CISG database of the Pace Law School Institute of International Commercial Law.

3. ACTIVITIES OF THE ICAC IN FIGURES

Finally, there are some statistics for illustration of the activities of the ICAC in the recent years.[2] According to the ICAC there were 210 claims submitted in 2003, 162 in 2004, and 148 claims in 2005. At the same time, a clear tendency that there was the increase of the disputes between non-Russian parties submitted to ICAC is remarkable. There were 9 claims relating to the agreements between non-Russian companies in 2002, 17 in 2003, and 30 claims in 2004.

In 2005 there were 5 claims where one party was a company from a Nordic country (Denmark -2 claims, Finland, Norway, and Sweden – 1 claim each).

The types of the matters in disputes remain relatively steady. In 2005, 107 claims (73%) arose out of international sales-purchase agreements, 13 claims (8,5%) out of service agreements, 13 claims (8,5%) out of credit and loan agreements, 5 claims (3,5%) out of construction agreements, another 5 claims (3,5%) out of transport agreements, and the rest 5% out of agency, insurance and lease agreements.

The largest amount in dispute in 2004 was USD 91.590.122 (claimant – Polish, respondent - Russian); and USD 26.880.000 in 2005 (claimant – Luxembourgian, respondent - Russian).

[2] Official statistical data of the ICAC.